

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BUTLER CHAIN CONCERNED )  
CITIZENS, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-2471  
 )  
WINDERMERE BOTANICAL GARDEN, )  
L.P., and DEPARTMENT OF )  
ENVIRONMENTAL PROTECTION, )  
 )  
Respondents. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Orlando, Florida, on December 3-5 and 8-10, 2003.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Petitioner has standing to contest the consent agreement into which Respondents entered and, if so, whether Respondent Department of Environmental Protection abused its discretion in entering into the agreement.

PRELIMINARY STATEMENT

By Butler Chain Concerned Citizens, Inc.'s Petition for Formal Administrative Hearing dated June 6, 2003, Petitioner challenged a proposed consent agreement into which Respondents entered on May 6, 2003. The petition alleges that Petitioner is a non-profit organization whose primary purpose is to protect water quality and wildlife. The petition alleges that Petitioner is committed to preserving the Butler chain of lakes, the surrounding environmentally sensitive lands, and associated fish and wildlife. The petition alleges that Petitioner comprises over 50 members, who own property in the area of the Butler chain of lakes and who use the Butler chain of lakes for various recreational purposes.

The petition alleges that Lake Butler is an outstanding Florida waterbody and is navigable. The petition alleges that the bottom of Lake Butler is sovereign submerged land.

Petitioner, which filed the petition under Sections 120.569 and 120.57, Florida Statutes, alleges that paragraph 4 of the consent agreement describes unauthorized activities that have caused substantial injury to the waters and wildlife of the Butler chain of lakes and severely diminished the recreational value of the lakes and surrounding areas. The petition alleges that the consent agreement fails to redress meaningfully the substantial adverse impacts of the illegal conduct of Respondent Windermere Botanical Garden, L.P., which is not required to restore the illegally dredged and filled wetlands or effectively mitigate the environmental damage. The consent agreement allegedly "effectuates a lingering substantial injury in fact to [Petitioner] and its membership."

The petition alleges that Respondent Windermere Botanical Garden, L.P., received authorization from Respondent Department of Environmental Protection to remove invasive aquatic vegetation from wetlands within the landward extent of Lake Butler, but the scope of the work allegedly far exceeded the work permitted by the Bureau of Invasive Plant Management Permit that the Department issued Respondent Windermere Botanical Garden, L.P. The permit allegedly required the proper use of

turbidity barriers during the removal of invasive aquatic vegetation, but they allegedly did not adequately protect state waters, especially with respect to turbidity. Respondent Windermere Botanical Garden, L.P., allegedly removed native vegetation not within the scope of its permit.

The petition alleges that Windermere Botanical Garden, L.P., also engaged in illegal dredging and filling activities, as it allegedly removed material at an average depth of eight feet and then illegally deposited the material on wetlands and in waters of the state. The dredging and filling allegedly caused adverse water quality impacts, including violations of turbidity standards.

The petition alleges that Windermere Botanical Garden, L.P., constructed and removed a berm in Lake Butler, without state approval or authorization. The petition alleges that Windermere Botanical Garden, L.P., constructed a haul road in the wetlands without the necessary permits.

Among the issues of material fact identified in the petition are whether Respondent Department of Environmental Protection abused its discretion by entering into the consent agreement, especially with respect to the stipulated penalty options.

The relief sought by the petition includes a final order determining that Respondent Department of Environmental

Protection set aside or modify the proposed consent agreement, so that the Department may order Respondent Windermere Botanical Garden, L.P., to fully restore the impacted wetlands to their natural condition before Respondent Windermere Botanical Garden, L.P., commenced its unauthorized activities.

By Amended Petition for Formal Administrative Hearing filed November 14, 2003, Petitioner corrected and clarified various allegations, mostly related to standing. Among the new allegations are that Petitioner comprises over 400 members, who live or own property in the area of the Lake Butler chain of lakes. The alleged interests of the members also include property interests. These property interests, interests in natural resources, and recreational interests are allegedly injured by the consent agreement and waiver by Respondent Department of Environmental Protection of unauthorized activities. The amended petition alleges that the activities of Respondent Windermere Botanical Garden, L.P., not only far exceeded the scope of its Bureau of Invasive Plant Management Permit, but also allegedly violated various conditions of this permit. The dredging allegedly included an area outside of the area permitted for an access corridor. The illegal dredging and filling allegedly destroyed a shallow wetland system.

