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STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF ADMINISTRATIVE HEARINGS

STEVE LARDAS,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

OGC CASE NO.: 04-1927
DOAH CASE NO.: 05-0458 JLJ
Closed

FINAL ORDER

An administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP") in this formal proceeding. A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were served upon counsel for DEP and the Petitioner, Steve Lardas ("Petitioner"). Exceptions to the RO were filed on behalf of the Petitioner, and Responses to Exceptions were filed on behalf of DEP. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

The Petitioner is the owner of various lots in the Ilexhurst Subdivision, Holmes Beach, in Manatee County. On November 15, 2004, DEP issued a letter giving notice of its intent to disapprove the Petitioner's request for a favorable "mosquito ditch" exemption determination pursuant to Rule 40D-4.051(10), Florida Administrative Code

("F.A.C."),[1] which reads as follows:

> Construction, alteration, operation, maintenance, removal, and abandonment of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, or works, in, on, or over lands that have become surface waters or wetlands solely because of mosquito control activities undertaken as a part of a governmental mosquito control program, and which lands were neither wetlands nor other surface waters before such activities, shall be exempt from the provisions in this chapter adopted by the District . . . (emphasis supplied) (citations omitted).

The Petitioner's exemption request was made in connection with plans (as described by DEP) "to fill approximately 0.72 acre of a remnant mosquito ditch and adjacent, tidally influenced mangrove swamp" located within the boundaries of his property. The Petitioner timely requested an administrative hearing to challenge DEP's denial of his exemption claim, and DEP referred the matter to DOAH for formal proceedings. The case was assigned to Administrative Law Judge, J. Lawrence Johnston (the "ALJ"), who held a final hearing in the case in Bradenton on May 17-19, 2005. The ALJ issued his RO now on administrative review on August 24, 2005.

RECOMMENDED ORDER

The RO contains key factual findings of the ALJ that: the Petitioner's property consisted of wetlands prior to the mosquito control ditching; and the mosquito control ditches were dug to reach mosquito-breeding wetlands on this property as well as on property to the south. (RO, para. 8) The ALJ also concluded in paragraph 17 that:

> As found, the Petitioner did not prove by a preponderance of the evidence that the surface waters or wetlands on his property "have become surface waters or wetlands solely because of mosquito control activities undertaken as a part of a governmental mosquito control program," and that they "were neither wetlands nor other surface waters before such activities."

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[1] The ALJ correctly noted in endnote 1 that DEP's letter dated November 15, 2004, contained an erroneous citation to former Rule 40D-4.051(14), F.A.C., rather than to the existing mosquito ditch exemption provisions currently set forth in Rule 40D-4.051(10). I view this mistaken rule citation to be a harmless scrivener's error.

The ALJ thus recommended that "DEP enter a final order denying Petitioner's request for an exemption."

STANDARDS OF ADMINISTRATIVE REVIEW

The findings of fact of administrative law judges may not be rejected or modified by a reviewing agency, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence". See subsection 120.57(1)(l), Fla. Stat. Accord Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995).

An agency reviewing a DOAH recommended order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as these are evidentiary matters within the province of the administrative law judges as the triers of the facts. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Furthermore, a reviewing agency has no authority to make independent or supplemental findings of fact in its final order. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994). The scope of agency review of a DOAH recommended order is limited to ascertaining whether the administrative law judge's existing findings of fact are supported by competent substantial evidence of record. Id., 645 So.2d at 487.

However, subsection 120.57(1)(l), Fla. Stat., does authorize an agency to modify or reject an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." Accordingly, an agency has the primary responsibility of interpreting statutes and rules within its regulatory

jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Assn., 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Great deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." See, e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting v. Dept of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998).

RULINGS ON THE PETITIONER'S EXCEPTIONS

Exceptions 1 and 3

In Exceptions 1 and 3, the Petitioner correctly points out what appears to be errors by the ALJ in his Statement of the Issue and in Finding of Fact No. 1 by mistakenly referring to Lot "18," rather than the correct Lot "16." These Exceptions are granted, but the ALJ's mistaken references to Lot 18 are deemed to be harmless scrivener's errors.

