STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Petitioner,

vs.

RICHARD H. LEAGUE AND NANCY A. LEAGUE,

Respondents.

Case No. 10-2196EF

FINAL ORDER

The final hearing in this case was held on February 21, 2011, by video teleconference at sites in Tallahassee and Jacksonville, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Christopher Thomas Byrd, Esquire
Krystle V. Macadangdang, Esquire
Department of Environmental Protection
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Mail Station 35
Tallahassee, Florida 32399-3000

For Respondents: Richard H. League, pro se
1160 River Road
Orange Park, Florida 32073

STATEMENT OF THE ISSUES

The issues to be determined in this case are whether Respondents, Richard H. League and Nancy A. League, violated a Department of Environmental Protection ("Department") rule that prohibits filling in wetlands and surface waters without a Department permit; and if so, whether Respondents should pay the administrative penalty and investigative costs and undertake the corrective actions that are demanded by the Department.

PRELIMINARY STATEMENT

On April 12, 2010, the Department issued a Notice of Violation, Orders for Corrective Action, and Administrative Penalty Assessment ("NOV"), which included three counts against Respondents. Respondents timely filed a request for an administrative hearing to contest the charges. The Department referred the matter to DOAH to conduct an evidentiary hearing and issue a final order. The Department was subsequently granted leave to file an amended NOV, which deleted one count. The amended NOV has two counts: Count I for filling in wetlands and surface waters without a permit; Count II for the recovery of the Department's investigative costs.

At the final hearing, the Department presented the testimony of James R. Maher, Matthew Kershner, and Heather Anthony. The Department's Exhibits 1 through 3, 5 through 20, and 22 through 24 were admitted into evidence. Respondent

Richard League testified on behalf of himself and his wife, Nancy League. Respondents' Exhibits 1 and 2 were admitted into evidence.

A court reporter recorded the hearing, but no party ordered a transcript. The parties filed post-hearing submittals which were considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Department is the state agency having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 373 and 403, Florida Statutes, and the rules promulgated pursuant thereto in Florida Administrative Code Title 62.

2. Respondents own property located at 1160 River Road, Orange Park, Clay County, Florida. The property is adjacent to the St. Johns River.

3. Sometime before 1995, pieces of concrete were placed in the water along the bank of the St. Johns River in an area that includes the shoreline of the League property, in an apparent effort to prevent or reduce shoreline erosion.

4. On August 14, 1995, the Department issued Permit No. 102752932 to Richard League to construct a dock and replace a stormwater ditch with a covered culvert. The 1995 permit did not authorize a seawall, riprap, or other erosion control structure.

5. A drawing attached to the 1995 permit shows the "typical concrete fill pieces at water's edge," which are the concrete pieces that had been placed along shoreline before 1995. The Department referred to the existing concrete pieces as a riprap revetment.

6. Following the issuance of the permit, Mr. League discussed with Michael Eaton, Environmental Manager for the Submerged Lands and Environmental Resources Program for the Department's Northeast District Office, Mr. League's desire to restore the riprap material along his shoreline because, according to Mr. League, the concrete pieces had been displaced by storm waves and were no longer protecting his shoreline from erosion.

7. On October 27, 1995, Mr. Eaton sent a letter to Mr. League regarding the "Existing Riprap Revetment," stating that "movement and rearranging of the riprap material along the revetment will not require a permit from the Department." The letter did not authorize the construction of a seawall or the placement of new material along Respondents' shoreline.

8. In May 2005, the Department received an anonymous complaint that Respondents were constructing an unauthorized dock at their property. An investigation was conducted, but no major violation was found.

9. Mr. League claims that, at the time of the 2005 investigation, he had completed 60 percent of the wall structure that is the subject of this proceeding. Mr. League also claims that the Department investigators saw the structure, but expressed no objection to the structure. However, there is no photographic or other evidence to support Mr. League's claim that the structure was observable in May 2005. No mention was made in the Department's investigative report that a seawall or similar structure was under construction at the League property. The normal practice of the Department is to describe such structures and activities in the investigative report. The aerial photographs in evidence support the Department's claim that the structure did not exist in May 2005.

10. In April 2009, the Department received another anonymous complaint that Respondents were constructing an unauthorized structure at the shoreline. The investigation of the complaint revealed that Respondents were constructing a wall of pre-existing concrete pieces and new concrete pieces. The wall or seawall was not located at the bank, but was 12 to 21 feet waterward of the bank.

11. It was apparently Respondents' intent to place fill behind the seawall to extend the upland property waterward. When Department employees conducted another inspection in January 2010, they found that wetlands and surface waters which

had previously been observed behind (landward of) the seawall had been partially filled.