On November 19, 2003, Respondent Department of Environmental Protection filed a Motion to Limit Scope of

Hearing. The motion requests an order limiting the scope of the hearing to violations addressed in the consent agreement of May 6, 2003, which was issued by the Department's Central District Submerged Lands and Environmental Resources Permitting Office. These violations are the unlawful filling of wetlands and surface waters of Lake Butler, the unpermitted creation of a berm separating the work from Lake Butler, the unlawful dredging of sovereign submerged lands, and the unlawful storage of spoil material with the wetlands or surface waters of Lake Butler. The motion seeks to prevent Petitioner from raising issues arising out of alleged violations of a Bureau of Invasive Plant Management Permit, which was not a subject of the consent agreement.

By Response to Motion to Limit Scope of Hearing, filed on November 26, 2003, Petitioner argued that the Bureau of Invasive Plant Management Permit was properly the subject of this case because, in part, Respondents would rely on it to justify the alteration of an eight-acre wetland.

At the hearing, the Administrative Law Judge reserved ruling on the motion, but advised the parties to treat the motion as denied in their presentation of evidence. Obviously, Respondents could introduce evidence of the Bureau of Invasive Plant Management Permit in defense of the allegations of Petitioner, and Petitioner could introduce evidence tending to

rebut such evidence of Respondents. The Administrative Law Judge reserved ruling on whether Petitioner has standing to allege violations of the Bureau of Invasive Plant Management Permit, and, if so, the nature of the relief to which Petitioner would be entitled, if it prevailed as to such allegations. The Conclusions of Law discuss this issue.

At the hearing, Petitioner called 30 witnesses and offered into evidence 43 exhibits: Petitioner Exhibits 2, 4-5, 8-9, 11-12, 17, 22-24, 29 (strictly for penalty), 33, 37, 43, 46, 61 (not for truth), 68, 70, 79-83, 88, 92-93, 96, 99-101, and 103-114 (as to Petitioner Exhibit 114, except for Requests for Admission 46 and 52). Respondent Windermere Botanical Garden, L.P., called eight witnesses and offered into evidence 133 exhibits: Windermere Botanical Garden, L.P., Exhibits 1-4, 5-89a, 90, and 92-133. Respondent Department of Environmental Protection called five witnesses and offered into evidence 24 exhibits: DEP Exhibits 1-15 and 17-25. All exhibits were admitted except DEP Exhibit 2, which was proffered. Petitioner was to file Petitioner Exhibit 111 after the hearing, but did not do so; Petitioner Exhibit 111 is thus withdrawn.

Most of Petitioner's witnesses testified primarily to establish Petitioner's standing. To save time, the Administrative Law Judge invited Petitioner to submit the standing testimony of additional such witnesses by affidavit.

On January 6, 2004, Petitioner filed 12 affidavits of witnesses concerning standing. On January 23, 2004, Petitioner filed a corrective affidavit for one of these witnesses.

On January 13 and 16, 2004, respectively, Respondents Department of Environmental Protection and Windermere Botanical Garden, L.P., filed their objections to the affidavits, complaining about statements that went beyond standing and to the merits of the case. These objections are well-taken, as is the statement of counsel of Windermere Botanical Garden, L.P., that the "objectionable passages are both too obvious (for the most part) and too numerous to be worth identifying here, sentence by sentence." The Administrative Law Judge has therefore ignored all non-standing assertions in these affidavits.

The court reporter filed the transcript on February 19, 2004. The parties filed their proposed recommended orders by March 24, 2004.

#### FINDINGS OF FACT

1. The Butler chain of lakes, which covers about 4,700 acres, comprises 11 lakes and artificial canals interconnecting these lakes. The northernmost lake of the chain is Lake Down, which lies immediately north and east of the Town of Windermere. The Town of Windermere is about 15 miles west of Orlando. Immediately west of the Town of Windermere is Lake Butler, the

largest of the lakes, covering roughly 1,900 acres at its normal high water elevation of 99.5 feet. (All elevations are National Geodetic Vertical Datum).

