STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFREY JAY FRANKEL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 98-1326
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on July 21, 1998, by video teleconference, at sites in Key West and Tallahassee, Florida, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jeffrey Jay Frankel, pro se
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Sugarloaf Key, Florida 33042

For Respondent: Francine M. Ffolkes, Esquire
Department of Environmental Protection
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STATEMENT OF THE ISSUE

Whether Petitioner should be granted the relief requested in his petition challenging the Department of Environmental Protection's Consolidated Notice of Denial [of] Environmental Resource Permit and Consent of Use to Use Sovereign Submerged

Lands.

PRELIMINARY STATEMENT

On or about January 8, 1998, the Department of Environmental Protection (Department) served on Petitioner a Consolidated Notice of Denial [of] Environmental Resource Permit and Consent of Use to Use Sovereign Submerged Lands (Consolidated Notice). By letter dated January 20, 1998, Petitioner challenged the Consolidated Notice and requested an administrative hearing on the matter. On March 20, 1998, the case was referred to the Division of Administrative Hearings (Division) for assignment of an Administrative Law Judge to conduct the hearing Petitioner had requested.

As noted above, the hearing was held on July 21, 1998. Four witnesses testified at the hearing: Petitioner; Grady Sullivan; Edward Barham, an Environmental Specialist II with the Department; and Randal Grau, an Environmental Manager with the Department. In addition to the testimony of these four witnesses, various exhibits were offered and received into evidence.

The evidentiary record was left open to allow the Department the opportunity to take the depositions of R. J. Helbling and Bill Lyons and to offer the transcripts of these depositions into evidence in lieu of the deponents' live testimony. Petitioner was advised that, if he desired to present any additional evidence to rebut Mr. Helbling's and Mr. Lyons' testimony, he needed to so notify the undersigned in writing no later than

seven days from the date of the filing of the deposition transcripts.

On October 20, 1998, the transcripts of Mr. Helbling's and Mr. Lyons' depositions (along with two exhibits, Respondent's Exhibits 25 and 26, that were discussed during the depositions) were filed with the Division. As of November 12, 1998, Petitioner had not filed written notification that he desired to present any rebuttal evidence. Accordingly, on that date, the undersigned issued an Order in which he announced the following:

> 1. The transcripts of Mr. Helbling's and Mr. Lyons' depositions, together with Respondent's Exhibits 25 and 26, are received into evidence.
>
> 2. Proposed recommended orders in this case shall be filed with the Division of Administrative Hearings no later than January 4, 1999.

Petitioner and the Department, on December 29, 1998, and January 4, 1999, respectively, filed their proposed recommended orders. These post-hearing submittals have been carefully considered by the undersigned.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. Petitioner is a collector and wholesaler of various "saltwater products," as defined in Chapter 370, Florida Statutes.[1]

2. He possess a saltwater products license (issued pursuant to the provisions of Chapter 370, Florida Statutes, and Chapter

46-42, Florida Administrative Code), with a restricted species and marine life endorsement, which allows him to engage in these activities.

3. Petitioner collects and sells, among other things, what is referred to as "live sand," a calcium carbonate sediment used in public and home aquaria as a decorative detoxifying agent.

4. "Live sand" is found on offshore water bottoms in the Florida Keys (where Petitioner engages in his collection activities) and other areas in Florida.

5. "Live sand" consists primarily of the calcified (dead) remains of Halimeda plants.

6. Halimeda plants (generally on a seasonal basis) produce plates, which they ultimately shed. These plates, through various physical and biological processes, are broken down over time into smaller and smaller granules.

7. Halimeda plants are very productive (in terms of the number of plates they produce), but they are found only in certain (not all) offshore areas in the Florida Keys.

8. While the granules that make up the "live sand" Petitioner collects and sells consist of dead plant matter, thousands of micro and macroorganisms (in a cubic foot area), representing numerous species, live amongst these granules and therefore are also removed from the water as a result of Petitioner's collection activities.

9. The microorganisms living in "live sand" include nitrosomous bacteria. The presence of nitrosomous bacteria

enables "live sand" to neutralize the ammonia waste products of fish in public and home aquaria.

