STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STANLEY DOMINICK, VINCE[1] EASEVOLI, KATHERINE EASEVOLI, JOHN EASEVOLI, PAULA EASEVOLI, TOM HODGES, ELAINE HODGES, HANY HAROUN, CHRISTINE[2] HAROUN, MARTHA SCOTT, and MARIANNE DELFINO,	)	
Petitioners,	)	
vs.	)	Case No. 01-1540
LELAND EGLAND and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

RECOMMENDED ORDER

On July 10-11, 2002, a final administrative hearing was held in this case in Tavernier, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners: Andrew M. Tobin, Esquire
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Tavernier, Florida 33070

For Respondent Leland Egland:

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For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, the Department of Environmental Protection (DEP), should grant the application of Respondent, Leland Egland, for an Environmental Resource Permit (ERP), Number 44-01700257-001-ES, to fill an illegally-dredged trench or channel in mangrove wetlands between Florida Bay and what was a land-locked lake, to restore preexisting conditions.

PRELIMINARY STATEMENT

DEP gave notice of intent to issue the requested ERP, and Petitioners[3] timely filed a Petition for Administrative Hearing (Petition), along with a Motion to Abate based on a pending state circuit court complaint for declaratory and injunctive relief to establish Petitioners' rights in and to the project area. On April 25, 2001, DEP referred the Petition and Motion to Abate to the Division of Administrative Hearings for assignment of an administrative law judge.

Final hearing was scheduled for July 10-11, 2001, in Tavernier, Florida; and the Motion to Abate, which was opposed by Egland and DEP, was denied. But Petitioners then moved

without objection for a continuance for additional time for preparation, and final hearing was continued to January 10-11, 2002.

On August 9, 2001, Petitioners filed a Motion to Dismiss and for Other Relief on the ground that Egland allegedly filled the trench or channel without a permit. DEP opposed the motion, and it was denied.

In December 2001, the parties filed a Joint Motion for Continuance pending disposition of the state circuit court case, and final hearing was continued to July 10-11, 2002. Although the state circuit court case was not resolved, the case went to final hearing as scheduled. In early July 2002, the parties filed a Prehearing Stipulation; and DEP filed a Motion for Official Recognition and a Motion in Limine.

The pending motions were considered at the outset of final hearing. Official recognition of codified Florida Statutes and the current codification of the Florida Administrative Code was granted; as to the other items in DEP's Motion for Official Recognition--a Basis of Review incorporated by reference in DEP's Florida Administrative Code Rules, an operating agreement between DEP and the South Florida Water Management District, and an operating agreement between DEP and the United States Army Corps of Engineers (ACOE)--DEP indicated during oral argument that it would

present the documents as exhibits during the course of final hearing, as necessary; and it did so as to just one of them--the operating agreement between DEP and ACOE. DEP's Motion in Limine was granted to the extent that neither federal endangered species issues nor real property issues would be decided in this case, but no evidence was excluded.

Egland testified in his own behalf and had Applicant Exhibits 1, 3-5, and 9 admitted in evidence.[4] DEP called two employees as witnesses (Environmental Manager, Edward Barham, and Environmental Administrator, Lucianne Blair) and had DEP Exhibits 1, 6, 10, 11, 15, 19, 22, 25, 31C, 32, and 35-37 admitted in evidence. Petitioners Vince Easevoli, Tom Hodges, Stanley Dominick, and Hany Haroun testified; and Petitioners had Petitioners' Exhibits 1-4, 6, 7, 9-15, and 31B admitted in evidence.[5]

After presentation of evidence, a transcript was ordered, and the parties requested and were given 30 days from the filing of the Transcript to file proposed recommended orders (PROs). The Transcript was filed on August 8, 2002, but the parties filed an Agreed Motion for Extension of Time to File Proposed Recommended Orders (PROs), which was granted, and the time for filing PROs was extended through October 9, 2002. Petitioners and DEP each timely filed a PRO, and each PRO has

been considered in preparation of this Recommended Order. Egland did not file a PRO.