2. Water flows north to south between these lakes and the surrounding area of west Orange County. The Butler chain occupies the northern end of the Reedy Creek Basin, which occupies the northern extent of the area under the jurisdiction of the South Florida Water Management District (SFWMD). In terms of drainage, Lake Down is the uppermost lake and drains through Wauseon Bay into Lake Butler.

3. Lake Butler's drainage basin captures about half of the strip of land dividing Lake Butler from Lake Down. Occupying this strip of land is the older, more densely developed residential area within the Windermere area. Just south of this residential area, Lake Butler's drainage basin encompasses the western extent of the Isleworth Country Club golf course. The portions of the drainage basin on the south and west sides of the lake contain the most upland, much of which remains in agricultural use or is vacant. These portions of the drainage area include the Lake Butler Sound and Tilden's Grove drainage subbasins, which are discussed in more detail below.

4. The relatively thin strip of land forming the drainage basin north of the lake is moderately developed residentially; the westernmost extension of this land is the residential

development known as Park Avenue West, formerly known as Chaine du Lac, a residential subdivision of at least 70 acres.

Respondent Windermere Botanical Garden, L.P. (WBG, which includes WBG's predecessor, Altima Development, L.P.), owns unbuilt platted lots within a 40-acre parcel in the subdivision, for which SFWMD has issued a Surface Water Management (SWM) Permit. The drainage facilities are already constructed, although numerous lots, especially in the immediate vicinity of the activity described below, remain unbuilt.

5. In 1984, Florida designated all of the Butler chain of lakes and their canals as Outstanding Florida Waters (OFW). The deepest depths of the Butler chain generally range from 15-30 feet, although parts of Lake Butler reportedly are 40 feet deep. At the time of their OFW designation, the uppermost seven lakes, which include Lake Butler, were oligomesotrophic, with low productivity, high water quality, and deep waters. At that time, the lowermost three lakes (Sheen, Pocket, and Fish) were mesotrophic, with moderate productivity, high coloration, and shallow waters.

6. Orange County collected water quality data for all of the lakes in the Butler chain since 1967. The same year, Respondent Department of Environmental Protection (DEP), which includes DEP's predecessor agency) began collecting water quality data in Lake Butler. At the time of their OFW

designation, the water quality of the entire Butler chain was excellent.

7. A DEP report dated January 11, 1984, recommends the OFW designation of the Butler chain. The report states that the biological data also supported the designation, noting that the frequent collection of varieties of mayfly, midge, and caddisfly suggested "excellent water quality" because "[f]ew of these organisms have been collected from lakes located in highly developed areas of central Florida."

8. The DEP report states that the shoreline vegetation of most of the lakes, except "several of the upper lakes," had remained in a natural state, consisting of cypress, wax myrtle, bays, primrose, panicum, cattails, and sawgrass. The dominant submerged plant was bogmoss, with hairgrass found in the deeper parts of the lakes.

9. The DEP report contains several figures that provide water quality data for each of the ten lakes covered by the report. It is impossible to determine if the data are averages or data points at a specific time. If averages, as seems more likely, the period of time is omitted from the figures and accompanying text.

10. Figure 4 of the DEP report indicates that Lake Butler, as was true of all of the lakes in the Butler chain, had between 0.01-0.02 mg/l of total phosphorus. Lake Butler had 0.8 mg/l of

total nitrogen. This ratio suggests that Lake Butler was a phosphorus-limited lake, as it remains today. For a phosphorus-limited lake, phosphorus is the more important nutrient in restricting the eutrophication process, by which lakes become increasingly more productive as they pass from oligotrophic to mesotrophic and ultimately to eutrophic states. The 0.8 mg/l value for Lake Butler was closer to the values for Lake Sheen and Pocket Lake, which were the more productive lowermost lakes, than to the 0.6 mg/l value for Lake Down.

11. However, Figure 6 of the DEP report reveals that the secchi depth of Lake Butler, which was about 3.7 meters, more closely approached the secchi depth of Lake Down, which was 4 meters, than it did the secchi depths of the lowermost three lakes, which were about 1.3 meters. Figure 8 indicates that Lake Butler more closely resembled Lake Down in turbidity, with the former at 1.0 NTU and the latter at 0.8 NTU. Two of the lowermost lakes were at 1.5 and 2.2 NTU, and the third was at 4.5 NTU.

