2-17-04

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

HARRIS J. SAMUELS, Petitioner, vs. JUANETTE IMHOOF and DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	OGC CASE NO. 03-1003 DOAH CASE NO. 03-2586

JLJ Clos

CONSOLIDATED FINAL ORDER

A Recommended Order was submitted to the Department of Environmental Protection ("DEP") in this proceeding by an administrative law judge with the Division of Administrative Hearings ("DOAH"). Copies of the Recommended Order were also served upon counsel for the Petitioner, Harris J Samuels ("Petitioner"), and the Co-Respondent, Juanette Imhoff ("Imhoff"). Each of the parties filed Exceptions to the Recommended Order. A Response to the Exceptions of the Petitioner and DEP was subsequently filed on behalf of Imhoof, and DEP filed a Response to the Petitioner's Exceptions. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

In August of 2000, DEP issued to Imhoof's now deceased husband a Notice of Exemption for construction of a private, single-family dock 628 square feet in size on the Indian River in New Smyrna Beach, Florida. DEP's Notice of Exemption informed Mr. Imhoof, among other things, that his proposed dock was "exempt from the need for an Environmental Resource Permit ("ERP") under Rule 40C-4.051(11)(g), Florida

Administrative Code." The cited rule exemption provisions have been transferred and are now codified in Rule 40C-4.051(12)(f), F.A.C. (2003). This Notice of Exemption also informed Mr. Imhoof that the regulatory exemption "determination shall expire after one year." In a separate authorization included in the same document, DEP informed Mr. Imhoof that his proposed dock "qualifies for a consent to use sovereign submerged lands" from the Board of Trustees of the Internal Improvement Trust Fund ("Trustees").[1]

Mr. Imhoof did not commence construction of his dock until about April of 2003, approximately two and one-half years after the Notice of Exemption was issued and related consent of use was granted. On July 1, 2003, the Petitioner mailed to DEP an Amended Petition for Administrative Hearing ("Amended Petition"). The Recommended Order states that the Amended Petition is unclear as to whether the Petitioner was requesting an administrative hearing on the propriety of the original exemption or whether the Petitioner was requesting revocation of the exemption for construction not consistent with the exemption. The Amended Petition did not allege that the exemption expired before construction commenced or that the dock was constructed without the benefit of a valid exemption determination and consent of use.

DOAH PROCEEDINGS

The Amended Petition was referred to DOAH and Administrative Law Judge J. Lawrence Johnston ("ALJ") was assigned to the case. A final hearing was held in New Smyrna Beach on December 9, 2003. The ALJ viewed the DOAH action as a de novo proceeding on the issue of whether a regulatory exemption determination and related

[1] The Trustees have delegated to DEP the authority to enter consolidated final orders taking final agency action on certain applications for authorizations to use sovereign submerged lands, including applications involving the construction of private, single-family docks, where the proposed activity is one over which DEP also has regulatory permitting responsibility. See, e.g., Rules 18-21.00401 and 18-21.0051, F.A.C.

consent of use of sovereign submerged lands should be granted in connection with Imhoof's as-built dock.

The ALJ concluded in his Recommended Order that "the evidence was clear that Mrs. Imhoof's dock meets the square footage requirement for a regulatory exemption."[2] (Conclusion of Law 25) The ALJ also concluded that Imhoof is entitled to a waiver of the 25-foot setback requirement from the riparian rights line because she proved at the final hearing that locating the dock structure within the setback area "is necessary to avoid or minimize adverse impacts to natural resources" as authorized by Rule 18-21.004(3)(d), F.A.C. (Conclusion of Law 31) Nevertheless, the ALJ recommended that the consent of use for Imhoof's dock should be granted only if it contains a condition that the terminal platform portion be rebuilt so that it "extends to the north, away from the riparian rights line and Petitioner's dock."

