STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

DONALD G. TUTEN,

Petitioner,

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

JHC

OGC CASE NO.: 04-0518
DOAH CASE NO.: 06-0186

FINAL ORDER

On August 11, 2006, an Administrative Law Judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this proceeding. Copies of the Recommended Order were served upon counsel for DEP and the Petitioner, Donald G. Tuten ("Petitioner"). A copy of the Recommended Order is attached as "Exhibit A."

On administrative review of this proceeding, the Petitioner filed with the DEP agency clerk three unopposed Requests for Extension of Time to File Exceptions to the Recommended Order ("Requests for Extension of Time"). In all three Requests for Extension of Time, the Petitioner agreed to equivalent extensions of time for the entry of an agency final order in this proceeding. In the last Request for Extension of Time dated September 11, 2006, the Petitioner asked for an additional extension of time to file his Exceptions until September 14, 2006; and the Petitioner agreed that the deadline for entry of an agency final order would be extended until October 14, 2006.

The Petitioner filed Exceptions to Recommended Order with the DEP agency clerk on September 14, 2006. On the same date, Petitioner also filed a Motion to Remand Action to Administrative Law Judge and a Request for Hearing before the Secretary of DEP. On September 21, 2006, DEP filed Responses in opposition to the Petitioner's Motion to Remand Action to Administrative Law Judge and Request for Hearing.[1] On September 25, 2006, DEP filed a Response in opposition to the Petitioner's Exceptions to Recommended Order. The matter is now before the Secretary of DEP for final agency action.

BACKGROUND

This administrative proceeding has a rather convoluted legal and procedural background. See Tuten v. Dept. of Environmental Protection, 906 So.2d 1202 (Fla. 4th DCA 2005) ("Tuten II"); and Tuten v. Dept. of Environmental Protection, 819 So.2d 187 (Fla. 4th DCA 2002) ("Tuten I"). On August 31, 2000, the Petitioner filed an application with DEP's Port St. Lucie Office for an Environmental Resource Permit ("ERP") to dredge a 300-foot long extension to an existing manmade canal in Glades County. This existing manmade canal intersects with the South Florida Water Management District ("SFWMD") Rim Canal located along the northwest shore of Lake Okeechobee in Glades County. DEP's Port St. Lucie Office then forwarded Petitioner's ERP application to DEP's South District Office in Ft. Myers. By letter dated October 4, 2000, DEP's South District Office notified the Petitioner that his ERP application should be filed with the South Florida Water Management District, and the application was returned to the Petitioner unprocessed.

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[1] The Petitioner's Motion to Remand Action to Administrative Law Judge and Request for Hearing were denied by a separate DEP order dated October 4, 2006.

Notwithstanding the above, the Petitioner subsequently received a letter from DEP's South District Office dated December 6, 2000, acknowledging that his ERP application had been reinstated by DEP effective October 13, 2000. On December 12, 2000, DEP sent the Petitioner a Request for Additional Information ("RAI") pursuant to § 373.4141, F.S. However, the Petitioner declined to waive the 90-day "default" period under § 120.60(1), Florida Statutes ("F.S."); and, prior to receiving any response from the Petitioner to the RAI, DEP subsequently entered an order denying his requested ERP on January 11, 2001.

The Petitioner then timely appealed DEP's order denying his ERP application. In its Tuten I opinion, the appellate court concluded that DEP had failed to comply with the statutory 90-day time period for approving or denying a permit and held that Petitioner was thus entitled to a "default" permit under § 120.60(1), F.S. Tuten I, 819 So.2d at 189. The Tuten I court remanded the case back to DEP with directions "to issue a default permit after a hearing to determine if conditions should be imposed to insure the protection of the environment." Id. Nevertheless, without holding an evidentiary hearing, DEP ultimately issued an ERP to the Petitioner containing various general and specific conditions, some of which conditions were apparently objectionable to the Petitioner.

The Petitioner subsequently appealed this default ERP permit with the conditions issued by DEP, and the Tuten II appellate decision was rendered in 2005. In its Tuten II opinion, the court stated in part as follows:

> We reverse the DEP's issuance of the default permit and remand jurisdiction to the DEP to allow it to conduct an evidentiary hearing on the issue of conditions to be placed on the permit. Pursuant to this court's ruling in *Tuten I*, the

> DEP must conduct an administrative hearing prior to the issuance of the default permit. "When the mandate was received by the [DEP], the [DEP] should have carried and placed into effect the order and judgment of this Court. Absent permission to do so, the [DEP] was without authority to alter or evade the mandate of this Court." Stuart v. Hertz Corp., 381 So.2d 1161, 1163 (Fla. 4th DCA 1980).

