STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHARLES R. BARNES AND EDWIN C. FREEZE,	)	
Petitioners,	)	
v.	)	**OGC CASE NO. 22-0249**
	)	**DOAH CASE NO. 22-2744**
STATE OF FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent.	)	

/

FINAL ORDER

An Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) on November 5, 2024, submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above-captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A.

On November 20, 2024, DEP timely filed exceptions to the RO. On December 2, 2024, Charles R. Barnes and Edwin C. Freeze (Petitioners) timely filed a response to DEP's exceptions.

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

BACKGROUND

On October 3, 2018, DEP issued an exemption verification (2018 Exemption) to the Petitioners for a project (the Project) to replace 200 linear feet of bulkhead within their previously permitted bulkheads in a manmade ditch between Petitioners' two properties extending to Doctors Lake. The 2018 Exemption provided that the new bulkheads would be six inches taller and placed immediately in front of the existing wooden bulkheads.

While Petitioners considered alternatives, the start of the Project was delayed until 2021. On June 5, 2021, after the Project was underway, DEP received a petition for an administrative hearing from a neighbor, Matt Taylor, challenging the 2018 Exemption to the administrative review process. The Project was completed in mid-August 2021.

By letter dated January 2022, DEP notified Petitioners that, upon further review, it had "determined that the Project does not qualify for an exemption under Section 373.406(6), F.S." On February 8, 2022, the Petitioners submitted a letter to DEP disputing its denial of the 2018 Exemption. After that letter was deemed insufficient, on March 31, 2022, the Petitioners filed a document titled "Amended Petition of Exemption Revoke" (Petition), challenging DEP's denial of the 2018 Exemption and requesting a formal administrative hearing. On August 31, 2022, the Petition was referred to DOAH.

The DOAH final hearing was conducted on June 6 and 7, 2024. The Petitioners testified on their own behalf and presented the testimony of DEP former Permit Supervisor Michelle Neeley, Petitioner Charles Barnes' wife, Virginia Barnes, and the deposition of fact witness John Kendall, P.E., admitted in lieu of live testimony. The Petitioners offered 43 exhibits received into evidence as P1 through P14, P16, P17, P19, P20, P22, P24 through P27, P29 through P35, P38, P39, P42, P44 through P48, P51, P54, P56, P58, and P60. DEP presented the testimony of fact witnesses Matthew Taylor, Robert Caudel, P.E., and Thomas Kalleymen; and offered six exhibits received into evidence as R8 through R13. The parties offered and received into evidence 42 joint exhibits as Joint Exhibits JE1 through JE42.

The parties were given 45 days from filing of the transcript within which to file with DOAH on July 29, 2024. The parties timely filed their proposed recommended

orders on September 12, 2024.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order "finding that Petitioners' Project qualifies for an exemption from the need to obtain an Environmental Resource Permit pursuant to chapter 62-330 and sections 373.406 and 403.813." (RO pp. 23-24).

STANDARD OF REVIEW FOR DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of the ALJ "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2024); *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1082 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61, 62 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez*, 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. School Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary

finding. *See, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622, 623 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1026-27 (Fla. 1st DCA 1997).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded, and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land & Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, the agency should not label what is essentially an ultimate factual determination as a "conclusion of law" to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Pro. Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2024); *see also Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cnty.*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1141-42 (Fla. 2d DCA 2001). The Department is charged with enforcing and interpreting

chapters 373 and 403 of the Florida Statutes. As a result, DEP has substantive jurisdiction over interpretation of the statutory provisions in chapters 373 and 403, Florida Statutes, and the Department's rules adopted to implement these statutes.

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Pro. Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio*, 622 So. 2d at 609.

RULINGS ON EXCEPTIONS

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); *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. 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, 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, even when exceptions are not filed. *See*

§ 120.57(1)(l), Fla. Stat. (2024); *Barfield,* 805 So. 2d at 1012; *Fla. Pub. Emp. Council, 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. (2024). The agency, however, 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.*

RULINGS ON DEP'S EXCEPTIONS

DEP's Exception No. 1 to RO Paragraph No. 11 and Footnote 14 to Paragraph No. 66

DEP takes exception to a portion of RO paragraph no. 11 and footnote 14 to RO paragraph no. 66. Specifically, DEP takes exception to the ALJ's finding in RO paragraph no. 11 that the Petitioners submitted a request for a verification of exemption "within one year from a discrete event (Hurricane Irma in September 2017) causing damaging flooding." (RO ¶ 11). DEP also takes exception to the finding of fact in footnote 14 to RO paragraph no. 66 to similar language that provides "[t]he 2018 Exemption Request was made to repair the bulkheads within one year after flooding from Hurricane Irma in 2017." (RO footnote no. 14). DEP alleges that no record evidence supports the clauses shown in quotations above. Instead, DEP contends the evidence shows Petitioners needed to replace the bulkheads due to the failure of the retention ponds at the college to the north of Petitioners' properties.

To the extent the clauses identified by DEP are intended to suggest hurricane Irma was the reason Petitioners requested the exemption verification, DEP is correct – no competent substantial evidence supports that finding. However, when narrowly construed the clauses merely speak to the *timing* of the request, not the *reason* for the request. Competent substantial evidence

shows that the application was filed after hurricane Irma, which resulted in damaging flooding. (Brunson, T. Vol. 3, p. 349; Joint Ex. 13 (exemption verification issued 10-03-2018). With the understanding that the clauses speak only to the timing of the request, and not the purpose, DEP's exception to RO paragraph no. 11 and footnote 14 to RO paragraph no. 66 is denied.

DEP's Exception No. 2 to Footnote 10 for RO Paragraph No. 35 and RO Paragraph No. 75 and its Footnote 20

This exception suggests three revisions. First, DEP contends that "no record evidence" supports the portions of Footnote 10 to RO paragraph no. 35 identified in strike-through below.

> FN 10 As depicted in a National Wetlands Survey, Exhibit P58, the wetland area west of Cedar Road formerly drained towards Blueline Stream south of Petitioners' properties. However, as depicted on a subsequent County Map of the Cedar Road drainage study area (Exhibit P13), a berm installed, presumably by Clay County, in the area labeled on the map as the "breech area," diverted the water flow north into the ditch that eventually drains north and into the drainage ditch between Petitioners' properties. Other historical drainages in the area have also been filled with the apparent approval (or at least without objection) from Clay County, St. John's WMD~~, or the Department~~.

DEP's Exceptions, pp. 5-6. DEP is correct. No record evidence supports a finding that the Department has approved "other historical drainages in the area." As a result, DEP's exception to the above portion of footnote 10 to RO paragraph no. 35 is granted and the portion suggested by DEP to be stricken is hereby deleted.

Second, DEP takes exception to the portion of RO paragraph no. 75 in strike-through below.

> 75. The Department further argues that the canal between the Petitioners' property is not a canal, but rather a stormwater management system that does not qualify for an exemption.[20] Aside from the fact that the waterway between Petitioners' properties has been referred to as a canal, as well as a ditch, over the years and throughout the pleadings, filings and exhibits, a preponderance of the evidence demonstrates that the canal is not a stormwater management system.[21] Rather, it is the unfortunate recipient over private lands of overwhelming outflows from a failed series of upstream systems ~~for which DEP, until now, showed little interest~~.

