

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

**FILED**  
2007 JUN 22 A 11:38  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

JOHN WOOLSHLAGER, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 FLORIDA DEPARTMENT OF )  
 ENVIRONMENTAL PROTECTION )  
 and KEITH ROCKMAN, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

OGC Case No. 06-0788  
DOAH Case No. 06-3296

FINAL ORDER

On May 7, 2007, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or the "Department") in this administrative proceeding. The RO indicates that copies were furnished to counsel for the Petitioner, John Woolshlager. A copy was also furnished to counsel for the Respondent, Keith Rockman. A copy of the RO is attached hereto as Exhibit A. No Exceptions to the RO were filed by any of the parties. The matter is now before me for entry of a Final Order.

BACKGROUND

On January 31, 2006, the Department issued a letter advising Mr. Rockman ("Rockman") that his proposed construction of a platform, two access piers, and fourteen mooring pilings adjacent to his residence in Choctawhatchee Bay in Fort Walton Beach, Florida (the "Project"), was exempt from DEP permit requirements. The

letter also constituted "authorization to use sovereign submerged land for the construction of [his] project."

On March 17, 2006, Petitioner John Woolshlager ("Woolshlager") filed a letter requesting a hearing (on behalf of himself and Charles A. Kennedy, both neighbors of Rockman<sup>1</sup>) to contest the determinations that the activity was exempt from permitting requirements and that authorization to use sovereign submerged lands should be given. On June 27, 2006, the Department issued an Order Dismissing Petition with Leave to Amend. In so doing, the Department struck a riparian boundary line claim included in the letter on the ground that such claim could only be prosecuted in the circuit court.

On July 11, 2006, Woolshlager filed a second letter (solely on his own behalf) which was treated as an Amended Petition. In that letter, Woolshlager—citing rule 18-21.004(7) of the Florida Administrative Code (reflecting general conditions for authorization to use sovereign submerged lands)—raised two grounds for reversing the Department's action: that his riparian rights would be severely restricted, and that the proposed structures will create a navigational hazard. The matter was forwarded by the Department to the Division of Administrative Hearings on September 1, 2006, with a request that an administrative law judge be assigned to conduct a hearing.

A status conference was held on January 5, 2007, at which time the ALJ ruled that only one issue in the Amended Petition required adjudication: whether the proposed structure or activities will create a navigation hazard within the meaning of

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<sup>1</sup> At hearing, it was disclosed that Mr. Kennedy no longer owns adjacent property.

rule 18-21.004(7)(g).<sup>2</sup> As reflected in the ALJ's order dated January 24, 2007, the parties agreed to admission of the Department's permit file as an exhibit at the final hearing. After completing the formal hearing and considering post-hearing filings, the ALJ entered the RO.

### RECOMMENDED ORDER

In the RO, the ALJ found that Rockman had requested authorization to construct a platform seven feet wide by eight feet long; one access pier three feet long, and another access pier four feet wide by forty-five feet long; four mooring pilings outside the slip; and ten mooring pilings inside the proposed slip, totaling 371 square feet. The RO reflects that, as indicated in Rockman's application, the proposed Project construction activities would take place in the Choctawhatchee Bay, a Class III water of the State, on which Rockman's property fronts. Woolshlager has 50 feet of water frontage on the Choctawhatchee Bay, with a dock extending into the water.

The ALJ found that the Project activity will take place in waters which are not located in Outstanding Florida Waters; that the structures are less than 1,000 square feet of surface area over the landward extent of waters of the State; that they will be used for recreational purposes; that they will be constructed on pilings; that they will not substantially impede the flow of water or create a navigational hazard; and that the Project structure is the sole dock constructed pursuant to the exemption, as measured

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<sup>2</sup> The ALJ correctly recognized that, because subsection (f) involves property rights that can only be resolved in circuit court, the navigation claim remained as the sole issue requiring adjudication. See § 26.012(2)(g), Fla. Stat. (reflecting that the circuit court has exclusive jurisdiction in "all actions involving the title and boundaries of real property"); Bd. of Trustees of the Internal Improv. Trust Fund v. Bd. of Prof'l Land Surveyors, 566 So. 2d 1358, 1361 (Fla. 1st DCA 1990) (acknowledging that "the determination of rights of parties to a riparian boundary dispute is...a matter subject ultimately to judicial resolution under all applicable law").

along the shoreline for a minimum distance of 65 feet.