12. All of the lakes were well-oxygenated. Figure 3 of the DEP report indicates that Lake Butler had over 8 mg/l of dissolved oxygen and less than 1 mg/l of biochemical oxygen demand, which were about the same values as those of the nine other lakes.

13. Figure 9 of the DEP report discloses that Lake Butler had the highest chlorophyll a value--1.75 ug/l, which one other lake shares. Lake Down had the lowest chlorophyll a value--1.32 ug/l. In general, chlorophyll a is associated with algae. However, these were relatively low chlorophyll a values, as was reflected in the fact that algae counts in the Butler chain seldom exceeded 100 algae/ml.

14. However, average chlorophyll a values in Lake Butler have been steadily increasing since 1989. Average chlorophyll a values remained at or below 1 ug/l in 1989 and 1990, then rose to about 2 ug/l in 1991 and 1992, before dropping to about 1.3 ug/l in 1993. In 1994, the lake's average chlorophyll a values increased to about 2.25 ug/l and, in 1995, increased again to about 3.7 ug/l. The next year, 1996, average chlorophyll a was about 3 ug/l, and, in 1997, average chlorophyll a was about 4.7 ug/l.

15. From 1989 through 1997, the average annual chlorophyll a in Lake Butler increased in reasonable conformance to a steady, straightline progression. However, average chlorophyll a dropped in 1998 to 2.5 ug/l and dropped again, in 1999, to 1.3 ug/l. In 2000, average chlorophyll a increased to 1.6 ug/l, but, in 2001, average chlorophyll a dropped to 1 ug/l.

16. The lake's chlorophyll a values for 1998-2001 were far below their predicted values, based on an extension of the

straightline progression established from 1989-1997. During much of these four years, central Florida experienced a severe drought, as noted below. When the drought ended, in 2002, average annual chlorophyll a values abruptly increased by one order of magnitude, to a little over 12 ug/l. If the straightline progression reestablishes itself with the return of normal rainfall amounts, the average annual chlorophyll a for 2003 will decrease, but only to nearly 6 ug/l. Although only half the chlorophyll a value of 2002, a value of 6 ug/l would be four times greater than the value when Lake Butler received its OFW designation 20 years ago.

17. The DEP report notes no point sources of discharge into the Butler chain. Nonpoint sources included residential and agricultural uses, mostly citrus, although retention of much of the native shoreline and native vegetation had filtered nutrients and prevented excessive algae growth.

18. In the 20 years since the Butler chain was designated an OFW, the surrounding area has undergone considerable development, with the conversion of agricultural and vacant land uses to residential uses, as well as the development of the Isleworth golf course that occupies much of the land separating Lake Butler from the downstream lakes. Much, if not all, of the residential development surrounding Lake Butler relies on septic tanks. Also, much of the development of the lakeshore predates

the implementation of strict stormwater management controls, so the nutrient-enriched stormwater runoff from yards and the golf course flow into the lake with little, if any, attenuation.

19. From 1999 to mid-2002, a severe drought caused the elevation of Lake Butler to drop from 99.3 feet to 95.3 feet. The drought ended with six months of heavy rainfall in 2002 that contributed to the second highest annual rainfall on record-9.5 inches. The elevation of Lake Butler rose to just over 100 feet in the last six months of 2002. Key facts in this case include the deluge after the drought, and the timing of the deluge. In June 2002, Lake Butler was at 95.2 feet. In July 2002, Lake Butler was at 96.7 feet. Six months later, in January 2003, the lake had risen to 100.3 feet. The water elevation increased 1.5 feet from June to July 2002 and then increased another 1.7 feet from July to September 2002, for a total of 3.2 feet over three months. From September 2002 to January 2003, the lake rose another 1.9 feet, so the summer of 2002 was a period of rapid rise in water elevation in Lake Butler.

20. Seeking to take advantage of the low lake elevations produced by the three-year drought, WBG decided to undertake a muck-removal project in an eight-acre cove at the northwest corner of Lake Butler and adjacent to the Park Avenue West development occupying the northwest shore of Lake Butler.