FINDINGS OF FACT

1. Since 1988, Applicant, Leland Egland, has resided in a home built on property he purchased in Buccaneer Point Estates in Key Largo, Florida, in 1986--namely, Lots 14 and 15, Block 2, plus the "southerly contiguous 50 feet."

2. A 1975 plat of Buccaneer Point shows this "southerly contiguous 50 feet" as a channel between Florida Bay to the west and a lake or pond to the east; it also shows a 800-foot linear canal extending from the lake or pond to the north. Egland's Lot 14 borders Florida Bay to the west; his lot 15 borders the lake or pond to the east; the "southerly contiguous 50 feet" is between Egland's lots 14 and 15 and property farther south owned by another developer. See Finding 10, infra. Buccaneer Point lots in Blocks 1 (to the east) and 2 (to the west) surround the lake or pond and canal.

3. The developer of Buccaneer Point applied to the Florida Department of Environmental Regulation (DER) in 1977 for a permit to dredge a channel, characterized as a flushing channel for the lake or pond, which was characterized as a tidal pond with replanted red mangroves. (There was no evidence as to the character of this pond before the 1977

permit application or if it even existed.) DER denied the permit application because the:

> proposal . . . to open a pond to Florida Bay . . . will connect an 800 linear foot dead-end canal. The pond and canal will act as a sink for marl and organic debris which will increase Biological Oxygen Demand and lower Dissolved Oxygen. The project is expected to result in substances which settle to form putrescent or otherwise objectionable sludge deposits and floating debris, oil scum, and other materials, in amounts sufficient to be deleterious.
>
> Based on the above, degradation of local water quality is expected.
>
> * * *
>
> Furthermore, your project will result in the following effects to such an extent as to be contrary to the public interest and the provisions of Chapter 253, Florida Statutes:
>
> Interference with the conservation of fish, marine life and wildlife, and other natural resources.
>
> Destruction of natural marine habitats, grass flats suitable as nursery or feeding grounds for marine life, including established marine soils suitable for producing plant growth of a type useful as nursery or feeding grounds for marine life.
>
> Reduction in the capability of habitat to support a well-balanced fish and wildlife population.
>
> Impairment of the management or feasibility of management of fish and wildlife resources.

As a result, the proposed channel to Florida Bay was not dredged (although some of the lake side of the proposed channel apparently was dredged before the project was abandoned); the building lots surrounding the lake or pond (now known as South Lake) and canal were sold as waterfront lots on a land-locked lake without access to Florida Bay; and the "southerly contiguous 50 feet" was included with the conveyance to Egland, along with the Lots 14 and 15 of Block 2.

4. The evidence was not clear as to the characteristics of the "southerly contiguous 50 feet" in 1977, or earlier. When Egland purchased his property in 1986, it was a mature mangrove slough with some tidal exchange between the lake and Florida Bay, especially during high tides and stormy weather. Some witnesses characterized the area of mangroves as a shallow creek in that general time frame (from about 1984 through 1988). According to Vince Easevoli, at least under certain conditions, a rowboat could be maneuvered between the lake and Florida Bay using a pole "like a gondola effect." But Egland testified to seeing Easevoli drag a shallow-draft boat through this area in this general time frame, and the greater weight of the evidence was that the mangrove slough was not regularly navigable channel at the time.

5. During this general time frame (the mid-to-late 1980's) several Petitioners (namely, Stanley Dominick, John and Katherine Easevoli, and their son, Vince Easevoli) purchased property on South Lake. All but Vince built homes and resided there; Vince did not reside there until after Hurricane Andrew in 1992, but he sometimes stayed at the residence on his parents' property during this general time frame.

6. In the early 1990's, the slough or creek became somewhat deeper, making it increasingly more easily passable by boat. Large storms such as Hurricane Andrew in 1992 and the "storm of the century" in 1993 may have contributed to these changes, but human intervention seems to have been primarily responsible.