10. Among the macroorganisms living in "live sand" are mollusks, worms, arthropods, and echinoderms.

11. These organisms are an important part of the diet of other species, including protected species such as the spiny lobster (Panulirus argus), which itself is part of the food supply for fish in the area.

12. Petitioner collects "live sand" by diving underwater and using his hands to scoop up and place in buckets the top layers of the bottom ("live sand") substrate.

13. Such collection activities have negative environmental consequences that are not insignificant.

14. They adversely impact water quality in the waters in which they occur and in adjacent waters inasmuch as they increase turbidity and reduce biological diversity. Excavation of the top layer of bottom substrate exposes the siltier sediment below, which, when disturbed, reduces water clarity and therefore also the amount of sunlight that penetrates the water. Furthermore, this newly exposed substrate, because of its anaerobic nature, is unable to attract a significant benthic community comparable to that found in the "live sand" that previously covered it.

15. In addition, because these collection activities result in the removal of organisms that are important components of the aquatic food chain and in loss of their habitats, these activities have an adverse effect on marine productivity and,

resultantly, on fishing and recreational values.

16. The "live sand" that is the subject of the instant controversy is located in Monroe County within the boundaries of the Florida Keys National Marine Sanctuary in state waters designated Class III, Outstanding Florida Waters (OFW).[2]

17. Petitioner first contacted the Department in writing regarding the removal of this "live sand" in May of 1997, when he sent the Department a letter which read, in pertinent part, as follows:

> REF: Collection of Sand for Use in Aquari[a]
>
> Pursuant to our recent telephone conversation, I respectfully request that I receive a letter of de minimis for the aforementioned activity.
>
> The sand is collected by hand using five gallon buckets. The collection occurs under water [at] a depth of approximately 20 feet. The sand occurs in an area devoid of marine grasses, plants and corals. No sand is taken from or near shorelines and no sedimentary resultant is produced. I intend to collect four five gallon buckets each of which contains 50 pounds of sand. This collection is to occur once a month. . . .

18. By letter dated June 2, 1997, the Department acknowledged receipt of Petitioner's letter and requested that he provide "additional information" to enable the Department to determine whether it should grant him "an exemption from the need for an Environmental Resource Permit pursuant to Part IV, Chapter 373, Florida Statutes (F.S.), and an authorization to use state-owned submerged lands, pursuant to Chapters 253 and 258, F.S., to collect sand, by hand, from underwater."

19. On August 28, 1997, Petitioner supplied the Department with an "addendum to [his] original request for consideration" in which he specified the location of his "proposed collection" of "live sand" as "Lat. N 24.31.29 - Lon. W 081.34.40.

20. The Department deemed Petitioner's "addendum" insufficient to render his paperwork "complete." By letter dated September 23, 1997, the Department so advised Petitioner. Along with letter, the Department provided Petitioner with the following "revised request for additional information identifying the remaining items necessary to complete [his] application":

> Part I
>
> REVISED COMPLETENESS SUMMARY FOR SAND COLLECTION
>
> 1. The proposed project will require an Environmental Resource Permit. The correct processing fee for this project is $500.00. Provide a $500 processing fee payable to the Department of Environmental Protection.
>
> 2. In your letter received May 6, 1997, requesting a De Minimis exemption you state you intend to collect four (4), five (5) gallon buckets of sand each of which contains fifty (50) pounds of sand per month. A letter you submitted to the Department from the Army Corps of Engineers (dated May 9, 1997) states you will collect four (4) or five (5), five (5) gallon buckets three (3) times per month. Please indicate the quantity of sand you propose[] to collect per month.
>
> Part II CONSENT OF USE (Chapters 18-18, 18-20 and 18-21, Florida Administrative Code)
>
> For your information
>
> If the project develops to the point where proposed dredging will be recommended for

> authorization, payment for the removal of sovereign submerged land will be required at $3.25 per cubic yard, or a minimum payment of $50.00 prior to issuance of the authorization. Do not provide payment until requested by Department staff. [See 18-21.011(3)(a), F.A.C.]

21. Petitioner timely responded to the Department's "revised request for additional information" by letter dated October 10, 1997, to which he attached the requested "processing fee." In his letter, Petitioner advised the Department that it was his "intent to collect approximately 600 (six hundred) pounds of material each month."