Tuten II, 906 So.2d at 1204.

On January 17, 2006, DEP referred this matter of appropriate default permit conditions to DOAH; and Administrative Law Judge, J. Lawrence Johnston ("ALJ"), was assigned to preside over the case. The ALJ held a formal administrative hearing in West Palm Beach on May 2-3, 2006, and the Petitioner and DEP presented testimony and exhibits at the hearing.

RECOMMENDED ORDER

The ALJ entered his Recommended Order in this case on August 11, 2006. The Recommended Order, 35 pages in length, contains 46 separately numbered findings of fact and eight related conclusions of law. The ALJ recommended that Petitioner's request for an award of attorney's fees be denied and that:

> DEP enter a final order issuing Petitioner a default ERP, to expire five years from issuance, to dredge an extension, 50 feet wide by 300 feet long by 5 feet deep, to an existing man-made canal, as applied for, subject to: DEP's proposed General Conditions 1-19; DEP's proposed Specific Conditions 4 and 11-21; DEP's proposed Specific Conditions 2, 5, and 7-10, as modified by the Findings of Fact; and the construction method committed to in Petitioner's PRO (see Finding of Fact 14, supra).

STANDARDS OF ADMINISTRATIVE REVIEW OF RECOMMENDED ORDERS

The findings of fact of administrative law judges may not be rejected or modified by a reviewing agency, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based

on competent substantial evidence". See subsection 120.57(1)(l), Fla. Stat. Accord Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995).

An agency reviewing a DOAH recommended order may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as these are evidentiary matters within the province of the administrative law judges as the triers of the facts. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Furthermore, a reviewing agency has no authority to make independent or supplemental findings of fact in its final order. See, e.g., North Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994). The scope of agency review of a DOAH recommended order is limited to ascertaining whether the administrative law judge's existing findings of fact are supported by competent substantial evidence of record. Id., 645 So.2d at 487.

However, subsection 120.57(1)(l), Fla. Stat., does authorize an agency to modify or reject an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." Accordingly, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Assn., 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994). Great deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless

"clearly erroneous." See, e.g., Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting v. Dept of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998).

RULINGS ON PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Exception No.1

The Petitioner's first Exception does not challenge any existing factual findings or legal conclusions in the Recommended Order. Instead, the Petitioner contends that the ALJ's Recommended Order is deficient by omitting findings of fact, conclusions of law, and recommendations pertaining to the issue of state water quality certification. However, as noted in the Standards of Administrative Review above, an agency head reviewing a DOAH recommended order does not have the authority to supplement the ALJ's findings of fact with additional findings suggested in a party's Exceptions.

In any event, the Petitioner's contention that the subject default ERP also constitutes a Certification of Compliance with State Water Quality Standards pursuant to Rule 62-4.160(13)(c), F.A.C., is not persuasive. This same contention was presented in the DOAH proceeding and was rejected by the ALJ. (RO, Conclusion of Law 50). I agree with the ALJ's conclusion that the Petitioner's proposed canal extension project requiring an environmental resource permit is an activity regulated under Part IV, Chapter 373, F.S. I also agree with the ALJ that the plain language of DEP Rule 62-4.001 states unequivocally that most of Part I of Chapter 62-4, F.A.C., including Rule 62-4.160, does not apply to such activities governed by Part IV of Chapter 373.

The above interpretation of DEP's administrative rules is also supported by competent substantial evidence of record. The subject default ERP issued to the Petitioner on February 27, 2004, was admitted into evidence at the final hearing in this

case as "DEP's Ex. 7." The front page of this ERP contains the disclaimer that:

> This permit does **NOT** constitute Certification of Compliance with State Water Quality Standards under Section 404 of the Clean Water Act, 33 U.S.C. 1344. Such certification is hereby waived, as the activity is not expected to meet the water quality standards contained in Chapter 62-302, F.A.C.

Also, DEP official Lucianne Blair, accepted by the ALJ as a water quality expert, testified at the final hearing that DEP has the option in its permits to "waive the [water quality] certification in the event we don't have adequate information or we cannot make a determination for whatever means." (Tr. Vol. 1, pp. 36-38) Ms. Blair also testified that she believed DEP has previously waived water quality certification in other canal extension projects. (Tr. Vol. 1, pp. 81-82)

Like the courts, the ALJ is also required to give considerable deference to an agency's expertise in interpreting its own administrative rules. State Contracting & Engineering Co. v. Dept. of Transportation, 769 So.2d 607, 610 (Fla. 1st DCA 1998). I conclude this agency rule interpretation, adopted by the ALJ, that the Petitioner is not entitled to rely on certification of compliance with state water quality standards pursuant to DEP Rule 62-4.160(13)(c) in this default ERP proceeding is a correct rule interpretation that should be affirmed. The Petitioner's Exception No. 1 is thus denied.

