

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of

Francis and Karen Goss

OGC CASE NO. 19-0281

Petitioners.

FINAL ORDER DENYING PETITION FOR DECLARATORY STATEMENT

Findings of Fact

1. On April 3, 2019 and April 22, 2019, Francis and Karen Goss (Petitioners) filed a petition for declaratory statement, amended petition for declaratory statement, and accompanying brief (Petition) requesting several opinions from the Florida Department of Environmental Protection (Department) and the St. Johns River Water Management District (SJRWMD) regarding the applicability of the state statutes and rules for the delineation and classification of wetlands in relation to a water body adjacent to their leased property in Volusia County, Florida, in an effort to expand their Florida room.

2. The Petitioners' questions are rephrased as follows:

- 1) Are sections 373.421 and 373.4211, Florida Statutes, and Florida Administrative Code chapter 62-340 the preempted law for the delineation and classification of wetlands in Florida? i.e. Must the State of Florida, County of Volusia (City), City of Ormond Beach (City), and Water and Navigation Control Authority (Authority) use the methodology in Florida Administrative Code chapter 62-340 to delineate and classify wetlands?
- 2) Are Florida Administrative Code chapter 62-340 and City of Ormond Beach Land Development Code section 3-21(b) ratified by section 373.4211, Florida Statute?

- 3) Does the preemption include Volusia County, its wetlands, and the Authority?
 - 4) Is the Department charged with enforcing sections 373.421 and 373.4211, Florida Statutes, and Florida Administrative Code chapter 62-340? Or is this law enforced by the City, County, or SJRWMD?
 - 5) Why is the SJRWMD failing to comply with the Florida 1994 Wetland Preservation Act?
 - 6) Why is the water body located adjacent to the Petitioners' leased property not classified as wetlands?
 - 7) Is Sun Set Existing Lake a wetland protected by the State of Florida 1994 Wetland Protection Act?
 - 8) Assuming Sun Set Existing Lake is a wetland, is the SJRWMD the permitting agency?
3. The petition was filed pursuant to section 120.565, Florida Statutes.
 4. The Department published notice of receipt of the Petition on April 24, 2019, in the Florida Administrative Register.
 5. As of the date of this Final Order, no third-party has petitioned for leave to intervene pursuant to Florida Administrative Code rule 28-105.0027.
 6. For this Final Order, factual allegations were derived from the above-referenced filings. Pursuant to Florida Administrative Code rule 28-105.003, the Department relies on the statements of facts as presented by Petitioners in the disposition of the Petition but takes no position on the truth or accuracy of such facts:
 - a. The Petitioners allege they lease real property located at 30 Grizzly Bear Path, Ormond Beach, Florida 32174. Their leased lot abuts an offsite water body.

- b. The Petitioners assert they would like to expand their “Florida room.” Petitioners requested permits to construct the expansion from both the SJRWMD and the City of Ormond Beach. The Petitioners do not allege they own the offsite water body.
- c. The Petitioners allege the City instructed them to hire an environmentalist to delineate and classify the water body that abuts 45 feet of their lease.
- d. The Petitioners allege the City required them to obtain a wetlands protection permit to clear or alter any wetland buffer.
- e. The Petitioners allege the offsite water body abutting their leased property is a wetland. It appears that Petitioner is seeking a declaratory statement regarding the application of Sections 373.421 and 373.4211, F.S., and Chapters 62-330 and 62-340, F.A.C., to the offsite stormwater pond. The Petitioners assert the purpose of the wetland determination is to confirm which City of Ormond Beach setback ordinance would apply to Petitioners’ Florida room expansion project.
- f. The Petitioners allege the SJRWMD incorrectly determined their proposed activity does not need an environmental resource permit.

Conclusions of Law

1. Section 120.565(1), F.S., states that “[a]ny substantially affected person may seek a declaratory statement regarding an agency’s opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner’s particular set of circumstances.”

2. Section 120.565(2), F.S., states that “[t]he petition seeking a declaratory statement shall state with particularity the Petitioner’s set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.”

