

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC.,**

Petitioner,

vs.

**FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Respondents.

**OGC CASE NO. 15-0094
DOAH CASE NO. 15-4107**

CONSOLIDATED FINAL ORDER

On January 5, 2016, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH), submitted an Order Closing File and Relinquishing Jurisdiction (Order) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. The Order is attached as Exhibit A. The Order disposed of a pending administrative proceeding, in which the Petitioner, Environmental Confederation of Southwest Florida, Inc. (Petitioner) challenged the DEP's Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent to Use Sovereign Submerged Lands in File No. 22-0303652-003 (Permit) to the Respondent, Florida Fish and Wildlife Conservation Commission (FWC).

After ruling on the DEP's Motion in Limine and Motion to Relinquish Jurisdiction, the ALJ canceled the scheduled final hearing and relinquished jurisdiction to the Department for final action. In light of the ALJ's findings and conclusions, the Order was

treated as a recommended order of dismissal, and the parties were allowed the opportunity to file written exceptions and responses. See Fla. Admin. Code R. 28-106.217. On January 20, the Petitioner filed its Exception to the Order, and on January 22, the DEP filed a Response to Petitioner's Exception. This matter is now on administrative review before the Secretary of the Department for final agency action.¹

SUMMARY OF THE ORDER

The ALJ canceled the final hearing and relinquished jurisdiction after finding that there remained no disputed issues of fact to be determined by DOAH. See Exhibit A. The ALJ ruled that there was only one issue remaining in the case, i.e., whether the borrow area for fill material is in a wetland. He determined that the issue was decided against the Petitioner in a previous case involving the same parties such that the doctrines of *res judicata* and administrative finality applied. See Exhibit A at page 2.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Env'tl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991); see also *Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.*, 847 So.2d 540, 542 (Fla. 4th DCA 2003). 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, however, even when exceptions are not filed. See §

¹ The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. See Fla. Admin. Code R. 18-21.0051(2).

120.57(1)(l), Fla. Stat. (2015); *Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994). In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." See § 120.57(1)(k), Fla. Stat. (2015). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

PETITIONER'S EXCEPTION

Exception No. 1

The Petitioner argues that it takes exception to the ALJ's Order:

... in order to preserve the status quo and allow the Second Judicial Circuit Court case regarding Fisheating Creek (Case No: 2015-ca-000497) to move forward. Since a temporary injunction to enforce a settlement agreement is under consideration in the Circuit Court, the Department of Environmental Protection should not grant final approval for permit number 22-0303652-003 because to grant approval now would be in derogation of the Circuit Court's jurisdiction.

See Petitioners' Exception at page 1. The Petitioner does not take exception to any specific finding or conclusion in the ALJ's Order as required under Section 120.57(1)(k), Florida Statutes. See § 120.57(1)(k), Fla. Stat. (2015). Therefore, this exception is denied.

The DEP filed a Response to the Petitioner's Exception that more thoroughly informed the Department regarding the status of the Second Judicial Circuit Court case. The court had entered an Order Granting Defendant's Motion to Stay on September 4, 2015, requiring notification at the conclusion of the instant administrative proceeding

and prohibiting any filling of any portion of Fisheating Creek without further order from the court. See Response to Petitioner's Exception at pages 1-2. The DEP's Response states that the court did not enter an order or judgement prohibiting the Department from issuing the Permit. Further, the Petitioner does not provide any legal authority for the assertion that approval of the permit "would be in derogation of the Circuit Court's jurisdiction."

Thus, the Petitioner's exception is actually a request to stay entry of the Department's Final Order in the instant proceeding. The statutory deadline for entry of a Final Order by the Department is 45 days after entry of the recommended order. See § 120.569(2)(l), Fla. Stat. (2015) ("Unless the time period is waived or extended with the consent of all parties, the final order . . . must be rendered within [45] days . . .") and § 120.60(1), Fla. Stat. (2015) (reflecting that a license must be approved within 45 days after the recommended order). Therefore, to the extent that the Petitioner's exception is a request to stay entry of the Final Order, the request does not reflect the consent and waiver of the 45-day statutory deadline by "all parties," and is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the Exception and Response, and being otherwise duly advised, it is

ORDERED that:

A. The Order Closing File and Relinquishing Jurisdiction (Exhibit A), is adopted and incorporated herein by reference.

B. FWC's application for Environmental Resource Permit and Letter of Consent to Use Sovereign Submerged Lands in DEP File No. 22-0303652-003, is GRANTED.

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 filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, 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 10th day of February, 2016, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



JONATHAN P. STEVERSON
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.



CLERK



DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Consolidated Final Order was sent by electronic mail only to:

Jack Chisolm, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., MS. 35
Tallahassee, FL 32399-3000
jack.chisolm@dep.state.fl.us

David G. Guest, Esquire
Bradley Marshall, Esquire
Earthjustice
111 South Martin Luther King Jr. Boulevard
Tallahassee, Florida 32301
dguest@earthjustice.org
bmarshall@earthjustice.org

Bud Vielhauer, Esquire
Ryan Smith Osborne, Esquire
Florida Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399-1600
Bud.Vielhauer@MyFWC.com
Ryan.Osborne@MyFWC.com

and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

this 16th day of February, 2016.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



FRANCINE M. FFOLKES
Administrative Law Counsel
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC.,

Petitioner,

vs.

