

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHN'S RIVER WATER)
MANAGEMENT DISTRICT,)
)
Petitioner,)
)
vs.) Case No. 07-4526
)
A. DUDA AND SONS, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On January 7-11 and 16-17, 2008, a formal administrative hearing was held in this case in Altamonte Springs and Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kenneth G. Oertel, Esquire
M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole &
Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

For Respondent: Timothy A. Smith, Esquire
William H. Congdon, Esquire
St. Johns River Water
Management District
4049 Reid Street
Palatka, Florida 32178-2529

STATEMENT OF THE ISSUES

The issues in this case include: whether certain were ditches dug and certain wetlands were filled by A. Duda and Sons, Inc. (Duda) without required permits, as alleged by the St. Johns River Water Management District (SJRWMD) in its Administrative Complaint; if so, whether Duda proved one or more of its affirmative defenses to SJRWMD's enforcement action, which include the agricultural exemption set out in Section 373.406(2), Florida Statutes, the maintenance exemption set out in Section 403.813(2)(g), Florida Statutes, authorization by permit, res judicata, estoppel, and laches; and, absent a proven affirmative defense to a proven violation, what remedy should be required.

PRELIMINARY STATEMENT

Before SJRWMD filed its Administrative Complaint against Duda, Duda filed a rule challenge pertaining to SJRWMD's interpretation of the agricultural exemption set out in Section 373.406(2), Florida Statutes. The rule challenge was given DOAH Case No. 07-3545RU. Subsequently, SJRWMD filed its enforcement action against Duda for filling wetlands and digging ditches without a permit. Duda petitioned for a hearing, denying the charges and raising several affirmative defenses, including the agricultural exemption set out in Section 373.406(2), Florida Statutes. Duda's enforcement petition was referred to DOAH, given DOAH Case No. 07-4526, and consolidated for final hearing with the rule challenge petition.

The consolidated cases were scheduled for final hearing on January 7-11 and 15-18, 2008, in Altamonte Springs. The parties filed a Joint Prehearing Stipulation on January 4, 2008.

At the final hearing, SJRWMD called: several employees, Jennifer Cope, Marc Van Heden, Karen Garrett-Krause, Peter Brown, and Jeff Elledge; a consultant with expertise interpreting aerial photographs, Peter Gottfried; and Steve Johnson, president of The Viera Company and a Duda vice-president. SJRWMD Exhibits 1, 6, 7, 9, 10, 13, 15, 17-19, 24, 26, 27, 29, 31 (pages 1406-07), 34, (pages 1519-20), 36, 37 (pages 1577-78), 46-48, 63, 76, 80 (except for the length of the ditches, which was hearsay), 100, 102, 107-110, 115, 117, 120, 121, 123, 128-137, 138 (pages 4987 and 4989), 139-141, 153 (and summary book), 154, 156, 158, 159, 163-168, 170 (except for the polygons and ditches drawn on it, which was hearsay), 171, 172, 174, 176, 177, 179, 185, and 193a-g were admitted in evidence. SJRWMD Exhibits 157, 160, 161, 162, and 190 were officially recognized. Ruling was reserved on objections to SJRWMD Exhibits 51, 54-56, 80, 118, 124-126, and 170. Except for the hearsay objections to SJRWMD Exhibits 80 and 170, which are sustained, those objections are overruled at this time, and the exhibits are admitted in evidence.

At the final hearing, Duda called: its vice-president, Larry Beasley; retired Duda ranch manager, David Willis; professional engineer, Hassan Kamal; soil scientist, Lewis Carter; farmer and rancher, James Sartori; former Duda

professional engineer, Mike Howeller; Duda professional and agricultural engineer, Pete Coultas; ecologist, William Lites; and attorney, Terry Cole. Duda also introduced the transcripts of depositions of District employees Vince Singleton (Duda Ex. 13A), Janice Unger (Duda Ex. 13B), and Victor McDaniel (Duda Ex. 13C). Duda Exhibits 1, 1A, 2-4, 13A-C, 15, 18-22, 24, 25, 28, 29, 31, 33-36, 38, 45, 52, 62 (page 2 of 4), 66-68, 71, 73, 77, and 78 were admitted in evidence. Ruling was reserved on objections to Exhibit 1 to Duda Exhibit 13C and to Duda Exhibits 46, 54-57, 59, and 91. At this time, those objections are overruled, and the exhibits are admitted in evidence.

