

4.14.05

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED  
MAY 23 PM 1:12

OFFICE OF  
ADMINISTRATIVE  
HEARINGS

KEVIN SCULLY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 SAM PATTERSON and DEPARTMENT OF )  
 ENVIRONMENTAL PROTECTION, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

OGC CASE NO. 04-1799 CAS Closed  
DOAH CASE NO. 05-0058

AT

**FINAL ORDER**

An Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this case. The Recommended Order indicates that copies were served upon the *pro se* Petitioner, Kevin Scully ("Petitioner"), and the *pro se* Co-Respondent, Sam Patterson ("Patterson"). A copy of the Recommended Order is attached as Exhibit A. No Exceptions to the Recommended Order were filed by any of the parties. The matter is now before the Secretary of DEP for final agency action.

**BACKGROUND**

Patterson is the owner of residential property in Boynton Beach, Florida, and the Petitioner is an adjacent residential property owner. Both residential properties have frontage on an artificial canal that ultimately connects with the Intracoastal Waterway. In September of 2004, Patterson filed an application requesting a DEP determination that a proposed dock reconstruction project was exempt from the need to obtain an Environmental Resource Permit ("ERP"). Patterson's original application proposed to

replace an existing five-foot by 21-foot (105-square feet) marginal dock in the same location, configuration, and dimensions as the existing dock, and to construct a five-foot by 16-foot (80-square feet) finger pier perpendicular to the existing marginal dock.

DEP reviewed the application and advised Patterson that the site of his proposed dock project is not on sovereign submerged lands, and thus no authorization was required from the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). DEP also advised Patterson that, pursuant to Rules 40E-4.051(3)(c) and (d), Florida Administrative Code ("F.A.C."), the dock project was exempt from the need to obtain an ERP.<sup>1</sup> The Petitioner filed an Amended Petition challenging this exemption determination, and DEP referred the matter to DOAH for a formal hearing. Administrative Law Judge, Charles A. Stampelos (the "ALJ"), held a final hearing on March 29, 2005, and submitted his Recommended Order on April 14, 2005.

#### RECOMMENDED ORDER

The Recommended Order contains an unchallenged finding by the ALJ that Patterson's project was revised prior to the DOAH final hearing so that the wooden finger pier will extend only 11.8 feet (rather than 16 feet) and will be perpendicular from the middle of the marginal dock. The ALJ also found that Patterson testified at the hearing that he intended to moor one boat at the finger pier; and the ALJ suggested that Patterson be limited to mooring only one boat on the north side of the finger pier.

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<sup>1</sup> Rule 40E-4.051(3)(c), F.A.C., exempts from ERP permitting requirements the "construction of private docks in artificially created waterways where construction will not violate water quality standards, impede navigation, or adversely affect flood control." Rule 40E-4.051(3)(d), F.A.C., exempts the "replacement or repair of existing docks" provided that no fill material other than the piles is used and the replaced or repaired dock is in the same location and of the same configuration and dimensions as the dock being replaced or repaired.

The ALJ concluded that Patterson's proposed dock renovation project will not impede navigation in the canal area or violate water quality standards. The ALJ also concluded that Patterson established that the dock project satisfies the exemption requirements of Rule 40E-4.051(3)(d)1-3, F.A.C. The ALJ recommended that DEP enter a final order determining that "Patterson's proposed dock project, as revised, is exempt from the need to obtain an ERP."

### CONCLUSION

Neither the Petitioner nor Patterson filed any exceptions objecting to any portion of the Recommended Order. However, it is undisputed that the lands underlying the artificial canal where Patterson's reconstructed dock is to be located are not sovereign submerged lands. Therefore, the Trustees do not have the authority to limit Patterson to mooring only one boat at the dock as suggested by the ALJ. Furthermore, the issue of post-construction boat mooring restrictions is a matter beyond the purview of the ERP exemption provisions of Rules 40E-4.051(3)(c) & (d), F.A.C.

It is therefore ORDERED:

A. The ALJ's suggestion that Patterson be limited to mooring one boat on the north side of the proposed finger pier is not adopted for the reasons set forth above.

B. The Recommended Order (Exhibit A) is otherwise adopted and incorporated by reference herein.

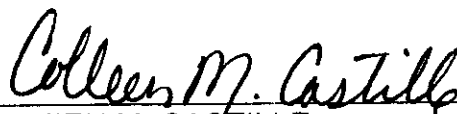
C. Patterson's revised dock project, as described in the Recommended Order, is exempt from Environmental Resource Permitting requirements.

D. This DEP order does not address compliance with State Programmatic General Permit requirements. A request for this required federal authorization should be filed with 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 Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department 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 clerk of the Department.

DONE AND ORDERED this 12<sup>th</sup> day of May, 2005, in Tallahassee, Florida.

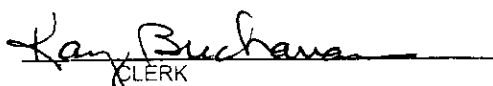
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



COLLEEN M. CASTILLE  
Secretary

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

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



CLERK

5/20/05  
DATE

**CERTIFICATE OF SERVICE**

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

Sam Patterson  
9449 Worswick Court  
Wellington, FL 33414

Kevin Scully  
941 Brookdale Drive  
Boynton Beach, FL 33435

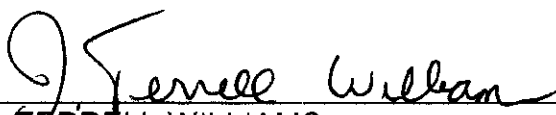
Ann Cole, Clerk and  
Charles A. Stampelos, Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine Ffolkes, Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000

this 20~~th~~ day of May, 2005.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
\_\_\_\_\_  
J. TERRELL WILLIAMS  
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/245-2242