DEP's Exceptions, pp. 5-6. DEP contends the identified language must be stricken because "the

competent substantial evidence supports that [DEP] has recognized and asserted the ditch was part of a stormwater system." (DEP's Exceptions at p. 6). Specifically, DEP alleges:

> Beginning back in 1995 when the first permit regarding this ditch was issued, [DEP] referred to the ditch as part of a stormwater management system. [JE-8]. Petitioners' own engineer, John Kendall, treated and referred to this ditch as a component of a stormwater system during the years that the parties were working on alternatives to the exemption at issue. [DEP-10, 000340:18-20 and 000315:10-12; *see also* DEP-10 000313-316[2] and 000328: 17-20[3] 000339:17-341:11; JE-14]. [DEP's] own engineers, Jim Maher and Junhong Shi, spent almost two years working with John Kendall regarding the capacity of the ditch to carry stormwater. [JPHS at ¶¶ 9 & 13, JE-16, JE-19, DEP-8]. In addition, during the final hearing Department witness Tom Kallemeyn and Petitioner Charles Barnes refer to this ditch as part of the stormwater management system. [TR 1, 261:6-10; TR 4, 541:4-9, 548:13-16, 568:18-23, 622:6-23].

DEP's Exceptions at pp. 6-7.

DEP is correct in that the record is replete with competent substantial evidence that asserts the ditch was part of a stormwater system and contains no evidence to support the finding in paragraph 75 that DEP showed "little interest" in the stormwater system's failures. As a result, DEP's exception to paragraph no. 75 is granted and the portion suggested by DEP to be stricken is hereby deleted.

Third, DEP takes the following exception to footnote 20 to RO paragraph no. 75:

> 75. The Department further argues that the canal between the Petitioners' property is not a canal, but rather a stormwater management system that does not qualify for an exemption.[20]
>
> * * *
>
> FN 20 ~~Throughout the lengthy history of this case, DEP never asserted that the ditch was part of a 'stormwater management system' until the filing of its PRO. Notably, the Second Amended Joint Prehearing Stipulation does not allege that stormwater management systems standards do or should apply to this case in the stipulated facts and law, or in the facts and law remaining in dispute. Failure to identify issues of fact or law to be litigated constitutes a waiver of those issues for disposition. *See, Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015).~~

DEP's Exceptions, pp. 5-6. The first sentence of footnote 20 should be stricken for the same reason DEP's exception to RO paragraph no. 75 was granted above – i.e., the record is replete

with competent substantial evidence that asserts the ditch was part of a stormwater system and contains no evidence to support the finding that this assertion first appeared in DEP's Proposed Recommended Order. Accordingly, the first sentence to footnote 20 to RO paragraph no. 75 is hereby deleted. However, contrary to DEP's assertion, the remainder of footnote 20 must stand.

The remainder of footnote 20 finds that the question of whether the ditch was part of a stormwater system was not identified in the prehearing stipulation. This finding is followed by a legal conclusion that the failure to identify this issue in the prehearing stipulation waived its disposition. This conclusion cannot be disturbed because DEP does not have jurisdiction to modify or reject rulings on the admissibility of evidence. *See, e.g., Martuccio*, 622 So. 2d at 609; *Heifetz*, 475 So. 2d at 1281-82.

While this evidentiary ruling in footnote 20 cannot be disturbed, it does necessitate a modification to RO paragraph no. 75 – namely, the conclusion that "a preponderance of the evidence demonstrates that the canal is not a stormwater management system." This conclusion is antinomic to the ALJ's prior waiver finding in footnote 20. These two conclusions cannot coexist. They are mutually exclusive. The issue is either waived or it is not. Because the ALJ first found it was waived in footnote 20, the subsequent conclusion in RO paragraph no. 75 that "a preponderance of the evidence demonstrates that the canal is not a stormwater management system" must be stricken and is hereby deleted.

DEP's Exception No. 3 to RO Paragraph Nos. 64 and 70

DEP takes exception to RO paragraph nos. 64 and 70, which provide:

> 64. The 2018 Exemption further advised Petitioners that the Project application qualified for a State Programmatic General Permit (SPGP), and that a separate permit from the Army Corp of Engineers would not be required.
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> * * *
>
> 70. In reversing its previously issued 2018 Exemption, the Department's Exemption Denial also advised Petitioners that they must apply for an Environmental Resource Permit, retracted its earlier declaration that the Project

qualified for a SPGP permit, and advised that a separate permit from the Army Corp of Engineers would now be required.

RO ¶¶ 64 and 70.

DEP does not allege that these two paragraphs should be stricken, rejected, or deleted; but rather contends they are findings of fact despite being labeled as conclusions of law. The Department concurs and grants DEP's exceptions to RO paragraph nos. 64 and 70. These paragraphs are hereby deemed findings of fact and not conclusions of law.

DEP's Exception No. 4 to RO Paragraph Nos. 51, 74 and Footnotes 18 and 19

DEP takes exception to portions of RO paragraph nos. 51, 74 and footnotes 18 and 19, which provide:

> 51. In fact, the Project, as completed, lifted failing bulkheads, saved Petitioners' properties from further erosion that threatened to undermine their homes, and provided an improved conduit for stormwater after normal rainfall.
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> * * *
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> 74. In further support of its argument that the 2018 Exemption should be denied, the Department argues that the bulkheads repaired by the Project are not 'seawalls' as authorized in rule 62-330.051 and section 403.813, quoted above, but only 'retaining walls.' This argument, however, ignores a plain reading of the definition of seawalls, [18] and the Department's prior recognition of such in the 1995 Permit. [19] Consistent with the statutory definition of seawalls, it is clear that the bulkheads were designed and function as a man-made wall or encroachment made to break the force of waves flowing down the canal and to protect the shore from erosion.
>
> [18] 'Seawall' is defined in section 373.403(17) [sic] as a man-made wall or encroachment, except riprap, which is made to break the force of waves and to protect the shore from erosion; *see also* A.H., Section 2.0(a)109.
>
> [19] The 1995 Permit refers to the length and materials for construction of 'seawalls.' *See* Jr. Exh. 8, Bates page 85.

RO ¶¶ 51 and 74 (with footnotes 18 and 19).

The crux of DEP's exception no. 4 is the ALJ's conclusion in RO paragraph no. 74 and its footnote that the Petitioners' Project is a "seawall" that qualifies for the seawall exemption authorized by section 403.813 of the Florida Statutes and DEP's rule 62-330.051 of the Florida

Administrative Code.[1] Specifically, DEP takes exception to the ALJ's conclusion that DEP incorrectly concludes that "the bulkheads repaired by the Project are not 'seawalls' . . . but only 'retaining walls.'" (RO ¶ 74).

Regardless of the terminology used to refer to the conveyance at issue,[2] it is what it is: a 200-foot, manmade trench about 3.5-4.5 ft wide that periodically directs stormwater into a lake. (RO ¶¶ 11, 14). The question is whether this is an artificial "waterway" within the meaning of the seawall exemption in Section 403.813(1)(i), Florida Statutes, and Florida Administrative Code Rule 62-330.051(12), respectively. The term "waterway" is not defined; however, the ERP Applicant's Handbook provides that terms not defined in the handbook are to be "given their ordinary and customary meaning or usage of the trade or will be defined using published, generally accepted dictionaries, together with any rules and statutes of the Agencies that have additional authority over the regulated activities." Applicant's Handbook, §2.0(b). The Merriam-Webster Dictionary defines "waterway" as "a way or channel for water" or "a navigable water." Merriam-Webster.com Dictionary, https://www.merriam-webster.com/dictionary/waterway (last visited December 10, 2024). Section 403.803(3), Florida Statutes, defines "channel" as "a trench, the bottom of which is normally covered entirely by water, with the upper edges of its sides normally below water." *Compare with* § 403.803(7), Fla. Stat. (defining "drainage ditch" as "a manmade trench dug for the purpose of draining water from the land or for transporting water

[1] While RO paragraph no. 51 is listed under the paragraphs to which this exception applies, DEP does not actually take an exception to this paragraph; rather, it references it as an example of when the ALJ found that "the purpose and function of Petitioners 'bulkheads' is to hold back their properties (i.e., retain the land), while providing a channel to convey stormwater." (DEP's Exceptions, p. 10).