As agreed, at the end of the hearing, the consolidated cases have been severed for entry of a separate Recommended Order in this case, using the evidentiary record made in the consolidated final hearing. The parties ordered a Transcript, which was filed (in ten volumes) on January 29, 2008. The parties requested and were given until March 10, 2008, to file proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

On March 21, 2008, SJRWMD filed a Notice of Supplemental Authority pertinent to the standard of proof to be imposed on SJRWMD, to which Duda responded "in opposition" (without moving to strike) because the supplemental authority--a SJRWMD Final Order, with DOAH Recommended Order, and appellate decision affirming the Final Order--was not new or "inadvertently

overloaded [sic]." Duda's Exhibit 66 is the very Final Order included as so-called supplemental authority, which necessarily leads to research of the corresponding Recommended Order and appellate decision. Although it is not necessary to refer to the "supplemental authority," there is no reason not to do so.

FINDINGS OF FACT

History of the Property

1. In the 1950's Duda started acquiring property in Brevard County between the St. Johns River system (including Lakes Winder and Washington) and the Atlantic Ocean. Eventually, 38,000 acres was acquired. The area is fairly flat but drains into the River. Duda put the property to use for cattle ranching and other agricultural uses, and it became known as Duda's Cocoa Ranch.

2. As early as the 1950's, ditches were dug on the Cocoa Ranch. The primary purpose of these ditches was generally to control groundwater levels to maintain the proper moisture content within the root zone in the soil. This is most critical on parts of the Ranch used for sod farming, and extensive ditch networks were dug in those areas. This is because either too little or too much moisture will inhibit crop production or kill the crop. A somewhat less extensive network of ditches was dug for areas of improved pasture. Even for unimproved, native range pasture land on the Ranch, cattle forage was enhanced by controlling groundwater levels to some extent. Enhanced forage increased the carrying capacity of the improved and unimproved

land--i.e., the number of cattle that could productively graze on the land. Also, having groundwater too close to the surface was undesirable for cattle grazing because cattle standing in water can lead to hoof problems, and cattle should not sleep in standing water. By 1981 numerous ditches of these kinds had been dug throughout the ranch.

3. In addition to cattle and sod production, Duda used portions of the Cocoa Ranch for timber production and for harvesting cabbage palm trees to be sold live for landscaping purposes. Construction of ditches allowed Duda to bring in the necessary equipment to cut and haul out the timber, or to dig up and transport the cabbage palms. In some areas, fill roads were constructed to provide access to areas for timber harvesting. In one case in the early 1990's, when construction of a fill road would have blocked or hampered the operation of an existing ditch, Duda dug a new connection to the ditch to change the flow to avoid impounding water.

4. The ditches which are the subject of this proceeding alter the topography of the land. They connect, directly or indirectly through other ditches, to larger canals or ditches that cut across the Cocoa Ranch in an east/west direction. These larger canals are known as the Two-Mile, Four-Mile, Six-Mile, and Seven-Mile canals, and the southern perimeter canal, all of which drained by gravity flow to the St. Johns River. The southern perimeter canal connects to the Two-Mile and Four-Mile canals,

and there also are culvert connections from the perimeter canal southwest into a marsh between the perimeter canal and Lake Washington.

5. The ditches in the sod farm portion of the Cocoa Ranch are set out in grid patterns to better control groundwater levels. They have control structures that allow water to be either directed to the land under crop production in times of too little moisture, or drained away in times of too much moisture and either impounded in reservoirs for subsequent use or drained into the larger ditch and canal system and ultimately to the River.

6. The ditches in the improved and unimproved pasture lands were dug in a random pattern generally connecting lower areas that naturally pond. Some of these random ditches also have an outfall ditch which drains to the larger ditch and canal network. Some have control structures; some do not.

Pertinent Regulatory History of the Cocoa Ranch

7. In April 1987 Duda and other farmers and ranchers in the Upper St. Johns River Basin signed a consent order with the Department of Environmental Regulation (DER) to address water quality concerns with discharges agricultural discharges to the River. The Consent Order required the farmers and ranchers to obtain permits for pumped discharges within five years.