RULINGS ON THE PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Exception Nos. 1, 2, and 4

The Petitioner's first and second Exceptions object to the portions of the ALJ's Finding of Fact 7 asserting that "the Imhoof property had sufficient riparian upland interest to qualify for an exemption and BOT consent of use" and "almost every other similarly-situated property on Riverside Drive to the north of the Imhoof's property has a dock built on the strip of land between Riverside Drive and the water line." The Petitioner's Exception No. 4 objects to the ALJ's related determination in Conclusion of Law 28 that Imhoof's evidence of upland interest was "sufficient for issuance of a

[2] Rule 40C-4.051(12)(f), F.A.C. (2003), exempts certain private docks having "1000 square feet or less of surface area over wetlands or other surface waters" from regulatory permitting requirements. It is undisputed that Imhoof's private as-built dock has a total surface area of less than 1000 square feet.

consent of use for her dock." I find that there is competent substantial evidence of record supporting these challenged factual findings and conclusion of the ALJ. This competent substantial evidence includes the final hearing testimony of DEP Environmental Manager, Lisa Prather; Imhoof's dock permitting consultant, Chip Steele; professional surveyor, Daniel Cory; and Imhoof's Exhibits 1, 4, 5, and 7. The Petitioner's Exception Nos. 1, 2, and 4 are thus denied.

Exception No. 3

The Petitioner's third Exception objects to the portion of the ALJ's Conclusion of Law No. 31 asserting Imhoof proved at the final hearing that "locating any portion of the structure or activity within the [25-foot] setback area is necessary to avoid or minimize adverse impacts to natural resources" pursuant to Rule 18-21.004(3)(d), F.A.C. This portion of Conclusion of Law 31 and the ALJ's unchallenged Finding of Fact 12 appear to be amply supported by the final hearing testimony of DEP Environmental Manager, Lisa Prather, and biologist, Carolyn Schultz. Accordingly, Exception No. 3 is denied.

Exception No. 5

The Petitioner's fifth Exception refers to the ALJ's Conclusion of Law 29, but does not object to any specific portion thereof. The Petitioner simply asserts that he also has riparian rights and "Respondent's dock interferes with these rights." However, the ALJ's related Finding of Fact No. 16 contains the following critical factual findings that were not objected to by the Petitioner:

> As for riparian rights, Petitioner accepted the riparian rights lines drawn by Respondents for purposes of this case. Those riparian rights lines indicate not only that Imhoof's dock does not interfere with Petitioner's riparian rights, but that Petitioner's dock actually interferes with Mrs. Imhoof's claimed riparian rights.

These critical findings that Imhoof's as-built dock does not interfere with the Petitioner's riparian rights and that the Petitioner's existing dock actually interferes with Imhoff's riparian rights are supported by the testimony of the Petitioner's own witness, Daniel Cory. (Tr. Vol. 1, 114-118) Mr. Cory, a professional surveyor with 36 years of experience, drew the Imhoof's riparian rights lines agreed to by the parties for purposes of this case. Cory's certified survey, last revised on June 19, 2003, was admitted into evidence at the final hearing as "Applicant's Exhibit 2." This certified survey reflects that all portions of Mrs. Imhoof's as-built dock structure are set back at least 10 feet from her southerly riparian rights line. This survey also reflects that a portion of the Petitioner's dock terminal platform extends north of Mrs. Imhoof's southerly riparian rights line.

For the above reasons, the Petitioner's Exception No. 5 is denied.

Exception No. 6

The Petitioner's final Exception does not object to any portion of the Recommended Order. Instead, this "Exception" is essentially a proposed supplement to the ALJ's ultimate recommendation that the DEP Final Order require Mrs. Imhoof to relocate the terminal platform portion of her as-built dock to the north. For the reasons stated in detail in the prior rulings on the Petitioner's Exceptions 1-5 and in the subsequent rulings on Imhoof's Exceptions, the Petitioner's Exception No. 6 is denied.

RULING ON DEP'S EXCEPTION TO RECOMMENDED ORDER

DEP's sole Exception requests that the Secretary "clarify Paragraph 31 of the Recommended Order" in the Final Order entered in this case. An agency head, however, has no authority under the Florida Administrative Procedure Act to "clarify" a portion of a DOAH recommended order submitted to the referring agency pursuant to

§ 120.57(1)(k), Florida Statutes ("Fla. Stat."). Once a DOAH recommended order is submitted to the referring agency, the agency must enter a final order adopting, modifying, or rejecting the recommended order or portions thereof. See § 120.57(1)(l), Fla. Stat. An agency reviewing a recommended order may also remand a formal administrative proceeding to DOAH under certain circumstances. See, e.g., Collier Dev. Corp. v. Dept. of Environmental Regulation, 592 So.2d 1107 (Fla. 2d DCA 1992). Accordingly, DEP's Exception is denied.[3]