Exception 3 also challenges the portion of the ALJ's Finding of Fact No. 1 stating that, in 1950, the Petitioner's great-grandfather acquired title to the "vacated alley of Block 44." The Petitioner contends that the record evidence establishes that the alleyway on Block 44 was not vacated by the City of Holmes Beach until November of 1982, suggesting that legal title to this alley was not acquired by his ancestors until that date. I agree that there does not appear to be any competent substantial evidence of record to support the challenged historical finding of the ALJ, and it is rejected.

Nevertheless, I conclude that date of the acquisition of title to the alleyway of Block 44 by the Petitioner's ancestors has no material bearing on the ultimate issue of

whether the Petitioner has demonstrated his compliance with the "mosquito ditch" exemption provisions of Rule 40D-4.051(10), F.A.C. Consequently, this portion of Exception 3 is granted, but the ALJ's challenged historical finding concerning the acquisition of title to the "alleyway of Block 44" is deemed to be immaterial and irrelevant in this proceeding and harmless error.

Exceptions 2 and 6

These two Exceptions of the Petitioner both object to evidentiary rulings of the ALJ. Exception 2 takes issue with the portion of the Preliminary Statement wherein the ALJ notes that DEP Exhibits 7 and 10 were admitted into evidence at the DOAH final hearing. Exception 6 challenges the portion of Finding of Fact 7 wherein the ALJ ruled that an affidavit of Steve Lacios was not "competent" evidence.

Evidentiary rulings in DOAH formal proceedings dealing with admissibility and relevance of evidence usually involve factual issues within the sound prerogative of the administrative law judges. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1279 (Fla. 1st DCA 1985). See also Barfield v. Dept. of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001) (concluding that the Dentistry Board lacked "substantive jurisdiction" to reject the administrative law judge's evidentiary ruling that designated grading sheets were inadmissible at the formal hearing). I thus conclude that these challenged evidentiary rulings of the ALJ concerning the admissibility and competency of certain documentary evidence at the final hearing in this case are not matters within this agency's "substantive jurisdiction" under § 120.57(1)(l), Fla. Stat. The Petitioner's Exceptions 2 and 6 are thus denied.

Exception 4

Exception 4 objects to the first sentence of the ALJ's Finding of Fact 4 stating that a finger of the network of ditches dug in the 1950's bisected the subject property "terminating at the right-of-way of Avenue C." The Petitioner does not deny that the ditch on his property currently terminates at Avenue C. The Petitioner merely contends that the referenced Avenue C did not exist until some time after 1968, and the challenged language of the ALJ implies that Avenue C was in existence in the 1950's when the ditch was dug.

I do not construe this first sentence of paragraph 4 of the RO to constitute a specific finding by the ALJ that Avenue C was actually in existence in the 1950s as suggested by the Petitioner. Rather, I view this mention of Avenue C to be a convenient reference by the ALJ to a current identifiable location in order to give a more meaningful description of the parameters of the ditch in question. Even if the first sentence of paragraph 4 of the RO were deemed to be a factual finding that Avenue C was in existence in the 1950s, I would view it to be harmless error having no bearing on the ultimate issue in this case. That ultimate issue is whether the Petitioner clearly demonstrated by a preponderance of the evidence at the final hearing that the surface waters or wetlands he now proposes to fill exist solely due to mosquito control activities and were not in existence before such mosquito control activities were conducted, as required by Rule 40D-4.051(10), F.A.C. Accordingly, Exception 4 is denied.

Exceptions 5 and 7

These two Exceptions both object to the last sentence of Finding of Fact 7 in the RO where the ALJ states that:

> But those subordinate facts [previously summarized by the ALJ based on evidence presented on behalf of the Petitioner] were not determinative of the ultimate disputed issues of material fact- -*i.e.*, they did not disprove the existence of any kind of jurisdictional wetlands on the Property before and after the wash-over event and before the mosquito control ditches.