8. In accordance with the Consent Order, on February 17, 1992, Duda applied to SJRWMD for a general permit for the pump-

drained, northern area of the Cocoa Ranch. The application included a drainage study prepared by Mr. Hassan Kamal of BSE Consultants, which recommended the excavation of various canal cross sections and the replacement and/or abandonment of various culverts, as shown on BSE drawings and also recommended that some ditch sections be dug deeper than "shown on the plans." These recommended improvements were on the gravity-drained, southern portion of the Cocoa Ranch. A table showed that 660,000 cubic yards of additional excavation was recommended.

9. In March 1992 SJRWMD asked in a request for additional information (RAI) whether any of the improvements recommended by BSE had been made. If so, the RAI asked for the permit covering the work, or for a copy of the "no permit required letter." If any improvements were made without a required permit, the RAI required that the pending application be amended to include the construction (in effect, to apply for an after-the-fact permit for that construction).

10. Initially, Duda resisted making the gravity-drained part of the Cocoa Ranch a part of its application. In a July 1992 response to the RAI, Duda acknowledged that some recommended improvements had indeed been done, with excavation in the major canals occurring in 1988 through 1991 and culvert replacements occurring in 1989.

11. SJRWMD responded with another RAI in September 1992 that repeated the previous RAI, but added more detail, asking for

a list of all the improvements, a location map for each improvement, a detailed description of each improvement, and pre- and post-improvement cross section drawings, and an analysis to demonstrate compliance with SJRWMD's permitting rules. The September 1992 RAI also prohibited any new construction, including land clearing, until a permit was issued.

12. On November 4, 1992, Duda responded to the September 1992 RAI with "a list of all improvements" and a "location map" of them. The RAI response went on to describe specific work in the major canals, which was represented to be all of the modifications to the drainage system done by Duda.

13. On December 22, 1992, SJRWMD sent another RAI to Duda that referenced the November 1992 response to RAI and asked Duda to amend its application to include a detailed description of each improvement, including engineering information to show that the improvements complied with permitting requirements. As before, this RAI also prohibited any new construction, including land clearing, until a permit was issued.

14. In February 1993 Duda declined to provide the requested assurances that improvements met the applicable permitting requirements due to the enormity of the undertaking. Instead, Duda relied on its response to the previous RAI.

15. In April 1993 SJRWMD staff prepared a Technical Staff Report (TSR) recommending approval of the pump-drained portion of the application and disapproval of the gravity-drained portion

because "the applicant has refused to respond to District staff's requests to demonstrate the post-improved condition did/will not result in higher peak discharge rates which may increase downstream flooding" and referencing the permit requirements not satisfied for that reason.

16. Within a month after the issuance of the TSR, and before the Governing Board took action on its recommendations, Duda entered into a Consent Order with SJRWMD recognizing that Duda was operating the pump-drained area after expiration of the DER Consent Order expired on May 18, 1992, and agreeing to submit within 60 days the information requested in the RAI of December 22, 1993, to propose remediation of any work in the major canals not meeting permitting requirements, and restoring any unpermitted work in the major canals "if issuance of the permit does not occur within one year." In separate provisions, the SJRWMD Consent Order authorized Duda to construct a detention pond in accordance with plans received by SJRWMD on February 17, 1993, and authorized continued operation of the drainage pumps in the pump-drained part of the Ranch, provided certain operating conditions were met. The SJRWMD Consent Order expired on June 1, 1993.

17. To provide reasonable assurances for the pump-drained part of the Ranch and for the work in the major canals, Duda submitted stormwater routing models. No other supporting documentation was submitted by Duda.

18. On May 10, 1994, SJRWMD's Governing Board issued permit #4-004-0435 to Duda. The permit described itself as:

A Permit Authorizing: Construction of a 452 acre wet detention reservoir to serve 2935 acres of pumped drained pasture also for the continued operation of two pump stations which drain 1830 acres of pasture and drainage improvements recently completed in the major canals draining +/- 25,000 acres of ranch.

Duda's Viera Development

19. In the 1980's, recognizing that its Cocoa Ranch was next in line to accommodate Brevard County's population growth, Duda formed Duda Lands, Inc. to get into the development business.

