STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
vs.	)	Case No. 12-3276EF
FRANKLIN COUNTY,	)	
Respondent.	)	

RECOMMENDED ORDER

After notice was given, this matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on November 30, 2012, in Apalachicola, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether Franklin County (County) violated the law by placing unauthorized construction debris and material within a permitted revetment seaward of the coastal construction control line (CCCL); and whether the County should

be required to take corrective action to remediate this violation.

PRELIMINARY STATEMENT

Pursuant to section 403.121(2)(a), Florida Statutes, on January 20, 2012, the Department of Environmental Protection (Department) issued a one-count Notice of Violation (NOV) alleging that after a storm event in July 2005, the County placed unauthorized construction debris and other debris material in a previously permitted rock revetment seaward of the CCCL, and that the debris still remains within the footprint of the revetment. On August 31, 2012, the NOV was amended by adding a second count, which alleges that between 2000 and 2005 the County placed granite rock boulders and unauthorized construction debris and material east of the revetment seaward of the CCCL; and that the County did not obtain a permit for the placement of the granite rock boulders or remove the unauthorized debris and material. The Amended NOV also includes a requirement that the County take remedial action to correct all violations; it does not seek reimbursement of investigative expenses or the imposition of an administrative penalty.

In response to the Amended NOV, on September 20, 2012, the County filed its Amended Petition requesting a formal hearing to contest the charges. Allegations in the Amended Petition that (a) the statute of limitations (section 95.11(3)(f)) bars the prosecution of any violations that occurred more than four years

before the issuance of the Amended NOV, and (b) the Department failed to comply with section 403.412(2) before issuing its Amended NOV, were stricken by Order dated November 27, 2012.

A Pre-Hearing Stipulation (Stipulation) was filed by the parties on November 28, 2012. At the beginning of the final hearing, the parties announced they had reached a settlement regarding Count II and requested that the stipulated corrective action for that Count be incorporated into this Recommended Order.

The Department presented the testimony of Jim Martinello, Environmental Manager with the Bureau of Beaches and Coastal Systems, and offered Department Exhibits 1-20, which were received in evidence. The County presented the testimony of Alan Pierce, County Planner and Director of Administrative Services, and offered County Exhibits 21-27, which were received in evidence. Finally, the County's request to take official notice of Capital City Bank v. Department of Environmental Protection, Case No. 2012-39-CA (Fla. 2d Cir. Ct., Franklin Cnty.), a pending civil action for injunctive relief filed by a non-party against the Department and County, was granted.[1]

A Transcript of the hearing was filed on December 17, 2012. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Count I

1. Since an undisclosed date in the late 1970s, the County has owned and maintained that portion of County Road 370, also known as Alligator Drive, located at Alligator Point in the southeastern tip of the County. Before then, the road was classified as a secondary road owned and maintained by the Department of Transportation (DOT). Sometime during the late 1970s, the Legislature transferred the ownership and control of some secondary roads, including County Road 370, from the State to local governments.

2. A revetment is a man-made sloping structure, typically using rock boulders, designed in this case to protect County Road 370 from coastal erosion by absorbing the energy of incoming water from the Gulf of Mexico. It is the only structure protecting that roadway from the open winds and waters of the Gulf of Mexico. In regulatory parlance, a revetment is "armoring," also known as a "rigid coastal armoring structure" within the meaning of Florida Administrative Code Rule 62B-33.002(5) and chapter 161.

3. The Department has established a CCCL for the County. A permit is required before any person may conduct construction activities seaward of that line. However, if public infrastructure is threatened or damaged by erosion related to a storm event, as an emergency measure, a local government may

construct a temporary armoring structure without first obtaining a permit from the Department. See § 161.085(3), Fla. Stat. Once the temporary structure is installed, the local government has 60 days in which to remove it or file an application for permanent authorization of the structure. See § 161.085(6), Fla. Stat.; Fla. Admin. Code R. 62-33.0051(5)(g). Construction debris may not be used for emergency protection. See § 161.085(6), Fla. Stat.; Fla. Admin. Code R. 62B-33.0051(5)(f). Construction debris is defined as "material resulting from the demolition of a structure" and does not "include such material which has been sorted, cleaned, and otherwise processed such that it meets the suitability criteria for armoring materials set forth in this rule chapter." Fla. Admin. Code R. 62B-33.002(15).