7. In 1994, Egland added a swimming pool south of the residence on his lots. During construction, some illegal filling took place. Several witnesses testified that the illegal fill occurred to the north of the creek, which was not affected. Vince Easevoli's lay interpretation of several surveys in evidence led him to maintain that illegal fill was placed in the mangrove slough and that the creek became narrower by approximately four feet and, eventually, deeper. But no surveyor testified to explain the surveys in evidence, which do not seem to clearly support Easevoli's position, and

the greater weight of the evidence was that illegal fill was not added to the creek in Egland's "southerly contiguous 50 feet."

8. At some point in time, hand tools were used to deepen the slough or creek and trim mangroves without a permit to enable a small boat to get through more easily. As boats were maneuvered through, the creek got deeper. Eventually, propeller-driven boats of increasing size were used to "prop-dredge" the creek even deeper.

9. According to Petitioner, Tom Hodges, when he and his wife purchased their lot on the lake in 1994, it was possible to navigate the creek in a 22-foot Mako boat (at least under certain conditions), and their lot was sold to them as having limited access to Florida Bay. (There was evidence that access to Florida Bay could increase the price of these lots by a factor of three.) Petitioners Martha Scott and Marianne Delfino also purchased their property on the lake in 1994.

10. Tom Hodges claimed to have seen manatees in the lake as early as 1994, but no other witnesses claimed sightings earlier than 1997, and the accuracy of this estimate is questionable. Even if manatees were in the lake during this time frame or earlier, it is possible that they used an access point other than the creek. At the southeast corner of South Lake in Buccaneer Point, there is a possible connection to a

body of water farther south, which is part of a condominium development called Landings of Largo and leads still farther south to access to Florida Bay near a dock owned by Landings of Largo. While this connection is shallow, it may have been deep enough under certain conditions to allow manatees to pass through. Apparently not with manatees but rather with boaters from the lake in Buccaneer Point in mind, Landings of Largo has attempted to close this access point by placement of rebar; Landings of Largo also has placed rip-rap under its dock farther south to prevent boats from passing under the dock. However, there are gaps in the rip-rap, some possibly large enough for manatees to pass.

11. In approximately 1995 or 1996, Egland observed Vince Easevoli and his father, John Easevoli, digging a trench through the mangrove slough with a shovel and cutting mangrove trees with a saw in Egland's "southerly contiguous 50 feet." Others were standing by, watching. Egland told them to stop and leave.[6] These actions made the creek even deeper and more easily navigable by boat, which continued to further excavate the trench by such methods as "prop dredging."

12. In 1997 Hany Haroun purchased property adjacent to South Lake where he lives with his wife, Christine. By this time, Florida Bay was easily accessible by boat from the lake, and Haroun paid $260,000 for the property. He estimated that

his property would be worth about $150,000 less without boat access to Florida Bay.

13. In approximately 1997, manatees began to appear in South Lake year round from time to time, especially in the winter months. In 1997, the Hodgeses saw one they thought may have been in distress and telephoned the Save Our Manatee Club and Dolphin Research for advice. Following the advice given, they used lettuce to coax the manatee over to their dock to check its condition and videotape the event. The manatee appeared healthy and eventually departed the lake. On subsequent visits, manatees have been seen and videotaped resting and cavorting with and without calves and possibly mating in the lake. Groups of as many as seven to eight manatees have been seen at one time in the lake. Tom Hodges, Vince Easevoli, and Hany Haroun testified that they have enjoyed watching manatees in the lake since 1997. It can be inferred from the evidence that Elaine Hodges also has enjoyed watching manatees in the lake. There was no evidence as to the extent to which other Petitioners enjoy watching manatees in the lake.

14. In 1997, the ACOE began an investigation of the illegal dredging of Egland's "southerly contiguous 50 feet." According to Egland, he was in communication with ACOE; presumably, he told ACOE what he knew about the illegal

dredging on his property. According to Egland, ACOE advised him to place posts in the dredged channel to keep boats out. When he did so, Tom Hodges removed the posts. Egland replaced the posts, and Hodges removed them again. When Egland told ACOE what was happening, ACOE asked him to try reinstalling the posts and screwing plywood to the posts to achieve a stronger, fence-like barrier. Hodges also removed these barriers, and Egland did not replace the posts or plywood barrier again.