[2] Paragraph 74 of the RO and its footnote 19 conclude that DEP ignored the prior recognition of the structure as a "seawall" in the original 1995 Permit. Specifically, Footnote 19 noted that the 1995 Permit for the structure between the two Petitioners' homes referred to "the length and materials for construction of 'seawalls.'" In Footnote 19, the ALJ references one page from the 1995 Permit that uses the term "seawall." (JE8, Bates JE00085). However, the ALJ refers to a page in Joint Exhibit 8 in which the word "seawall" is part of the Department's application template. (JE8, Bates p. JE00085). Moreover, every representation and information supplied by the Applicants in their application referred to the vertical retaining walls as "bulkheads" and not "seawalls." (JE8, Bates pp. 000076, 000079-81, 000086-88, and 000096).

for use on the land and is not built for navigational purposes"). The conveyance at issue clearly does not qualify as the type of "waterway" contemplated under 403.813(1)(i), Florida Statutes, and Florida Administrative Code Rule 62-330.051(12).[3]

Section 120.57(1)(l) of the Florida Statutes authorizes the Department to reject an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See* § 120.57(1)(l), Fla. Stat. (2024); *see also* Barfield, 805 So. 2d at 1012; *L.B. Bryan & Co.*, 746 So. 2d at 1197; *Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1141-42. Since the Department is charged with implementing chapters 373 and 403 of the Florida Statutes, it has substantive jurisdiction over interpretation of the statutory provisions in these chapters and the rules adopted to implement these statutes.

The Department concurs with DEP's exception that the Project is not a seawall, but instead a retaining wall that runs laterally parallel between the two Petitioner's properties, and discharges stormwater directly to Doctors Lake. The Department's interpretation in this Final Order of a "seawall" in Section 373.403(17) is more reasonable than the ALJ's interpretation. *See* § 120.57(1)(l), Fla. Stat. (2024). Accordingly, the Department grants DEP's exception; the legal conclusion in paragraph 74 and its supporting footnotes that the bulkheads sought to be repaired are "seawalls" must be stricken and is hereby deleted.[4]

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[3] DEP offers further support to this notion by pointing out that seawalls must protect the "shore." *See* § 373.403(17), Fla. Stat. (defining "seawall" as "a man-made wall or encroachment, except riprap, which is made to break the force of waves and to *protect the shore* from erosion."). While shore is not defined by DEP rule or statute, its plain meaning is "land bordering a usually large body of water (or the coast)" and the "land as distinguished from the sea." Merriam-Webster.com Dictionary, http://merriam-webster.com/dictionary/shore (last visited December 10, 2024).

[4] Based on this ruling Petitioners are not eligible for the exemption under Section 403.813(1)(i), Florida Statutes, and Florida Administrative Code Rule 62-330.051(12); however, as expressed below, the final order ultimately adopts the ALJ's recommendation that the project be authorized in accordance with the ALJ's findings in RO paragraph nos. 73 and 76 and Section 373.406(6), Florida Statutes, and Florida Administrative Code Rule 62-330.051.

DEP's Exception No. 5 to RO Paragraph Nos. 44 and 45

DEP takes exception to both RO paragraph nos. 44 and 45. Specifically, DEP takes exception to the ALJ's findings in RO paragraph no. 44 alleging that "[t]he ALJ's findings in FOF ¶¶ 44 and 45 are [a] mischaracterization of the facts and evidence. FOF ¶ 44 is an inaccurate representation of Mr. Kendall's testimony. For example, Mr. Kendall referred to the drainage ditch as a 'component of a [stormwater] system.' DEP-10, 000340:18-20 and 000315:10-12. . . ." (DEP's Exceptions, p. 18).

DEP contends that RO paragraph no. 44 should be amended, as follows:

> 44. Moreover, as explained by Mr. Kendall, which fact-based explanation is credited, the ditch between Petitioners' properties is~~, at best, only~~ a component of~~, not~~ a stormwater system.

DEP's Exceptions, p. 19. However, DEP acknowledged that Mr. Kendall identified the drainage ditch as a "component of a [stormwater] system." (DEP's Exceptions, p. 19). The Department concludes that the ALJ did not mischaracterize the facts and evidence.

DEP seeks to have the Department reweigh the evidence. However, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing. *See e.g.*, *Rogers*, 920 So. 2d at 30; *Belleau*, 695 So. 2d at 1307; *Dunham*, 652 So. 2d at 896. Contrary to DEP's exception to RO paragraph no. 44, the ALJ's findings in this paragraph are supported by competent substantial evidence. *Id.* (DEP10, Bates pp. 000313-000315 and 000339-000341).

Based on the foregoing reasons, DEP's exception to RO paragraph nos. 44 and 45 are denied.

DEP's Exception No. 6 to RO Paragraph Nos. 67, 68 [sic] and 76

DEP takes exception to portions of RO paragraph nos. 67, 68, and 76, which provide:

> 67. Section 403.813(1)(i), cited in rule 62-330.051(12)(a), quoted above, provides for an exception to permitting for '[t]he construction of seawalls in artificially created waterways when such construction will not violate existing water quality standards, impede navigation or affect flood control.'

> 68. Section 403.813(1)(e), cited in rule 62-330.051(12)(a), quoted above, provides for an exception to permitting for "[t]he restoration of seawalls at their previous location or upland of, or within 18 inches waterward of, their previous locations. This may not affect the permitting requirements of chapter 161, and department rules shall clearly indicate that this exception does not constitute an exception from the permitting requirements of chapter 161."
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> * * *
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> 76. The Project, as implemented, successfully repaired failing bulkheads that were pinching off the canal, prevented further undermining of the foundations of Petitioners' homes, and stabilized the canal so that it could continue to convey normal rainfall outflows. Petitioners otherwise proved, by a preponderance of the evidence, that the statutory and rule standards required for the exemption issued by the 2018 Exemption for the Project were met and that the exemption should be issued in accordance with section 373.406(6).

RO ¶¶ 67, 68, and 76.

Paragraphs 67 and 68 merely quote the exemption criteria from the need for an Environmental Resource Permit under sections 403.813(1)(i) and 403.813(1)(e) of the Florida Statutes. Fla. Admin. Code R. 403.813(2024). Accordingly, no revisions to these two paragraphs are warranted.

To the extent that RO paragraph no. 76 concludes that the Project is authorized under Section 403.813, Florida Statutes, this portion of paragraph 76 is rejected. The Department rejects any possible interpretation that the Petitioners' Project qualifies for the seawall exemptions in Section 403.813, Florida Statutes, and Florida Administrative Code Rule 62-330.051(12) for the reasons explained in the Department's rulings on DEP Exception nos. 4 and 6 above. However, the Department adopts the legal conclusion in RO paragraph 76 that concludes Petitioners' Project qualifies for the "de minimus exemption" in Section 373.406(6), Florida Statutes, and Florida Administrative Code Rule 62-330.051. This ruling likewise applies to the ALJ's ultimate recommendation.

CONCLUSION

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the Recommended Order, and being otherwise duly advised, it is ORDERED that:

A. The Recommended Order (Exhibit A) is adopted, except as modified by the above rulings on Exceptions, and incorporated by reference herein.

B. The exemption verification for the Project constructed by Charles R. Barnes and Edwin C. Freeze is GRANTED in accordance with section 373.406(6) of the Florida Statutes and chapter 62-330 of the Florida Administrative Code.

