

FACT SCENARIO

Mr. Potter hired Clarence, Inc., a marine contracting business, to construct a dock measuring over 2,100 square feet on the Indian River without a permit. The terminal platform measures over 160 square feet. The dock is located within the Indian River Aquatic Preserve and has an access walkway that was built across wetlands that are landward of the mean high water line.

The permit fees would have been \$500.00 for the construction permit and \$200.00 for the application for use of sovereign submerged lands.

Potter previously applied in 1997 to construct a 5,000 square foot dock and boathouse at this location. The permit was denied but he started construction anyway. Clarence, Inc. conducted the work. DEP stopped him before it got very far. A short form consent order was entered and Potter paid a \$1500 penalty. This settlement does not meet the criteria for increasing the penalty for a history of non-compliance because the penalty is below \$2000 and the consent order was entered in 1998.

Under 403.121(3)(c), Fla. Stat., Potter is liable for the penalties assessed for the dredging and filling violation and the economic benefit enhancement. Clarence, Inc. is only liable for the \$5000 penalty for a contractor.

The assessment of administrative fines for state lands violations is different from the ELRA procedure in four important regards: First, administrative fines can only be assessed if the person “knowingly refuse[s] to comply with any provision of Chapter 253, F.S., willfully violate[s] any provision of Chapter 253, F.S., or willfully damage[s] state land. . . .” Thus, we must prove the violation was done with prior knowledge of the legal requirements for prior authorization. Second, State lands administrative fines are not limited to \$10,000.00 per NOV as are ELRA penalties. Third, state lands administrative fines cannot be imposed until the violator has been given at least 20 days to cure the violation. The 20-day limitation is a minimum but you should give more time if more time is reasonably needed to cure the violation. Fourth, if the violators cease the violation and apply for consent to use state lands, and enter a consent order with the Department to restore the problems, the state lands fine cannot exceed \$2,500.00.

In this fact scenario, Potter is clearly liable for the state lands violations because the Department told him that state lands authorization was required. If he had not been told or if you cannot prove that he had prior knowledge of the requirement, he cannot be fined for the state lands violation. Clarence, Inc. would not be liable unless it was clear that it knew authorization was required before it commenced construction. In this scenario Clarence, Inc. was involved in the first violation so it is reasonable to infer that it had prior knowledge of the requirements. Potter and Clarence, Inc. are both liable for

a penalty and each are fined \$2,500.00 individually. It is a better practice to set a specific fine for each violator and not make the violators jointly and severally liable for the same fine. "Jointly and severally liable" is a legal term that means Clarence, Inc. and Potter would both be liable for the same \$2,500.00 fine, but that only one fine is imposed. If either Respondent pays the fine in full, or if they both pay a portion, the debt is satisfied. Joint and several liability for a fine makes collection more difficult.

Under Rule 18-14.005 the Respondents must be given at least 20 days to cure the violation before the fine is imposed. If the violation is cured, no penalty can be imposed. If no corrective actions are required, the fine will be due immediately. Rule 18-14.002(2) lists the considerations for imposing a fine. The penalty can be from \$1-\$2,500, for first offense based on aggravating or mitigating circumstances. In this case we assessed the maximum penalty based on the earlier violation and the economic benefit gained by Potter for the increased value of his home.

Because of the differences between state lands and ELRA, the corrective actions will be complicated and must be carefully thought through. For example, if you are requiring complete restoration you should delay the payment of the state lands penalty until the time for compliance expires.

As you can see, combining State Lands and ELRA violations can get complicated. It is important to carefully draft the NOV to ensure the allegations are clearly alleged and the Respondents will not be confused.

BEFORE THE STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION
and BOARD OF TRUSTEES OF THE
INTERNAL IMPROVEMENT TRUST FUND,

IN THE OFFICE OF THE
_____ DISTRICT

Petitioners,

v.

OGC FILE NO.:

[For corporations, insert entire name as listed in corporate information records. For joint owners of the property, include all owners. For businesses not listed in corporate information, contact OGC for advice on naming the proper parties.],

JAMES POTTER and CLARENCE, INC.,

Respondents.