3. Florida Administrative Code rule 28-105.001, which implements the above referenced statutes, provides:

A declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders over which the agency has authority. A petition for declaratory statement may be used to resolve questions or doubts as to how the statutes, rules, or orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person.

4. The Petition fails to allege how the Petitioners would be “substantially affected” by statutes, rules, or orders in the Petitioners’ particular set of circumstances.

5. Based on the facts presented, the Petitioners are not entitled to a declaratory statement on the questions presented.

State Preemption of Wetlands Delineation and Classification

6. Questions 1 through 3 ask whether sections 373.421 and 373.4211, Florida Statutes, and Florida Administrative Code chapter 62-340 are the preempted law for the delineation and classification of wetlands in Florida, whether 62-340 has been ratified, and whether the Department, SJRWMD, County, City, and Authority must follow that methodology.

7. As the Petition relates to the SJRWMD, County, City, and Water and Authority, the Department must deny the petition because a petition for declaratory statement is not a proper means for determining the conduct of a third-party. Fla. Admin. Code r. 28-105.001; *see also Manasota-88, Inc. v. Gardinier, Inc.*, 481 So. 2d. 948 (Fla. 1st DCA 1986) (upholding agency’s denial of petition for declaratory statement concerning the applicability of air pollution permit statutes to a third party). Here, the Petitioners seek a determination concerning third parties’ authority to delineate and classify water bodies adjacent to their properties. Florida Administrative Code rule 28-105.001 expressly prohibits the issuance of a declaratory statement that determines the conduct of another person other than the petitioner. Thus, questions 1 through 3 are not appropriate

for a declaratory statement because they do not require an interpretation of the applicability of the statutes and rule to the Petitioners' set of circumstances. Thus, the petition must be denied.

8. Even assuming arguendo, that it was proper for the Department to issue a declaratory statement concerning whether the SJRWMD, County, City, and Authority must use Florida Administrative Code chapter 62-340, to delineate wetlands, there is no controversy or dispute. A petition for declaratory statement under section 120.565, F.S., must involve an actual controversy or actual doubt as to the application of a statute, rule, or order. *Novick v. Dep't of Health, Bd. of Med.*, 816 So. 2d 1237, 1240 (Fla. Dist. Ct. App. 2002) (Holding a petition for a declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied.) "Declaratory statements are meant to address a pending crisis which is particular to the circumstances." *The Expanded Availability of Declaratory Statements in Administrative Law*, *The Florida Bar Journal*, 90, 91, (April 2000).

9. By preemption, section 373.421, Florida Statutes, requires all water management districts, state or regional agencies (including the Department and SJRWMD), and local government (including the City, County, and the Authority) to use the methodology adopted in Florida Administrative Code chapter 62-340 define and delineate wetlands. The Florida Legislature ratified this rule chapter in 1994.¹

10. Therefore, there is no lack of doubt about whether the Department, SJRWMD, County, City, and Authority must follow Florida Administrative Code chapter 62-340 or whether the rule chapter has been ratified. Thus, the petition must be denied. *See also In re: Mauers*, OGC Case No. 14-0430, 2015 WL 1525660 (DEP 2015).

¹ Chapter 1994-122, Laws of Florida, § 373.4211, Fla. Stat.; Fla. Admin. Code chapter 62-340, was formerly Fla. Admin. Code chapter 17-340. *See* Fla. Admin. Code chapter 62-340 history notes.

Classification of the Water Body Adjacent to the Petitioners' Property

11. Questions 4 through 8 ask whether the water body adjacent to the Petitioners' lease is wetlands protected under Florida's wetland protection laws and who enforces the law.

12. Florida Administrative Code rule 28-105.002, requires a petition include "the statutory provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought." The Petition fails to satisfy the requirements of section 120.565(2), F.S., and Florida Administrative Code rule 28-105.002, because many of the Petitioners' questions do not specify the statutory provisions, rules, or orders that the Petitioners wish the Department to interpret. Questions 4 through 6 and 8 of the Petition contain extensive factual statements but do not connect any of the factual allegations to a specific statutory provision, rule, or order.