15. In 1998, ACOE mailed Egland a Cease and Desist Order accusing him of illegal dredging in his "southerly contiguous 50 feet" and demanding that he restore the mangrove slough to its previous conditions. Egland was angry at being blamed for the dredging and initially disputed ACOE's charges and demands. But ACOE and the United States Environmental Protection Agency (EPA), which accepted the role of lead federal enforcement agency on December 18, 1998, was seeking monetary civil penalties. In addition, Egland received legal advice that, if restoration were delayed, he could be sued for damages by someone purchasing property on the lake or canal in the meantime upon the mistaken belief that there was boat access to Florida Bay. For these reasons, Egland agreed to comply with the Cease and Desist Order. However, ACOE and EPA informed Egland that he might have to obtain a permit from DEP

to fill the dredged channel in compliance with the Cease and Desist Order.

16. On May 22, 2000, Egland applied to DEP for an ERP to restore a trench about 100 feet long varying from seven to ten feet in width that was illegally dredged on his property. He estimated that a total of 160 cubic yards of fill would be required, to be spread over approximately 900 square feet. He assured DEP that rip-rap would be used to contain the fill and that turbidity screens would be used during construction.

17. During processing of Egland's application, DEP requested additional information, which Egland provided, and DEP's Environmental Manager, Edward Barham, visited the project site in October 2000. Based on all the evidence available to him at that point in time, Barham viewed Egland's proposed fill project as a simple restoration project to correct illegal dredging and return the mangrove slough to its preexisting condition. For that reason, Barham recommended that DEP process the application as a de minimis exemption and not charge a permit application fee.

18. Subsequently, some Petitioners brought it to DEP's attention that manatees were accessing South Lake through the channel Egland wanted to fill. DEP saw no need to verify the accuracy of Petitioners' information or obtain additional information about the manatees use of the lake because DEP

still viewed it as a restoration project. However, DEP decided that it would be necessary to include specific conditions in any ERP issued to Egland to ensure that no manatees would be trapped in the lake or otherwise injured as a result of filling the channel. Primarily due to the need for these conditions, and also because of anticipated opposition from Petitioners, DEP decided to charge Egland a permit application fee and not process the application as a de minimis exemption.

19. DEP staff visited the mangrove slough on numerous occasions between October 2000, and final hearing and observed that the trench continued to get deeper over time as a result of continued prop-dredging and digging.

20. In early August 2001, Tom Hodges observed a man walking back and forth with a wheel barrow between a storage shed on Egland's property and the channel. (Hodges was on his property across South Lake but use of binoculars enabled him to see this.) The next day, Hany Haroun discovered a poured-concrete slab forming a plug or dam in the channel on the lake side. Haroun reported his discovery to Tom Hodges, who investigated with his wife, who took photographs of the structure. At some point, the Hodgeses realized that a manatee was trapped in the lake. The manatee did not, and appeared unable to, use the other possible access point

towards Landings of Largo to escape. See Finding 10, supra. The Hodgeses telephoned Barham at DEP to report the situation and complain. Tom Hodges then proceeded to break up the concrete, remove the resulting rubble, and place it on the path to the storage shed, freeing the manatee. The incident was reported in the newspaper the next day and prompted Petitioners to file their Motion to Dismiss and for Other Relief on August 9, 2001. See Preliminary Statement.

21. The evidence was inconclusive as to who poured the concrete, or had it poured, and why. Egland testified that he was in Egypt on an extended trip at the time and denied any knowledge of the concrete plug until he saw the rubble on his property upon his return from Egypt. Egland testified that he saw no "aggregate" in the concrete, which would make it relatively easy to break up, and he suspected that Petitioners were responsible for pouring the concrete in order to publicly make false accusations against Egland. Petitioners denied Egland's accusation. Vince testified that the concrete contained rebar for strength. The evidence was inconclusive as to who was responsible for this incident.