The Petitioner repeatedly cites to the DEP Final Order in McGinnis v.Manasota-88, Inc., 20 FALR 2023 (Fla. DEP 1998), as purported authority for his contention that the evidence he presented in this case is the same as the evidence presented by the applicants in McGinnis. However, the McGinnis Final Order does not support the Petitioner's claim that he has established compliance with the mosquito ditch exemption provisions set forth in Rule 40D-4.051(10), F.A.C. To the contrary, in the McGinnis case, both the Secretary of DEP and the administrative law judge concluded that the McGinnises were not entitled to their requested mosquito ditch exemption based on the evidence presented in that case. Id. at 20 FALR 2027, 2047-48.

The Petitioner's reliance on the DEP Final Order in Samuels v. Imhoof, 26 FALR 3689 (Fla. DEP 2004), is also misplaced. The Imhoof case did not involve a mosquito ditch exemption request. The exemption requested and approved in Imhoof was based on the undisputed fact that the proposed dock facility was less than 1000 square feet in size and thus complied with the "small dock" exemption provisions of Rule 40C-4.051(12)(f), F.A.C. Therefore, issues relating to whether or not the surface waters or wetlands on Imhoof's property were created solely due to mosquito control activities and were not in existence before such mosquito control activities were conducted were not even before the administrative law judge or DEP Secretary for consideration in the Imhoof case.

The Petitioner also contends that the ALJ erred by not applying the "reasonable assurance" rationale to his burden of proving entitlement to the mosquito ditch exemption. This reasonable assurance rationale has been defined by case law to mean a "substantial likelihood that the proposed project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3d DCA 1992).

I conclude that the reasonable assurance rationale is not applicable to exemption requests. "Reasonable assurance" only applies to applications for permits and related approvals of activities regulated by DEP or the water management districts. See § 373.414(1), Fla. Stat., stating in part that: "As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources . . . the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards . . . will not be violated." See also Rule 62-4.070(1), F.A.C., stating in part that: "A permit shall be issued to the applicant upon such conditions as the Department may direct, only if the applicant affirmatively provides the Department with reasonable assurance . . . that the . . . activity . . . will not discharge, emit, or cause pollution in contravention of Department standards or rules."

An example of the proper application of the reasonable assurance rationale is the Coscan decision cited above. In Coscan, the Department of Environmental Regulation entered a final order granting an application for a permit to expand an existing marina, which order was appealed. The Coscan court then enunciated the reasonable assurance rationale and concluded that the applicant had not established at the final hearing that there was a substantial likelihood that the proposed marina project would be successfully implemented. Coscan, 609 So.2d at 648.

In this case, however, the Petitioner did not seek an environmental resource permit from DEP to fill the remnant mosquito ditch on his property. Instead, the Petitioner requested a favorable exemption determination from DEP, which would actually relieve him from the burden of having to apply for a regulatory permit. Unlike the reasonable assurance rationale applicable to a permit application, a party claiming an exemption from general requirements imposed on the public at large must "clearly" establish entitlement to the exemption. Green v. Pederson, 99 So.2d 292, 296 (Fla. 1957); Robison v. Fix, 113 Fla. 151, 151 So. 512 (Fla. 1933).

In addition, unlike general permitting provisions, exemption provisions are to be construed strictly against the party claiming the exemption. Pal-Mar Water Management. Dist. v. Martin County, 384 So.2d 232, 233 (Fla. 4th DCA 1980); Armstrong v. City of Tampa, 112 So.2d 293, 298 (Fla. 2d DCA 1959). Thus, any reasonable doubts concerning the applicability of the mosquito ditch exemption provisions of Rule 40-D-4.051(10), F.A.C., to the facts of this case must be resolved against the Petitioner.

Even if "reasonable assurance" did apply to exemption determinations, I would still accept the ALJ's recommendation that the Petitioner's mosquito ditch exemption request be denied. Paragraphs 7 and 17 of the RO, adopted herein, clearly reveal that the ALJ did not find the testimony of the Petitioner's witnesses to be very persuasive. Thus, based on the ALJ's judgment as to the unpersuasive nature of the Petitioner's evidence at the final hearing, a determination that he had demonstrated a "substantial likelihood that the project would be successfully implemented" is not warranted.

