STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs.

DANIEL A. REYNOLDS,

Respondent.

OGC CASE NO. 07-0448
DOAH CASE NO. 07-2883EF

FINAL ORDER

On August 12, 2008, an Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH") submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department"). A copy of the RO is attached hereto as Exhibit A. The RO indicates that copies were sent to counsel for the Petitioner DEP and to counsel for the Respondent Daniel A. Reynolds ("Reynolds"). On August 26, 2008, the DEP filed Exceptions to the RO. Respondent Reynolds did not file any Exceptions to the RO or any response to the DEP's Exceptions. This matter is now before me for final agency action.

BACKGROUND

On May 15, 2007, the DEP issued a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment ("Notice") under Section 403.121(2), Florida Statutes. The Notice alleged that in July 2006, DEP conducted an inspection of Respondent's property in Highlands County, Florida, and discovered that the aquatic

vegetation had been chemically controlled, which resulted in eighty-seven (87) feet of shoreline on Lake June adjacent to Respondent's property being "devoid of aquatic vegetation." The Notice further alleged that Respondent had engaged in this activity without a permit in violation of Section 369.20(7), Florida Statutes, and Florida Administrative Code Rule 62C-20.002(1). For violating the statute and rule, the Department sought to impose a $3,000.00 administrative penalty and require repayment of reasonable investigative costs and expenses. The Notice also described certain corrective actions to be taken by the Respondent.

On June 25, 2007, the Respondent filed his Petition for Administrative Proceeding in which he denied the allegations and requested a hearing to contest the charges. The matter was referred to DOAH and an ALJ was assigned to conduct a hearing. On April 24, 2008, DEP filed a Motion for Leave to Amend Notice of Violation. By Order dated May 2, 2008, leave to file an Amended Notice of Violation and Orders for Corrective Action ("Amended Notice") was granted. The Amended Notice modified the original Notice by alleging that the aquatic vegetation in Lake June had been controlled, eradicated, removed, or otherwise altered rather than being chemically treated; eliminated the imposition of an administrative penalty; requested recovery of investigative costs and expenses of not less than $179.00; and modified the corrective action by requiring Respondent to replant 126 Pickerelweed in Lake June and obtain a permit from the Department to remove aquatic plants. Respondent's Answer to the Amended Notice was filed on May 13, 2008. By eliminating the request for an administrative penalty, the Department "retains its final-order authority" in this matter.

See § 403.121(2)(c), Fla. Stat. (2008). On May 29, 2008, the ALJ conducted the final hearing in Sebring, Florida. A transcript of the hearing (two volumes) was filed on July 17, 2008. Proposed Findings of Fact and Conclusions of Law were filed by the Respondent and DEP, and the ALJ subsequently issued the RO on August 12, 2008.

RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order sustaining the charges in the Amended Notice. (RO page 19). The ALJ found that, based on a stipulation of the parties, Lake June constitutes "waters" or "waters of the state" within the meaning of Florida Administrative Code Rule 62C-20.0015(23), and is not exempt from the Department's aquatic plant management permitting program under Florida Administrative Code Rule 62C-20.0035. (RO ¶ 3). Unless expressly exempted, a riparian owner who wishes to control, eradicate, remove, or otherwise alter any aquatic plants in waters of the state must obtain an aquatic plant management permit from the Department. See § 369.20(7), Fla. Stat. (2008); Fla. Admin. Code R. 62C-20.002(1). An aquatic plant is defined as "any plant, including a floating plant, emersed, submersed, or ditchbank species, growing in, or closely associated with, an aquatic environment, and includes any part or seed of such plant." See Fla. Admin. Code R. 62C-20.0015(1). These plants are found not only in the water, but also along the shoreline when the water recedes below the high water mark. They provide important habitat for fish, insects, birds, frogs, and other animals. Torpedo Grass and Maidencane are two common species of aquatic plants or weeds. (RO ¶ 4). The ALJ determined that it was undisputed that Respondent never obtained a permit. (RO ¶ 5). The ALJ

noted that a statutory exemption provided that "a riparian owner may physically or mechanically remove herbaceous aquatic plants . . . within an area delimited by up to 50 percent of the property owner's frontage or 50 feet, whichever is less, and by a sufficient length waterward from, and perpendicular to, the riparian owner's shoreline to create a corridor to allow access for a boat or swimmer to reach open water." § 369.20(8), Fla. Stat. (2008). The exemption was established so that riparian owners could create a vegetation-free access corridor to the waterbody adjacent to their upland property. The statute makes clear that "physical or mechanical removal does not include the use of any chemicals . . . ." Id. If chemicals are used, the exemption does not apply. Under the foregoing exemption, Respondent could have removed up to 43.5 feet of aquatic vegetation in front of his property on Lake June, or one-half of his 87-foot shoreline. (RO ¶ 6).

