STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner, vs. LEONA BROCK, Respondent.	)	Case No. 11-1016EF

FINAL ORDER

On June 23, 2011, a final administrative hearing was held in this case by video teleconference before J. Lawrence Johnston, Administrative Law Judge ("ALJ"), Division of Administrative Hearings.

APPEARANCES

For Petitioner: Matthew Smith-Kennedy, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

For Respondent: Leona Brock
5624 206th Terrace North
Loxahatchee, Florida 33470-2216

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Leona Brock, should be penalized, and have to take corrective actions, for

illegally filling wetlands on her property in Loxahatchee without a permit.

PRELIMINARY STATEMENT

On January 25, 2011, the Department of Environmental Protection (DEP) filed and served a Notice of Violation, Orders for Corrective Action, and Civil Penalty Assessment, DEP OGC File No. 10-3454. Respondent requested an administrative hearing under sections 120.569 and 403.121(2)(d), Florida Statutes.

A final hearing was held via video teleconference at sites in Tallahassee and West Palm Beach. At the final hearing, DEP called Katy Collins, an environmental specialist with DEP. DEP also had its Exhibits 1-7, 9, and 11-12 admitted in evidence. Respondent testified at the final hearing and had her Exhibits 1 and 2 admitted in evidence. After the evidence was presented, DEP reduced the amount of the penalty it was requesting from $1,000 to $500.

Neither party requested a transcript of the final hearing. Respondent timely filed a "rebuttal," which has been considered to the extent that it proposed findings of fact and conclusions of law and argued the evidence presented at the final hearing, but was not considered as additional evidence. On July 21, 2011, DEP filed a Proposed Final Order, which also has been considered.

FINDINGS OF FACT

1. Respondent owns five acres of property at 5624 206th Terrace North, Loxahatchee, Florida. There are wetlands and a small lake or pond in the eastern third of the property. The western two-thirds of the property are uplands. Respondent's house is in the center of the property. There is a driveway from 206th Terrace North on the west to and south of the house.

2. Respondent's property is in an area with other parcels that are similar in size and nature. In early 2010, Respondent contacted DEP and other agencies because a neighbor two lots to the south was filling the property with construction debris. Respondent was concerned about flooding impacts to her property and water quality impacts to the groundwater that is the source of Respondent's and her neighbors' drinking water. Ultimately, Respondent asked DEP to determine whether her neighbor was in violation.

3. In addition to seeking help from DEP and the other agencies, Respondent decided to protect her land from flooding by having cypress mulch spread roughly in the shape of a horseshoe around but not immediately adjacent to her house. No mulch was placed south of Respondent's driveway and house, in the northeast corner of the property, or in the southeast corner of the property.

4. In February 2010, Katy Collins, an environmental specialist with DEP, inspected the neighbor's fill and determined that there were no violations. During the inspection, Ms. Collins noticed the mulch being spread on Respondent's property. Suspecting that some of the mulch was being spread in wetlands on Respondent's property, Ms. Collins and other DEP staff conducted a site visit to Respondent's property on March 18, 2010.

5. When DEP arrived for the site visit, Respondent was surprised because she did not think any prior notice had been given. As the site visit proceeded, including a wetland delineation, Respondent advised Ms. Collins that she already had a wetland delineation on the property that would show that she was not filling wetlands with the mulch. Respondent went into the house to find the previous delineation, and DEP proceeded with the site visit and wetland delineation. By the time the site visit and wetland delineation concluded, Respondent had found a non-binding wetland delineation that had been done by DEP in August 2002.

6. DEP notified Respondent that, according to its wetland delineation, mulch on the southeastern lobe of the "horseshoe" extended into the wetlands (the mulch violation area) and had to be removed. In addition, DEP cited Respondent for pine logs and vegetative debris that were piled up farther to the southeast in

the wetlands on Respondent's property. There was no evidence that the two violation areas, combined, were greater than a quarter acre.

7. Respondent believed the 2002 wetland delineation proved that none of the mulch was in wetlands. Respondent testified that she was intimidated by the presence of law enforcement officers with weapons and agreed to remove the mulch as instructed by DEP notwithstanding her belief that it was not in the wetlands. (It is not clear who Respondent meant by law enforcement officers with weapons.)

8. Respondent complains that DEP insisted on pulling the mulch back out of the violation area without the use of a machinery, which made it more difficult. Respondent had the mulch pulled back out of some but not all of the violation area.