Case No. 15-4107

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

ORDER CLOSING FILE AND RELINQUISHING JURISDICTION

This cause came before the Administrative Law Judge on the Department of Environmental Protection's Motion in Limine and Motion to Relinquish Jurisdiction, based on there being only one issue remaining in the case, whether the borrow area for fill material is in a wetland, and that issue was decided against Petitioner in a previous case involving the same parties. A response in opposition was filed by Petitioner.

Petitioner argues that the motion to relinquish jurisdiction is tantamount to a motion to dismiss and, therefore, is barred by Florida Administrative Code Rule 28-106.204(2), which requires that a motion to dismiss be filed within 20 days of the assignment of the Administrative Law Judge. The 20-day limit does not apply to incurable errors. Although there does not appear to be a case which addresses this particular point of law, it is concluded that an issue which would be barred by the doctrine of *res judicata* or administrative finality is an incurable error and not subject to the 20-day limit.

The principle of *res judicata* may be applied in administrative proceedings. Thomson v. Dep't of Env'tl. Reg., 511 So. 2d 989 (Fla. 1987). The doctrine provides that final action entered by an agency having jurisdiction over the subject matter is conclusive of the rights of the parties and their

EXHIBIT A

privies and constitutes a bar to subsequent action or suit involving the same cause of action or subject matter. Sometimes, the doctrine of administrative finality is referred to as the administrative counterpart to the doctrine of *res judicata*. Administrative finality is the policy that there must be a terminal point in every proceeding at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved. Fla. Power Corp. v. Garcia, 780 So. 2d 34, 44 (Fla. 2001).

When these doctrines are applicable under the facts plead, the error is incurable because the jurisdiction of the Division of Administrative Hearings is dependent on the need to resolve disputed factual issues. An issue is no longer disputed if it was litigated by the same parties and the agency issued a final order that addressed the issue. A party cannot unilaterally transform such an issue into a disputed issue simply by including it in a new petition for hearing. Like other incurable errors, a claim barred by the doctrine of administrative finality obviates the need for an evidentiary hearing on the claim. Curable errors, which are generally pleading errors, do not give rise to unnecessary hearings and final orders.

Petitioner does not claim that it would offer facts in this case that it could not have offered in the prior case. The facts it describes (basically, a land survey) are facts that it could have offered in the prior case. However, Petitioner cites Thomson and several other cases for the proposition that it is unnecessary for the challenger to show that the facts could not have been presented in the first case. Before explaining why the cited cases do not support Petitioner's argument, it is noted that Petitioner makes no attempt to explain how administrative litigation can operate effectively if losing parties may keep trying in new proceedings to prove the same claims. The problems associated with such a legal system are obvious and they are the reason for the doctrine of administrative finality. Petitioner's argument dispenses altogether with administrative finality.

Petitioner believes its argument is supported by a statement in the Thomson opinion that *res judicata* is not appropriate when there are "new facts" to present. However, it is clear in Thomson and the other cases cited by Petitioner that "new facts" means facts that were not available to present in the first case. "New facts" does not simply mean facts that will be presented for the first time in the second case. In

Thomson, the permit applicant modified its proposed project to avoid shading sea grasses, which was the reason the agency denied the first application. In Delray Med. Ctr. V. Agency for Health Care Admin., 5 So. 3d 26 (Fla. 4th DCA 2009), "substantial changes" were made to the application. In Glidden v. Dep't of Juvenile Justice, 870 So. 2d 962 (Fla 1st DCA 2004), a different agency was involved in the second action and a different standard was applicable. In Emiddio v. Fla. Office of Fin. Reg., 147 So. 3d 587 (Fla. 4th DCA 2014), the applicable law had changed since the first action. In Fla. Wildlife Fed. v. CRP/HLV Highlands Ranch, Case No. 12-3219 (DEP Final Order Jun. 13, 2013), changes were made to the application and a different agency was involved in the second action. All of the cases cited by Petitioner involved changed circumstances. Petitioner does not allege changed circumstances; only a desire to present evidence it could have presented in the first case.

The Department contends, and Petitioner does not deny, that there are no other claims in the amended petition that require DOAH to retain jurisdiction. Because there are no remaining disputed issues of fact to be determined, it is

ORDERED that:

1. The final hearing scheduled for February 2 through 5, 2016, is canceled.
2. The file of the Division of Administrative Hearings is CLOSED and jurisdiction is relinquished to the agency for final action.

DONE AND ORDERED this 5th day of January, 2016, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of January, 2016.

COPIES FURNISHED:

Jack Chisolm, Esquire
Department of Environmental Protection
Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

David G. Guest, Esquire
Earthjustice
111 South Martin Luther King Jr Boulevard
Tallahassee, Florida 32301
(eServed)

Ryan Smith Osborne, Esquire
Florida Fish and Wildlife
Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399-1600
(eServed)

Bradley Ian Brustman Marshall, Esquire
Earthjustice
111 South Martin Luther King Jr Boulevard
Tallahassee, Florida 32301
(eServed)