On August 11, 2006, Ms. Van Horn, a regional biologist with the DEP, sent Respondent a letter advising him that a violation of Department rules may have occurred based upon the findings of her inspection conducted on July 12, 2006. The letter described the unlawful activities as being "removal of aquatic vegetation from the span of the total adjacent shore line and significant over spray on to aquatic vegetation of neighboring properties on either side of [his] property." (RO ¶¶ 11 and 16). During her inspection Ms. Van Horn noted that the "lake abutting 260 Lake June Road was completely devoid of vegetation." She further noted that "on either side of that property [there was] lush green Torpedo Grass." Ms. Van Horn found it "very unusual" for the vegetation to stop right at the riparian line. Although she observed that there was "a

small percentage of Maidencane" on the site, approximately ninety to ninety-five percent of the frontage "was free of aquatic vegetation." Finally, she noted that the dead Torpedo Grass on the east and west sides of the property was in an "[arc] shape pattern," which is very typical when someone uses a herbicide sprayer. (RO ¶ 12).

The ALJ found that on May 15, 2007, the Department issued its Notice alleging that Respondent had "chemically controlled" the aquatic vegetation on 87 feet of his shoreline in violation of Section 369.20(7), Florida Statutes, and Florida Administrative Code Rule 62C-20.002(1). The Notice sought the imposition of an administrative penalty in the amount of $3,000.00, recovery of reasonable investigative costs and expenses, and prescribed certain corrective action. On April 28, 2008, the Department filed an Amended Notice alleging that, rather than chemically removing the vegetation, Respondent had controlled, eradicated, removed, or otherwise altered the aquatic vegetation on his shoreline. The Amended Notice deleted the provision requesting the imposition of an administrative penalty, expressly sought the recovery of investigative costs and expenses of not less than $179.00, and modified the corrective action. (RO ¶ 17). After her initial inspection, Ms. Van Horn rode by the property in a Department boat on several occasions while conducting other inspections on Lake June and observed that the property "was still mostly devoid of vegetation." At the direction of a supervisor, on June 15, 2007, she returned to Respondent's property for the purpose of assessing whether any changes had occurred since her inspection eleven months earlier. Ms. Van Horn observed that the area was still "devoid of vegetation but there was some

Torpedo Grass growing back on the [eastern] side." She estimated that "much more" than fifty percent of the shoreline was free of vegetation. (RO ¶ 18).

The ALJ found that, although Respondent denied using chemicals on his property and attributed the loss of vegetation to constant use of the back yard, dock area, and shoreline for water-related activities; the greater weight of evidence supported a finding that it is very unlikely that heavy usage of the shoreline and adjacent waters in the lake by Respondent's family and their guests alone would cause ninety-five percent of the shoreline and lake waters to be devoid of vegetation when the inspection was made in July 2006. The AL further found that even if true, Respondent was still required to get a permit since the amount of vegetation altered or removed through these activities exceeded more than fifty percent of the vegetation on the shoreline. (RO ¶¶ 19 through 22). The ALJ determined that, more than likely, the vegetation was removed by a combination of factors, including recreational usage, mechanical or physical means, and the application of chemical herbicides on each riparian boundary line, as alleged in the Amended Notice. Therefore, the ALJ concluded that the allegations in the Amended Notice were sustained. (RO ¶¶ 23 and 29).

The ALJ noted that the parties had stipulated that if the charges were sustained, the DEP was entitled to recover reasonable costs and expenses associated with the investigation in the amount of $179.00. (RO ¶ 24). In addition, the ALJ found that the required corrective action was reasonable and should be approved. However, the ALJ also found that since the evidence showed that some vegetation had regrown on the property since the 2006 inspection, the corrective action should be modified depending

on the current state of the property. As such, the ALJ recommended that the Department should reinspect the site to determine if the corrective action should be modified. (RO ¶¶ 25 and 32).