22. Following its receipt of Petitioner's letter and accompanying "processing fee," the Department sent letters to potentially affected parties advising them of Petitioner's "proposed [sand collection] activit[ies]" and soliciting their comments concerning these activities. The Florida Department of Community Affairs responded to the Department's request by indicating, in written correspondence it sent to the Department, that it had "no objection to the proposed project." The National Oceanic and Atmospheric Administration (NOAA) also provided written comments to the Department. It did so by letter dated November 21, 1997, which read as follows:

> The following are comments from the Florida Keys National Marine Sanctuary (FKNMS) concerning the application from Jeff Frankel to collect live sand, File No 44-0128760-001. These comments reflect the consensus of both NOAA and FDEP Sanctuary staff.
>
> The harvest of live sand is viewed by the Sanctuary as dredging. This activity is

considered neither fishing nor traditional fishing activity. Therefore, "harvesting of live sand" is within the prohibition against dredging, or otherwise altering the seabed of the Sanctuary and does not fall within the exception for "traditional fishing activities" as Mr. Frankel asserts. As such this activity should not be conducted in the Sanctuary without a Federal or State permit.

The Sanctuary is opposed to permitting this activity in Federal or State waters for the following reasons:

1) As stated above, it is a dredging activity which is prohibited.[3]

2) The Sanctuary exists because of the unique and nationally significant resources found here. These resources exist due to the dynamic ecosystem of which sand, and the meiofaunal communities found therein, is a major component. The Sanctuary is opposed to unnecessary alteration of the ecosystem particularly when viable alternatives exist such as harvesting outside the FKNMS in Gulf waters and aquaculture.

3) Sixty-five percent of the Sanctuary seabottom is State sovereign lands. Removal of the quantities of substrate for commercial purposes does not appear to be in the public interest.

4) Pursuant to the intragency compact agreement between the State of Florida and the National Oceanic and Atmospheric Administration dated May 19, 1997, NOAA will not permit a prohibited activity in federal waters in the Sanctuary that is not allowed in the State waters of the Sanctuary.

We appreciate the opportunity to comment on this application.

23. On January 8, 1998, the Department issued its Consolidated Notice of Denial [of] Environmental Resource Permit and Consent of Use to Use Sovereign Submerged Lands. In its

Consolidated Notice, the Department gave the following reasons for its action:

> The Department hereby denies the permit for the following reason:
>
> The proposed project will directly impact water quality by removal of approximately 660 pounds of "live sand" from state-owned sovereign submerged land each month. The material collected consists of dead calcareous green algae (Halimeda spp.) and calcium carbonate grains. This substrate is important habitat for grazers and detritivores and it contains an extensive and diverse invertebrate community. . . .
>
> The project as proposed does not comply with the specific criteria within; Chapter 373, F.S., F.A.C. Rule 62-300, and Section 4.2 of the Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District.
>
> The above impacts are expected to adversely affect marine productivity, fisheries, wildlife habitat, and water quality.
>
> The applicant has not provided reasonable assurance that the immediate and long-term impacts of the project will not result in the violation of water quality standards pursuant to F.A.C. Rule 62-312.150(3) and 62-312.070. Specific State Water Quality Standards in F.A.C. Rules 62-302.500, 62-302.510, 62-302.560 and 62-4.242 that will be affected by the completion of the project include the following:
>
> Biological Integrity- . . . .
>
> This project will also result in the following matter which are not clearly in the public interest pursuant to Section 373.414(1)(a), F.S.:
>
> a. adversely affect the conservation of fish and wildlife, including endangered species, or their habitats;

b. diminish the current condition and relative value of functions being performed by areas affected by the proposed activity;

c. adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

d. the activity will be permanent in nature;

e. adversely affect the functions and relative value of the habitat within the area of the proposed project.

Therefore, the Applicant has not provided reasonable assurance that the project is clearly in the public interest pursuant to Section 373.414(1)(a), F.S.

The request for authorization to use sovereign submerged lands is denied because the Applicant has not met all applicable requirements for proprietary authorizations to use sovereign submerged lands, pursuant to Article X, Section 11 of the Florida Constitution, Chapter 253 F,S., associated Chapter 18-21, F.A.C., and the policies of the Board of Trustees.