NOTICE OF VIOLATION,
ORDERS FOR CORRECTIVE ACTION, AND CIVIL PENALTY ASSESSMENT

TO: James Potter
1630 Bailey Drive
Bedford Falls, FL

Clarence, Inc.
c/o Mr. Gower, President
5555 Industrial Lane
Bedford Falls, FL

Certified Mail Numbers

Pursuant to the authority of Section 253.04 and 403.121(2), Florida Statutes (Fla. Stat.) the State of Florida Department of Environmental Protection (Department) and Board of Trustees of the Internal Improvement Trust Fund (Board) give notice to James Potter and Clarence, Inc. (Respondents) of the following findings of fact and conclusions of law with respect to violations of Chapters 253, 373, and 403, Fla. Stat.

FINDINGS OF FACT

PARAGRAPHS APPLICABLE TO ALL COUNTS

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 253, 373, and 403, Fla. Stat., and the rules promulgated thereunder in Florida Administrative Code (Fla. Admin. Code) Titles 18 and 62.

2. The Board is responsible for overseeing state owned lands and ensuring that they are managed in trust for the citizens of the State of Florida pursuant to Chapter 253, Fla. Stat., and the rules promulgated and authorized thereunder, Fla. Admin. Code Title 18. The Department performs all staff duties and functions related to the administration of state lands as provided in Section 253.002, Fla. Stat.

3. [DESCRIBE THE RESPONDENT(S) AND WHAT IT DOES, WHERE IT IS LOCATED. FOR EXAMPLE: Respondent Potter is an individual who owns property located at 1630 Bailey Drive, Bedford Falls, Zuzu County, Florida (Property). The Property is located adjacent to the Indian River.

4. Respondent Clarence, Inc. is a corporation that operates as a marine contracting business and is located at 5555 Industrial Lane, Bedford Falls, Zuzu County, Florida. [Section, Township, Range alone is not sufficient.]

5. [DESCRIBE THE INSPECTION OF THE FACILITY OR PROPERTY THAT LED TO THE DISCOVERY OF THE VIOLATIONS OR THE DEADLINES/ REPORTING REQUIREMENTS THAT WERE NOT MET. Only include those exhibits

that are necessary for the cause of action, such as a permit. Do not include warning letters or inspection reports. You must state enough specific facts so that someone would be able to understand who, what, where, how, and when the violations occurred. This fact recitation must be more detailed than that needed for a consent order.] FOR EXAMPLE:

On December 31, 2001, the Department inspected the Property and discovered that Potter had constructed a dock in the Indian River adjacent to the Property without a permit. The total area of the dock is approximately 2,100 square feet and consists of a walkway and terminal platform. The terminal platform is approximately 500 square feet. The walkway is built across a marsh that is dominated by *Spartina alterniflora*.

The dock is connected to the Property and extends beyond the mean high water line in the Indian River. The Indian River in this location is a Class III water of the state as defined in Fla. Admin. Code Rule 62-302, an Aquatic Preserve as defined in Section 258.39, Fla. Stat. and Fla. Admin. Code Rule 18-20.02, and an Outstanding Florida Water of the state, pursuant to Fla. Admin. Code Rule 62-302.700

6. The Board deraigns title to the submerged real property in the Indian River from the United States under the Equal Footing Doctrine, and by Florida's admission to the Union, Act of March 3, 1845, (Chapter 48, Subsection 1, 5 Stat. 742, Art. X, s. 11, Florida Constitution). The Board holds title to the submerged real property, not otherwise alienated or conveyed, in trust for all the people of the State of Florida. Sections 253.03, 253.12, Fla. Stat.; Art. X, s. 11, Florida Constitution.

7. In 1997, Clarence, Inc. was hired by Potter to construct a 5,000 square foot dock and boathouse adjacent to Potter's property. That application was denied and Potter and Clarence, Inc. were informed by the Department of the requirements for a dock constructed on state property in an aquatic preserve.