22. As pointed out by Petitioners, DEP did not investigate and does not know whether there is any freshwater upwelling in the lake, whether manatees have mated in the lake, or whether calves have been birthed in the lake. DEP

also did not investigate and does not know whether South Lake is unlike other manatee habitat in the area. DEP did not investigate or obtain any information as to how many manatees use the lake, or what manatees use the lake for, in addition to the information provided by Petitioners.

23. Carol Knox, an Environmental Specialist III with the Florida Fish and Wildlife Commission, testified as a manatee expert based on her knowledge of manatees and manatee habitat in the area, as well as the information known to DEP. It was her opinion that, regardless what South Lake might offer manatees in the way of habitat, closing the channel (with the specific conditions required by DEP to protect manatees during the filling itself) would have no adverse impact on manatees because it did not appear that manatees made use of the lake before the channel was dug in 1996 or 1997, and ample other manatee habitat of various kinds continued to be available in the area.[7] Based on the testimony of Knox and Barham, and the totality of the evidence in this case, it is found that Egland provided reasonable assurance that his proposed restoration project will not harm or adversely affect manatees or their habitats.

24. Petitioners also questioned Egland's assurances as to water quality. Vince Easevoli, Stanley Dominick, and Hany

Haroun testified to their concerns that water quality in the lake will decline if the channel is closed.

25. As Petitioners point out, DEP did not require Egland to provide any water quality measurements. This was because the proposal is reasonably expected to reverse the effects of the illegal dredging on water quality and to return both the water in the lake and canal and the water in Florida Bay to the quality that existed prior to the illegal dredging. Without requiring any water quality measurements, it is reasonably expected that the water quality in Florida Bay would not decline in any respect; to the contrary, if anything, Florida Bay's water quality would be expected to improve by reduction of contributions from the lake and canal. Conversely, water quality in the lake and canal would be expected to decline but not below what it was before the illegal dredging.

26. Petitioners also question DEP's failure to require Egland to provide a survey or stake the area to be filled, so as to ensure against filling too much of the mangrove slough. But the proposed ERP contains a specific condition: "The final fill elevation of the fill shall be at the elevation of the substrate within the adjacent mangrove wetlands." Barham testified persuasively that this specific condition is adequate to provide reasonable assurance. Compliance can be

ascertained by simply viewing the site after completion of the restoration project, and compliance can be enforced by requiring removal of excess fill as necessary.

27. The proposed ERP also contains a general condition that the permit does not convey or create any property right, or any interest in real property, or authorize any entrances upon or activities on property which is not owned or controlled by Egland.

CONCLUSIONS OF LAW

28. Section 373.413, Florida Statutes (2001), and applicable administrative rules, required Egland to obtain an ERP to fill the trench or channel at issue in this case.

Permit Criteria

29. Section 373.414(1), Florida Statutes, requires an

> applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 372.421(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 department 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 governing board or the department 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;
>
> 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 provision of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

These statutory provisions are also incorporated (albeit apparently superfluously and unnecessarily) in Florida Administrative Code Rule 40E-4.302, which is made applicable by a complicated maze of administrative rules.[8]

30. Florida Administrative Code Rule 40E-40.302 also makes Rule 40E-4.301 applicable to this case. In pertinent part, Rule 40E-4.301 requires applicants for "a standard individual, or conceptual approval permit under this chapter or Chapter 40C-40" to provide reasonable assurance that a "surface water management system":

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
(e) Will not adversely affect the quality of receiving waters such that the water qualify standards set for the in Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated; . . . .

31. Florida Administrative Code Rule 62-4.242(2)(a) provides in pertinent part:

(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 or 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; lowered water quality would occur only within a

> restricted mixing zone approved by the Department; and, water quality criteria would not be violated outside the restricted mixing zone.

Standing

32. Section 120.52(12)(b), Florida Statutes, defines a "party" to include "[a]ny person. . . whose substantial interests will be affected by proposed agency action. . . ." (Other parts of the definition are not applicable.) It was held in Agrico Chemical Co v. Dept of Environmental Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981):

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

See also Ameristeel Corp v. Clark, 691 So. 2d 473 (Fla. 1997).