STANDARDS OF REVIEW

Subsection 120.57(1)(l), Florida Statutes, provides that an agency final order "may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction." Subsection 120.57(1)(l) also prescribes that an agency reviewing a DOAH recommended order may not reject or modify the findings of fact of an administrative law judge, "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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. (2008); Wills v. Florida Elections Commission, 955 So.2d 61 (Fla. 1st DCA 2007); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985) (holding that agency may not reject an ALJ's findings of fact, which are supported by competent, substantial evidence, nor is it authorized to reweigh the evidence, resolve conflicts in testimony, draw inferences, judge credibility of witnesses, or otherwise interpret the evidence). However, if a finding of fact in a recommended order is improperly labeled by an administrative law judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. Battaglia Properties v. Fla. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

Evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. See e.g., Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. See e.g., Collier Medical Center v. State, Dept. of HRS, 462 So.2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983). A reviewing agency has no authority to evaluate the quantity and quality of the evidence presented at a DOAH formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 (Fla. 1st DCA 1996). Therefore, if the DOAH record in this case discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, I am bound by such finding in this Final Order. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122, 1124 (Fla. 1st DCA 1987). In addition, a reviewing agency has no authority to make independent or supplemental findings of fact in construing the recommended order on review. See, e.g., North Port, Fla. v. Con. Minerals, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

RULINGS ON EXCEPTIONS

Preface

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. 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). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

Rulings on DEP's Exceptions

The Department filed two technical exceptions to the RO, which the Department described as "inadvertent misstatements" and "scriveners error."

(a) The Department takes exception to the second sentence of Finding of Fact 10. The Department argues that the sequence of events outlined by the ALJ does not accurately reflect the testimony given at the hearing. (T. p. 113). After reviewing the complete record of the hearing, I agree that no competent, substantial evidence exists to support the ALJ's finding that the 2004 letter from the Department asked the Respondent to "let it regrow." Therefore, the Department's exception is granted.

(b) The Department's technical exception points out that the references to "Lake Juno" in Findings of Fact 19 and 20 contain a scrivener's error. The record shows that

the subject lake shoreline at issue in this proceeding was that of Lake June-in-Winter also known as "Lake June." Therefore, the technical exception is granted.

CONCLUSION

The ALJ's RO found that the Respondent Reynolds violated Section 369.20(7), Florida Statutes, by controlling, eradicating, removing, or otherwise altering aquatic vegetation in Lake June adjacent to Respondent's property without a permit. Reynolds did not file any Exceptions to the RO. Therefore, those findings are uncontested.

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

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

B. The charges in the Department's Amended Notice are sustained.

C. The corrective actions described in the Amended Notice shall be taken by Respondent Reynolds, to the extent they are now found necessary, after the Department performs a site inspection immediately upon issuance of this Final Order.

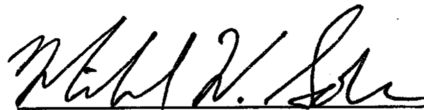
D. Based on the parties' stipulation, the Department shall recover the sum of $179.00 in costs and expenses incurred while investigating this matter.

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 5th day of November, 2008, in Tallahassee, Florida.

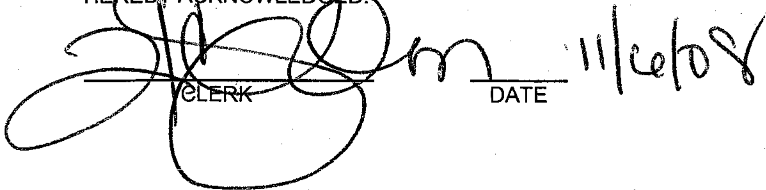
STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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 DATE 11/6/08

CERTIFICATE OF SERVICE

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

Joseph A. Farish, Jr., Esquire
Law Offices Joseph D. Farish, Jr., LLC
Post Office Box 4118
West Palm Beach, FL 33402-4118

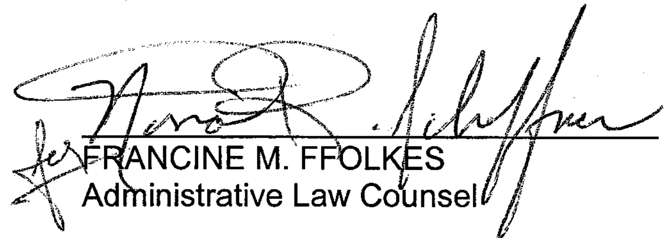
Claudia Llado, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

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

this 6th day of November, 2008.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



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