8. Clarence, Inc., who was hired by Potter to conduct the work, constructed the existing dock at issue in this Notice of Violation.

[IF YOU ARE INCREASING THE PENALTY FOR A HISTORY OF NON-COMPLIANCE, YOU MUST INCLUDE THE INFORMATION IN SECTION 403.121(7), FLA. STAT. In this fact scenario, the prior consent order does not qualify under ELRA.]

COUNT I

[COUNTS MAY NOT EXCEED \$5,000 AGAINST ANY ONE VIOLATOR (UNLESS YOU ARE USING HISTORY OF NON-COMPLIANCE, ECONOMIC BENEFIT OR MULTI-DAY PENALTIES.) Total ELRA penalties per NOV cannot exceed \$10,000 per person. Each count should contain a separate violation. The counts should describe facts that relate to the violations. If you are assessing multi-day penalties, you must specifically recite the number of days of violation.] FOR EXAMPLE:

9. Potter constructed a dock over the Indian River adjacent to the Property without a permit. Respondents constructed the dock within the Indian River Aquatic Preserve, an Outstanding Florida Water of the state of Florida. The dock measured 2,100 square feet and required an environmental resource permit prior to construction. The walkway was built across wetlands that are characterized by the presence and dominance of *Spartina alterniflora*, which indicative of regular and periodic inundation and saturation.

10. [IF YOU ARE INCLUDING ECONOMIC BENEFIT, YOU MUST INCLUDE IT IN THE SPECIFIC COUNT THAT APPLIES.] FOR EXAMPLE:

The cost of the permit required prior to dredging or filling within a surface water is \$500.00. Potter saved that money by not applying for and receiving the permit.

COUNT II

11. [FOR THE STATE LANDS PENALITIES, YOU MUST SHOW THAT RESPONDENT COMMITTED A KNOWING OR WILFULL VIOLATION. You can do this by showing they had prior knowledge of the requirements or that they have been asked to correct the violation but have refused.] FOR EXAMPLE:

The Department requested that Potter and Clarence, Inc. obtain authorization to use the sovereign submerged lands, but they have refused to make the necessary modifications to the structures and obtain authorization.

12. To date, neither Respondent has corrected the violations, and Potter has not received authorization to use sovereign submerged lands.

13. The cost of the application for authorization to use sovereign submerged lands is \$200.00. Potter saved that money by not applying for and receiving authorization.

COUNT III

14. [ALWAYS INCLUDE THIS COUNT] The Department has incurred expenses to date while investigating this matter in the amount of not less than \$_____.

CONCLUSIONS OF LAW

The Department and Board have evaluated the Findings of Fact with regard to the requirements of Chapters 253, 373, and 403, Fla. Stat. and Fla. Admin. Code Titles 18 and 62. Based on the foregoing facts the Department and Board have made the following conclusions of law:

15. Respondents Potter and Clarence, Inc., are "persons" within the meaning of Sections 253.04, 373.019(12), and 403.031, Fla. Stat.

16. Respondent Potter is the owner of the Property.

17. The Board owns the bottom of the Indian River adjacent to the Property waterward of the mean high water line.

18. Respondent Clarence, Inc., is a contractor retained by Potter who constructed the dock on Respondent Potter's Property.

Administrative Penalties Imposed Under the
Environmental Litigation Reform Act (ELRA)

19. The Department is imposing an administrative penalty of less than or equal to \$10,000.00 against each Respondent in this Notice of Violation as calculated in accordance with Section 403.121, Fla. Stat.

[IN THE FOLLOWING PARAGRAPHS YOU MUST RECITE THE RULES AND STATUTES THAT RELATE TO THE SPECIFIC COUNTS. The penalty assessment for each count should be in a separate paragraph. Each count must have at least one corresponding conclusion of law. FOR EXAMPLE:]

20. The facts in Count I constitute a violation of Fla. Admin. Code Rule 62-343.050, [Rule 62-312.030 in the NW District], which provides that a permit must be obtained from the Department prior to dredging or filling in, on, or over surface waters. The facts also constitute a violation of Section 403.161, Fla. Stat., which makes it a violation to fail to comply with Department rules.