Specifically, operation of the activity is inconsistent with management policies, standards and criteria of F.A.C. Rule 18-21.00401(2) and 18-21.004. The Applicant has not provided reasonable assurance that the activity will be clearly "in the public interest," will maintain essentially natural conditions, will not cause adverse impacts to fish and wildlife resources or public recreation or navigation, and will not interfere with the riparian rights of adjacent property owners.

In addition, the project is inconsistent with the goals and objectives of the "Conceptual State Lands Management Plan," adopted by the Board of Trustees on March 17, 1981.

The . . . activity is inconsistent with Section 18-21.00401(2), F.A.C., the authorization to use sovereign submerged lands cannot be approved, in accordance with

> Sections 18-21.00401 and 62-343.075, F.A.C., because the activity does not meet the conditions for issuance of a standard general of individual permit under Part IV of Chapter 373, F.S., as described above.

24. The Consolidated Notice accurately describes the adverse impacts of the "project" which is subject of the instant case (Project).

25. Petitioner has not proposed any measures to mitigate these adverse impacts.

26. If the Department authorizes the Project, it is reasonable to anticipate that other collectors of "live sand" would seek the Department's approval to engage in similar activity in the area.

27. If these other projects were also approved, there would be additional adverse environmental consequences.

28. As the Consolidated Notice alleges, Petitioner has failed to provide reasonable assurance that the Project would not degrade the ambient water quality of the OFW in which the Project would be undertaken, nor has he provided reasonable assurance that the Project is clearly in the public interest.

CONCLUSIONS OF LAW

29. Article X, Section 11, of the Florida Constitution provides as follows with respect to "[s]overeignty lands," such as those in the Florida Keys National Marine Sanctuary from which Petitioner proposes to remove "live sand":

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches

> below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

30. Pursuant to 253.03(1), Florida Statutes, the Board of Trustees of the Internal Improvement Trust Fund (Board), which is comprised of the Governor and Cabinet, "is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition" of all state-owned lands, including those "sovereignty lands" referenced in Article X, Section 11, of the Florida Constitution.

31. The Board has also been delegated the authority to adopt rules necessary to carry out these functions. Section 253.03(7)(a), Florida Statutes.

32. The Board has adopted such rules.

33. One such rule the Board has adopted is Rule 18-21.004, Florida Administrative Code, which sets forth "[m]anagement [p]olicies, [s]tandards, and [c]riteria." It provides, in pertinent part, as follows:

> The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereign submerged lands.
>
> (1) General Proprietary
>
> (a) For approval, all activities on sovereignty lands must be not contrary to the public interest, except for sales which must be in the public interest.

(b) All leases, easements, deeds or other forms of approval for sovereignty land activities shall contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands.

(c) Equitable compensation shall be required for leases and easements which generate revenues, monies or profits for the user or that limit or preempt general public use. Public utilities and state or other governmental agencies exempted by law shall be excepted from this requirement.

(d) Activities on sovereignty lands shall be limited to water dependent activities only unless the [B]oard determines that it is in the public interest to allow an exception as determined by a case by case evaluation. Public projects which are primarily intended to provide access to and use of the waterfront may be permitted to contain minor uses which are not water dependent if:

1. located in areas along seawalls or other nonnatural shorelines;

2. located outside of aquatic preserves or class II waters; and

3. the nonwater dependent uses are incidental to the basic purpose of the project, and constitute only minor nearshore encroachments on sovereign lands. . . .

(e) Stilt houses, boathouses with living quarters, or other such residential structures shall be prohibited on sovereignty lands.

(f) The State Lands Management Plan shall be considered and utilized in developing recommendations for all activities on sovereignty lands. . . .

(2) Resource Management

(a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of

essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.

(b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.

(c) The Department . . . biological assessments and reports by other agencies with related statutory, management, or regulatory authority may be considered in evaluating specific requests to use sovereignty lands. Any such reports sent to the [D]epartment in a timely manner shall be considered.

(d) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation (as listed in Rule 17-4.020(17), Florida Administrative Code) on sovereignty lands. . . .

(g) Severance of materials from sovereignty lands shall be approved only if the proposed dredging is the minimum amount necessary to accomplish the stated purpose and is designed to minimize the need for maintenance dredging.