Finally, in these two Exceptions, the Petitioner cites to testimony of record purportedly supporting his exemption claims and essentially disagrees with the ALJ as to the weight given to the evidence as a whole and the reasonable inferences to be drawn there from. Nevertheless, I decline to attempt to reweigh the evidence, draw inferences from the testimony in a manner different from the ALJ, or to resolve arguably conflicting testimony in favor of the Petitioner where the ALJ did not. Such evidentiary issues are not matters within this agency's "substantive jurisdiction" under § 120.57(1)(l), Fla. Stat. Accordingly, the Petitioner's Exceptions 5 and 7 are denied.

Exception 8

In this lengthy Exception, containing seven subparts and covering approximately ten pages, the Petitioner objects to the ALJ Finding of Fact 9, which reads as follows:

> Proposed findings of facts 18-20 and 22-51 in DEP's PRO include a clear and comprehensive explanation [of] why DEP's evidence was more persuasive on the ultimate disputed issues of material fact. These proposed findings of fact are approved and adopted except for a few scrivener's errors.

The Petitioner contends that there is no competent substantial evidence of record supporting the ALJ's statements in Finding of Fact 9 or the incorporated factual findings set forth in DEP's Proposed Recommended Order ("PRO"). The Petitioner also argues that the ALJ's "Finding of Fact 9" is not actually a factual finding, but "improperly adopts conclusions of law."

I agree with Petitioner to the limited extent that portions of some of the paragraphs in DEP's PRO incorporated by reference into Finding of Fact 9 are actually mixed statements of law and fact where certain provisions of Chapter 62-340, F.A.C. ("Delineation of the Landward Extent of Wetlands and Surface Waters"), are construed

in light of the material facts of this case. However, if a conclusion of law is improperly labeled as a finding of fact in a recommended order, the label should be disregarded on administrative or judicial review, and the item should be treated as though it were actually a conclusion of law. Battaglia Properties v. Fla. Land and Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994). Consequently, those portions of DEP's proposed findings of fact 22-51 adopted by the ALJ where the provisions of Chapter 62-340 are being construed in light of the evidence presented at the final hearing are treated in this Final Order as though they were mixed statements of law and fact.

I conclude that the interpretations by DEP staff of the rule provisions of Chapter 62-340 adopted by the ALJ in paragraph 9 of the RO were adequately explicated at the final hearing by DEP officials, Richard Cantrell, Terry Cartwright, and Eric Hickman. These agency rule interpretations are entitled to great deference from administrative law judges and the courts and should not be overturned, unless "clearly erroneous." Falk, 614 So.2d at 1089; State Contracting & Engineering Corp. v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998). I am of the view that these agency rule interpretations of Chapter 62-340 adopted by the ALJ and challenged by the Petitioner are not clearly erroneous, but are permissible rule interpretations that are adopted in this Final Order.

Despite the Petitioner's suggestions to the contrary, I also conclude that the ALJ's Finding of Fact 9 and the incorporated findings in DEP's PRO are supported by competent substantial evidence of record. This competent substantial evidence includes the cumulative testimony at the final hearing of DEP witnesses, Richard

Cantrell, Terry Cartwright, and Eric Hickman. Cantrell and Hickman, both accepted by the ALJ as experts in jurisdictional wetlands delineation, opined that the portion of the Petitioner's property proposed to be filled was a historical wetland before the mosquito ditch excavation was commenced in the mid-1950s. (Tr. pp. 630-675, 735-749) Cartwright, the DEP official who processed the Petitioner's exemption request, testified about his review of aerials, photographs, and other documents leading to his ultimate determination that the Petitioner's property at issue was a historical wetland prior to the mosquito ditch activity. (Tr. pp. 508-524)

This Exception contains various citations to the testimony of record, which the Petitioner contends warrant the rejection of the ALJ's challenged factual findings and related rule interpretations. I conclude that the Petitioner is again disagreeing with the weight given by the ALJ to the testimony and is requesting this agency to reweigh the evidence on administrative review. I have already ruled that there is competent substantial evidence to support the challenged findings and rule interpretations of the ALJ. I once more decline to substitute my judgment for that of the ALJ on evidentiary matters, and I refuse to draw the factual inferences from the testimony in favor of the Petitioner as suggested in this Exception when the ALJ did not do so in his RO.