21. The violation in Count I requires an assessment of an administrative penalty against Potter under Section 403.121(3)(c), Fla. Stat. of \$1,000.00 for unauthorized dredging and filling, plus \$2,000.00 because the unauthorized dredging and filling occurred in an Aquatic Preserve or Outstanding Florida Water, for a total administrative penalty of \$3,000.00.

22. The facts related in Count I establish that Potter gained a direct economic benefit of \$500.00 by failing to apply for a permit from the Department prior to dredging or filling.

23. The facts related in Counts I and II establish that Clarence, Inc., conducted the actual construction of the dock over the surface water adjacent to the Property. Pursuant to Section 403.121(3)(c), Fla. Stat., the total administrative penalty against Clarence, Inc., is \$5,000.00.

Administrative Fines for Damaging State Lands

24. The facts in Count II constitute a violation of Fla. Admin. Code Rule 18-21.005, which provides that all activities on sovereignty lands shall require authorization from the Board. The facts establish that Potter and Clarence, Inc. knew the dock required authorization from the Board prior to construction.

25. The violation in Count II requires the assessment of an administrative fine individually against both Potter and Clarence, Inc. under Fla. Admin. Code Rule 18-14.002, of \$2,500 for unauthorized use of sovereign submerged land. If the dock is removed in the manner and time frame as provided in the Orders for Corrective Action below, these state lands administrative fines will not be assessed.

26. The facts related in Count II establish Potter gained a direct economic benefit of \$200.00 by failing to apply for an authorization from the Board prior to dredging or filling.

Total Penalties, Fines, and Expenses

27. The costs and expenses related in Count III are reasonable costs and expenses incurred by the State while investigating this matter, which are recoverable pursuant to Section 403.141(1) Fla. Stat.

28. The total ELRA administrative penalty and economic benefit assessed against Potter is \$3,000.00 plus \$700.00 for a total of \$3,700.00.

29. The total ELRA administrative penalty assessed against Clarence, Inc. is \$5,000.00.

30. The total state lands administrative fine assessed against Clarence, Inc. is \$2,500.00. This state lands administrative fine, but not the ELRA administrative penalties or economic benefit described above, will not be imposed if Clarence, Inc. or Potter fully complies with the corrective actions described in paragraph 33 within 20 days of the receipt of this Notice of Violation.

31. The total state lands administrative fine assessed against Potter is \$2,500.00. This administrative fine, but not the administrative penalties or economic

benefit described above, will not be imposed if Clarence, Inc. or Potter fully complies with the corrective actions described in paragraph 33 within 20 days of the receipt of this Notice of Violation.

ORDERS FOR CORRECTIVE ACTION

The Department and Board have alleged that the activities related in the Findings of Fact constitute violations of Florida law. The Orders for Corrective Action state what you, Respondents, must do in order to correct and redress the violations alleged in this Notice of violation (NOV).

The Department and Board will adopt the Orders for Corrective Action as part of its Final Order in this case unless Respondents either file a timely request for a formal hearing or informal proceeding, pursuant to Section 403.121(2)(c), Fla. Stat., or file written notice with the Department opting out of this administrative process, pursuant to Section 403.121(2)(c), Fla. Stat. (See Notice of Rights.) If Respondents fail to comply with the corrective actions ordered by the Final Order, the Department and Board are authorized to file suit seeking judicial enforcement of the Department's Order pursuant to Sections 120.69, 253.04, 403.121, and 403.131, Fla. Stat.

Pursuant to the authority of Sections 403.061(8) and 403.121, Fla. Stat., the Department and Board propose to adopt in their Final Order in this case the following specific corrective actions that will redress the alleged violations:

32. Respondents shall forthwith comply with all Department and Board rules regarding environmental resource permitting and the use of state lands. Respondents shall correct and redress all violations in the time periods required below and shall comply with all applicable rules in Fla. Admin. Code Chapters 18 and 62 [LIST APPROPRIATE RULES].