33. In this case, all Petitioners reside on South Lake, and the water quality of South Lake is expected to decline from present levels (albeit not below levels before the illegal dredging of the channel to Florida Bay) as a result of the proposed project. It is concluded that these facts are enough to prove the standing of all Petitioners. In addition, at least some Petitioners--Vince Easevoli, the Hodges, and Hany Haroun--also presented sufficient evidence of their

enjoyment watching manatees in South Lake sufficient to support their standing.

Burden of Proof and Persuasion

34. As applicant, Egland has the ultimate burden of proof and burden of persuasion. See Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 786-789 (Fla. 1st DCA 1981). However, if Egland presents a prima facie case of credible evidence of reasonable assurances and entitlement to the permit, the burden of presenting evidence can be shifted to Petitioners, as permit challengers, to present evidence of equivalent quality to refute the applicant's evidence of reasonable assurances and entitlement to the permit. Id.

Application of Permit Criteria

35. Under the facts of this case, Egland gave reasonable assurance that filling the trench or channel at issue to restore preexisting conditions will not degrade the water quality of Florida Bay, clearly Outstanding Florida Water under Florida Administrative Code Rule 62-302.700(2)(h) and (9)(i)13. To the contrary, if the water quality in Florida Bay changes as a result of this project, it will likely improve since less lower-quality water from South Lake will enter Florida Bay.

36. The illegally dredged channel itself clearly is excluded from the Florida Keys Outstanding Florida Waters under Rule 62-302.700(9)(i)13.c., which excludes "[a]rtificial waterbodies, defined as any waterbody created by dredging, or excavation, or by the filling in of its boundaries, including canals as defined in Rule 62-312.020(3), F.A.C.(5-8-85)." As such, the antidegradation provisions do not apply, and restoring the location to its preexisting conditions would not violate any water quality standards.

37. Citing Save Anna Maria, Inc. v. Dept. of Transportation and Dept. of Environmental Protection, 700 So. 2d 113 (Fla. 2d DCA 1997), Petitioners contend that Egland did not provide reasonable assurance that the proposed restoration project would not degrade Outstanding Florida Water because he did not present evidence of the "existing ambient water quality," as defined by Rule 62-242(2)(c). But the ERP application denied in Save Anna Maria was for construction of a high-level, fixed-span bridge over Sarasota Pass, a designated Outstanding Florida Water, not a restoration project to correct and reverse the effects of illegal dredging. It is concluded that, under the facts of this case, it was not necessary for Egland to produce scientific evidence of "existing ambient water quality" of Florida Bay to prove that it will not be lowered as a result

of his proposed restoration project, much less significantly degraded.

38. It is not clear from the evidence whether South Lake should excluded from the Florida Keys Outstanding Florida Waters. under Rule 62-302.700(9)(i)13.c. The origin of South Lake was not clear from the evidence; nor was there any evidence of the 1985 version of Rule 62-312.020(3).

39. If South Lake were not Outstanding Florida Water, the antidegradation provisions would not apply. Egland provided reasonable assurance that the proposed project probably would return South Lake to its preexisting water quality, which would not violate any water quality standards. Even if South Lake were considered Outstanding Florida Water, Egland's restoration project would be "clearly in the public interest" because of its restorative nature and the resulting improvement to the water quality to Florida Bay.

40. Citing Metropolitan Dade County v. Coscan Florida, Inc. and Dept. of Environmental Regulation, 609 So. 2d 644 (Fla. 3d DCA 1992), Petitioners contended that Egland and DEP failed to consider whether the project would adversely affect manatees, an endangered species, or their habitat. But in Coscan, DER judged impacts on manatees using less rigorous federal standards. See also Section 370.12(12)(b), Florida Statutes. In this case, impacts on manatees have been

considered and judged properly under the requirements of Florida law. As found, Egland provided reasonable assurances that his proposed restoration project will not adversely impact the value of functions provided to manatees, so as to meet the requirements of Rule 40E-4.301(d).

41. Based on the facts of this case, and balancing the factors listed in Section 373.414(1)(a), Florida Statutes, and in Florida Administrative Code Rule 40C-4.302(1), including whether Egland's restoration project will adversely affect the conservation of manatees or their habitats, Egland's evidence was sufficient to provide reasonable assurance that his proposed restoration project is clearly in the public interest.