4. On October 5, 1971, the Department of Natural Resources (DNR), which was later merged into the Department, issued to DOT Permit No. BBS 71-33 for the construction of a rock revetment on the south side of County Road 370 in the area that is the subject of the Amended NOV. See Department Ex. 2, ¶9. A Final Order issued by DNR on May 29, 1986, states in part that while the project was never constructed, "[s]ince 1971, DOT did place loose rock and rubble debris on several occasions in noncompliance to any engineering design and without construction." Id. However, a Department inspection in 1996 revealed that no debris was located within the area where the current revetment is built. See Finding of Fact 6, infra.

5. On May 29, 1986, DNR issued to the County CCCL Permit No. FR-204 for the construction of a 1,500-foot rock revetment seaward of the established CCCL and adjacent to portions of County Road 370 abutting the Gulf of Mexico. See Department Ex. 2. The revetment was located approximately 350 feet east of DNR's [now Department] reference monument R-211 to approximately 150 feet west of DNR's reference monument R-213. Id. at ¶ 1.

6. On November 7, 1994, the Department issued to the County CCCL Permit No. FR-446 for the re-construction of the original revetment authorized in 1986 and extension of the eastern limits of the structure. The revetment is located approximately 540 feet west of Department reference monument R-212 to approximately 140 feet east of Department reference monument R-213. See Department Ex. 3. The permit did not authorize placement of any construction debris within the revetment. On February 5, 1996, the County certified that the revetment was constructed in compliance with the permit. See Department Ex. 4. A final site inspection performed by the Department revealed that no unauthorized construction debris or other material had been placed in the permitted revetment. See Department Ex. 5.

7. In July 2005, Hurricane Dennis made landfall in the Florida Panhandle causing damage to the shoreline along County Road 370. As an emergency measure after the storm event, the County replaced rock boulders that had been displaced back into the rock revetment seaward of the CCCL. It also placed

unauthorized concrete debris and other debris material within the footprint of the rock revetment seaward of the CCCL. The unauthorized debris material has never been removed. Such debris poses a potential safety hazard to the public.

8. On September 11, 2006, the County submitted to the Department an application for a joint coastal permit, which would authorize a 2.9-mile beach and dune restoration project along a segment of the Alligator Point shoreline. In 2007, a Department site inspection (attended by County officials and its consultant) revealed the presence of concrete debris and other debris material stacked on top of and intermixed with the previously permitted rock revetment. The purpose of the site inspection was to have the County's consultant formulate a debris removal plan, which would be incorporated as a condition in the joint coastal permit and sovereign submerged lands authorization. An enforcement action was not initiated because the debris removal plan, if completed, would resolve the violation.

9. On May 11, 2011, the County's application for a joint coastal permit was approved and Permit Number 0269516-001-JC was issued. See Department Ex. 6. Special Condition 5 of the permit gave the County specific instructions on how to remove the construction debris within the previously-permitted rock revetment and included a requirement that it be placed in an upland disposal site. Id. at p. 6 of 23. An attachment to the permit identified the debris and derelict structures to be

removed. However, the County has never undertaken the beach re-nourishment project or completed any of the work relating to the debris removal plan. This is because the voters of the County rejected the funding mechanism for the project several years before the permit was issued.

10. On January 9, 2012, the Department conducted an inspection of the site to document how much debris was in the revetment and where it was located. The inspection revealed the presence of a significant amount of concrete debris and other debris material scattered throughout the revetment and continuing eastward. See Department Ex. 7. A NOV was issued after the inspection.

11. On March 8, 2012, a follow-up inspection was conducted by the Department and County representatives. The conditions observed at that time were essentially the same as those present during the January inspection. During the March inspection, a County representative pointed out several pieces of concrete debris that he believed were the remains of an old swimming pool from an upland property that had been placed on top of the revetment after a storm event. Prior to that time, the County had taken no steps to remove this debris, and it had never notified the Department that concrete pool debris had been placed in the revetment, apparently by an unknown third party.

12. An Amended NOV was issued on August 31, 2012, which added a Count II, relating to the area east of the permitted

revetment, and identified the corrective action to be taken by the County for both Counts. The corrective action for Count I requires the County, within 60 days of the effective date of a final order in this proceeding, to remove all construction debris and other debris material, seaward of the CCCL, from and adjacent to the footprint of the previously permitted rock revetment. It further requires the County to promptly dispose of all debris at an appropriate disposal facility landward of the CCCL. If compliance with these conditions requires the County to remove the debris during the Atlantic hurricane season, the time frame to complete the removal activity shall be within 60 days after the end of that season.