21. The cove is triangular-shaped. The mouth of the cove is 500-600 feet long and runs in a northwest to southeast direction. The southern side of the cove is about 1000 feet long, and the west side of the cove is about 950-1000 feet long. At the apex of the cove across from the cove mouth is a culvert that runs under West Lake Butler Road and connects the cove to the Tilden's Grove wetlands to the southwest of the cove.

22. Most of the cove bottom is below 99.5 feet elevation, so the cove bottom is submerged when Lake Butler is at its normal high water elevation. The parties do not contest that the cove bottom is sovereign submerged land. However, by the end of the three-year drought described above, about 75 percent of the cove was walkable.

23. Historically, the cove was open water, as reflected by a rough map from the mid-19th century. For at least the past 50 years, though, much of the cove has been filled with vegetative material. For at least the past several years, the cove has been occupied by a thick mat of living vegetation, known as a tussock.

24. During periods of normal water elevations, such as in May 1998, just prior to the three-year drought, the tussock in the cove floated on several feet of water, its thick vegetative mat held together by the roots of the plants by which it was formed. The tussock remained wedged in the cove, which much of

the year receives an easterly wind that tends to restrain the tussock in the apex of the cove.

25. The formation of the tussock accelerates the process by which muck forms on the bottom beneath the tussock. Little submerged vegetation survived the thick shade of the floating and occasionally grounded tussock. The dead plant material decayed and added to the thick layer of muck on the bottom of the cove. Large tussocks in central Florida have been known to become untethered to the bottom and, driven by the wind, have destroyed docks and seawalls, scoured submerged vegetation, and presented a hazard to navigation.

26. To convert its unbuilt tussock-front lots to lakefront lots, WBG undertook a project to dredge several feet of muck from the bottom of the cove and place the spoil on a nearby upland site owned by WBG. The first step in this process was for WBG to renew its 1998 Bureau of Invasive Plant Management Permit (BIPM Permit).

27. Pursuant to an application for renewal filed in March 2001, DEP renewed WBG's BIPM Permit (2001 BIPM Permit). Condition 6 of the 2001 BIPM Permit requires WBG, as permittee, to plant nearly all of the cove bottom with 60,000 aquatic plants. Condition 4 of the 2001 BIPM Permit requires WBG to maintain the revegetated site pursuant to the attached site

plan, but no site plan is attached to the permit, nor could any witness adequately identify any such site plan.

28. The 2001 BIPM Permit identifies the "area of operation" as the five unbuilt lots owned by WBG that abut the cove. Based on the earlier BIPM permit, the 2001 BIPM Permit describes ten targeted plant species over only one-quarter of an acre. Notwithstanding these provisions, the agreement between DEP and WBG was for WBG to clear eight acres of tussock vegetation and replant the entire submerged cove bottom.

29. Having obtained the 2001 BIPM Permit, WBG proceeded to the next step of the project--removing organic materials from the cove. WBG elected to demuck the cove pursuant to a statutory exemption that allows the holder of the BIPM permit to remove up to three feet of organic material, but not sand, without an Environmental Resource Permit (ERP). WBG interpreted the statutory exemption to allow it to remove the tussock, which was about one foot thick, plus up to three feet of underlying muck.

30. On March 19, 2002, WBG posted its Notice of Commencement for the muck-removal job. Three days later, the contractor began site clearing at the apex of the cove. The findings of fact refer to WBG, rather than its contractor, because the contractor performed pursuant to its contract, and

WBG representatives were onsite sufficiently to know exactly what the contractor was doing as the contractor was doing it.

31. On March 29, 2002, WBG installed double turbidity barriers across the cove mouth. These barriers ran from the submerged bottom to the surface of the lake. On April 3, 2002, WBG submitted an application to SFWMD for a dewatering permit and, assured of its issuance, began dewatering the cove without delay.

32. At the same time, WBG began constructing a berm across the mouth of the cove. The berm, which was finished by April 25, 2002, occupies sovereign submerged land. To construct the berm, WBG dredged muck and some sand from the landward and waterward sides of the site of the berm. As built, the berm, which also served as a haul road, was 12-16 feet wide, two feet above the elevation of the lake, and 500-600 feet long.