[IN THIS SECTION YOU MUST INCLUDE SPECIFIC CORRECTIVE ACTIONS THAT RELATE TO EACH OF THE COUNTS. Please keep in mind that Rule 18-14.005(2) allows the violator to avoid the state lands penalty by correcting the violation within 20

days of receipt of the NOV. This does not apply to the ELRA penalty. Coordinating the state lands and ERP corrective actions can be complicated and should be carefully thought out so that there will be no conflicts. For example, the state lands violation may just involve structures built over state lands, while the ERP violations may be more extensive. In such a situation, you can only waive penalties for correction of the state lands violations.]

33. Within 20 days from the effective date of these Orders, Respondents shall remove the walkway on the Property that was built over the marsh without a permit and all structures that were built waterward of the mean high water line in the Indian River without a permit or state lands authorization.

34. Within 10 days of the effective date of this Order, Potter shall pay \$3,700.00 to the Department for the ELRA administrative penalties and direct economic benefit imposed above. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to [Insert Address].

35. Within 10 days of the effective date of this Order, Clarence, Inc. shall pay \$5,000.00 to the Department for the ELRA administrative penalties imposed above. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to [Insert Address].

36. Within 10 days of the effective date of this Order, Potter and Clarence, Inc. each shall pay \$2,500.00 to the Department for the state lands administrative fines imposed above. Payments shall be made by cashier's check or money order payable to the "Internal Improvement Trust Fund" and shall include thereon the OGC Case

number and the notation "Internal Improvement Trust Fund." The payments shall be sent to [Insert Address]. However, if the unauthorized structures built landwards of the mean high water line of the Indian River were removed within 20 days of the receipt of this Notice, then Potter and Clarence, Inc. do not have to pay these state lands administrative fines.

37. In addition to the administrative penalties, within 10 days of the effective date of this Order, Potter and Clarence, Inc. shall pay _____ to the Department for costs and expenses. Payment shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the OGC Case number assigned to this case and the notation "Ecosystem Management and Restoration Trust Fund." The payment shall be sent to [Insert Address].

NOTICE OF RIGHTS

PLEASE READ THIS CAREFULLY

Respondents' rights to negotiate, litigate or transfer this action are set forth below.

Right to Negotiate

38. This matter may be resolved if the Department and Respondents enter into a Consent Order, in accordance with Section 120.57(4), Fla. Stat., upon such terms and conditions as may be mutually agreeable.

Right to Request a Hearing

39. Respondents have the right to a formal administrative hearing pursuant to Sections 120.569, 120.57(1), and 403.121(2), Fla. Stat., if Respondents dispute issues of material fact raised by this Notice of Violation and Orders for Corrective Action ("Notice"). At a formal hearing, Respondents will have the opportunity to be represented by counsel or other qualified representative, to present evidence and

argument on all issues involved, to conduct cross-examination and submit rebuttal evidence.

40. Respondents have the right to an informal administrative proceeding pursuant to Sections 120.569 and 120.57(2), Fla. Stat., if Respondents do not dispute issues of material fact raised by this Notice. If an informal proceeding is held, Respondents will have the opportunity to be represented by counsel or other qualified representative, to present to the agency written or oral evidence in opposition to the Department's proposed action, or to present a written statement challenging the grounds upon which the Department is justifying its proposed action.

41. If Respondents desire a formal hearing or an informal proceeding, Respondent must file a written responsive pleading entitled "Request for Administrative Proceeding" within 20 days of receipt of this Notice. The request must be in the form required by Fla. Admin. Code Rule 28-106.2015 and include the following:

- (a) The Department's Notice identification number and the county in which the subject matter or activity is located;
- (b) The name, address, and telephone number, and facsimile number (if any) of each respondent;
- (c) The name, address, telephone number, and facsimile number of the attorney or qualified representative of respondent, if any, upon whom service of pleadings and other papers shall be made;
- (d) A statement of when respondent received the Notice; and
- (e) A statement requesting an administrative hearing identifying those material facts that are in dispute. If there are none, the request for hearing must so indicate.