20. Preliminary to filing a Development of Regional Impact (DRI) application for the part of the Ranch east of I-95, Duda retained Mr. Kamal of BSE Consultants to study the Ranch's drainage system. BSE's preliminary report, entitled "Cocoa Ranch-Duda DRI Preliminary Drainage Investigation, was dated August 1988. The final report was provided as support for Duda's application for the pump-drained part of the Ranch filed in February 1992.

21. The objective of the BSE drainage study was "to determine what improvements and modifications are necessary to provide adequate drainage and flood protection for both existing and proposed land uses." The drainage study analyzed the Ranch's existing drainage characteristics and "recommended that the

improvements listed . . . be closely coordinated with the ongoing land development."

22. In 1990 the DRI was approved, resulting in a 3,000-acre DRI called Viera East. Duda Lands was renamed the Viera Company. In 1993 the Viera Company submitted an application for a substantial deviation from its approved DRI for a 5,800-acre expansion onto the west side of I-95. The Master Plan map in the substantial deviation application's executive summary showed future expansion planned for much of the remainder of the Ranch.

SJRWMD Purchases of Duda Land

23. In 1999 SJRWMD purchased from Duda approximately 14,000 acres of the Cocoa Ranch. The land purchased by SJRWMD was parallel and adjacent to the St. Johns River. Currently, the Ranch lies west of I-95, east of the River and Lake Winder, and north of Lake Washington.

24. The land sold to SJRWMD along the perimeter canal included the fill road paralleling the canal to its southwest.

2006 Dredge and Fill at the Perimeter Ditch

25. In August 2006 SJRWMD discovered that in June or July of that year, Duda had excavated the perimeter ditch and deposited the fill on the northwest side of the canal to create a new fill road for Duda's use. The newly-created fill road was approximately 16,000 feet long and 30 feet wide. At the same time, SJRWMD discovered that Duda had cleaned out a ditch feeding

the perimeter canal labeled ditch F-17 and placed the spoil next to ditch F-17.

26. The evidence proved that the spoil from the excavation of the perimeter canal and ditch F-17 in 2006 was deposited in wetlands as defined by Florida Administrative Code Rule Chapter 62-340, the wetland delineation rule of the Department of Environmental Protection (DEP).

27. The only witness giving contrary evidence was Lewis Carter, who acknowledged that the hydric soils and vegetation necessary for a wetland were present where the fill was deposited but he thought the area "probably would not meet the hydrology requirement of a wetland . . . even though it still had the hydric indicators and vegetation."

28. Mr. Carter's testimony was based on observations on a single day. From that observation, he concluded that the perimeter canal would exert such a strong influence that the groundwater table would be two and a half to three feet below the land surface where the fill was deposited next to the canal. However, the evidence was that before the excavation in 2006 the canal was only about a foot deep. At that depth, the canal would not exert as much influence as it did after excavation, which deepened the canal to 3-4 feet deep according to the evidence.

29. DEP's wetland delineation rule allows a hydrologic analysis to refute a delineation based on soils and vegetation. See Fla. Admin. Code R. 62-340.550. However, such an analysis

must be based on data "of such a duration, frequency, and accuracy to . . . be representative of the long-term hydrologic conditions." Id. Mr. Carter's single-day observation was not enough to refute a wetland determination based on soils and vegetation. Mr. Carter admitted he was unable to say whether the area would be inundated for at least seven days or saturated for at least twenty consecutive days, which the rule requires for a hydrologic analysis to refute a delineation based on soils and vegetation.

The Enforcement Ditches

30. In October 2006, while investigating the perimeter canal violations, SJRWMD staff reviewed aerial photographs from 1994 and 1995 and discovered that ditches had been excavated between those dates on various parts of the Cocoa Ranch not sold to SJRWMD. For identification, SJRWMD referred to these ditches by their location in seven different areas of the Ranch, labeled A through G, and by number--e.g., A-1. Collectively, SJRWMD referred to them as the "enforcement ditches." Some have since been deleted from the list of enforcement ditches after further investigation and discovery in this case.

31. The enforcement ditches are in the native rangeland parts of the Ranch, not in the sod farm or improved pasture areas. All connect via the Ranch's overall surface water management system to the main canals that drain to the St. Johns

River. Measured from the top of the banks, they are generally from 10 to 20 feet wide; most are between 12 and 15 feet wide.