(h) Severance of materials for the primary purpose of providing upland fill shall not be approved unless no other reasonable source of materials is available or the activity is determined to be in the public interest.

(i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat. Special attention and consideration shall be given to endangered and threatened species habitat.

> (j) To the maximum extent feasible, all beach compatible dredge materials shall be placed on beaches or within the nearshore sand system. . . .

34. Another rule adopted by the Board pursuant to the authority delegated it pursuant to Section 253.03(7)(a), Florida Statutes is Rule 18-21.003, Florida Administrative Code, subsection (40) of which provides as follows:

> "Public interest" [as used in Rule 18-21.004, Florida Administrative Code] means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the [B]oard shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials.

35. The rules adopted by the Board in Chapter 18-21, Florida Administrative Code:

> are to implement the administrative and management responsibilities of the [B]oard and [D]epartment regarding sovereign submerged lands. Responsibility for environmental permitting of activities and water quality protection on sovereign and other lands is vested with the Department of Environmental Protection. These rules are considered cumulative. Therefore, a person planning an activity should consult other applicable department rules as well as the rules of the Department of Environmental Protection.

Rule 18-21.002(1), Florida Administrative Code.

36. The Board is authorized to delegate to the Department "any statutory duty or obligation relating to the acquisition, administration, or disposition" of state-owned land. Section 253.002(1), Florida Statutes. "Delegations to the [D]epartment . . . of authority to take final action on applications for authorization to use submerged lands owned by the [B]oard . . . , without any action on behalf of the [B]oard . . . , [must] be by rule." Section 253.002(2), Florida Statutes.

37. The Board has adopted a rule, Rule 18-21.0051, Florida Administrative Code, delegating to the Department:

> the authority to review and take final agency action on applications to use sovereign submerged lands when the application involves an activity for which that agency has permitting responsibility . . . unless the proposed activity includes any of the following:
>
> (a) docking facilities with more than 50 slips, and additions to existing docking facilities where the number of proposed new slips exceeds 10% of the existing slips and the total number of existing and proposed additional slips exceeds 50;
>
> (b) docking facilities having a preempted area, as defined in Subsection 18-21.003(38), F.A.C., of more than 50,000 square feet, and additions to existing docking facilities where the size of the proposed additional preempted area exceeds 10% of the existing preempted area and the total of existing and proposed additional preempted area exceeds 50,000 square feet;
>
> (c) private easements of more than 5 acres; or
>
> (d) the establishment of a mitigation bank.

38. In exercising its delegated authority "to review and take final agency action on applications to use sovereign submerged lands," the Department must act in accordance with the provisions of Article X, Section 11, of the Florida Constitution, Chapter 253, Florida Statutes, and Chapter 18-21, Florida Administrative Code.

39. Section 373.427, Florida Statutes, authorizes the Department to adopt a rule "requiring concurrent application submittal and establishing a concurrent review procedure for any activity regulated under [Chapter 373, Part IV, Florida Statutes] that also requires . . . [p]ropriety authorization under [C]hapter 253 . . . to use submerged lands owned by the [B]oard," such as the dredging and collection activity proposed by Petitioner in the instant case.[4]

40. The Department has adopted such a rule, Rule 62-343.075, Florida Administrative Code, which provides, in pertinent part, as follows:

> (1) A single application shall be submitted and reviewed for activities that require an individual or standard general environmental resource permit under Part IV of Chapter 373, F.S., and a proprietary authorization under Chapters 253 . . ., F.S., to use sovereign submerged lands. In such cases, the application shall not be deemed complete, and the timeframes for approval or denial shall not commence, until all information required by applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under Chapters 253 . . ., F.S., and rules adopted thereunder for both the environmental resource permit and the proprietary authorization is received.