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 20th day of December 2024, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

ALEXIS A. LAMBERT
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.

Lea Crandall Digitally signed by Lea Crandall Date: 2024.12.20 12:33:33 -05'00'

Clerk

December 20, 2024
Date

CERTIFICATE OF SERVICE

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

Charles Barnes 4419 Cedar Road Orange Park, FL 32065 Rgbarnes04@aol.com rickandgini@att.net	Kelley F. Corbari, Esquire Kathryn E. Lewis, Esquire 3900 Commonwealth Boulevard Mail Station 35 Tallahassee, Florida 32399-3000 Kelley.Corbari@FloridaDEP.gov Kathryn.Lewis@FloridaDEP.gov Anne.Willis@FloridaDEP.gov Jacqueline.Gardner@FloridaDEP.gov
Edwin Freeze 4397 Cedar Road Orange Park, FL 32065 C_freeze@comcast.net	

this 20th day of December 2024.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES R. BARNES
AND EDWIN C. FREEZE,

Petitioners,

vs. Case No. 22-2744

STATE OF FLORIDA, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on June 6 and 7, 2024, in Jacksonville, Florida, before James H. Peterson, III, an Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES[1]

For Petitioner: Charles Richard Barnes, pro se
4419 Cedar Road
Orange Park, Florida 32065

Edwin Carter Freeze, pro se
4397 Cedar Road
Orange Park, Florida 32065

For Respondent: Kelley F. Corbari, Esquire
Kathryn E. D. Lewis, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, MS-35
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[1] The pro se parties and attorneys for the Department of Environmental Protection are commended for their professionalism and cooperation in their effort to resolve this case prior to the hearing, and preparation and presentation of this case.

STATEMENT OF THE ISSUE

Whether Petitioners' project is exempt from the need to obtain an Environmental Resource Permit (ERP) pursuant to Florida Administrative Code Chapter 62-330 and sections 373.406 and 403.813, Florida Statutes.[2]

PRELIMINARY STATEMENT

On October 3, 2018, the Department of Environmental Protection (Respondent, Department, or DEP) issued an exemption verification (2018 Exemption) to Charles R. Barnes and Edwin C. Freeze (Petitioners) for a project (the Project) to replace 200 linear feet of bulkhead within their previously permitted bulkheads in a manmade ditch between Petitioners' two properties extending to Doctors Lake. The 2018 Exemption provided that the new bulkheads would be six inches taller and be placed immediately in front of the existing wooden bulkheads.

While Petitioners considered alternatives, start of the Project was delayed until 2021. On June 5, 2021, after the Project was underway, the Department received a petition for an administrative hearing from a neighbor, Matt Taylor, challenging the 2018 Exemption. After that petition was deemed insufficient, on August 19, 2021, the Department received an amended petition from Mr. Taylor, which was deemed sufficient, thereby subjecting the 2018 Exemption to the administrative review process. The Project was completed in mid-August 2021.

By letter dated January 2022, the Department notified Petitioners that, upon further review, it had "determined that the Project does not qualify for an exemption under Section 373.406(6), F.S." On February 8, 2022, Petitioners submitted a letter to the Department disputing its denial of the

[2] Unless otherwise noted, all references to the Florida Statutes or Florida Administrative Code are to current versions.

2018 Exemption. After that letter was deemed insufficient, on March 31, 2022, Petitioners filed a document entitled "Amended Petition of Exemption Revoke" (Petition), challenging the Department's denial of the 2018 Exemption and requesting a formal administrative hearing. The Petition was deemed sufficient by the Department and, on August 13, 2022, the Petition was referred to DOAH.

The administrative hearing for this case was originally scheduled to be held November 30 and December 1, 2022, but was continued and rescheduled for March 21 and 22, 2023. The hearing was continued again and reset for August 28 through 31, 2023, which hearing was cancelled, and the case was placed in abeyance until it was rescheduled for the hearing held June 6 and 7, 2024.

At the hearing, 42 joint exhibits were offered and received into evidence as Joint Exhibits JE1 through JE42. Petitioners testified on their own behalves and offered the testimony of the following fact witnesses: DEP former Permit Supervisor Michelle Neeley; Petitioner Charles R. Barnes's wife, Virginia Barnes; and the deposition of fact witness John Kendall, P.E. (Respondent's Exhibit R10), admitted in lieu of live testimony. Including the deposition of John Kendall, Petitioners offered 43 exhibits received into evidence as P1 through P14, P16, P17, P19, P20, P22, P24 through P27, P29 through P35, P38, P39, P42, P44 through P48, P51, P54, P56, P58, and P60. The Department presented the testimony of fact witnesses Matthew Taylor; Robert Caudel, P.E.; and Thomas Kalleymen; and offered six exhibits received into evidence as R8 through R13.

The proceedings were recorded and a transcript was ordered. The parties were given 45 days from the filing of the transcript within which to file proposed recommended orders. The four-volume Transcript of the

proceedings was filed on July 29, 2024. Thereafter, the parties timely filed their Proposed Recommended Orders, both of which were considered in preparing this Recommended Order.

FINDINGS OF FACT

1. The Department is the administrative agency of the State of Florida having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 373 and 403 and the rules promulgated thereunder in Florida Administrative Code Title 62. In addition, the Department is specifically authorized to administer and enforce the management and storage of surface waters and the environmental resource permitting programs in chapter 373, part IV, as implemented by chapter 62-330.

2. Petitioner, Charles Barnes, and his wife, Virginia Barnes, are the owners of record of the upland property located at 4419 Cedar Road, Orange Park, Clay County, Florida 32065 (Barnes Property).

3. Petitioner, Edwin “Carter” Freeze, is the owner of record of the upland property located at 4397 Cedar Road, Orange Park, Clay County, Florida 32065 (Freeze Property).

4. The eastern boundaries of both the Barnes and Freeze Properties are directly adjacent to Doctors Lake, a waterbody that extends west from the St. Johns River just south of Orange Park at Doctors Inlet. Doctors Lake is a relatively shallow waterbody, having a maximum depth of about 14 feet in channelized areas, and is tidally influenced with a differential of approximately one foot.

5. The Board of Trustees of the Internal Improvement Trust Fund (the Board) owns the bottom of Doctors Lake adjacent to the Barnes and Freeze upland Properties, waterward of the mean high-water line. The Department performs all staff duties and functions related to the administration of state lands, pursuant to chapter 253, Florida Statutes.

6. Development along Cedar Road, including both the Barnes and Freeze Properties, is limited to the eastern (i.e., lake side) side of Cedar Road. The Federal Emergency Management Agency (FEMA) has classified the area of development as an AE floodplain.

7. A railroad track grade lies immediately west of Cedar Road through a large wetland.[3] Beneath the railroad grade is a 30-inch reinforced concrete pipe culvert that is reported to drain runoff from the westerly wetlands to a drainage ditch on the west side of Cedar Road. Several culvert pipes under Cedar Road convey water from the ditch on the west side of Cedar Road to the east side, the largest of which is a 36-inch x 40-inch elliptical corrugated metal pipe which conveys water to a drainage canal located on the east side of Cedar Road between the northern boundary of the Barnes Property and the southern boundary of the Freeze Property. Runoff from a section of Cedar Road and the adjacent developed properties is also conveyed to the same drainage canal via roadside swales. The culvert pipes under Cedar Road, including the largest elliptical corrugated metal pipe, are in poor condition which significantly impacts their flow capacity and efficiency. The drainage canal between the Barnes and Freeze Properties begins at the eastern edge of Cedar Road, runs laterally parallel between the two properties, and discharges directly to Doctors Lake.