42. As to Petitioners' claims to real property easement rights to Egland's "southerly contiguous 50 feet," no applicable statute or rule explicitly requires Egland to demonstrate ownership or control. Instead, as found, the ERP that DEP intends to issue to Egland would have specific permit conditions that the permit does not convey or create any property right, or any interest in real property, or authorize any entrances upon or activities on property which is not owned or controlled by Egland. See Finding 27, supra. See also Florida Administrative Code Rule 62-343.020(5). Contrast, e.g., Florida Administrative Code Rule 40E-4.101(2),

which Florida Administrative Code Rule 62-330.200(4) does not adopt by reference. For these reasons, it appears that Egland's ERP can be granted without a showing of ownership or control, leaving Petitioners' real property claims for determination in state circuit court in an action involving title and boundaries of real property under Section 26.012(2), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED that the Respondent, the Department of Environmental Protection, enter a final order granting the application of Leland Egland and issuing ERP Number 44-01700257-001-ES.

DONE AND ENTERED this 25th day of November, 2002, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2002.

ENDNOTES

[1]/ This part of the caption was amended to correct an error noticed at final hearing.

[2]/ Previously, the caption used an erroneous first name, Catherine, for this Petitioner instead of the correct first, Christine; the error has now been corrected.

[3]/ Four others, in addition to the current Petitioners, joined in the original Petition but have since voluntarily dismissed and have been dropped as parties.

[4]/ Exhibit numbers assigned in the parties' Prehearing Stipulation were used at final hearing; not all exhibits listed in the Prehearing Stipulation were used, which explains the gaps in the numbering sequence.

[5]/ The Transcript is in error in stating that Petitioners' Exhibits 5 and 8 were received in evidence. Actually, they were only identified for the record; an objection to 5 was sustained, and Petitioners never moved 8 into evidence. Petitioners' Exhibit 31B was listed on DEP's exhibit list in the Prehearing Stipulation, but was used and introduced into evidence by Petitioners using DEP's exhibit number.

[6]/ Vince Easevoli denied digging the trench or cutting mangrove in the area, stating that he only removed garbage from the area. But Bud Cornell, who sold Vince his property on the lake, remembers telling Vince there was no boat access to Florida Bay and remembers Vince saying he would like to see boat access. In addition, Egland testified to seeing Vince drag his boat through the creek before the channel was opened. Based on all the evidence, Egland's testimony on this point is accepted, and the testimony of Vince Easevoli is rejected.

[7]/ Knox also testified that, if manatees accessed and used the lake before that time, it still might be possible for manatees to continue to use the lake by using the other possible access point leading to Landings of Largo. But this was not a major consideration for her since earlier use of the lake was not probable.

[8]/ Since Egland's ERP was required by Section 373.413, Florida Statutes, most of Parts I and III of DEP's Florida Administrative Code Rule Chapter 62-4 do not apply. See Florida Administrative Code Rules 62-4.001 and 62-4.510.

Instead, certain rules of the South Florida Water Management District, including those cited infra, are adopted by reference for use in this case in conjunction with applicable DEP rules. See Florida Administrative Code Rule 62-330.200(4). Because this project is so small, Florida Administrative Code Rule Chapter 40E-40 applies instead of Chapter 40E-4. Compare Rule 40E-4.015 to Rule 40E-40.041. See also Rule 40E-40.011, providing that "rules in this chapter authorize environmental resource standard general permits for certain surface water management systems which have been determined to be not harmful to the water resources of the District and to be not inconsistent with the objectives of the District." Rule 40E-40.302, applies to surface water management systems. But Rule 40E-4.021(33), which is incorporated in Rule 40E-40.021, defines surface water management systems to include dredging or filling. The permit thresholds in Rules 40E-4.015 and 40E-40.041 also make it clear that these rules apply to dredge and fill. Rule 40E-40.302, in turn, incorporates superfluous and unnecessary Rule 40E-4.302.

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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.