The RO reflects that, in addressing Woolshlager's challenge, the permit requirements raised in the Amended Petition, and contained in rule 18-21.004 (7)(f) and (g) of the Florida Administrative Code, were most relevant to the ALJ's analysis. Subsection (7) requires (in pertinent part) that all authorizations granted pursuant to rule 18-21.005, whether by rule or in writing, shall be subject to the following conditions:

(f) Structures or activities shall not unreasonably interfere with riparian rights. When a court of competent jurisdiction determines that riparian rights have been unlawfully affected, the structure or activity shall be modified in accordance with the court's decision.

(g) Structures or activities shall not create a navigational hazard.

The ALJ observed that, in construing rule 18-21.004(7)(g) (and the similar requirement in Florida rule 62-312.050(1)(d)3. of the Florida Administrative Code), the Department considers whether the structures will create a navigational hazard for boaters on the Intracoastal Waterway and owners of property on either side of Rockman's property. The ALJ found that it was established, through testimony from a licensed boat captain, that Rockman's dock does not create a navigational hazard, either for boaters in the Intracoastal Waterway (whose channel lies at least 600 feet or so from the shoreline) or for property owners on either side of Rockman's property.

In his Amended Petition, Woolshlager had contended that the proposed structures or activities will create a navigational hazard when he accesses the dock in front of his property. However, as clarified at hearing, Woolshlager did not dispute that he (or any "good boat driver") has adequate ingress and egress for his smaller boat, even with the larger dock on Rockman's property. Additionally, as the ALJ noted, the record reflects that Woolshlager was observed leaving his dock and accessing the

Intracoastal Waterway.

Ultimately, with respect to the navigational issue, the ALJ determined that "the preponderance of the evidence supports a conclusion that Mr. Rockman's project will not create a navigational hazard." In making this determination, the ALJ observed that "mere inconvenience does not constitute the type of navigational hazard contemplated by the rule." The ALJ found that, while Rockman's Project may create some inconvenience, or cause Woolshlager to be more cautious during ingress and egress from his dock, the Project will not create a navigational hazard.

Based on these findings, the ALJ concluded that Rockman had demonstrated, by a preponderance of the evidence, that his Project is exempt from Department permitting requirements, and that the conditions for authorization to use state-owned submerged lands had been met. The ALJ concluded, therefore, that no application or written authorization is required for Rockman's proposed Project structures and activities.

#### CONCLUSION

Parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures, or in the ALJ's findings of fact, by filing exceptions to DOAH recommended orders. See Couch v. Comm'n on Ethics, 617 So. 2d 1119, 1124 (Fla. 5th DCA 1993); Florida Dep't of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). Here, the ALJ concluded in the RO that Rockman had demonstrated, by a preponderance of the evidence, that his Project is exempt from Department permitting requirements, and that the conditions for authorization to use state-owned submerged lands have been met. Rockman filed no Exceptions to the RO; he did not object either to the ALJ's findings of fact, or to the DOAH hearing procedures.

Having considered the applicable law in light of the uncontested findings of fact set forth in the RO, and being otherwise duly advised, it is ORDERED that:

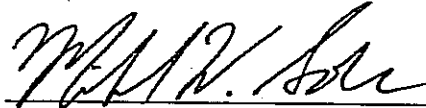
A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. Rockman's Project activities (as reflected in the Department's permit file in this matter) are exempt from Department permitting requirements, and Rockman is authorized to use state-owned submerged lands for those specified activities, provided such activities continue to be in compliance with the conditions set forth in rules 18-21.004(7), 18-21.005(1)(b), and 62-312.050(1)(d) of the Florida Administrative Code.

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 Rules 9.110 and 9.190, 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 20<sup>th</sup> day of June, 2007, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



MICHAEL W. SOLE  
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.



CLERK

6/21/07  
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by

United States Postal Service to:

John N. C. Ledbetter, Esquire  
4641 Gulfstarr Drive  
Suite 102  
Destin, Florida 32541-5324

Michael William Mead, Esquire  
John S. Mead, Esquire  
Michael Wm Mead, P.A.  
Post Office Drawer 1329  
Fort Walton Beach, Florida 32549-1329

Claudia Llado, Clerk, and  
Donald R. Alexander, 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  
Amanda G. Bush, Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000

this 21<sup>st</sup> day of June, 2007.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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