RULINGS ON IMHOOF'S EXCEPTIONS TO RECOMMENDED ORDER

First and Third Exceptions

Imhoof's First Exception objects to the last sentence of the ALJ's Findings of Fact 15 stating that "[e]xtending the terminal platform portion to the north, away from the riparian rights line and Petitioner's dock, would be just as environmentally-friendly" as the present configuration of Imhoof's as-built dock. Even assuming that this finding is based on competent substantial evidence, it would not warrant the entry of a Final Order directing that Mrs. Imhoof must relocate her existing dock terminal platform to the north in order to be entitled to a consent of use of sovereign submerged lands. There are no statutes or rules authorizing DEP to condition a consent of use of sovereign submerged lands based on a mandated relocation of a dock structure merely because a different location "would be just as environmentally-friendly."

Imhoof's First Exception also objects to the last sentence of the ALJ's Finding of Fact 16 stating that "there was no valid, natural resource-based reason for the Imhoofs to construct the platform of their dock so as to extend south towards the riparian rights

[3] In any event, the subsequent rulings on Imhoof's Exceptions to Recommended Order should indirectly provide some "clarification" to the ALJ's Conclusion of Law 31.

line and Petitioner's dock." Imhoof's related Third Exception objects to the fourth sentence of Conclusion of Law 31, wherein the ALJ similarly concluded "there was no valid, natural resource-based reason (or any other reason) to extend the [terminal] platform to the south from the terminus of the access pier." I conclude that the quoted portions of the ALJ's Finding of Fact 16 and Conclusion of Law 31, even if based on competent substantial evidence, do not warrant the entry of a Final Order directing Mrs. Imhoof to relocate her dock terminal platform to the north as recommended by the ALJ.

The ALJ's Conclusion of Law 25 determining that Imhoof's as-built dock structure is exempt in its entirety from DEP's "regulatory" requirements is affirmed and adopted in this Final Order. This Final Order also affirms and adopts the portion of the ALJ's Conclusion of Law 31 asserting that Mrs. Imhoof "is entitled to a waiver of the 25-foot setback" under Rule 18-21.004(3)(d), F.A.C., because she was able to prove that "locating any portion of the structure or activity within the setback area is necessary to avoid or minimize adverse impacts to natural resources."

I agree with Imhoof's contention that neither the ALJ nor DEP has the authority to amend Rule 18-21.004(3)(d) to read that the 25-foot setback requirement can only be waived when a determination is made that "locating ~~any portion~~ all of the structure or activity is necessary to avoid or minimize adverse impacts to natural resources." I would note that the ALJ's unchallenged Finding of Fact 12 contains a summary of the testimony of DEP Environmental Manager Lisa Prather that, even though Imhoof's dock is not exactly in the same place as proposed in the data previously supplied to DEP, "**the dock, as built, still falls within the parameters to be granted a waiver from the 25-foot setback requirement**." Finding of Fact 12 also contains a summary of the

uncontroverted opinion testimony of Ms. Prather that "placing the dock on the south side [where it is presently located] would result in less destruction of natural vegetation and less loss of habitat" and "the as-built location avoids or minimizes environmental impacts due to shading, edge effect, and diversity."

This agency rule interpretation by Ms. Prather of the "waiver" provisions of Rule 18-21.004(3)(d, F.A.C., is entitled to great deference and should not be overturned, unless clearly erroneous. See, e.g., Dept. of Environmental Regulation v. Goldring, 477 532 (Fla. 1985); Suddath Van Lines v. Dept of Environmental Protection, 668 So.2d 209 (Fla. 1st DCA 1996). I do not find this rule interpretation to be "clearly erroneous," and it is affirmed in this Final Order.