33. The berm served as a barrier to prevent the waters of Lake Butler to enter the cove and interfere with the muck-removal project. The berm also served as a barrier to prevent stormwater-transported turbidity and sediments from the cove and its drainage subbasin from entering the waters of Lake Butler. Additionally, WBG temporarily stored the removed muck in adjacent wetlands, constructed a rim ditch in muck and some sand, and permanently deposited the removed muck in nearby uplands owned by WBG.

34. The berm on sovereign submerged bottom and across waters of the state did not go unnoticed. During the first week of April, DEP's BIPM representative notified a DEP representative in its Office of Submerged Lands and Environmental Resources Permitting (SLERP). On April 8, the SLERP representative visited the site and found the obvious violations. A second visit on April 25 revealed that the work had proceeded and the violations had not been corrected. On May 1, 2002, DEP Central District Director Vivien Garfein issued a warning letter to WBG for the illegal filling of the wetlands to form the berm, although the letter omits any mention of the illegal dredging to form the berm or temporary storage of the muck in wetlands.

35. Racing against the darkening horizons of both regulatory intervention and the approaching rainy season, WBG proceeded without delay with its demucking job. By May 4, half of the tussock was gone, and a pump removed water from the cove to a nearby detention pond, which was part of the SWM system already in place in the Park Avenue West subdivision. At no time did the pumped water overrun the pond, probably due to the drought and the fact that the pond served a part of the subdivision that had not yet been built. Nor did the pumped water transport into Lake Butler nutrients or other contaminant through the groundwater under or nearby the pond.

36. By May 21, the tussock was completely gone, and muck removal was in full force. Trenches drew the water toward the apex of the cove, and the pump was now running continually.

37. On May 29, with the job nearly two-thirds finished, representatives of WBG, DEP, SFWMD, and Orange County met to discuss all of the violations, not just that cited in the warning letter. The parties discussed using a consent order to authorize the construction of the berm, restoration of sand from the rim ditches, removal of the muck fill to uplands, removal of the berm, reflooding the cove, and replanting to the conditions set forth in the 2001 BIPM Permit.

38. However, the three-year drought was to end long before DEP would prepare a consent order, whose contents are set forth below. DEP sent the first draft of the consent order to WBG in January 2003. At WBG's insistence, DEP changed the name of the document from "consent order" to "consent agreement." WBG signed the consent agreement on April 28, 2003, and DEP signed it on May 6, 2003. In the yearlong interval between the discovery of the violations and the execution of the consent agreement, WBG had continued with the project, now with the tacit consent of DEP.

39. In the latter half of June and first half of July of 2002, the rains returned and, as noted above, returned in abundance. WBG completed the muck removal on June 30 and was

ready to refill the cove. By now, the lake elevation was five feet above the cove bottom, so, rather than flood the cove and generate considerable turbidity, WBG, by opening a previously installed culvert in the berm, gradually reintroduced water into the cove. After doing so, WBG finished removing nearly all of the berm by July 4 and proceeded substantially to complete the job in the following days.

40. Upon the removal of the berm, in mid-July, the cove was more turbid than Lake Butler, so the turbidity barriers, which were still in place after the removal of the berm, were effectively containing the temporary turbidity associated with the removal of the berm, as well as any temporary turbidity associated with the heavy rains generating stormwater runoff from Tilden's Grove under West Lake Butler Road and into the cove. In early August, though, the rapidly rising lake elevation forced the turbidity barriers off of the submerged bottom and eventually the wind drove them into the lake, although their anchors still held them, at points, along the mouth of the cove.

41. As noted above, the three-year drought ended with extremely heavy rains from mid-June to mid-July, such that the lake rose 1.5 feet in this 30-day period. By the end of July or the first few days of August, Lake Butler suffered a catastrophic algae bloom, turning its once-clear waters, almost

overnight, a thick green-brown, depositing scum on pilings, seawalls, and boats, and repulsing swimmers, boaters, and fishers from pursuing their recreational activities.

42. By the end of July or early August, WBG had substantially completed its work in the cove, except for that required by the 2001 BIPM Permit. Even though lifted two to three feet from the bottom and partially blown into the lake, the turbidity curtains remained effective--now, though, shielding the refilled cove from the more-turbid waters of Lake Butler.