A request for hearing is filed when it is received by the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000.

Right to Mediation

42. If Respondents timely file a request for hearing challenging the Notice, the Respondents have the right to mediate the issues raised in the Notice. If requested, a mediator will be appointed to assist the Department and Respondents to reach a resolution of some or all of the issues. The mediator is chosen from a list of mediators provided by the FCRC Consensus Center ("FCRC"). The FCRC will provide up to 8 hours of free mediation services to the Respondents. A mediator cannot require the parties to settle the case. If mediation is unsuccessful, both parties retain their full rights to litigate the issues before an administrative law judge. The Respondents must select the mediator and notify the FCRC within 15 days of receipt of the list of mediators. The mediation process does not interrupt the time frames of the administrative proceedings and the mediation must be completed at least 15 days before the date of the final hearing.

43. The written request to appoint a mediator must be made within 10 days after receipt of the Initial Order from the administrative law judge appointed to hear the case. The request must be received by the FCRC Consensus Center, Attn. Chris Pedersen, 2035 East Paul Dirac Drive, Room 236, Tallahassee, Florida, 32310, (850) 644-6320, cpedersen@fsu.edu. Once the request is timely received, the FCRC will provide the parties with a list of mediators and the necessary information.

Right to Opt Out of the Administrative Proceeding **(This Right only applies to Count I)**

44. If Respondents do not wish to contest the issues before an administrative law judge, Respondents may file a notice with the Department opting out of the administrative process. However, Respondents have no right to opt out of Count II. Respondents can opt out of Counts I and III. If Respondents opt out as provided in this section, the Department may continue with the administrative action on Count II.

45. Respondents must file their written opt out notice within 20 days after service of the Notice. The written notice to opt out is filed when it is received by the Department's Office of General Counsel, 3900 Commonwealth Boulevard, MS-35, Tallahassee, Florida 32399-3000.

46. Once the Respondents opt out of the administrative process, the Department may sue the Respondents for injunctive relief, damages, costs and expenses and civil penalties. If the Respondents opt out of the administrative process, the Department may ask the judge to assess civil penalties in excess of the amounts in this Notice up to \$10,000.00 per day per violation. The election to opt out of the administrative process is permanent and once the election is made the administrative process cannot be restarted.

Waivers

47. Respondents will waive the right to a formal hearing or an informal proceeding if a request for a formal hearing or informal proceeding is not filed with the Department within 20 days of receipt of this NOV.

48. Respondents will waive the right to opt out of the administrative process if a notice opting out of the administrative proceeding is not filed with the Department within 20 days of receipt of this NOV.

49. These time limits may be varied only by written consent of the Department.

General Provisions

50. The findings of fact and conclusions of law of this Notice together with the Orders for Corrective Action will be adopted by the Department and Board in a Final Order if Respondent fails to timely file a request for a formal hearing or informal proceeding, pursuant to Section 403.121, Fla. Stat. A Final Order will constitute a full and final adjudication of the matters alleged in this Notice.

51. If Respondents fail to comply with the Final Order, the Department and Board are authorized to file suit in circuit court seeking a mandatory injunction to compel compliance with the Order, pursuant to Sections 120.69, 253.04, 373.129, 403.121 and 403.131, Fla. Stat. The Department and Board may also seek to recover damages, all costs of litigation including reasonable attorney's fees and expert witness fees, and civil penalties of not more than \$10,000 per day for each day that Respondents have failed to comply with the Final Order.

52. Copies of Department rules referenced in this Notice may be examined at any Department Office or may be obtained by written request to the District Office.

DATED this _____ day of _____, 20__.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

District Director
_____ District

Copies furnished to:
Jack Chisolm, OGC Enforcement Section

Mail Station 35