12. At the hearing Respondents claimed that the structure qualifies as riprap. However, in their post-hearing submittal, Respondents alternately claimed that the structure was a seawall, an upland retaining wall, or riprap, depending on what rule or statute Respondents perceived as helpful in arguing that the structure did not require a permit.

13. Florida Administrative Code Rule 62-341.021(15) defines "riprap" as "a sloping retaining or stabilizing structure made to reduce the force of waves and to protect the shore from erosion, and consists of unconsolidated boulders, rocks, or clean concrete rubble with no exposed reinforcing rods or similar protrusions." Respondents' structure is a consolidated wall, made by stacking relatively flat pieces of concrete. It has virtually no slope. It is not an unconsolidated, sloping pile of material. In addition, Respondents' structure is not placed at the bank for the purpose of retaining the existing bank.

14. The Department contends that Respondents' structure is a seawall, which is defined in rule 62-341.021(16) as "a man-made wall or encroachment, except riprap, which is made to break the force of waves and to protect the shore from erosion."

15. The waters of the St. Johns River reach and extend landward of the seawall constructed by Respondents. Photographs of the seawall show water stains and rafted debris at the base deposited by the waters of the St. Johns River. There was wetland vegetation behind the seawall. Mr. League admitted at the hearing that the waters of the St. Johns River sometimes move through the porous wall and fill the void between the wall and the bank. The landward extent of the St. Johns River is landward of Respondents' structure.

16. The Department showed that the value of the time spent by Jim Maher, Matthew Kershner, and Heather Anthony to investigate this matter exceeded $1,000. However, the Department is only seeking $1,000 from Respondents for the Department's investigative costs.

CONCLUSIONS OF LAW

17. The Department's NOV charges Respondents with a violation of a rule that implements the provisions of Part IV of chapter 373, Florida Statutes. The Department may enforce the provisions of Part IV of Chapter 373, using the procedures in section 403.121(2). See § 373.129(7), Fla. Stat. (2010).

18. The Department may institute an administrative proceeding to establish liability, to recover damages, and to order corrective actions pursuant to section 403.121 when the

Department seeks administrative penalties, which cannot exceed $10,000. See § 403.121(2), Fla. Stat.

19. The Department has the burden to prove by a preponderance of the evidence that Respondents violated the law as alleged in the amended NOV. See § 403.121(2)(d), Fla. Stat.

20. When the Department seeks administrative penalties, the Administrative Law Judge is to issue a final order on all matters. See § 403.121 (2)(d).

21. Count I of the amended NOV charges Respondents with filling in wetlands and surface waters without a permit in violation of rule 62-343.050(1), which states in pertinent part:

> [A] noticed general, standard general, or individual environmental resource permit must be obtained from the department . . . prior to construction, alteration, operation, maintenance, abandonment, or removal of any stormwater management system, dam, impoundment, reservoir, or appurtenant work or works, including dredging or filling in, on, or over wetlands and other surface waters . . . ."

22. "Filling" is defined in section 373.403(14), Florida Statutes, as "the deposition, by any means, in surface waters or wetlands, as delineated in s. 373.421(1)."

23. Respondents claim that the structure did not require a permit because it was landward of the mean high water line ("MHWL"). However, the jurisdiction of the Department over Respondent's structure is based on the fact that it constitutes

filling in "wetlands or other surface waters." The Department's jurisdiction is not limited to filling waterward of the MHWL.

24. The construction of the wall and the backfilling by Respondents constitute filling and were done in wetlands and other surface waters. Therefore, a permit was required for these activities.

25. The Department's interpretation of the definition of "riprap" in rule 62-431.021(15) is a reasonable one and, under that interpretation, Respondents' structure is not riprap.

26. Respondents did not obtain a permit for the construction of a concrete wall or for filling behind the wall. Neither the 1995 permit nor the Eaton letter authorized these activities.

27. Following the hearing, Respondents submitted additional exhibits without leave of the Administrative Law Judge. However, no objection was raised by the Department. These exhibits include incomplete copies of emergency orders issued by the Department following hurricanes and were apparently submitted to support Respondents' claim that the structure was authorized by these orders without the need to obtain a permit. However, in some cases the orders do not apply to Clay County. Furthermore, the emergency orders only allow the repair, restoration or replacement of pre-existing, legal structures. The orders do not authorize new structures.

28. Respondents cite section 403.813(1)(o), Florida Statutes, which creates a statutory exemption from permitting for private seawalls in wetlands or other surface waters where the seawall adjoins at both ends existing seawalls. There are no seawalls adjoining Respondents' structure. Respondents' structure does not qualify for the exemption in section 403.813(1)(o).