I also place considerable emphasis on the fact that the Petitioner's Exceptions do not object to the propriety of the ALJ Finding of Fact 8, which is directly related to Finding of Fact 9 challenged in this Exception. The ALJ's unchallenged Finding of Fact 8, adopted in this Final Order, reads as follows:

> Meanwhile, DEP countered with its own extensive and detailed testimony and evidence, which was persuasive. It is found that the evidence, taken as a whole, did not prove Petitioner's position. To the contrary, taken as a whole, the evidence proved DEP's position--namely, that the Petitioner's

Property did not consist entirely of uplands prior to the mosquito control ditching; that Petitioner's Property consisted of wetlands prior to the mosquito control ditching; and that the mosquito control ditches were dug to reach mosquito-breeding wetlands on the Property as well as on property to the south.

A party disputing findings of fact in a DOAH recommended order has the burden of alerting a reviewing agency to any perceived defects in the factual findings by filing exceptions with the agency. See Couch v. Commission on Ethics, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). The failure to file exceptions to the ALJ's findings of fact with the reviewing agency results in the party being barred from presenting a different version of the facts, and will preclude any argument on appeal that the agency erred in accepting the facts set forth in the recommended order. Id. at 1124; accord Kantor v. School Board of Monroe County, 648 So.2d 1266, 1267 (Fla. 3d DCA 1995).

In view of the above rulings, the Petitioner's Exception 8 is denied.

Exceptions 9, 10, 11, and 12

The Petitioner's Exceptions 9, 10, 11, and 12 object to the ALJ's Conclusions of Law 10-17. These related Exceptions, consisting largely of arguments previously raised in the Petitioner's Exceptions to the ALJ's Findings of Fact, are addressed as follows:

1. The Petitioner's repeated contention that the ALJ erred by failing to rely on the "reasonable assurance" rationale was considered in detail in the prior rulings denying Petitioner's Exceptions 5 and 7, which are incorporated by reference herein. I reaffirm my ruling that the reasonable assurance rationale does not apply to an exemption request. I also find no fault with the ALJ's crucial Conclusion of Law 17 asserting that

the Petitioner "did not prove by a preponderance of evidence" at the final hearing that he is entitled to rely on the exemption provisions of Rule 40D-4.051(10), F.A.C.

2. The Petitioner's continued reliance on the DEP final orders in Samuels v. Imhoof, supra, and McGinnis v. Dept. of Environmental Protection, supra, is again found to be misplaced. This agency did not rule that the reasonable assurance rationale applied to an exemption request in either of these two administrative decisions. More importantly, neither the Samuels nor the McGinnis final order resulted in a determination by DEP that a party requesting a "mosquito ditch" exemption had proved that they were entitled to such exemption based on any evidentiary standard. Thus, the Petitioner's repeated citations to these DEP final orders in support of its exemption claim are not compelling.

3. The Petitioner again cites to certain testimony of record and requests this agency to reweigh the evidence and to draw factual inferences from the evidence decidedly different from those inferences drawn by the ALJ. I again decline to substitute my judgment for that of the ALJ on these evidentiary matters. The Petitioner also suggests that, after he presented his evidence at the final hearing, the burden of proof shifted to DEP to disprove his entitlement to the mosquito ditch exemption. I reject this suggestion in light of the ALJ's finding in paragraph 7 of the RO, adopted in this Final Order, that the Petitioner's evidence was "not determinative of the ultimate disputed issues of material fact." Even if the burden of proof had shifted to DEP, it would be of no avail to the Petitioner. In his unchallenged Finding of Fact 8, the ALJ found that "DEP countered with its own extensive and detailed testimony and evidence, which was persuasive" and, "taken as whole, the evidence proved DEP's position."