> (2) No application under this section shall be approved until all the requirements of applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under Chapters 253 . . ., F.S., and rules adopted thereunder for both the individual or standard general environmental resource permit and the proprietary authorization are met. The approval shall be subject to all permit conditions imposed by such rules.
>
> (3) For an application reviewed under this section for which a request for proprietary authorization to use sovereign submerged lands has been delegated to the Department . . . to take final action without action by the Board of Trustees of the Internal Improvement Trust Fund, the Department . . . shall issue a consolidated notice of intent to issue or deny the environmental resource permit and the proprietary authorization within 90 days of receiving a complete application under this section. . . .
>
> (5) . . . [I]f an administrative proceeding under Section 120.57, F.S., is properly requested on both the environmental resource permit and the proprietary authorization under this section, the review shall be conducted as a single consolidated administrative proceeding. If an administrative proceeding under Section 120.57, F.S., is properly requested on either the environmental resource permit or the proprietary authorization under this section, final agency action shall not be taken on either authorization until the administrative proceeding is concluded.
>
> (6) Appellate review of any consolidated order under this section is governed by the provisions of Section 373.4275, F.S.[5] . . .

41. Before determining whether, and under what conditions, if any, it should grant a request for an environmental resource permit under Chapter 373, Part IV, Florida Statutes (made, as required by Rule 62-343.075, Florida Administrative Code,

concurrently with a request for proprietary authorization to use state-owned submerged lands), the Department must evaluate the request in light of the following provisions of Section 373.414, Florida Statutes:

> (1) . . . [T]he [D]epartment shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated[6] and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by [D]epartment rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.
>
> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, . . . the [D]epartment shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;[7]
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, . . . the [D]epartment, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity. . . .

(8) . . . [T]he D]epartment, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

(a) The activity for which the permit is sought.

(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be

> located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations. . . .

42. "Reasonable assurance," as used in Section 373.414, Florida Statutes, "contemplates . . . a substantial likelihood that the project [for which the environmental resource permit is sought] will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

43. Section 373.414, Florida Statutes, "is prohibitory. It requires reasonable assurance before the project is started that water quality [and the public interest] will not be violated. It is not within the [Department's] province to allow [an applicant] to proceed with a project . . . with no idea as to what the effect on water quality [and the public interest] will be." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

44. In determining the adverse effects of a proposed project, the Department should take into consideration not only the direct impacts of the project, but also the "secondary" impacts caused or enabled by the project. See Florida Power Corporation v. Department of Environmental Regulation, 605 So. 2d 149, 152 (Fla. 1st DCA 1992); The Conservancy, Inc. v. A. Vernon Allen Builder, Inc., 580 So. 2d 772, 779 (Fla. 1st DCA 1991).

45. An applicant seeking an environmental resource permit "need not show any particular need or net public benefit as a condition of obtaining the permit." In cases where the proposed activity "would substantially degrade water quality or materially harm the natural environment, [however,] the fact that a substantial public need or benefit would be met by approving the project may be taken into consideration in balancing adverse environmental effects. This is the purpose of the public interest test and the seven statutory criteria." 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946, 958 (Fla. 1st DCA 1989).

46. Where, as in the instant case, the Department issues a consolidated notice of intent to deny the environmental resource permit and proprietary authorization sought by the applicant, the applicant bears the ultimate burden (in a Section 120.57(1) hearing on such preliminary action) of demonstrating, by a preponderance of the evidence, entitlement to the requested permit and authorization. See Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); Pershing Industries, Inc., v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So. 2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414-15 (Fla. 4th DCA 1974).

47. When the record evidence in the instant case is examined in light of the constitutional, statutory, and rule provisions cited above governing the issuance of environmental resource permits and proprietary authorizations it must be concluded that Petitioner has failed to meet his burden of proof.

48. He has not provided, through his evidentiary presentation, reasonable assurances that the Project (which would be undertaken on state-owned submerged lands in an Outstanding Florida Water) would not result in violation of state water quality standards, that the Project would be clearly in the "public interest," as that term is used in Section 373.414, Florida Statutes (relating to requests for environmental resource permits), or that the Project would not be contrary to the "public interest," as defined in Rule 18-21.003(40), Florida Administrative Code (relating to requests for proprietary authorizations).

49. It does not appear from the evidentiary record in this case that there is a reasonable likelihood that the adverse effects of the Project would be outweighed by the Project's benefits. Furthermore, Petitioner has not proposed, nor has he agreed to, any specific mitigative measure or measures that would offset the adverse effects of the Project to such an extent as to justify the Department's approval of the Project.

50. In view of the foregoing, Petitioner should be granted neither an environmental resource permit for the Project, nor a lease to use sovereign submerged lands.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order denying Petitioners' application for an environmental resource permit and for a lease to use sovereign submerged lands.