Even if the ALJ had found that Imhoof's as-built terminal platform adversely impacts mangroves or other natural resources at the present site, the appropriate remedy would have been to deny a consent of use for the dock structure, rather than to order Mrs. Imhoof to relocate the terminal platform "to the north" in some manner not specified in the Recommended Order. See, e.g., Metropolitan Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992) (concluding that an application contested in a formal administrative proceeding must be examined as of the time of the final hearing in order to determine whether the proposed project complies with applicable permitting requirements). See also Pope v. Ray, OGC Case No. 03-1939 (Fla. DEP, Final Order Apr. 15, 2004) (rejecting the ALJ's recommendation that DEP issue a final order requiring the permit applicant to "re-site" a proposed condominium building in some undesignated fashion in order to be entitled to the requested permit); Leto v. Dept. of Environmental Protection, 18 F.A.L.R. 3056 (Fla. DEP 1996) (rejecting

the hearing officer's recommendation that DEP consider in its final order whether some suggested changes to a project might entitle the applicant to a statutory exception).

In view of the above rulings, Imhoof's First and Third Exceptions are granted. Accordingly, the last sentences of the ALJ's Findings of Fact 15 and 16 and the fourth sentence of his Conclusion of Law 31 are deemed to be insufficient bases for requiring Mrs. Imhoof to move her as-built terminal platform in order to be entitled to a consent of use of sovereign submerged lands. I also reject the ALJ's related conclusion in the last sentence of Conclusion of Law 31 that "Mrs. Imhoof should be required to build the terminal platform to the north, away from the riparian rights line and Petitioner's dock."[4]

Second Exception

Imhoof's Second Exception objects to the ALJ's conclusion in the third sentence of Conclusion of Law 31 that "while [Mrs. Imhoof is] entitled to a waiver, the waiver should specify where within the 25-foot setback the dock must be built." Imhoof's Exception correctly notes that the ALJ does not cite to any legal authority arguably supporting this rule interpretation. The provisions of Rule 18-21.004(3)(d), F.A.C., do not prescribe that a "waiver" determination by DEP or the Trustees must specify exactly where within the 25-foot setback area a proposed structure must be built in order for a party to be entitled to a consent of use of sovereign submerged lands. As discussed in the preceding ruling, neither the ALJ nor DEP has the authority to amend the plain language of Rule 18-21.004(3)(d). I thus decline to follow the ALJ's suggestion that Rule 18-21.004(3)(d) be construed to require that a waiver determination of the 25-foot

[4] Pursuant to § 120.57(1)(l), Fla. Stat., I find that the conclusion of law adopted in this portion of the Final Order is more reasonable than the ALJ's conclusion of law that was rejected.

setback requirement in this case must also include a specification of the exact location within the setback area of Imhoof's dock structure.

As also noted in the preceding ruling, Ms. Prather's interpretation of Rule 18-21.004(3)(d), F.A.C., was that "the dock, as built, still falls within the parameters to be granted a waiver from the 25-foot setback requirement." I reaffirm my prior conclusion that this agency rule interpretation of the "waiver" provisions of Rule 18-21.004(3)(d), as applied to the facts of this case, is a permissible interpretation and should be upheld.

In any event, the ALJ actually found in his Recommended Order that Ms. Prather of DEP did specify in an email that "**Mr. Imhoof is authorized to construct his dock 10 feet from his property line.**" (See Finding of Fact 9.) The ALJ's unchallenged Finding of Fact 11 establishes that Imhoof's as-built dock structure does comply with this minimum 10-foot setback requirement specified in Ms. Prather's email. Thus, the ALJ's suggestion that DEP's "waiver should specify where within the 25-foot set back the [Imhoof's] dock must be built" was seemingly complied with in this case.

Based on the above, Imfhoof's Second Exception is granted. The third sentence of the ALJ's Conclusion of Law 31 is deemed to be erroneous as a matter of law and is rejected. Pursuant to § 120.57(1)(l), Fla. Stat., I find that DEP's agency interpretation of the 25-foot setback waiver provisions of Rule 18-21.004(3)(d) upheld in this portion of the Final Order is more reasonable than the ALJ's rule interpretation that was rejected. I conclude, in the alternative, that the ALJ's unchallenged Finding of Fact 9 establishes that DEP did specify in this case where within the 25-foot seback Imhooof's dock must be built – the area between 25 feet and 10 feet from Imhoof's southerly property line.

Fourth Exception

Imhoof's Fourth Exception objects to the last sentence of the ALJ's Conclusion of Law 30 asserting that "the Imhoof dock's interference with Petitioner's use of his dock is not reasonable" and his related recommendation that Mrs. Imhoof's consent of use of sovereign submerged lands for her dock should only be granted upon the condition that the dock terminal platform "extends to the north, away from the riparian rights line and Petitioner's dock." Excluding Imfhoof's contention that she is entitled to an award of attorney's fees and costs, I conclude that this Exception otherwise has merit.