4. These Exceptions also cite to portions of the testimony at the final hearing, draws factual inferences there from favorable to the Petitioner, and argues that the ALJ erred by upholding the interpretation by DEP staff of various provisions of Chapter 62-340, F.A.C., governing the "Delineation of the Landward Extent of Wetlands and Surface Waters." The arguments raised here are similar to those previously raised in Petitioner's challenge to the ALJ's Finding of Fact 9. Those arguments were considered in detail and rejected in my prior rulings denying the Petitioner's Exception 8, which are incorporated by reference herein. I again conclude that the DEP staff interpretations of the applicable rules in Chapter 62-340, F.A.C., upheld by the ALJ in the RO, are permissible agency interpretations entitled to great deference and they are adopted in this Final Order. DEP has the primary responsibility of interpreting its own administrative rules, not a party seeking an exemption from permitting requirements. Public Employees Relations Commission, 467 So.2d at 989.

Based on the above rulings, Exceptions 9, 10, 11, and 12 are denied.

Exceptions 13, 14, and 15

Exceptions 13, 14, and 15 challenge various evidentiary rulings by the ALJ adverse to the Petitioner. The Petitioner contends that these rulings of the ALJ, denying the admissibility of certain documents tendered by him at the final hearing, are improper and should be reversed in this Final Order. I again conclude that issues relating to the admissibility and relevance of evidence offered at administrative hearings are not matters within the "substantive jurisdiction" of this agency under § 120.57(1)(k), Fla. Stat. Barfield, 805 So.2d at 1011. Exceptions 13, 14, and 15 are thus denied.

Exception 16

The Petitioner's final Exception consists of an argument that the ALJ may have improperly relied on the exemption provisions of DEP Rule 62-340.750, F.A.C., rather than the governing exemption provisions of Rule 40D-4.051(10), F.A.C. I find this argument to be without merit on both procedural and substantive grounds.

First, Exception 16 does not comply with the provisions of § 120.57(1)(k), Fla. Stat. Section 120.57(1)(k) requires a party filing exceptions to a recommended order to "identify the disputed portion of the recommended order by page number or paragraph" and to "include appropriate and specific citations to the record." Exception 16 does not identify any specific page number of paragraph of the RO objected to and does not cite to any testimony of record arguably supporting the Petitioner's rule interpretation.

In addition, Rules 40D-4.051(10) and 62-340.750 have virtually identical substantive language providing that "lands that have become surface waters or wetlands solely because of mosquito control activities undertaken as part of a governmental mosquito control program, and which lands were neither surface waters nor wetlands before such activities, shall be exempt." Moreover, neither Rule 40D-4.051(10) nor Rule 62-340.750 contains the term "upland" objected to by the Petitioner. Accordingly, Exception 16 is denied.

CONCLUSION

Exemption provisions are in derogation of the general requirements imposed upon the public at large. Robinson, 151 So. at 512. The Florida case law thus holds that a party claiming an exemption must clearly establish his entitlement thereto, and the exemption provisions must be strictly construed against the claimant. In order to

grant the Petitioner's Exceptions, these case law principles would essentially have to be reversed. Most of the material disputed facts would have to be resolved in the Petitioner's favor when the ALJ did not do so; and the exemption provisions of Rule 40D-4.051(10) would have to be strictly construed against DEP, rather than against the Petitioner. The RO on review properly adheres to the case law of this state governing the disposition of requests for exemptions from regulatory requirements. I am bound to do likewise in this Final Order.

It is therefore ORDERED:

A. With the minor clerical corrections made above, the RO (Exhibit A) is adopted and incorporated by reference herein.

B. Based on the material facts as found by the ALJ in the RO, it is hereby determined that the Petitioner is not entitled to rely on the "mosquito ditch" exemption provisions set forth in Rule 40D-4.051(10), F.A.C.

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 21 day of October, 2005, 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.

Kay Buchanan 10/21/05
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:

Kevin S. Hennessy, Esquire
Lewis, Longman & Walker, P.A.
1001 Third Avenue West
Suite 670
Bradenton, FL 34205

Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 21st day of October, 2005.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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