8. On April 6, 1995, the Department issued a Wetland Resource Management Permit No. 102619932 to Charles Barnes and E. Kent Fleming[4] to "construct approximately 200 feet of vertical bulkhead[5] within an unnamed drainage canal to Doctors Lake, Clay County, as depicted in the

[3] The wetland is approximately 500 feet to 2,500 feet (from west to east) and 2,800 feet (from north to south) comprising approximately 175 acres.

[4] Mr. Fleming was the prior owner of the Freeze Property located at 4397 Cedar Road.

[5] The back page of the 1995 Permit (Bates stamp JE000085) references "Seawall length 200 ft., Seawall material 2.5 Sea Pressure Treated Wood, and Type of riprap or seawall material: wood 2.5 Pressure Treat 2 x 8 Vertical Wall."

permit drawings" along the north and south banks of the lateral drainageway separating the two properties (1995 Permit).[6]

9. The bulkhead walls authorized by the 1995 Permit were situated on private property and were not recorded as part of a lawful easement/right of way of record within property deeds of Clay County, Florida for a Clay County/St Johns Water Management District (WMD) stormwater system. Mr. Barnes and Mr. Fleming's purpose for building the bulkheads was to protect their private properties from land erosion caused by Clay County's discharge, not to operate a stormwater system. When issuing the 1995 Permit, the Department did not request or require stormwater information or engineering that would be required for a stormwater system. Rather, Mr. Barnes and Mr. Fleming were instructed to submit a hand-drawn plan (which the Department supplied an example) to depict the plan and assure they did not pollute the air or water.

10. The 1995 Permit authorized the bulkheads in between the two Properties to be located approximately 4.6 to 5.6 feet apart, so that the drainage canal maintained "a functional width of 4.5 to 5.5 feet," to sufficiently convey normal stormwater flows, and stop erosion of land on both properties which was undermining the foundations of the houses on both sides of the canal.

11. On September 5, 2018, within one year from a discrete event (Hurricane Irma in September 2017) causing damaging flooding, the Petitioners submitted a request for a verification of exemption (2018 Exemption Request) to the Department to replace "200 linear feet of existing private residential, single-family bulkhead located within a 3.5 ft to 4.5 ft wide manmade ditch that extends to Doctors Lake," between the Barnes and

[6] The Wetland Resource Management Permit was the predecessor to an Environmental Resource Permit (ERP), issued pursuant to chapter 373, part IV, and chapter 62-330.

Freeze Properties. The information supplied by Petitioners for the Project stated that the new bulkheads would be placed immediately in front of the existing bulkheads (i.e., on the interior of drainage ditch) and would be approximately 6 inches higher than the existing bulkheads.

12. Michelle Neeley, who was a Department permit manager at the time, and Mark Marousky, who was then a Department environmental specialist, performed a site visit for the 2018 Exemption Request to access what could be done at the site based on applicable rules and regulations. During this inspection, Petitioners were told that they would not qualify for an ERP, but would qualify for an exemption.

13. On October 3, 2018, the Department issued the 2018 Exemption for the Project pursuant to section 373.406(6).

14. After the 2018 Exemption was issued, for over a year between May 2019 and June 2020, Petitioners conferred with the Department, Petitioners' consultants, as well as engineers with Clay County, the St. Johns WMD, and the U.S. Army Corps of Engineers, to discuss alternative projects and/or designs that could protect their properties, address flooding issues on Cedar Road, and stormwater being directed to the canal between the Barnes and Freeze Properties to Doctors Lake. During this time period, Petitioners hired Engineer John Kendell to evaluate the bulkhead failure and prepare alternative solutions.

15. The reason Petitioners sought the 2018 Exemption in the first place, and the reason Petitioners wanted to explore alternatives, is because failure of the 1995 bulkheads had eroded the ground on either side of the drainage canal next to their homes. In consultation with Mr. Kendall and others, Petitioners realized that installation of new supports on the outside of the bulkheads was unworkable because of the lack of room between the two houses (which were only 25 feet apart) and removal of the existing bulkheads would have likely undermined the foundations of their homes. The narrow space also made it impractical to bring in heavy equipment because there

was not enough room and it was feared that equipment vibration would further damage the supporting ground. Even the installation of sheet piles as authorized by the 2018 Exemption posed a potential risk to the foundations of their homes.

16. In his credible, fact-based deposition testimony, Engineer John Kendell,[7] explained that when he accessed the site in 2019, the original 1995 bulkheads in the ditch had partially collapsed and were restricting waterflow through the ditch.

17. The most promising alternative that Mr. Kendell explored was the installation of a smooth 48-inch pipe the length of the ditch. The pipe would have been sufficient to convey the upstream discharge of up to 50 cubic feet per second (cfs), performing even better than the 1995 canal before the collapse of some of the bulkhead walls. Ultimately, however, Petitioners did not proceed with the alternative proposal because the Department believed the alternative would have an impermissible "impact."

18. The Department's belief that installation of the 48-inch pipe would have a prohibited "impact" is based on Department engineer flow reports suggesting that, at flows rates above 50 cfs, the proposed pipe would be less efficient than the bulkhead ditch as originally constructed in 1995. The reports however, did not consider the fact that, by 2019, the bulkheads were failing and constricting the flow. In addition, evidence of the flow rates of the failing culverts under Cedar Road was not provided. In fact, neither the Department's engineers, nor any other expert, provided expert testimony in this proceeding.

19. After it became evident that alternatives would not be approved, Petitioners began construction of the bulkhead replacement Project described in the 2018 Exemption sometime between March and April 2021.

[7] Mr. Kendell is a professional engineer with years of experience, but did not offer expert testimony because of a directive from his employer, the U.S. Army Corps of Engineers, specifically prohibiting him from offering expert testimony in this case.

20. Petitioners did not publish notice of the 2018 Exemption or provide copies of the 2018 Exemption to residents of Cedar Road prior to starting construction of the Project. However, as required by the conditions of the 2018 Exemption, Petitioners posted a copy of the 2018 Exemption at the Project site during the Project's construction.

21. After receiving a complaint from a resident of Cedar Road that the Project was causing additional flooding,[8] the Department performed an inspection of the Project site on May 5, 2021.

22. After being contacted by Cedar Road resident Matt Taylor, then-DEP permit supervisor Michelle Neeley, on May 21, 2021, emailed Mr. Taylor a copy of the 2018 Exemption.

23. The 2018 Exemption contained a "Notice of Rights" section, with a subsection entitled "Time Period for Filing a Petition," stating:

> Petitions filed by any persons other than the applicant, and other than those entitled to written notice under Section 120.60(3), F.S. must be filed within 21 days of publication of the notice or within 21 days of receipt of the written notice, whichever occurs first.

24. As a non-applicant, upon his receipt of a copy of the 2018 Exemption, Mr. Taylor was placed on notice that he had 21 days in which to file a petition challenging that agency action.

25. On June 5, 2021, the Department received an original petition from Matt Taylor challenging the 2018 Exemption. The Department dismissed the original petition as "legally insufficient," with leave to amend. Then, on August 19, 2021, the Department received Matt Taylor's Amended Petition for administrative hearing challenging the 2018 Exemption. On August 28,

[8] Between May 2021 and December 2021, the Department investigated the flooding issues in the Cedar Road area, including the permitting history of the Project site, aerials, historical and current photographs of the area, and stormwater plans and engineering modeling submitted to the Department. The Department also conducted meetings with Petitioners and the St. Johns River WMD and Clay County. None of those governmental entities offered viable solutions for the problems at the time.