The Recommended Order contains unchallenged factual findings by the ALJ that Imhoof's as-built dock does not interfere with the Petitioner's riparian rights, and the Petitioner's existing dock actually interferes with Mrs. Imhoof's riparian rights. (See Finding of Fact 16.) In his related Conclusion of Law 29, the ALJ also concludes that:

> Petitioner accepted the riparian rights lines drawn by Respondents. . . As found, the riparian rights lines drawn by Respondents indicate not only that Mrs. Imhoof's dock does not encroach upon Petitioner's riparian rights line, but that Petitioner's dock actually encroaches upon Mrs. Imhoof's claimed riparian rights.

Therefore, in two separate portions of the Recommended Order on review, the ALJ determines that it is the Petitioner's dock that is the source of "interference with riparian rights," rather than Imhoof's dock. As discussed in the prior ruling denying the Petitioner's Exception No. 5, the testimony and survey of the Petitioner's own witness, Daniel Cory, established that all portions of Mrs. Imhoof's as-built dock structure are set back at least 10 feet from her southerly riparian rights line, and Petitioner's existing dock terminal platform actually encroaches into the area north of this agreed upon riparian rights line (Tr. Vol. 1, 114-118; Applicant's Exhibit 2). I thus find the last sentence of

Conclusion of Law 30 suggesting that "the Imhoof dock's interference with Petitioner's use of his dock is not reasonable" to be incongruous with the ALJ's more evidentiary-based findings and conclusions in paragraphs 16 and 29 of the Recommended Order.

In addition, in the first sentence of Conclusion of Law 30, the ALJ observes that the "Petitioner's main contention was that Imhoof"s dock, as built, is too close to his and interferes with the use of his docks for kayaks and sailboats." This "riparian rights" claim of the Petitioner appears to be integrally connected to the ALJ's assertion in the third sentence of Conclusion of Law 30 that "the Imhoof dock's interference with Petitioner's use of his dock is not reasonable."

Page four of the Recommended Order contains a summary of the ALJ's ruling made at the beginning of the final hearing that any purported "interference with navigation [due to the location of Imhoof's dock] was eliminated as an issue because it was not raised in the Amended Petition." The last sentence of Conclusion of Law 30 suggesting that the location of Imhoof's dock as-built terminal platform creates an unreasonable interference with the navigation of kayaks and sailboats to and from the Petitioner's dock thus appears to exceed the scope of the issues to be considered in this case as limited by the ALJ's own procedural ruling at the DOAH final hearing.

Finally, Imhoof's request that she be awarded attorney's fees and costs to be assessed against the Petitioner is not supported by the governing administrative law of Florida and is denied. The issues of entitlement to attorney's fees and costs in formal administrative proceedings are matters to be determined by the DOAH administrative law judges, not the referring agencies. See, e.g., §§ 57.111(4)(d) and 120.595(1), Fla. Stat. In this case, the ALJ expressly denied Imhoof's Renewed Motion for Attorney's

Fees and Costs filed after the DOAH final hearing was concluded. (See Recommended Order, page 6) I have no authority to reverse this ruling of the ALJ denying Imhoof's request for attorney's fees and costs in this case.

In light of the above rulings, Imhoof's Fourth and final Exception is granted in part and denied in part. The portion of this Exception objecting to the last sentence of the ALJ's Conclusion of Law 30 is granted based on a finding that the substituted conclusions of law set forth in this portion of the Final Order are more reasonable than the ALJ's conclusion of law that was rejected. The portion of this Exception requesting that Mrs. Imhoof be awarded attorney's fees and costs against the Petitioner is denied.

RULING ON IMHOOF'S "SUPPLEMENTED EXCEPTIONS"

The primary contention raised in these timely-filed "Supplemented Exceptions" is that the Petitioner's claim of "interference with his riparian rights" due to the proximity of Imhoof's as-built dock terminal platform is a real property matter beyond the subject-matter jurisdiction of this administrative proceeding. Imhoof cites to administrative and judicial case law correctly holding that disputes over real property titles and boundaries are issues that can only be resolved in the circuit courts of this State. Nevertheless, I do not find the cases cited in Imhoof's Supplemented Exceptions to be controlling as to the disposition of this proceeding.