43. By letter dated October 30, 2002, from WBG's project engineer to WBG and DEP, the engineer noted that turbidity in the cove was considerably lower than the range of turbidities in Lake Butler and requested permission to remove the turbidity barriers. However, by agreement between WBG and DEP, the turbidity barriers have remained in place, at least partly to protect the newly planted submerged and emergent vegetation from the disturbance posed by boating.

44. The consent agreement, in which WBG does not admit to any wrongdoing, recites the findings of DEP representatives in April 2002, but adds that a reinspection on September 10, 2002, revealed that WBG had restored the impacted areas to DEP's satisfaction. The consent agreement notes that replanting of the cove is proceeding pursuant to the 2001 BIPM Permit.

45. The consent agreement imposes a civil penalty of \$8,600 for alleged violations of Section 373.430, Florida Statutes, and DEP rules and \$350 for DEP's investigative costs. The consent agreement states that, instead of paying the fine and costs, WBG has elected to make an in-kind contribution, in the form of a videotape of the benefits of lakeshore care and restoration, at a "value" of \$13,425. The consent agreement establishes deadlines for the production of the videotape. The consent agreement requires WBG to publish a notice of intended agency action, which advises persons who are substantially affected by the consent agreement to file a petition for a hearing "on the consent agreement."

46. In response to the deteriorating water conditions in Lake Butler, Orange County retained a limnologist, Dr. Larry Battoe, who is an assistant director of Environmental Services Division of the St. Johns River Water Management District. On October 31, 2003, Dr. Battoe prepared a report of his findings and conclusions.

47. Relying on water quality data collected by Orange County, Dr. Battoe noted that total phosphorus in Lake Butler rose an order of magnitude from July 8, 2002, when it was 2.5 ug/l, to December 2002, when it was 25 ug/l. Because Lake Butler is a phosphorus-limited lake, the rapid rise in phosphorus fed a rapid rise in algae, as evidenced by the

chlorophyll a values, which began to increase in late August and peaked on November 20, 2002, at 27 ug/l.

48. Turning his attention to WBG's muck-removal project, Dr. Battoe identified three ways by which phosphorus could have entered the lake: erosion of soils exposed by the project or leaching of phosphorus from the soils and subsequent movement into the lake, stormwater running through the project area, and resuspension of bottom sediments so as to release soluble phosphorus.

49. Few cases receive the detailed attention provided by an expert as competent and disinterested as Dr. Battoe. Resorting to comparables where direct data were unavailable and analyzing the Lake Butler Sound drainage subbasin, as well as the Tilden's Grove drainage subbasin, Dr. Battoe developed water balances and water budgets for Lake Butler. He analyzed the spoil mounds to compare estimated post-project levels of phosphorus with predicted pre-project levels. Dr. Battoe took water quality samples within the cove and waterward of the turbidity barriers, which were still in place in August 2003, when he collected much of his data.

50. Dr. Battoe found "little evidence" that the WBG muck-removal project loaded phosphorus into Lake Butler. Dr. Battoe favored explanations involving runoff, especially enriched after

a three-year drought, and septic-tank leachate as sources of phosphorus loading.

51. Dr. Battoe compared cumulative rainfall to total phosphorus concentrations in Lake Butler and found a direct relationship, suggesting that the rains contributed the phosphorus, directly by phosphorus-laden rainfall and indirectly by phosphorus-laden stormwater. Comparing chlorophyll a levels over a longer period of time, as already described above, Dr. Battoe found the direct relationship between lower rainfall levels and lower chlorophyll a levels and, over the longer term, the steadily rising chlorophyll a levels. Ultimately, Dr. Battoe concluded that about three-quarters of the increase in phosphorus that the lake suffered was attributable to the increase in rain that started in the latter half of June 2002. Dr. Battoe concluded that the rainfall directly into the lake and the runoff over the entire drainage basin generated the algae bloom and that the lake suffered no disproportionate phosphorus loading from the Tilden's Grove subbasin or the dredged cove.

