

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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

SUPPLEMENT TO RECOMMENDED ORDER ON REMAND

In accordance with the Initial Order on Remand, the parties filed memoranda on the scope of fact-finding required by the court's mandate and opinion in the appeal of the Final Order in this case, and on the best way to proceed to resolve the issues on remand, and oral argument on the issues framed by the memoranda was heard in Tallahassee on June 18, 2010. The written and oral arguments have been considered.

This case began when the St. Johns River Water Management District (SJRWMD) filed an Administrative Complaint that A. Duda and Sons, Inc. (Duda), dug ditches on its Cocoa Ranch without the required surface water management system permits. Duda raised several defenses, including an alleged agricultural exemption under Section 373.406(2), Florida Statutes.¹

In its opinion in A. Duda and Sons, Inc. v. St. Johns River Water Management District, 22 So. 2d 622 (Fla. 5th DCA 2009)(Duda II), the court held that, in accordance with the court's opinion in A. Duda and Sons, Inc. v. St. Johns River Water Management District, 17 So. 2d 738 (Fla. 5th DCA 2009)(Duda I), the Final Order in this case incorrectly interpreted the third prong of the agricultural exemption in Section 373.406(2), Florida Statutes ("such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters"), "the matter must be remanded for additional fact-finding so that the agricultural exemption can be applied consistently with the statute as explained in Duda I." The court's opinion concluded:

However, Duda I did not address the interplay between section 373.406(2) and language from the Warren S. Henderson Wetlands Protection Act, chapter 84-79, Laws of Florida, now codified at sections 403.927 (2) & (4)(a), Florida Statutes. Those provisions virtually eliminate the agricultural exemption as it applies to alterations impacting wetlands. Under section 403.927, agricultural activities that impede or divert the flow of surface waters even incidentally are not exempt from regulation if they impact wetlands. Id. In the order on appeal, the District found that Duda's enforcement ditches impacted at least 500 acres of wetlands, a finding clearly supported by competent, substantial evidence. Accordingly, it appears that the District's ultimate conclusion that Duda must either restore the impacted wetlands or apply for after-the-fact permits is correct at least with respect to that portion of the ditch system impacting wetlands.

Additional fact-finding would be necessary if it were necessary to apply the third prong of the agricultural exemption in Section 373.406(2), Florida Statutes. But application of the third prong of the exemption is not necessary in light of the rest of the opinion in Duda II.

Believing, incorrectly, that SJRWMD had the burden of proving impacts to wetlands as part of its case-in-chief, Duda contended that wetland impacts were not proven, focusing on the following statement in the Recommended Order, which was adopted in the Final Order:

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.

Recommended Order, ¶ 53. That statement was in a part of the Recommended Order entitled "Requested Corrective Action." It was intended to convey that the evidence was not sufficient to delineate the exact boundary of the former wetlands that would have to be restored, except for the impacted freshwater marshes depicted on SJRWMD Exhibit 139, all of which clearly would have been former wetlands, as defined before 1994. It was not intended to convey that the enforcement ditches did not impact former wetlands, as defined before 1994. It also was not intended to convey that SJRWMD had the burden to delineate the former wetlands as part of its enforcement case-in-chief.² Rather, the former wetlands could be delineated specifically for restoration purposes as part of the after-the-fact permit process.

For these reasons, the only additional fact-finding that might be required at this point would be the clarification that Duda did not prove that any of the enforcement ditches did not impact wetlands. To the contrary, there was competent, substantial evidence proving that all of the enforcement ditches impacted wetlands. As reflected in Duda II, impacting wetlands ceased to be consistent with the practice of agriculture in Florida, which is the second prong of the agricultural exemption, after the enactment of the Henderson Wetlands Protection Act.

Duda contends that the court's opinion in Duda II gives Duda the opportunity to raise exemptions under Section 403.905(4), Florida Statutes, and Florida Administrative Code Rule³ 40C-4.041(2)(b)5., both of which were in effect when the enforcement ditches were dug but have since been repealed. However, the court's opinion does not allow Duda to raise additional defenses on remand.⁴ Proceedings on remand are restricted to implementation of the court's opinion. See Sullivan v. Chase Federal Sav. And Loan Ass'n, 132 So. 2d 341, 343 (Fla. 3d DCA 1961).

SJRWMD alleged in its Administrative Complaint that the enforcement ditches were required to be permitted under former Rule 40C-4.051(2)(b)2. because they were alterations to a surface water management system which served a project with a total land area equal to or exceeding forty acres. If Duda believed the alleged exemptions in former Section 403.905(4), Florida Statutes, and former Florida Administrative Code Rule 40C-4.041(2)(b)5. were among its defenses, it should have raised them in response to the Administrative Complaint. Not having done so, they were waived.

Even if not waived, former Section 403.905(4), Florida Statutes, and former Florida Administrative Code Rule 40C-4.041(2)(b)5. would not be valid defenses. The statute provided an exemption from dredge and fill permitting under Chapter 403, Florida Statutes, when a water management district had stormwater permitting authority under Chapter 373, Florida Statutes. It did not provide for an exemption from water management district stormwater permitting. The rule did not provide exemptions; rather, it set out permitting thresholds in the disjunctive, meaning that permitting was required under Rule 40C-4.051(2)(b)2. regardless of whether it was required under Rule 40C-4.041(2)(b)5.

For the reasons set forth above, it is found that SJRWMD proved its case-in-chief and that Duda did not prove any legal defense; and jurisdiction is relinquished to SJRWMD for after-the-fact permit proceedings for the enforcement ditches.

DONE AND ENTERED this 22nd day of June, 2010, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2010.

ENDNOTES

1/ Unless otherwise noted, statutory references are to the codification of the Florida Statutes in effect between 1987 and 1993. Section 373.406(2), Florida Statutes, has not changed since then.

2/ In a footnote at the end of the opinion, the court stated:
"To aid the parties on remand, we note that we find no merit to Duda's arguments that the ALJ applied an incorrect evidentiary standard or improperly shifted the burden of proof."

3/ Unless otherwise noted, citations to rules refer to the version of the Florida Administrative Code in effect between 1987 and 1993. A copy of the rules and applicant's handbook in effect during this time period may be found in District Exhibits 161 and 162, respectively, at Volume XX, R. 3549 and 3643, respectively, in the appellate record.

4/ SJRWMD's responsive memorandum argued that the court rejected the contention in Duda's motion for rehearing that the court's opinion would give rise to these additional defenses. Duda has not disputed SJRWMD's representation as to the contents of Duda's motion for rehearing, but the motion for rehearing is not in the file of the Division of Administrative Hearings.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Supplement to Recommended Order on Remand. Any exceptions to this Supplement to Recommended Order on Remand should be filed with SJRWMD, which will issue the Final Order on Remand in this case.