13. Except for a contention that it is not responsible for removing all of the debris in the revetment, the County does not dispute the charges in Count I. See Stip., ¶ 7.a. In an effort to limit its liability, the County points to language in a 1986 DNR Final Order, which states in part that "loose rock and rubble debris" was placed in the revetment footprint by DOT "on several occasions" in the 1970s. Department Ex. 2, ¶ 9. However, a Department inspection of the site in 1996 just after the structure was rebuilt determined that there was no unauthorized debris in the footprint of the permitted revetment. The results of that inspection were not credibly disputed. The County also contends that other debris may have been placed in or on top of the revetment by unknown third parties after various storm events

in later years. But even if this is true, it is the responsibility of the property owner, in this case the County, to remove the debris.

14. The County also seeks "equitable relief" on the ground it lacks the necessary finances to perform the corrective action. The County Director of Administrative Services stated that due to the recession, the property tax base has been cut in half (from $4.1 billion to $1.9 billion) between 2006 and 2011, essentially cutting ad valorem property taxes by 50 percent.

15. The County further points out that the Federal Emergency Management Agency (FEMA) is not a source of funding to correct the violations. Several years ago, FEMA funding was available to the County on a one-time basis to either construct a bypass road for portions of Alligator Drive adjacent to the previously permitted rock revetment or to maintain the rock revetment. Based upon FEMA's recommendation, the County opted to build a bypass road, which is approximately 75 percent completed, with the remainder temporarily delayed due to pending condemnation litigation with an affected property owner. However, the County described the bypass road as being far less safe than County Road 370 because the bypass road has sharp turns, poor driving visibility, and a much smaller right-of-way (52 feet versus 80 to 100 feet for County Road 370). In any event, FEMA funding for performing revetment-related work adjacent to County Road 370 is no longer available.

16. Finally, the County estimates that there are "a hundred [truck] loads of material to be removed from this area," and if the debris is removed, it will "reduce the volume of protection that [the road] currently [has]" and increase the risk of the road failing. The County suggests that even if the debris is removed, it has no money to then restore the structural integrity of the revetment. If that part of County Road 370 becomes unsafe or unusable, approximately 400 homes west of the revetment will lose the only paved hurricane evacuation route from the coastline, and emergency services may not be able to quickly access the area.

17. As discussed in the Conclusions of Law, despite these unfortunate circumstances, the financial condition of the violator is not a consideration in formulating a corrective action plan.

B. Count II

18. Beginning in September 2000, and continuing until at least through July 2005, the County placed material, including granite rock boulders, rock, and debris material, in a location east of the previously permitted rock revetment, seaward of the CCCL. The granite rock boulders are permitted material taken from the rock revetment. A permit for a permanent rigid coastal armoring structure has never been obtained for the placement of the authorized material, and the debris material has never been removed. The construction activity is located to the east of the

previously permitted rock revetment seaward of the CCCL approximately 140 feet east of Department reference monument R-213 to approximately 80 feet east of Department reference monument R-214.

19. To address the violations in Count II, the County has agreed that within 60 days of the effective date of a final order in this case, it will submit to the Department a complete application for a rigid coastal armoring structure located between Department reference monuments R-213 and R-214 that complies with all Department requirements. All work shall be completed prior to the expiration of the permit. If a complete application is not timely submitted, or the structure is not completed prior to the expiration of the permit, the County will remove all material placed seaward of the CCCL pursuant to a Department approved debris removal plan.

CONCLUSIONS OF LAW

20. Section 403.121(2)(a) authorizes the Department "to institute an administrative proceeding to establish liability and to recover damages for any injury to the air, waters, or property . . . of the state caused by any violation." Under this process, an enforcement action is initiated to "order the prevention, abatement, or control of the conditions creating the violation or other appropriate corrective action." § 403.121(2)(b), Fla. Stat. Unless the charging document seeks to impose an administrative penalty, the administrative law judge shall issue

a recommended order at the conclusion of the proceeding. See § 403.121(2)(d), Fla. Stat. The Amended NOV does not seek to impose a penalty.

21. "The department has the burden of proving by the preponderance of the evidence that the respondent is responsible for the violation." Id.