2021, the Department deemed the Amended Petition sufficient, thereby rendering the 2018 Exemption "proposed," rather than final, agency action.

26. Construction of the Project was completed in mid-August 2021.

27. On August 14, 2021, Mr. Taylor emailed the Department photos of flooding along Cedar Road, which he alleged was caused by the Project.

28. On August 25, 2021, the Department performed an as-built inspection of the Project.

29. On September 7, 2021, Ms. Neeley received a Memorandum from Richard C. Smith, Jr., P.E., Director of Engineering and Traffic Signals, Clay County Board of Commissioners, stating:

> SUBJECT: Cedar Road Drainage Issue
> Clay County, Florida
> Ms. Neely,
>
> We understand you've been engaged in the drainage issues in this area. We wanted to update you from the County's perspective.
>
> Before Cedar Road and the houses along it were built, this entire area would have been wetlands along Doctors Lake shoreline. It was inadequately filled for the road and house construction under then current standards. Stormwater runoff from a large wetland area flows under the CSX railroad into a small ditch on the west side of Cedar Road, opposite of the lake. This ditch only has one outlet to drain the lake through a culvert under the road. Water may also flow in the ditch to a creek a third of mile to the south, this would have to be verified with a survey. The lack of outfall for this ditch results in it regularly overtopping the road.
>
> There is no county easement over the existing outfall ditch, nor is there room for improvement. An additional outfall would require a landowner to provide the County with a drainage easement in a suitable location. There are some very narrow lots being used as side yards that may not have any

> intention of being built on. There is no funding for this in the current budget year.
>
> Another possible solution is to raise the road a couple inches, reducing how often the road will overtop with water and decrease the flooding depth. However, this can have unintended consequences as the low point in the new road profile would could disproportionately affect nearby properties by rerouting flooding waters to that location. Additionally, water that presently stands on the road would then drain to resident yards.
>
> An offsite improvement may also be possible as it has recently been brought to our attention that a swale exists on the upstream side of the CSX railroad. This swale could potentially be used by the County to attenuate stormwater runoff. We will explore this option with CSZ and FDEP.
>
> It is important to note that with the extremely low elevation of this area, regular flooding will always occur here. The intention is that any drainage improvements may reduce the frequency or severity of flooding, but not eliminate it.
>
> Let us know if you have further questions.
>
> /S/

30. Michell Neely, who was the DEP employee most familiar with the Project at the time that the 2018 Exemption was issued, gave credible testimony consistent with and verifying the information related in the September 7, 2021, memorandum from Richard C. Smith, Jr.

31. After review, others at the Department, not Ms. Neely,[9] determined that the Project, as designed and constructed, did not qualify for an ERP exemption under section 373.406(6) and rule 62-330.050(9)(b)1. based on its conclusion that the Project adversely impounds or obstructs water flow,

[9] Ms. Neely testified that the decision to retract the exemption was "beyond her paygrade."

causes adverse impacts to existing surface water storage conveyance capabilities, and appears to cause adverse flooding impacts to adjacent lands.

32. As a result, the Department issued a denial of Petitioners' 2018 Exemption request on January 20, 2022 (Exemption Denial), stating the Project was not exempt from the need to obtain an ERP and that when submitting an ERP application for the Project, Petitioners must provide additional information, such as an analysis of the existing water flow and conveyance capabilities of the drainage ditch should be developed and submitted by a professional engineer.

33. On February 8, 2022, Petitioners submitted a "letter" to the Department, disputing the Department's denial of the 2018 Exemption Verification. Petitioners' letter was dismissed by the Department as "legally insufficient" with leave to amend. On March 31, 2022, Petitioners filed an Amended Petition of Exemption Revoke (Petition), requesting a formal administrative hearing and challenging the Department's denial of the 2018 Exemption. The Petition was deemed sufficient by the Department on or about April 21, 2022.

34. On August 13, 2022, the Petition was referred to DOAH where it was assigned DOAH Case No. 22-2744.

35. The canal between Petitioners' properties is now the only drainage outlet along Cedar Road to convey water runoff from the wetland area on west-side of Cedar Road because, as Cedar Road area developed over time, other drainage ditches were filled in.[10] In addition to less drainage, the stormwater outfalls have significantly increased over time as a result of the

[10] As depicted in a National Wetlands Survey, Exhibit P58, the wetland area west of Cedar Road formerly drained towards Blueline Stream south of Petitioners' properties. However, as depicted on a subsequent County Map of the Cedar Road drainage study area (Exhibit P13), a berm installed, presumably by Clay County, in the area labeled on the map as the "breech area," diverted the water flow north into the ditch that eventually drains north and into the drainage ditch between Petitioners' properties. Other historical drainages in the area have also been filled with the apparent approval (or at least without objection) from Clay County, St. John's WMD, or the Department.

development of an 85-home subdivision and enlargement of the community college to the west of the wetland area that now drains towards Petitioners' and surrounding low-lying properties on the east side of Cedar Road.

36. The opening of the drainage ditch at Cedar Road between Petitioners' properties is approximately 46-inches (3.83 feet). Another culvert-pipe from the Barnes Property discharges water into the subject drainage ditch near this opening.

37. The "bulkheads" located on Petitioners' properties on either side of the drainage ditch are retaining walls that "provide stabilization for the banks [of the properties]." The drainage conveys water runoff to Doctors Lake. There is no county or public easement making the ditch a part of a public runoff system because neither Clay County nor any other entity obtained an easement along the drainage ditch between Petitioners' Properties. Rather, the subject ditch and bulkheads are on private land owned by Petitioners.

38. When originally constructed in 1995, the ditch had an approximate width of 4.5 feet to 5.5 feet measuring from the walls behind, but not including the width of supporting pilings protruding into the waterside of the canal,[11] between the Barnes and Freeze Properties.

39. The Project was constructed as authorized in conformance with the 2018 Exemption at a cost to Petitioners of more than $92,000. The Project was completed by installing vinyl corrugated sheet piles inside the existing wooden bulkhead walls that were installed in 1995. Starting approximately two to three feet from the road, the sheet piles were installed along the entirety of the canal between Petitioners' properties and extended approximately six inches higher than the existing bulkheads.

[11] The actual width of the 1995 canal at the time the 2018 Exemption was granted is best described in the 2018 Exemption itself, which states that the Project is to "[r]eplace 200 linear feet of existing private residential, single-family bulkhead located within a 3.5 ft to 4.5 ft wide manmade ditch that extends to Doctors Lake. . . ."

40. As built in accordance with the 2018 Exemption, the current canal has a width of 26 inches (2.17 feet) at its narrowest points between approximately 20 inch segments protruding 8.5 inches from each side of the canal in an alternating pattern of corrugated sheet piles, and widths of 43 inches (3.3 feet) between the alternating 20-inch segments of the corrugated sheet piles that do not protrude.[12] The ditch varies in depth from 4.5 to 5.5 feet along the drainage way from Cedar Road to Doctors Lake.

41. Petitioners acknowledge the as-built Project narrowed the width of the drainage ditch as originally built in 1995. Petitioners, however, dispute that the as-built Project causes additional flooding.

42. Mr. Taylor's allegations that the Project caused flooding were never proven. In support of his allegations, Mr. Taylor submitted photos showing water on Cedar Road and in his front yard. Such occurrences, however, were common both before and after the Project, because of the low topography of Cedar Road, inadequate fill, tidal influxes of Doctors Lake, upland development, retention pond failures, inclement weather, and the overall lack of proper drainage in the area.

