



Outstanding Florida Water (OFW), and an area of Monroe County designated as an Area of Critical State Concern (ACSC).

DEP issued four requests for additional information (RAI) to the Petitioner on August 24, 2018, November 21, 2018, February 8, 2019, and May 8, 2019. DEP's fourth RAI raised the same concerns as the first, second, and third RAIs, and stated that seven of the 19 specific items were not addressed by the Petitioner. DEP denied the Petitioner's five ERP permit applications on October 25, 2019. Petitioner timely filed five petitions for administrative hearing on December 13, 2019, which were referred to DOAH for final hearing.

DEP's five notices of denial each stated that the following changes to the Project might enable DEP to grant the Petitioner an ERP permit: (1) an appropriate mitigation plan to adequately offset the direct, secondary, and cumulative impacts; (2) supporting information to demonstrate that the proposed stormwater management system is designed in accordance with the Applicant's Handbook, Volumes I and II; (3) supporting information to demonstrate that the proposed activities are consistent with part IV of rule 62-312, Florida Administrative Code<sup>1</sup>; (4) a demonstration that the activities are clearly in the public interest; and (5) resolution of the issues identified by the Department of Economic Opportunity in its consistency objection letter dated August 24, 2018, and revised by letters dated November 26, 2018, and February 8, 2019.

Because of a federal consistency objection raised by the Department of Economic Opportunity (DEO) regarding inconsistencies with the regulations governing the Florida Keys ACSC, DEO was made a co-respondent. *See* § 373.428, Fla. Stat. (2020) ("[a]n agency which

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<sup>1</sup> Part IV of rule 62-312, Florida Administrative Code, contains additional DEP rule requirements applicable to ERP permit applications located in Outstanding Florida Waters within Monroe County. This part of rule 62-312 continues to apply to ERP applications to this date.

submits a determination of inconsistency to the permitting agency shall be an indispensable party to any administrative or judicial proceeding in which such determination is an issue."); *see also* § 380.23(2)(a), Fla. Stat. (2020).

In advance of the final hearing, DOAH consolidated the five DOAH cases into DOAH Case No. 20-0659. DEP and DEO filed a Motion to Strike, or in the Alternative, Motion in Limine, to strike portions of the petitions that raised issues concerning inverse condemnation. On July 29, 2020, the ALJ granted this motion.

DOAH held the final hearing on these permit applications on October 13 and 14, 2020, by Zoom video conference. At the final hearing, Petitioner presented the testimony of Edward A. Swakon (Swakon), a civil engineer and owner of EAS Engineering, Inc., accepted as an expert; and Howard Nelson (Nelson), an attorney and participant in drafting the responses to DEP's RAIs during the application review process. DEP presented the testimony of Megan Mills (Mills), the permitting program administrator, accepted as an expert. DEO presented the testimony of Barbara Powell (Powell), the regional planning administrator for the ACSC program, accepted as an expert. Joint Exhibits J-1 through J-88 were admitted into evidence.

On November 2, 2020, the parties requested an extension until November 20, 2020, to file their proposed recommended orders, which the ALJ granted. The parties filed their proposed recommended orders (PROs) on November 20 and 23, 2020; and the ALJ carefully considered the PROs in preparing her RO.

This matter is now before the Secretary of the Department for final agency action.

#### **SUMMARY OF THE RECOMMENDED ORDER**

In the RO, the ALJ recommended that the Department issue a final order denying the Petitioner's five ERP applications for Key Haven Lots 34, 35, 37, 39 and 40. (RO at p. 33). In

doing so, the ALJ found that the permit applications did not satisfy most of the conditions for issuance under rule 62-330.301, Florida Administrative Code. (RO ¶ 69). Specifically, the ALJ found that the applicant failed to provide adequate assurances regarding the following potential impacts: flooding to on-site or off-site property, adverse water quantity impacts to receiving waters and adjacent lands, adverse water quality impacts to receiving waters (RO ¶ 70); harmful erosion and shoaling (RO ¶ 77); and cumulative impacts to wetlands and other surface waters (RO ¶ 79). Moreover, the ALJ found that the Project would cause the following adverse impacts: secondary impacts to the water resources and adverse impacts to surface water conveyance, neither of which would be adequately offset by appropriate mitigation (RO ¶ 72); adverse effects to the public health, safety, or welfare, or the property of others, because the side of Floral Avenue adjacent to the Petitioner's lots has no stormwater management or treatment system, the lack of which would direct the stormwater into the mangrove fringe and contiguous OFW (RO ¶ 74); adverse effects to the conservation of fish and wildlife, or their habitat, which would not be adequately offset by appropriate mitigation (RO ¶ 75); and adverse effects to marine productivity and the relative value of functions being performed by the impacted areas. (RO ¶ 76). The ALJ concluded that the Petitioner applicant did not provide reasonable assurance that the Project would meet the ERP conditions for issuance, the additional criteria of part IV of chapter 62-312, Florida Administrative Code, and section 380.0552, Florida Statutes, regarding protection of the Florida Keys as an ACSC. (RO ¶ 115). Moreover, the ALJ concluded that the Project is not consistent with the federally approved Florida Coastal Management Program (FCMP), which includes part II of chapter 163, and part II of chapter 380, Florida Statutes. (RO ¶ 115). *See also* RO ¶ 4.



## CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to any findings of fact the parties “[have] thereby expressed [their] agreement with, or at least waived any objection to, those findings of fact.” *Env't Coal. of Fla., Inc. v. Broward Cnty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Med. Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003). However, even when exceptions are not filed, an agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. (2020); *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *Fla. Public Emp. Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

No party filed any exceptions to the RO objecting to the ALJ's findings, conclusions of law, recommendations, or to the DOAH hearing procedures. The Department concurs with the ALJ's legal conclusions and recommendations, with one exception. The Department rejects as unnecessary dictum the last sentence of the RO's conclusion of law paragraph 113, which should not be incorporated in this Final Order.<sup>2</sup> *Dep't of Env't Prot. v. Thomas Kerper and All Salvaged Auto Parts, Inc.*, DOAH Case No. 02-3907 (Fla. DOAH December 19, 2003; DEP March 15,

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<sup>2</sup> In accordance with section 120.57(1)(l), Florida Statutes, the Department finds that the treatment of conclusion of law 113 as dictum is more reasonable than adopting the ALJ's unnecessary legal conclusion.

2004). As noted in section 380.23, Florida Statutes, when DEO makes a federal inconsistency determination, DEP cannot override DEO's determination. However, in this case, when DEO did not issue a final order regarding its inconsistency determination, part II of chapter 380 might not prohibit the Department from overriding DEO's preliminary federal inconsistency determination.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

**ORDERED that:**

A. The Recommended Order (Exhibit A) is adopted and incorporated by reference with one exception; the last sentence of the RO's conclusion of law paragraph 113 is deemed to be unnecessary dictum and not adopted;

B. The environmental resource permit applications for Key Haven Lot 34 (DEP File No. 365144-001), Key Haven Lot 35 (DEP File No. 365142-001), Key Haven Lot 37 (DEP File No. 365142-001), Key Haven Lot 39 (DEP File No. 365131-010), and Key Haven Lot 40 (DEP File No. 365127-001) (collectively identified as the Project) are DENIED.

#### **JUDICIAL REVIEW**

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the

appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 8<sup>th</sup> day of July, 2021, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



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SHAWN HAMILTON  
Interim Secretary

Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.

Syndie Kinsey

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CLERK

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DATE

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by electronic

mail to:

<p>S. William Moore, Esq. Moore, Bowman &amp; Reese, P.A. 551 N. Cattlemen Road Suite 100 Sarasota, Florida 34232 <a href="mailto:bmoore@mbrfirm.com">bmoore@mbrfirm.com</a> <a href="mailto:ksasse@mbrfirm.com">ksasse@mbrfirm.com</a></p>	<p>Valerie A. Wright, Esq. Brandon W. White, Esq. Department of Economic Opportunity 107 East Madison Street Caldwell Bldg., Mail Station 110 Tallahassee, Florida 32399-4128 <a href="mailto:Valerie.Wright@deo.myflorida.com">Valerie.Wright@deo.myflorida.com</a> <a href="mailto:Brandon.White@deo.myflorida.com">Brandon.White@deo.myflorida.com</a> <a href="mailto:DEO.eservice@deo.myflorida.com">DEO.eservice@deo.myflorida.com</a></p>
<p>Jay Patrick Reynolds Senior Assistant General Counsel Kathryn E.D. Lewis Assistant General Counsel 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, FL 32399-3000 <a href="mailto:Patrick.Reynolds@FloridaDEP.gov">Patrick.Reynolds@FloridaDEP.gov</a> <a href="mailto:Kathryn.Lewis@FloridaDEP.gov">Kathryn.Lewis@FloridaDEP.gov</a> <a href="mailto:Lateshee.M.Daniels@FloridaDEP.gov">Lateshee.M.Daniels@FloridaDEP.gov</a> <a href="mailto:Michelle.M.Knight@FloridaDEP.gov">Michelle.M.Knight@FloridaDEP.gov</a></p>	

this 8<sup>th</sup> day of July, 2021.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
STACEY D. COWLEY  
Administrative Law Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/245-2242  
email [Stacey.Cowley@FloridaDEP.gov](mailto:Stacey.Cowley@FloridaDEP.gov)