In this case, there is no dispute as to the location of the boundary line and/or riparian rights line between Imhoof's property and the Petitioner's property to the south. To the contrary, the ALJ made the unchallenged finding in paragraph 16 of the Recommended Order that the "Petitioner accepted the riparian rights lines drawn by the Respondent [Imhoof] for purposes of this case." There are also no allegations in this

case that Imhoof's as-built dock structure and related activities encroach beyond the Petitioner's riparian rights line. None of the cases cited in Imhoof's Supplemented Exceptions involve an administrative action where the parties stipulated to the exact location of the critical riparian rights lines as shown on a certified survey and where there was no claim that the applicant's dock encroached beyond the riparian rights line of the complaining adjacent upland landowner.

In order to be entitled to a contested consent of use of sovereign submerged lands, the applicant must establish (among other things) that the proposed activity will not "unreasonably infringe upon the traditional, common law riparian rights " of adjacent upland property owners. See Rule 18-21.004(3)(a), F.A.C. The common law riparian rights referenced in this rule are identified in § 253.141(1), Fla. Stat., and include "rights of ingress, egress, boating, bathing, and fishing."

I conclude that the Petitioner's claim that Imhoof's as-built terminal platform "interferes with the use of his dock by kayaks and sailboats" raises a disputed riparian rights boating issue under Rule 18-21.004(3)(a) that may be considered and resolved in this administrative proceeding. See Davis v. Schmitt, 10 F.A.L.R. 2769 (Fla. DER 1987) (concluding that petitioner's claim of "impairment of riparian rights" due to a proposed dock of an adjoining landowner seeking a regulatory permit and a consent of use was a matter "within the province of the Trustees"). Accordingly, Imhoof's "Supplemented Exception" is denied. However, based on the prior rulings in this Final Order, the contention that Imhoof's as-built terminal platform "unreasonably interferes" with the Petitioner's riparian rights has been rejected on its merits.

CONCLUSION

It is particularly significant that there are no findings or conclusions by the ALJ in this case that any portion of Imhoof's as-built dock terminal platform adversely impacts mangroves or other natural resources existing at the present site. To the contrary, the ALJ's unchallenged Findings of Fact 12 and 13 state that the southerly portion of Imhoof's property where the as-built terminal platform is located has been "disturbed by fill material" and is "devoid of mangroves," whereas Imhoof's property to the north is "at least 85 percent covered with mangroves."

Even though the Petitioner's dock platform actually encroaches beyond Imhoof's southerly riparian rights line, it is undisputed that Imhoof's as-built terminal platform is still located "approximately 17 feet north of the platform of Petitioner's dock." (ALJ's Finding of Fact 11) Consequently, the ALJ's recommendation that Mrs. Imfhoof be required to rebuild her terminal platform at some unspecified location further to the north as a condition to receiving a consent of use of sovereign submerged lands is rejected.

It is therefore ORDERED:

A. As modified by the above rulings, the attached Recommended Order (Exhibit A) is otherwise adopted and incorporated by reference herein.

B. Imhoof's as-built dock structure, as described in this Final Order, is EXEMPT from the need for an Environmental Resource Permit.

C. Imhoof's as-built dock structure, as described in this Final Order, is entitled to a "waiver" of the setback requirement of Rule18-21.004(3)(d), F.A.C.

D. Imhoof is GRANTED Authorization to Use Sovereign Submerged Lands for construction and operation of the as-built dock structure, as described in this Final

Order, subject to the "General Consent Conditions" attached to the DEP letter dated August 8, 2000, to Edward Neal Imhoof in DEP File No. 64-172146-001

E. This Final Order does not constitute authorization of compliance with State Programmatic General Permit requirements. A request for this federal authorization should be directed to the U.S. Army Corps of Engineers (Jacksonville District).

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to § 120.68, Fla. Stat., by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the Department clerk in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the Department clerk.

DONE AND ORDERED this 27th day of May, 2004, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille

COLLEEN M. CASTILLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Heather Chapman 5/27/04

CLERK DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

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Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
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and by hand delivery to:

Nona R. Schaffner, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 27th day of May, 2004.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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