43. In support of its preliminary decision to deny the 2018 Exemption, the Department relies on water flow calculations from its engineers, a letter from Clay County stating that the as-built Project reduces water flow, and anecdotal evidence of flooding allegedly caused by the Project based on photos and non-expert testimony from Cedar Road neighbors. There was no reliable evidence comparing the flow of the ditch in its failed condition before construction of the Project,

44. Moreover, as explained by Mr. Kendall, which fact-based explanation is credited, the ditch between Petitioners' properties is, at best, only a component, not a stormwater system. As such, especially under the facts, the

[12] The Department's calculations with the narrower measurement of only 26 inches for the width of the canal differs because DEP did not measure the sides from the wider openings between the sheet piles.

as-built Project should not be held responsible or to the standards for managing stormwater flow or preventing flooding caused by other factors.

45. When the bulkheads were first permitted in 1995, no engineering, no stormwater flow rates, and no conveyance capabilities were required. At the time, there was no housing development on the other side of the wetlands, though the junior community college was in existence.

46. The drainage canal constructed under the 1995 Permit and the Project as completed in compliance with the 2018 Exemption was not designed, and never could prevent, the periodic flooding that has occurred in the area from influences beyond the canal and its capacities.

47. It is apparent that the tremendous expansion of the higher-elevation properties on the west side of the wetlands and the outflow from those activities, together with the closing-off and rerouting of previous drainages, are responsible for the extra flooding over the years, not the Project.

48. While the installation of sheet piles as authorized in the 2018 Exemption may have narrowed the canal, under the circumstances, the narrowing had only a minimal impact, if any, on flooding in the area, which has occurred both before and after completion of the Project.

49. As noted by former Department permit manager, Michelle Neely, in her testimony at the hearing in this case:

> We looked at the current condition that it was in. It was in terrible condition given the fact that 175 acres of stormwater was running through a tiny little ditch and it was never meant to be there in the first place, given the information that you read from Clay County themselves that told you that it could not handle that. And we were trying to come up with something to stabilize that water flow. So given that situation, anything was better than what was previously done.

50. Under the facts and circumstances, the Project had only an insignificant, if any, impact on increased flooding in the area, which has occurred both before and after the Project.

51. In fact, the Project, as completed, lifted failing bulkheads, saved Petitioners' properties from further erosion that threatened to undermine their homes, and provided an improved conduit for stormwater after normal rainfall.[13]

CONCLUSIONS OF LAW

52. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

53. The Department is an agency of the state defined in section 120.52(1)(b), Florida Statutes, with regulatory jurisdiction over the Project, pursuant to chapter 373, Part IV, and rules adopted pursuant thereto in chapter 62-330.

54. All statutory requirements for convening this final hearing have been satisfied. A preponderance of the evidence demonstrates that Mr. Taylor timely filed a petition challenging the 2018 Exemption after obtaining a copy of the 2018 Exemption. Fla. Admin. Code R. 28-106.111, § 120.54(5), Fla. Stat.; and *City of St. Cloud v. Dep't Envtl. Reg.,* 490 So. 2d 1356, 1358 (Fla. 5th DCA 1986) (time to challenge an agency action does not run until you see a copy of the agency action advising how to challenge).

55. Upon the filing of that petition, the Department's issuance of the 2018 Exemption became "proposed" agency action, wherein the agency can "change" its position. *See Capeletti v. State, Dep't of Transp*., 362 So. 2d 346 (Fla. 1st DCA 1978) (failure to provide a written clear point of entry, as provided by statute or rule, to challenge agency action results in that agency action being preliminary only, and the persons whose substantial interests

[13] 15 cfs according to Mr. Kendall's credited testimony.

are determined or affected may challenge that action at any time until they have received such written clear point of entry, and either challenged the agency action or waived the right to such challenge); *Capeletti Bro., Inc. v. State Dep't of Gen. Serv.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983) ("APA hearing requirements are designed to give affected parties an opportunity to change the agency's mind").

56. This is a de novo proceeding, pursuant to section 120.57, intended to formulate final agency action rather than to review the Department's preliminary decision to deny the Exemption Verification and the preliminary agency action is not entitled to a presumption of correctness. § 120.57(1)(k), Fla. Stat.; *See also, Dep't. of Transp. v. J.W.C. Co., Inc.,* 396 So. 2d 778, 785 (Fla. 1st DCA 1981) (quoting *McDonald v. Dep't of Banking and Fin.,* 346 So. 2d 569, 584 (Fla. 1st DCA 1977). In addition, interpretation of a statute or rule in an administrative proceeding is de novo. Art. V, § 21, Fla. Const.; *See also, Kanter Real Est., LLC v. Dep't of Env't Prot.,* 267 So. 3d 483, 487 (Fla. 1st DCA 2019), *reh'g denied* (Fla. 1st DCA 2019).

57. The Department has final order authority.

58. The standard of proof in this case is a preponderance of the competent, substantial evidence. § 120.57(1)(j), Fla. Stat.; *Dep't. of Transp. v. J.W.C. Co., Inc.,* 396 So. 2d 788, 790 (Fla. 1st DCA 1981).

59. As stipulated by the parties, the governing legal requirements for an environmental resource permit are set forth in chapter 373, Part IV, and the rules of the Department contained in chapter 62-330, including the *Environmental Resource Permit Applicant's Handbook* (A.H.) Volumes I and II (St. Johns River WMD) incorporated by reference in rule 62-330.010.

60. As further stipulated, Petitioners bear the initial burden of going forward with the evidence and the ultimate burden of proving entitlement to the 2018 Exemption by a preponderance of evidence that the Project met the applicable requirements of chapters 373, Part IV, and chapter 62-330. *Dep't. of Transp. v. J.W.C. Co., Inc.,* 396 So. 2d 788, 788-89 (Fla. 1st DCA 1981).

61. Section 373.406(6) provides:

> [T]he department may exempt from regulation under this part those activities that the . . . department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources . . . and the department [is] authorized to determine, on a case-by-case basis, whether a specific activity comes within this exemption. Requests to qualify for this exemption shall be submitted in writing to . . . the department, and such activities shall not be commenced without a written determination from . . . the department confirming that the activity qualifies for the exemption."

§ 373.406(6), Fla. Stat.

62. A preponderance of the evidence, as outlined in the Findings of Fact, above, demonstrates that Petitioners are entitled to the 2018 Exemption.

63. After receiving Petitioners' September 5, 2018, written request for verification of exemption, the Department's letter dated October 3, 2018, notifying Petitioner of the 2018 Exemption issued on October 3, 2018, stated, in part:

> Based on the information submitted, the Department has verified that the activity as proposed is exempt under Chapter 62-330.051(12)(b), Florida Administrative Code, from the need to obtain a regulatory permit under Part IV of Chapter 373 of the Florida Statutes.

64. The 2018 Exemption further advised Petitioners that the Project application qualified for a State Programmatic General Permit (SPGP), and that a separate permit from the Army Corp of Engineers would not be required.

65. The initial sentence in rule 62-330.051, referenced in the 2018 Exemption, states, "The activities meeting the limitations and restrictions below are exempt from permitting."

66. Rule 62-330.051(12)(a) & (b) provide:

> (12) Construction, Replacement, Restoration, Enhancement, and Repair of Seawall, Riprap, and Other Shoreline Stabilization –
>
> a) Construction, replacement, and repair of seawalls or riprap in artificially created waterways under section 403.813(1)(i), F.S., and within residential canal systems legally in existence under chapter 403 or part IV of chapter 373, F.S, including only that backfilling needed to level the land behind seawalls or riprap.
>
> (b) The restoration of a seawall or riprap under section 403.813(1)(e), F.S., where:
> 1. The seawall or riprap has been damaged or destroyed within the last year by a discrete event, such as a storm,[14] flood, accident, or fire or where the seawall or riprap restoration or repair involves only minimal backfilling to level the land directly associated with the restoration or repair and does not involve land reclamation as the primary project purpose. See section 3.2.4 of Volume I for factors used to determine qualification under this provision;
> 2. Restoration shall be no more than 18 inches waterward of its previous location, as measured from the waterward face of the existing seawall to the face of the restored seawall,[15] or from the waterward slope of the existing riprap to the waterward slope of the restored riprap; and
> 3. Applicable permits under chapter 161, F.S., are obtained.