52. Pursuant to the 2001 BIPM Permit, WBG's wetland-restoration consultant, Jim Thomas, has undertaken much work in revegetating the submerged bottom of the cove, as well as the littoral shelf and a conservation area that runs along the uplands adjacent to the cove. With considerable experience in

projects of this type, Mr. Thomas agreed to participate in the revegetation project only after WBG decided to remove the tussock and demuck the cove, rather than try to eliminate individual plants, as it had in connection with the two previous BIPM permits.

53. Replacing the degraded wetland and waterbody that the tussock-choked, muck-filled cove had become with a diverse array of submerged and emergent vegetation, Mr. Thomas's work will result in the more efficient removal of nutrients and other contaminants from the runoff passing from Tilden's Grove through the cove and into the open waters of Lake Butler. Once completed, the revegetation of the cove will provide a more diverse habitat for wildlife than previously existed. The tussock-removal, demucking, and revegetation processes work in conjunction with each other to reverse the aging process by which lakes accumulate detritus in the process by which they transform to marshes--a process accelerated by the addition of phosphorus from external sources, such as agricultural and urban runoff.

54. Mr. Thomas's work was impeded by the high rainfall levels that took place starting in mid-June 2002. Rather than insist that Mr. Thomas attempt to plant in such adverse conditions, which all but precluded the survival of many of the plants, DEP sensibly suspended the time constraints of the 2001

BIPM Permit, so that Mr. Thomas could plant during periods of more normal lake elevations.

55. After delaying the planting during the high lake elevations of the fall and winter of 2002, Mr. Thomas recommenced his work in the spring of 2003. A cease-and-desist order from the U.S. Army Corps of Engineers stopped the work from April 21, 2003, to July 14, 2003. After one month's delay while WBG assessed the probable outcomes of this case, Mr. Thomas recommenced his work by the fall of 2003 and planted more than 1000 plants in addition to the 3000-4000 plants that he had already planted.

56. By this time, the emergent vegetation that Mr. Thomas had first planted had proliferated into a luxuriant growth. At the time of the hearing, in December 2003, the submerged vegetation had taken hold, mostly from natural recruitment, which promises a more robust, persistent vegetative presence than would ensue from individual replanting. Mr. Thomas estimates that natural recruitment will reduce the 60,000 plants specified in the 2001 BIPM Permit by 20-50 percent. At the time of the hearing, hydrilla eradication and replacement of a small number of replanted cypress trees appear to be most urgent needs, although more time needs to pass to confirm that the submerged and emergent vegetation have taken hold.

## CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Florida Statutes.

58. This case potentially raises multiple issues of law. However, the findings of fact necessitate resolution of the case based on the threshold issue of standing.

59. Even before determining whether, and the extent to which, Petitioner may challenge the consent agreement, it is necessary to determine whether Petitioner has standing under Section 120.569, Florida Statutes, pursuant to Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 351 (Fla. 1982). The first prong of the Agrico standing test is whether Petitioner's substantial interests will be adversely affected by the proposed agency action--in this case, the consent agreement.

60. Petitioner lacks standing despite the multi-dimensional role of Lake Butler in the lives of substantial numbers of its members and WBG's obvious violations of the laws protecting this outstanding Florida water and governing the private use of sovereign submerged lands. Petitioner's standing is precluded by the fact that the record does not support a finding that the acts and omissions of WBG contributed to any water quality violations in Lake Butler, including, of course,

the algae bloom that took place in early August 2002. To the contrary, in the long run, the removal of the tussock and muck from the cove, especially in tandem with the completion of the revegetation required by the 2001 BIPM Permit, will improve the water quality of Lake Butler and add to the diversity of the habitat associated with the lake. And, in the short run, the berm and turbidity barriers protected the open waters of the lake from construction- and stormwater-related turbidity.

61. Under these circumstances, Petitioner lacks the standing to dispute the proposed agency action of DEP in finalizing the consent agreement with WBG, and WBG's multiple violations are left to DEP to punish.

#### RECOMMENDATION

It is

RECOMMENDED that the Department of Environmental Protection enter a final order dismissing Petitioner's challenge to the consent agreement.

DONE AND ENTERED this 4th day of May, 2004, in Tallahassee,  
Leon County, Florida.



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ROBERT E. MEALE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of May, 2004.

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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 must be filed with the agency that will issue the final order in this case.