32. Based on aerial photographic interpretation, Duda excavated the enforcement ditches between the beginning of 1987 and the end of 1993. Duda questioned whether some enforcement ditches may have been dug earlier, become obscured by vegetation over time, and just cleaned out at later dates. However, Duda was unable to identify any enforcement ditches that pre-dated 1987. In addition, vegetation obscuring a ditch would form a linear feature that an expert would be able to identify on an aerial photograph. It is found that SJRWMD's evidence was sufficient to prove when the enforcement ditches were dug.

33. The following enforcement ditches were dug during the years 1984-1987: C-9, north of C-14; and C-14. The following enforcement ditches were dug during the years 1987-1990: A-1; A-2; F-1; and G-1 through G-9. The following enforcement ditches were dug during the years 1990-1992: C-2; C-3; E-1 through E-11; F-6 through F-8; F-10; F-11; and F-14 through F-16. The following enforcement ditches were dug during the years 1992-1993: C-1 through C-8; C-10 through C-13; C-15 through C-28; D-1 through D-7; F-2 through F-5; and F-9. The northern and southern ends of Ditch B-1 were dug before 1969, but the middle section was dug during 1990 through 1992. Only the middle section is considered to be an enforcement ditch.

34. The enforcement ditches drain approximately 2,300 acres of native rangeland on the Ranch. This approximation was reasonable for purposes of SJRWMD's case.

35. SJRWMD proved that some of the lands drained by the enforcement ditches are wetlands. The acreage of wetlands drained by the enforcement ditches was not precisely determined but was approximated to be between 500 and 650 acres.

36. SJRWMD's approximation was determined using DEP's current wetland delineation Rule Chapter 62-340, not the wetland delineation rule in effect before 1994, which might not include some wetlands captured by the current rule. Nonetheless, based on the totality of the evidence, the low end of the approximation (i.e., approximately 500 acres) would be a reasonable approximation of the acreage of wetlands affected by the enforcement ditches for purposes of SJRWMD's case.

Agricultural Exemption Defense

37. Neither construction of the perimeter canal by dredge and fill in wetlands, nor the construction of the enforcement ditches that drained wetlands, was consistent with the practice of agriculture. See Final Order, DOAH Case No. 07-3545RU.

38. Even if those activities might be considered to be consistent with the practice of agriculture, they had the predominant purpose of impounding or obstructing surface waters. The enforcement ditches obstructed surface waters in that they had the effect of more-than-incidentally diverting surface water

from its natural flow patterns into the ditches, which drained the wetlands affected by the ditches. SJRWMD reasonably determined that the predominant purpose of the enforcement ditches was to obstruct surface waters. See Final Order, DOAH Case No. 07-3545RU.

Maintenance Exemption Defense

39. The enforcement ditches were new ditches when dug between 1987 and 1993. Duda was not maintaining pre-existing ditches.

40. The spoil from the excavation of the perimeter canal in 2006 was not deposited on a self-contained, upland spoil site which would prevent the escape of the spoil material into waters of the state. To the contrary, it was placed in wetlands and at a site that would allow discharges to the canal and eventually to the St. Johns River.

41. In addition, Duda did not prove that none of the perimeter canal was dug deeper or wider in 2006 than initially permitted. To the contrary, it appears that Duda dug it deeper and wider in places.

1994 Permit Defense

42. While geographically covering the entire Cocoa Ranch as it existed at the time, the 1994 Permit only permitted the reservoir and works in the pump-drained area and, in the gravity-drained area, the works in the major canals specifically identified and supported by appropriate documentation in Duda's

application submittals. It did not permit the enforcement ditches.

Res Judicata Defense

43. As part of the process leading to the 1994 Permit, the 1993 Consent Order addressed the detention pond and continued operation of the drainage pumps in the pump-drained part of the Ranch and the works in the major canals in the gravity-drained part of the Ranch. It did not address the undisclosed enforcement ditches.

Estoppel Defense

44. Duda takes the position that it understood from the application process itself and from statements made by Carol Fall, SJRWMD's lead employee on the processing of the Duda application, and other SJRWMD staff that all existing ditches, culverts, and control structures on the Cocoa Ranch would be included in the individual permit ultimately issued to Duda in 1994 (or "grandfathered").