DONE AND ENTERED this 12th day of January, 1999, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of January, 1999.

ENDNOTES

[1] "Saltwater products," as used in Chapter 370, Florida Statutes, are "any species of saltwater fish, marine plant, or echinoderm, except shells, and salted, cured, canned, or smoked seafood."

[2] With respect to Petitioner's collection of "live sand" in federal waters outside the boundaries of the Florida Keys National Marine Sanctuary, Petitioner received the following correspondence, dated May 9, 1997, from the United States Army Corps of Engineers:

> Reference is made to your inquiry on 3 May 1997, concerning the collection of sand which is located in various depths of water beyond the three mile limit outside the boundaries of the Florida Keys National Marine Sanctuary. The sand is collected underwater by hand and placed in five gallon buckets and then winced to the surface. The amount collected is normally four or five buckets (each bucket weighs approximately 50 pounds) three times a month. The sand is collected from unvegetated areas, which are also devoid

> of marine communities such as hard or soft corals, offshore of Monroe County, Florida.
>
> The project as proposed is considered de minimis activity and is not currently regulated under Section 10 of the Rivers and Harbors Act of 1899. Furthermore, a permit will not be required in accordance with Section 404 of the Clean Water Act as it will not involve the discharge of dredged or fill material into waters of the United States.
>
> This letter does not obviate the requirement to obtain any other Federal, State, or local permits which may be necessary for your project.
>
> Thank you for your cooperation with our permit program.

[3] NOAA's regulations governing the Florida Keys National Marine Sanctuary are found, among other places in 15 CFR Part 922, Section 922.163(a)(3) of which provides, in pertinent part, as follows:

> § 922.163 Prohibited activities--Sanctuary-wide.
>
> [T]he following activities are prohibited and thus are unlawful for any person to conduct or to cause to be conducted:
>
> (3) Alteration of, or construction on, the seabed. Drilling into, dredging, or otherwise altering the seabed of the Sanctuary, or engaging in prop-dredging; or constructing, placing or abandoning any structure, material, or other matter on the seabed of the Sanctuary, except as an incidental result of: . . .
>
> (ii) Traditional fishing activities not otherwise prohibited by this part; . . .

[4] "Dredging," as used in Part IV (Sections 373.403 through 373.461) of Chapter 373, Florida Statutes, is defined in Section 373.403(13), Florida Statutes, as follows:

> "Dredging" means excavation, by any means, in surface waters or wetlands, as delineated in s. 373.421(1). It also means the excavation,

> or creation, of a water body which is, or is to be, connected to surface waters or wetlands, as delineated in s. 373.421(1), directly or via an excavated water body or series of water bodies.

"Dredging" in state waters is an activity regulated by Chapter 373, Part IV, Florida Statutes, for which an environmental resource permit must be obtained unless the activity is exempt from such permitting requirements pursuant to Section 373.406, Florida Statutes, which provides as follows:

> 373.406 Exemptions.–
>
> The following exemptions shall apply:
>
> (1) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any natural person to capture, discharge, and use water for purposes permitted by law.
>
> (2) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.
>
> (3) Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to be applicable to construction, operation, or maintenance of any agricultural closed system. However, part II of this chapter shall be applicable as to the taking and discharging of water for filling, replenishing, and maintaining the water level in any such agricultural closed system. This subsection shall not be construed to eliminate the necessity to meet generally accepted engineering practices for construction, operation, and maintenance of dams, dikes, or levees.
>
> (4) All rights and restrictions set forth in this section shall be enforced by the

> governing board or the Department of Environmental Protection or its successor agency, and nothing contained herein shall be construed to establish a basis for a cause of action for private litigants.
>
> (5) The department or the governing board may by rule establish general permits for stormwater management systems which have, either singularly or cumulatively, minimal environmental impact. The department or the governing board also may establish by rule exemptions or general permits that implement interagency agreements entered into pursuant to s. 373.046, s. 378.202, s. 378.205, or s. 378.402.
>
> (6) Any district or the department may exempt from regulation under this part those activities that the district or department determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district. The district and the department are 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 district or department, and such activities shall not be commenced without a written determination from the district or department confirming that the activity qualifies for the exemption.
>
> (7) Nothing in this part, or in any rule or order adopted under this part, may be construed to require a permit for mining activities for which an operator receives a life-of-the-mine permit under s. 378.901.