22. Once a CCCL has been established, no person shall make any excavation, remove any beach material, or otherwise alter existing ground elevations seaward of that line except as provided in the law. See § 163.053(2)(a), Fla. Stat.

23. Section 163.085(6) provides that an emergency rigid coastal armoring structure constructed under section 161.085(3) "shall be temporary," and unless an application for a permanent structure is submitted by the local government, the temporary structure must be removed "within 60 days after the emergency installation of the structure." The statute further provides that "[c]onstruction debris shall not be used in the construction of a rigid coastal armoring structure." Emergency measures taken pursuant to sections 161.085(3) and 161.085(6) are also subject to the conditions specified in rule 62B-33.0051(5).

24. Count I alleges that the County used construction debris and other debris material in the re-construction of the previously permitted rock revetment after Hurricane Dennis in 2005. Such activities, if proven to be true, constitute a violation of section 161.085(6) and rule 62B-33.0051(5)(f). They

also constitute a violation of section 403.161(1), which makes it a violation to fail to comply with a Department rule. By a preponderance of the evidence, the Department has established that the County violated these statutes and rule. The corrective action for these violations, set forth in Finding of Fact 12, is reasonable and appropriate.

25. The parties have stipulated that the County is liable under Count II, and they have agreed upon the appropriate corrective action.

26. Although the County contended in its Amended Petition that the enforcement action should be barred by the doctrine of equitable estoppel, no proof was submitted in support of this allegation, and the issue was not addressed in the County's Proposed Recommended Order. The contention is rejected.

27. The County also argued at final hearing that the enforcement action should be barred because of "unreasonable delay" on the part of the Department in undertaking enforcement. Although couching its argument in slightly different terms, the County is contending again that the statute of limitations in section 95.11(3)(f) bars this action. For the reasons cited in the Order on Motions dated November 27, 2012, the argument has been rejected.

28. Finally, the County contends that, due to a substantial decline in property values caused by the recession, it lacks the necessary resources to comply with the corrective action, and its

financial status should be taken into account in formulating a corrective action plan. A similar argument was recently raised by a gas station operator in another enforcement case involving a pollution discharge on the owner's property. See Dep't of Envtl. Prot. v. Z.K. Mart, Inc., Case No. 08-1473EF, 2009 Fla. ENV LEXIS 51 (Fla. DOAH, May 20, 2009). On appeal, in rejecting that contention, the court noted that "the [property owner's] statutory responsibility for ameliorating the pollution it caused is not linked to [its] financial status." Z.K. Mart, Inc. v. Dep't of Envtl. Prot., 38 So. 3d 857, 858 (Fla. 1st DCA 2010). Therefore, while the cost involved in remediating the violations is no doubt a genuine concern, the County's financial status is not a defense to its liability under the Amended NOV.

RECOMMENDATION

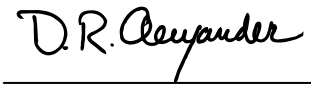
Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department enter a final order determining that the County is liable for the violations in Count I. As corrective action, within 60 days of the effective date of a final order in this proceeding, the County shall remove the existing construction debris and other material seaward of the CCCL from within the footprint of the previously permitted rock revetment and dispose of the material at an appropriate disposal facility landward of the CCCL. If compliance with the time period requires the County to complete activities during the

Atlantic hurricane season, the time frame for completing the debris removal activities is 60 days after the end of the hurricane season. It is further

RECOMMENDED that, based upon the parties' agreement at final hearing, the Department also determine that the County is liable for the violations in Count II. As corrective action, within 60 days of the effective date of this Order, the County shall submit to the Department a complete application for a rigid coastal armoring structure located between Department reference monuments R-213 and R-214 that complies with all Department permitting rules and statutes. The County shall complete the permitted construction prior to the expiration of the permit. If the County does not submit a complete application within 60 days of entry of a final order, or does not construct the structure authorized by the permit prior to the expiration of the permit, the County shall remove all material placed seaward of the CCCL pursuant to a Department approved debris removal plan.

DONE AND ENTERED this 29th day of January, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of January, 2013.

ENDNOTE

1/ The issues in that civil action were summarized in an Order Denying Motion dated November 1, 2012. Capital City Bank, which owns upland property near or adjacent to the revetment, has a Third Amended Complaint pending before the court; Motions to Dismiss that pleading have been filed by the County and the Department. Only a copy of the Third Amended Complaint was submitted by the County at the final hearing.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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