29. Although not clear, Respondents seemed to contend that the water bottom beneath the old riprap material was no longer state-owned submerged lands because the riprap material was above the MHWL of the St. Johns River and, consequently, Respondents did not need a permit to build a structure on top of the riprap material. However, Respondents (1) did not establish the location of the MHWL, (2) did not show what statute or legal doctrine would cause the placement of riprap material to change the legal title to the submerged lands beneath the riprap, and (3) did not show what rule or statute allows a structure to be built on top of riprap material without a Department permit.

30. The Department proved by a preponderance of the evidence that Respondents violated rule 62-343.050(1).

31. Section 403.121(3)(c) provides that, for dredge and fill violations, the Department shall assess a penalty of $1,000 for unpermitted or unauthorized filling. Therefore, Respondents are liable for $1,000 for the violation charged in Count I.

32. Evidence may be received in mitigation and the Administrative Law Judge may reduce a penalty up to 50 percent for mitigating factors. See § 403.121(10). The record evidence does not justify a reduction in the penalty. It was not reasonable for Respondents to believe that the structure could be built without a permit from the Department.

33. Count II of the amended NOV charges Respondents with liability for the Department's investigative costs in an amount not less than $1,000.

34. The recovery of investigative costs is authorized by section 373.129(6).

35. The Department proved by a preponderance of the evidence that it is entitled to $1,000 of investigative costs.

CORRECTIVE ACTIONS

36. The corrective actions sought by the Department in the amended NOV are reasonable and are incorporated below, except that the Department's proposed action to require Respondents to comply with the law is deleted as unnecessary, as all persons must comply with the law.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Within 30 days from the effective date of this Final Order, Respondents shall completely remove the seawall and any

associated fill material such as wood, stones or rocks, mortar, or grouting, from the St. Johns River.

2. Within six months of the effective date of this Final Order:

a. Respondents may relocate enough stones or rocks necessary to construct a riprap revetment along the property shoreline. Riprap is defined as a sloping retaining or stabilizing structure made to reduce the force of waves and to protect the shore from erosion, and consists of unconsolidated boulders, rocks, or clean concrete rubble with no exposed reinforcing rods or similar protrusions. Boulders, rocks, or clean concrete rubble should consist of pieces not less than three inches in diameter. Respondents shall install construction filter cloth or filter fabric behind and underneath all riprap to prevent erosion.

b. If Respondents elect to construct a riprap revetment, Respondents shall ensure the riprap revetment is completed with a slope of 0.5, which is 1 unit rise in the vertical for every 2 units of run in the horizontal.

c. If Respondents elect to construct a riprap revetment, Respondents shall not locate or place construction materials farther waterward than the extent required to construct a slope profile having 2 units of run for every 1 unit of rise, but not to exceed a maximum extent of 90 feet as

measured perpendicular from the center line of the River Road right-of-way. The existing top of earthen river bank to the existing toe of earthen river bank shall be the length of the rise. The existing toe of slope of the river bank to the most waterward extent of the proposed clean concrete riprap revetment shall be the run.

d. Respondents shall remove any excess riprap and/or fill materials to a suitable upland disposal site.

3. Turbidity barriers such as siltation curtains shall be utilized while implementing these corrective actions, pursuant to Chapter 6 of The Florida Land Development Manual, A Guide to Sound Land and Water Management prior to the commencement of dredging, filling, or construction activity, shall remain functional at all times, and shall be maintained on a regular basis. Turbidity and/or sedimentation resulting from any activities associated with the project shall not be allowed to enter waters of the State. The turbidity barriers shall be maintained and shall remain in place until the removal actions are completed.

4. Within 10 days of this Final Order, Respondents shall pay $2,000 to the Department for the administrative penalties and investigative costs assessed herein. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall

include thereon the OCG Case Number 09-4254 and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the Department of Environmental Protection, SLERP, Compliance and Enforcement Manager, 7825 Baymeadows Way, Suite B200, Jacksonville, Florida 32256-7590.

5. Respondents shall allow authorized representatives of the Department access to the property at reasonable times for the purpose of determining compliance with this Final Order and the rules of the Department.

6. If the property is sold during the corrective action periods, Respondents shall remain obligated to perform the corrective actions. Before or at the closing of the sale of the property, Respondents shall inform the purchaser of Respondents' obligations under this Final Order and shall deliver a copy of this Final Order to the purchaser. Respondents shall also notify the Department in writing of the sale of the property within 15 days of the closing.

DONE AND ORDERED this 24th day of March, 2011, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
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this 24th day of March, 2011.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceeding are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.