13. Further, section 373.421, F.S., governs formal wetland determinations. Subsection 373.421(5), F.S., states that a "formal determination obtained under this section is final agency action and is in lieu of a declaratory statement of jurisdiction obtainable under s. 120.565" (emphasis added). Florida Administrative Code rule 62-330.201(2) requires that a request for a formal wetland determination "be submitted using Form 62-330.201(1), 'Petition for a Formal Determination of the Landward Extent of Wetlands and Other Surface Waters,' (June 1, 2018)..." and the petition "...be submitted with the fee prescribed in Rule 62-330.071, F.A.C." If the Petitioners are seeking a determination regarding wetlands, the Petitioners cannot avoid these substantive and procedural requirements by filing a Petition for Declaratory Statement via section 120.565, F.S. The sole means by which the Petitioners' question can be answered is to apply for a wetland determination pursuant to section 373.421, F.S.

14. With regards to question 7, the question is not appropriate for a declaratory statement because it does not require an interpretation of the applicability of the statute and rule to

the Petitioners' set of circumstances. As discussed above, Florida Administrative Code rule 28-105.001 expressly prohibits the issuance of a declaratory statement that determines the conduct of another person other than the petitioner. Section 373.421, Florida Statutes requires the Department and water management districts to designate who implements the determination process by interagency agreement. Further, while part IV, chapter 373, Florida Statutes, provides the authority for a local government to obtain delegation from the Department to administer the Act, there is nothing in the language of the Act that the Department could interpret to determine whether the County, City, and Authority have been delegated such authority. Instead, facts regarding which state agency makes a determination or which local governments in Florida have been delegated the authority to administer part IV, chapter 373, Florida Statute, are publicly available on the Department's website. *See* <https://floridadep.gov/ogc/ogc/content/operating-agreements>.

15. With regards to questions 6 and 7, the Petitioners do not allege they own the water body adjacent to their lease. Florida Administrative Code rule 62-330.201(1), F.A.C., authorizes a "real property owner, an entity having a contract to purchase real property, an entity having the power of eminent domain, or any other person who has legal or equitable interest in the property, may petition the Agency for a formal wetland determination of the landward extent of wetlands and other surface water for that property." Petitioners have never alleged that they have any legal or equitable interest in the offsite water bodies. As discussed above, the Department must dismiss the petition because a petition for declaratory statement is not a proper means for determining the conduct of a third-party. The Petitioners are asking the Department to make a determination about the applicability of the statutes and rules to property another party potentially owns.

16. Questions 4 through 8 appear to have been answered by the SJRWMD. As discussed above, a petition for declaratory statement under Section 120.565, F.S., must involve an

actual controversy or actual doubt as to the application of a statute, rule, or order. The SJRWMD have determined the Petitioners do not require a permit. Thus, there is no future controversy.

17. The Petitioners' questions 5 and 8 also appear to be aimed at challenging the SJRWMD's decision that the Petitioners do not need a permit. Petitions for declaratory statements are not the appropriate forum to challenge agency decisions. *Kahn v. Office of Ins. Regulation*, 881 So. 2d 699 (Fla. 1st DCA 2004). Thus, the petition must be denied.

DISPOSITION


IT IS THEREFORE ORDERED:

The Petitioners' request for a declaratory statement is **DENIED**.

Any party to this order has the right to seek judicial review of the order under section 120.68 of the Florida Statutes by filing a notice of appeal under rules 9.110 and 9.190 of the Florida Rules of Appellate Procedure with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, Mail Station 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 thirty days from the date this order is filed with the clerk of the Department.

DONE AND ORDERED this 16th day of July 2019, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


JUSTIN G. WOLFE
General Counsel
3900 Commonwealth Boulevard
Mail Station 35
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.

Donna M. Stridge 7/16/19
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was emailed to Francis and Karen Goss, 30
Grizzly Bear Path, Ormond Beach, Florida 32174 at FRA_GOS@msn.com, on this 16th day of
July 2019.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION


N. West Gregory
Assistant General Counsel
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000
Telephone: (850) 245-2242
Facsimile: (850) 245-2298
Email: West.Gregory@FloridaDEP.gov