Fla. Admin. Code R. 62-330.051.

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[14] The 2018 Exemption Request was made to repair the bulkheads within one year after flooding from Hurricane Irma in 2017.

[15] The Project met this condition. From the narrowest part of the 1995 canal (3.5 ft.= 42 inches), the reduction to 26 inches is only 16 inches (8 inches waterward from each side of the canal). From the widest part of the 1995 canal (4.5 ft. = 54 inches), the reduction to 26 inches constitutes only a 14-inch reduction waterward from each side). The alternating wider parts of the canal (43 inches) constructed for the Project are even less waterward encroaching.

67. Section 403.813(1)(i), cited in rule 62-330.051(12)(a), quoted above, provides for an exception to permitting for "[t]he construction of seawalls in artificially created waterways when such construction will not violate existing water quality standards, impede navigation or affect flood control."

68. Section 403.813(1)(e), cited in rule 62-330.051(12)(b), quoted above, provides for an exception to permitting for "[t]he restoration of seawalls at their previous location or upland of, or within 18 inches waterward of, their previous locations. This may not affect the permitting requirements of chapter 161, and department rules shall clearly indicate that this exception does not constitute an exception from the permitting requirements of chapter 161."

69. In its Exemption Denial letter dated January 20, 2022, sent approximately six months after Matt Taylor's August 19, 2021, amended petition challenging the 2018 Exemption was deemed sufficient, the Department stated, in pertinent part:

> The filing of a sufficient petition for administrative hearing makes the Department's October 3, 2018, Exemption Verification proposed agency action subject to the administrative review process.
>
> Upon further review, it has been determined that the Project does not qualify for an exemption under Section 373.406(6), F.S.
>
> The Department in reviewing the application materials has determined the activity is not exempt from the need to obtain an environmental resource permit, for the reasons described below. This letter replaces and supersedes the previous verification of exemption. Additional authorization must be obtained prior to commencement[16] of the proposed activity. This letter does not relieve you from the responsibility of obtaining other federal, state, or local authorizations that may be required for the

[16] The Project was completed more than six months prior to the Exemption Denial.

> activity. Please refer to the specific section(s)dealing with that portion of the review below for advice on how to proceed.
>
> **1. Regulatory Review – EXEMPTION NOT VERIFIED**
>
> The proposed activity, replace 200 linear feet of existing private residential, single-family bulkhead located within a 3.5 ft to 4.5 ft wide manmade ditch that extends to Doctors Lake, does not qualify for a regulatory exemption pursuant to 62-330.050(9)(b)1. F.A.C., because the activity appears to adversely impound or obstruct water flow and can cause adverse impacts to existing surface water storage and conveyance capabilities. The proposed project also appears to cause adverse flooding impacts to adjacent land (Exhibit II).
>
> The applicant did not provide information to show the effects of the proposed activity would not cause adverse impacts to water flow, surface water conveyance capabilities, and/or flooding impacts to adjacent lands.

70. In reversing its previously issued 2018 Exemption, the Department's Exemption Denial also advised Petitioners that they must apply for an Environmental Resource Permit, retracted its earlier declaration that the project qualified for a SPGP permit, and advised that a separate permit from the Army Corp of Engineers would now be required.

71. Rule 62-330.050(9)(b)1., referenced in the Department's Exemption Denial, provides:

> (9) The following apply when specified in an exemption in Rule 62-330.051, F.A.C.:
>
> * * *
>
> (b) Construction, alteration, and operation shall not:
> 1. Adversely impound or obstruct existing water flow, cause adverse impacts to existing surface water storage and conveyance capabilities, or

> otherwise cause adverse water quantity or flooding impacts to receiving water and adjacent lands;

72. The Department contends that the Project failed to comply with applicable standards quoted above because the Project adversely impounds or obstructs water flow, causes adverse impacts to existing surface water storage conveyance capabilities, and appears to cause adverse flooding impacts to adjacent lands.

73. A preponderance of the evidence, however, demonstrates that the Project's adverse impact on flooding, if any,[17] is de minimus, and that any flooding is a result of the low topography, inadequate fill, upland development, retention pond failures, inclement weather, and the overall lack of proper drainage in the area.

74. In further support of its argument that the 2018 Exemption should be denied, the Department argues that the bulkheads repaired by the Project are not "seawalls" as authorized in rule 62-330.051 and section 403.813, quoted above, but only "retaining walls." This argument, however, ignores a plain reading of the definition of seawalls,[18] and the Department's prior recognition of such in the 1995 Permit.[19] Consistent with the statutory definition of seawalls, it is clear that the bulkheads were designed and function as a man-made wall or encroachment made to break the force of waves flowing down the canal and to protect the shore from erosion.

75. The Department further argues that the canal between the Petitioners' property is not a canal, but rather a stormwater management

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[17] Alleged modeling suggesting adverse flooding impacts by the Project was not supported by expert testimony, had no accurate base-line as to output of failing culverts or volume of flow from the wetlands, and was otherwise without foundation.

[18] "Seawall" is defined in section 373.404(17) as a man-made wall or encroachment, except riprap, which is made to break the force of waves and to protect the shore from erosion; *see also* A.H., Section 2.0(a)109.

[19] The 1995 Permit refers to the length and materials for construction of "seawalls." *See* Jt. Exh. 8, Bates page 85).

system that does not qualify for an exemption.[20] Aside from the fact that the waterway between Petitioners' properties has been referred to as a canal, as well as a ditch, over the years and throughout the pleadings, filings and exhibits, a preponderance of the evidence demonstrates that the canal is not a stormwater management system.[21] Rather, it is the unfortunate recipient over private lands of overwhelming outflows from a failed series of upstream systems for which DEP, until now, showed little interest.

76. The Project, as implemented, successfully repaired failing bulkheads that were pinching off the canal, prevented further undermining of the foundations of Petitioners' homes, and stabilized the canal so that it could continue to convey normal rainfall outflows. Petitioners otherwise proved, by a preponderance of the evidence, that the statutory and rule standards required for the exemption issued by the 2018 Exemption for the Project were met and that the exemption should be issued in accordance with section 373.406(6).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order finding that Petitioners' Project qualifies for an exemption from the need to obtain an Environmental Resource Permit pursuant to chapter 62-330 and sections

[20] Throughout the lengthy history of this case, DEP never asserted that the ditch was part of a "stormwater management system" until the filing of its PRO. Notably, the Second Amended Joint Prehearing Stipulation does not allege that stormwater management systems standards do or should apply to this case in the stipulated facts and law, or in the facts and law remaining in dispute. Failure to identify issues of fact or law to be litigated constitutes a waiver of those issues for disposition. *See*, *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037 (Fla. 4th DCA 2015).

[21] "Stormwater management system" means a system which is designed and constructed or implemented to control discharges which are necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system. *See* § 373.403(10), Fla. Stat; *see also* Finding of Facts 9 and 44.

373.406 and 403.813 and the Project is authorized as in the previously issued 2018 Exemption.

DONE AND ENTERED this 5th day of November, 2024, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of November, 2024.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

EXHIBIT A