45. It was unreasonable for Duda to infer from the application process that the undisclosed enforcement ditches would be included in the eventual permit or "grandfathered." Likewise, it was unreasonable for Duda to infer from statements made by SJRWMD staff that the undisclosed enforcement ditches would be included in the eventual permit or "grandfathered." It was reasonable for Duda to believe that the obvious, extensive network of feeder ditches in the sod farm and perhaps improved

pasture portion of the Ranch would be included in the eventual permit or "grandfathered," but not undisclosed ditches in the less accessible native rangeland and timbered parts of the 38,000-acre Ranch, many of which were being dug during the application process.

46. Even if it were reasonable for Duda to infer from the application process itself or from statements made by SJRWMD staff that existing enforcement ditches would be included in the eventual permit or "grandfathered," Duda did not prove that it actually relied on any such inference. To the contrary, Mr. Beasley testified that Duda believed the ditches being dug during the application process were exempt from permitting.

Laches Defense

47. Duda presented evidence from which it seeks an inference that SJRWMD staff had actual knowledge of the existence of at least some of the enforcement ditches 15 years ago and a finding that the delay in bringing this action has prejudiced Duda.

48. SJRWMD staff was on the 38,000-acre Ranch from time to time for various reasons. Most of the time, SJRWMD staff accessed the Ranch using the roads alongside the main canals and some of the other roads mostly in the more intensively-used parts of the Ranch. Carol Fall once drove by Ditches F-1, F-12, and F-13. It was suggested that she or other SJRWMD staff also may have seen other enforcement ditches while on the Ranch. But it

was not clear from the evidence that any of the enforcement ditches were visible to any SJRWMD staff, or (if they were) whether SJRWMD staff actually saw any enforcement ditches, or (if they did) whether SJRWMD would have had any way of knowing that the ditches were unlawful as opposed to grandfathered ditches dug before the Warren S. Henderson Wetlands Protection Act in 1984.

49. SJRWMD takes the position that Duda suffered no prejudice from any delay in bringing enforcement proceedings because SJRWMD is seeking now only what it would have sought on a timelier basis. Depending on how timely the enforcement proceedings, that might be true as to the older enforcement ditches. But it also is possible that, again depending on how timely the enforcement proceedings, Duda might have chosen not dig some of the subsequent enforcement ditches and would not be faced with either having to undergo after-the-fact permit proceedings or expensive restoration as to the subsequent enforcement ditches. Nonetheless, the alleged prejudice was speculative and not proven by a preponderance of the evidence.

50. The only other evidence of prejudice from the delay in bringing enforcement proceedings was the possibility that witnesses to refute SJRWMD's case-in-chief or support Duda's affirmative defenses no longer can be found and some of Duda's witnesses no longer could remember specifics related to SJRWMD's case-in-chief or Duda's affirmative defenses, including the laches defense. However, Duda did not prove more than a

possibility that such evidence helpful to Duda's case could have been presented in timelier enforcement proceedings, or that it might have been helpful enough for Duda to prevail on the issues.

51. Finally, Duda did not prove that it has "clean hands" for its laches defense. In light of the RAIs issued in the application process leading to the 1994 Permit, Duda had numerous opportunities if not direct requests for information about works on the gravity-drained part of the Ranch, which would include the enforcement ditches. Duda also had an agreement with SJRWMD that it would advise SJRWMD of any new ditch construction. Not having disclosed the existence of the enforcement ditches, Duda cannot now claim "clean hands."

Requested Corrective Action

52. SJRWMD seeks alternative corrective action for the 2006 perimeter ditch dredge and fill and for the earlier enforcement ditches: apply for an after-the-fact permit; restore the wetlands impacted; or a combination of after-the-fact permit and restoration. In the case of the 2006 perimeter ditch dredge and fill, the requested restoration would consist of removing the fill, depositing it in an upland area, returning the area beneath the fill to its historic grade, monitoring for the return of appropriate wetland vegetation, and planting and monitoring planted wetland vegetation if necessary to complete restoration. In the case of the earlier enforcement ditches, the requested restoration would consist of filling the ditches and roller-

chopping shrubby vegetation that invaded former freshwater marshes after the ditches altered hydro-periods. The former freshwater marshes to be roller-chopped are the depressions circled in neon green on SJRWMD Exhibit 139.