Petitioner maintains that he is not required to obtain an environmental resource permit from the Department to collect "live sand" from state waters in the Florida Keys National Marine Sanctuary because he has already been issued a saltwater products license that authorizes him to collect Halimeda. The argument is without merit. Halimeda is a restricted "tropical ornamental marine plant" that Petitioner, by virtue of having obtained his saltwater products license, is permitted to harvest alive. See Rules 46-42.001(4)(b), 46-42.002(14), and 46-42.0035, Florida Administrative Code. His saltwater products license, however, does not authorize him to engage in the dredging activity

involved in the collection of "live sand" (which contains the remains of dead Halimeda plants) from state waters. Such dredging activity is subject to the permitting requirements of Chapter 373, Part IV, Florida Statutes. Had the Legislature desired to exempt the excavation of bottom material by those possessing a saltwater products license from these requirements it could have provided for such an exemption in Section 373.406, Florida Statutes. Its failure to have done so is compelling evidence that no such exemption was intended. See Department of Health and Rehabilitative Services v. Hartsfield, 443 So. 2d 322, 324-25 (Fla. 1st DCA 1983); Florida Legal Services v. Department of Labor and Employment Security, 381 So. 2d 1120, 1122 (Fla. 1st DCA 1979)("Therefore the rule 'expressio unius est exclusio alterius," seems to apply. Where the legislature creates specific exceptions to the language in a statute, we may apply the rule to infer that 'had the legislature intended to establish other exceptions it would have done so clearly and unequivocally.'"). Petitioner also argues, in the alternative, that he should be issued "a letter of de minimis" pursuant to subsection (6) of Section 373.406, Florida Statutes. Petitioner had the burden of proving his entitlement to this exemption by showing that his "activities . . . will have minimal or insignificant individual or cumulative adverse impacts on . . . water resources." Cf. Green v. Pederson, 99 So. 2d 292, 296 (Fla. 1957)("It is well settled that he who would shelter himself under an exemption clause in a tax statute must show clearly he is entitled under the law to [the] exemption."). A review of the evidentiary record in the instant case reveals that Petitioner failed to make such a showing.

[5] Section 373.4275, Florida Statutes, provides, in pertinent part, as follows:

> (a) The final order issued under this section shall contain separate findings of fact and conclusions of law, and a ruling that individually addresses each authorization, permit, . . and approval that was the subject of the review.
>
> (b) If a consolidated order includes proprietary authorization under chapter 253 . . . . to use submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund for an activity for which the authority has been delegated to take final agency action without action of the [B]oard. . . ., the following additional provisions and exceptions to s. 373.114(1) apply:

> 1. The Governor and Cabinet shall sit concurrently as the Land and Water Adjudicatory Commission and the Board of Trustees of the Internal Improvement Trust Fund in exercising the exclusive authority to review the order;
>
> 2. The review may also be initiated by the Governor or any member of the Cabinet within 20 days after the rendering of the order in which case the other provisions of s. 373.114(1)(a) regarding acceptance of a request for review do not apply; and
>
> 3. If the Governor and Cabinet find that an authorization to use submerged lands is not consistent with chapter 253 . . ., any authorization, permit, . . . or approval authorized or granted by the consolidated order must be rescinded or modified or the proceeding must be remanded for further action consistent with the order issued under this section. . . .

[6] Rule 62-4.242(2), Florida Administrative Code, prescribes "state water quality standards" applicable to Outstanding Florida Waters. It provides, in pertinent part, as follows:

> (2) Standards Applying to Outstanding Florida Waters
>
> (a) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that: . . .
>
> 2. The proposed activity of discharge is clearly in the public interest, and . . . .
>
> b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction for a period not to exceed thirty days . . . .

[7] "If the proposed project will have an adverse effect on the endangered species or its habitat, then the standard [described in subsection (1)(a)2 of Section 373.414, Florida Statutes] is violated. This is so even if the adverse effect is not so great as to jeopardize the continued existence of the species." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 650 (Fla. 3d DCA 1992).

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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.

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