9. Respondent has not removed the pine logs and vegetative debris from the southeastern corner of Respondent's property. Her position is that they were from trees that were toppled and vegetation that was killed during storms. Respondent had them moved into the wetlands and piled up with the intention of eventually burning them. Respondent's position is that they do not constitute fill.

10. As to the mulch violation, DEP's 2010 wetland determination followed the current wetland delineation procedure set out in Florida Administrative Code Chapter 62-340.

Especially in light of the mulch that had been placed on the property, it was not possible to delineate the landward extent of the wetlands on Respondent's property by direct application of the definition of wetlands in rule 62-340.200(19). This had to be determined using rule 62-340.300(2), based on vegetation, hydrologic indicators, and soil conditions.

11. The vegetative canopy in the mulch violation area was limited to slash pine and ear-leaf acacia. Ms. Collins chose not to use the canopy to determine plant dominance because it was less than ten percent of the areal extent and, in her judgment, not indicative of the hydrologic conditions on the site. She determined that the ground cover was the stratum most indicative of onsite hydrologic conditions, considering the seasonal variability in the amount and distribution of rainfall. These were reasonable scientific judgments.

12. The groundcover in the mulch violation area itself was difficult to determine. However, in and around the area there was Cephalanthus occidentalis (buttonbush), Cladium jamaiceense (sawgrass), Fuirena scirpoidea (umbrella grass), Ludwigia peruviana (water-primrose), Persea palustris (swamp bay), Salix caroliniana (Carolina willow), Xyris spp. (yellow-eyed grass), Blechnum serrulatum (swamp fern), and Pluchea spp. (stink weed). All of these plants are obligate plants, except that swamp fern and stink weed are facultative wet plants. See Fla. Admin. Code

R. 62-340.450. Ms. Collins determined, by exercise of reasonable scientific judgment, that yellow-eyed grass appeared to be the dominant ground cover in the area; that the areal extent of obligate plants in the ground cover was greater than the areal extent of all upland plants in the ground cover; and that the areal extent of obligate or facultative wet plants, or combinations of them, was equal to or greater than 80 percent of all the plants in the ground cover in the area.

13. Ms. Collins also considered hydrologic indicators. There were water marks on some of the trees in the mulch violation area, near the apparent upland/wetland boundary, as well as morphological plant adaptations (adventitious roots). These are considered to be hydrologic indicators of a wetland. See Fla. Admin. Code R. 62-340.500(9) and (13).

14. A soil sample was taken at the eastern edge of the mulch violation area. (It was not taken in the middle of the violation area because one to two feet of mulch covered the violation area.) Ms. Collins testified that the sample had enough red mottling (3-4 percent of the sample) to indicate "sandy redox" from the oxidation of iron and manganese. This would be an indicator of soil that is saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part of the soil profile. This is an indicator of hydric soil. See Fla. Admin. Code R.

62-340.200(8). The percentage of red mottling was an estimate, not an objective measurement.

15. Using tests A and B under rule 62-340.300(2), Ms. Collins determined the mulch violation area to be wetland.

16. Respondent believed the 2010 wetland determination was unfair and erroneous in part because it greatly expanded the area of wetlands delineated on her property, as compared to the 2002 delineation. She expressed concern that a future wetland delineation might extend the wetlands more, even to the foundation of her house. This fear is not reasonable. Most of the apparent expansion of designated wetlands on the 2010 delineation was in the northeast corner of the property, which was not the focus of Ms. Collins work. The expansion in the mulch violation area was minor.

17. Respondent's perception of the difference between the two delineations in the mulch violation area was deceived by differences in the shapes of Respondent's property on the aerial photographs on which the delineations were drawn. On the photograph used to depict the 2010 delineation, Respondent's property appears to be shorter along the east-west axis and taller along the north-south axis than on the photograph used to depict the 2002 delineation. Adjusted for those differences, the two delineations are very similar in the mulch violation area. The mulch violation area actually extends very little, on

the northwestern edge, into the area depicted as uplands on the 2002 delineation.

18. Respondent contends that saw palmetto, which is not an obligate or facultative wet plant, dominated the ground cover in the mulch violation area and that the area was a "pine flatwood," which would make it an upland. See Fla. Admin. Code R. 62-340(2)(c)4. There was some saw palmetto on the fringe of the wetlands on Respondent's property, near the boundary between the wetlands and uplands, but saw palmetto did not dominate the ground cover in the mulch violation area. Respondent's testimony that numerous saw palmettos might have been bull-dozed and covered over when the mulch was spread is speculative and not believable.