53. The alternative corrective actions are reasonable. Certainly, an after-the-fact permit and restoration of the 2006 perimeter ditch dredge and fill are reasonable. As to restoration of impacts from the earlier enforcement ditches, the evidence was not sufficient to specifically pinpoint all former wetlands, as defined before 1994, affected by the enforcement ditches. However, it is reasonable to infer that the depressions circled on SJRWMD Exhibit 139 were freshwater marshes that were impacted by the enforcement ditches.

CONCLUSIONS OF LAW

54. DOAH's jurisdiction over this case is undisputed and clear. SJRWMD's jurisdiction is part of its enforcement case in the sense that SJRWMD has the burden to prove that Duda's alleged activities required SJRWMD permits.

55. The parties disagree as to the standard of proof required of SJRWMD in its enforcement case. SJRWMD maintains that it must prove its case by a preponderance of the evidence, whereas Duda insists on clear and convincing evidence. Each cites Dept. of Banking and Finance v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996), as support. It is concluded that, under the rationale of that decision, SJRWMD must prove its case-in-

chief by a preponderance of the evidence. See SJRWMD v. Modern, Inc., et al., 784 So. 2d 464 (Fla. 1st DCA 2001), aff'g, DOAH Case Nos. 97-4389, etc. (SJRWMD Dec. 9, 1999; DOAH June 15, 1999).

56. The parties agree that Duda has the burden of proof its affirmative defenses. Except for Duda's exemption defenses, the parties agree that the standard of proof to be imposed on Duda is a preponderance of the evidence. As to the exemption defenses, SJRWMD contends in this case that the standard of proof is clear and convincing evidence, citing Harper v. England, 124 Fla. 296, 301-302, 168 So. 403, 406 (Fla. 1936), Samara Development Corp. v Marlow, 556 So. 2d 1097, 1100 (Fla. 1990), and Heburn v. Dept. of Children and Families, 772 So. 2d 561, 563 (Fla. 1st DCA 2000). However, in SJRWMD v. Modern, Inc., et al., supra, SJRWMD approved and adopted a recommendation that the standard of proof is a preponderance of the evidence. It is concluded that the usual preponderance of the evidence standard applies to Duda's exemption defenses.

Proof of Alleged Violations

57. Based on the findings, it is concluded that Duda dredged and filled wetlands in and along the perimeter canal in 2006 and dug the enforcement ditches during 1987 through 1993 without the permits required under Florida Administrative Code Rules 40C-4.041 and 40C-44.041.

Agricultural Exemption Defense

58. Section 373.406(2), Florida Statutes, states:

Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

59. As found, Duda's dredge and fill of wetlands in and along the perimeter canal in 2006 and the enforcement ditches dug during 1987 through 1993 had the effect of draining wetlands and more-than-incidentally trapping, obstructing or diverting surface water. For those reasons, those activities were not exempt under Section 373.406(2), Florida Statutes. See Final Order, DOAH Case No. 07-3545RU.

Maintenance Exemption Defense

60. Section 403.813(2)(g), Florida Statutes, has been in effect at all times pertinent to this case. During those times, it has stated that a permit is not required under Chapter 373 for the "maintenance of existing . . . irrigation and drainage ditches, provided that the spoil material is deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material into waters of the state."

61. To be exempt under this statute, ditch excavation must be routine and custodial, having no more than a minimal adverse environmental impact. See St. Johns River Water Management

District v. Modern, Inc., supra; Save the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193 (Fla 1st DCA 1993); Corporation of the President of the Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District, 489 So. 2d 59, 61 (Fla. 5th DCA 1986), rev. denied, 496 So. 2d 142 (Fla. 1986). Duda did not prove that all of the dredge and fill of wetlands in and along the perimeter canal in 2006 was routine maintenance or that any of the enforcement ditches dug during 1987 through 1993 was routine maintenance. In addition, Duda did not prove that the excavation spoil was placed in uplands, much less a self-contained upland spoil site that would not allow discharges to the St. Johns River. For those reasons, it is concluded that Duda's dredge and fill of wetlands in and along the perimeter canal in 2006 and the enforcement ditches dug during 1987 through 1993 were not exempt under Section 403.813(2)(g), Florida Statutes.