19. Respondent contended that recent changes made more of her property appear to be wetlands at the time of DEP's site visit than actually were. First, she contends that her neighbor's fill flooded her property. Second, she testified that rainfall for February and March 2010 was five inches above average. Third, she contended that the mulch was holding moisture on her property longer. However, if her neighbor was not in violation for filling wetlands without a permit, the neighbor's fill should not have caused extensive or long-term flooding on Respondent's property. Also, the recent rainfall would not explain the vegetative, hydrologic, and hydric soil

indicators, all of which would require persistent wetland conditions over a longer period of time. Similarly, recent rain in combination with the placement of mulch would not have converted the mulch-filled area into a wetland (assuming that, in the short term, the mulch actually would increase soil moisture from the rain).

CONCLUSIONS OF LAW

20. Section 403.121(2)(b), Florida Statutes, authorizes DEP to institute an administrative action to prevent, abate, or control the conditions creating a violation, and impose an administrative penalty up to $10,000.

21. Under section 403.121(2)(d), DEP has the burden of proving, by a preponderance of the evidence, that Respondent is responsible for a violation.

22. A "wetland" is defined in rule 62-340.200(19). If the landward extent of a wetland cannot be determined by direct application of the rule definition to observed vegetative communities, the wetland delineation methodology set out in rule 62-340.300 must be used. DEP used this methodology to prove that the mulch violation area was a wetland, as was the area where the pine logs and vegetative debris were piled.

23. It was a violation of section 373.430 and rule 62-343.050, and therefore also section 403.161(2)(b), to fill the mulch violation area without a permit. In addition, moving pine

logs and vegetative debris into a wetland can result in the filling of the wetland. ("'Filling' is the deposition, by any means, of materials in waters of the state." Fla. Admin. Code R. 62-312.200(11).) These violations should be corrected by removing the fill from the wetlands.

24. Section 403.121(3)(c) sets the penalty for violating rule 62-343.050 at $1,000. Section 403.121(10) authorizes the administrative law judge to reduce penalties by up to 50 percent if it is shown that Respondent made "good faith efforts to comply prior to or after discovery of the violations by the department." DEP agrees that the penalty should be reduced to $500 under this statute.

25. Section 403.121(10) authorizes a further penalty reduction "[u]pon an affirmative finding that the violation was caused by circumstances beyond the reasonable control of the respondent and could not have been prevented by Respondent's due diligence . . . ." No further reduction under this statute is warranted in this case.

26. DEP also seeks the recovery of investigative costs under section 403.141(1). Section 403.141(1) provides: "Whoever commits a violation specified in s. 403.161(1) liable to the state for any damage caused to the air, waters, or property, including animal, plant, or aquatic life, of the state and for reasonable costs and expenses of the state in tracing

the source of the discharge, in controlling and abating the source and the pollutants, and in restoring the air, waters, and property, including animal, plant, and aquatic life, of the state to their former condition . . . ." DEP asked for and proved $500 of investigative costs and expenses, which are recoverable under section 403.141(1).

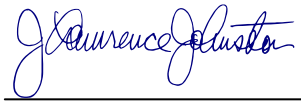
27. Section 403.121(11) provides that penalties "shall be deposited in the Ecosystem Management and Restoration Trust Fund or other trust fund designated by statute and shall be used to fund the restoration of ecosystems, or polluted areas of the state, as defined by the department, to their condition before pollution occurred." No other trust fund appears to have been designated by statute. In addition, section 403.1651(2)(a) provides that the Ecosystem Management and Restoration Trust Fund "shall be used for the deposit of all moneys recovered by the state" under chapter 403.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, Respondent shall: remove the mulch, pine logs, and vegetative debris from the violation areas within 45 days; and pay a $500 administrative penalty and $500 in investigative costs, for a total of $1,000, within 60 days, by cashier's check or money order made payable to the "State of Florida Department of Environmental Protection" and including the notations OGC

File No. 10-3454 and "Ecosystem Management and Restoration Trust Fund" to be mailed to DEP's Southeast District office at 400 North Congress Avenue, Suite 200, West Palm Beach, Florida 33401.

DONE AND ORDERED this 26th day of July, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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 proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency 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.