Authorization By Permit Defense

62. The language of the 1994 Permit is unambiguous with respect to what is authorized. See Centennial Mortgage, Inc. v. SG/SC, Ltd., 772 So. 2d 564, 565 (Fla. 1st DCA 2000)(internal citations omitted)(the existence of ambiguity in a written instrument is a question of law). Therefore, parole or extrinsic evidence in the form of staff RAI letters cannot vary or contradict the terms of the Governing Board's unambiguous permit). See Bucacci v. Boutin, 933 So. 2d 580, 583 (Fla. 3d DCA

2006); Jenkins v. Eckerd Corp., 913 So. 2d 43, 52 (Fla. 1st DCA 2005).

63. Based on the findings, it is concluded that the enforcement ditches dug by Duda during 1987 through 1993 were not authorized by the 1994 Permit.

Res Judicata Defense

64. The 1993 Consent Order does not bar SJRWMD's case against the enforcement ditches. When all parts of the 1993 Consent Order are read in pari materia, it cannot be reasonably understood as authorizing the construction and operation of the enforcement ditches. The first clause of paragraph 9, "to bring the construction and the continued operation of [Duda's] agricultural surface water management into compliance," refers to construction of a detention pond and continued operation of the drainage pumps in the pump-drained part of the Ranch, which are described in other paragraphs of the Consent Order. The second clause, "to address the unpermitted alterations to the surface water management system," refers to the work in the major canals. The fact that the Consent Order expired in May 1994 confirms that the Consent Order was a part of the process leading to permit issuance and did not authorize construction and operation of the at-that-time unknown enforcement ditches.

65. It is concluded that SJRWMD is not barred by the doctrine of res judicata by virtue of the 1993 Consent Order from

bringing the Administrative Complaint in this case against the enforcement ditches dug by Duda during 1987 through 1993.

Estoppel Defense

66. The doctrine of estoppel would apply in this case if SJRWMD, by word, act, or conduct, willfully caused Duda to believe it could construct the enforcement ditches without a permit, and thereby induced Duda to excavate those ditches, to its injury. See Dept. of Health and Rehab. Services v. S.A.P., 835 So. 2d 1091, 1096-97 (Fla. 2002). In addition, the word, act, or conduct upon which Duda relied must be an action on which Duda had a right to rely. See Monroe County v. Hemisphere Equity Realty, Inc. v. Dept. of Labor and Employment Security, 634 So. 2d 745, 747 (Fla. 3d DCA 1994). Finally, equitable estoppel will apply against a governmental entity only in rare instances and under exceptional circumstances. See Associated Industries Ins. Co., Inc. v. Dept. of Labor and Employment Security, 923 So. 2d 1252, 1254-55 (Fla. 1st DCA 2006).

67. It is concluded that Duda did not prove that SJRWMD is estopped by virtue of statements or actions taken during the process leading to issuance of the 1994 Permit from bringing the Administrative Complaint in this case against the enforcement ditches dug by Duda during 1987 through 1993.

Laches Defense

68. To establish laches, Duda had to prove: (1) that SJRWMD had knowledge of Duda's violations but unreasonably

delayed in beginning enforcement action; and (2) injury or prejudice to Duda as a result of the delay. See Nelson v. City of Sneads, 921 So. 2d 760, 761 (Fla. 1st DCA 2006). Laches also requires clean hands. See Goodwin v. Blu Murray Ins. Agency, Inc., 939 So. 2d 1098, 1105 (Fla. 5th DCA 2006).

69. It is concluded that SJRWMD is not barred by laches from bringing the Administrative Complaint in this case against the enforcement ditches dug by Duda during 1987 through 1993.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Governing Board enter a Final Order requiring Duda to apply for the necessary after-the-fact permit and/or restore wetland impacts, as described in Findings 52-53, supra.

DONE AND ENTERED this 25th day of April, 2008, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of April, 2008.

COPIES FURNISHED:

Kenneth G. Oertel, Esquire
M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole &
Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

Timothy A. Smith, Esquire
William H. Congdon, Esquire
St. Johns River Water
Management District
4049 Reid Street
Palatka, Florida 32178-2529

Kirby B. Green, III, Executive Director
St. Johns River Water
Management District
4049 Reid Street
Palatka, Florida 32178-2529

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.