Exception Nos. 2 and 3

These related Exceptions, challenging the ALJ's Findings of Fact 1 and 3, deal with the issue of the width of the Petitioner's proposed canal extension authorized by the subject court-mandated default ERP permit. The Petitioner contends that the ALJ should have found that the proposed canal extension is to be 60 feet wide, instead of 50 feet wide as stated in Finding of Fact 1. Nevertheless, there are multiple evidentiary

bases in the record supporting the ALJ's finding that the proposed canal extension is to be 50 feet wide. (Tr. Vol. 1, pp. 53, 56, 130; DEP Ex. 7, p. 2; Petitioner's Exs. 2, 7) The fact that there may be conflicting evidence of record is irrelevant. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1992). If there is conflicting evidence of record supporting two inconsistent factual findings, it is the role of the ALJ to decide the evidentiary issue one way or another. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

In view of the above rulings, the Petitioner's Exception Nos. 2 and 3 are denied.

Exception No. 4

Petitioner's fourth Exception objects to the ALJ's Finding of Fact 13. Petitioner does not contend that Finding of Fact 13 is not supported by competent substantial evidence. Instead, Petitioner argues that this factual finding is deficient because it "only addresses the method of construction contained in Petitioner's Application and fails to consider Petitioner's commitment to the use of construction method prescribed in Finding of Fact No. 14 which . . . was contained in Tuten's PRO." The Petitioner would apparently have the challenged Finding of Fact 13 be supplemented in this Final Order by including the additional matters suggested in this Exception. However, as noted above, I have no such authority. Also, when the ALJ's Finding of Fact 13 is read in conjunction with succeeding Findings of Fact 14 and 15, most of the concerns raised by Petitioner in this Exception appear to be resolved.

The Petitioner also complains that DEP could have, but failed to obtain the information about the proposed method of construction of the canal extension through diligent prehearing discovery. However, prehearing discovery issues in formal

administrative proceedings are not matters over which this environmental agency claims any special regulatory expertise. Thus, the issue of the adequacy of DEP's prehearing discovery efforts in this case appears to be an evidentiary-related matter within the "substantive jurisdiction" of the ALJ under § 120.57(1)(l), F.S.; and I decline to substitute my judgment for that of the ALJ on this matter.

In Finding of Fact 11, the ALJ acknowledged Petitioner's position on DEP's alleged inadequate discovery efforts as to the method of construction issue. Nevertheless, in the related Findings of Fact 13 through 15, the ALJ made findings on the details of the method of construction of the canal extension that are supported by the testimony of Petitioner's own expert witness, Gerald Ward, and by commitments made in Petitioner's Proposed Recommended Order submitted to the ALJ.

Based on the above rulings, the Petitioner's Exception No. 4 is denied.

Exception No. 6

The Petitioner's sixth Exception notes that the ALJ made an apparent clerical error in Finding of Fact 19 by citing to Specific Condition "1." DEP's Response to this Exception agrees with the Petitioner that the correct reference should be to Specific Condition "2." Exception No. 6 is thus granted, and line 12 of Finding of Fact 19 is modified by striking the numeral "1" and substituting in lieu thereof the numeral "2."

Exception Nos. 5, 7, 8, 9, 10,11, 12, 13, 14, and 15

These related Exceptions all assert that the ALJ erred by making multiple findings in the Recommended Order approving certain Specific Conditions proposed by DEP to be incorporated into Petitioner's default ERP. In his challenged Findings of Fact 18, 22, 23, 24, 27, 29, 31, 32, 34, and 35, the ALJ finds that portions of proposed

Specific Conditions 2, 5, and 7-10, and all of proposed Specific Conditions 4 and 11 are appropriate Specific Conditions that are "reasonable and necessary to protect the interests of the public and the environment." The Petitioner repeatedly objects to these proposed Specific Conditions, which would require him to provide certain technical information to DEP within designated time periods after the subject default ERP is issued. Included among the technical information required in DEP's proposed Specific Conditions approved by the ALJ are dimensioned drawings of the project sealed by a registered professional engineer and flushing characteristics of Petitioner's proposed canal extension.

There are at least two common or related complaints in these Exceptions of Petitioner:

1. The Petitioner first claims that this Specific Condition technical information is improper because it is the same information requested by DEP in the RAI sent to him back in December of 2000. I conclude, however, that the pivotal question in reviewing the ALJ's factual findings challenged in these Exceptions is whether such findings are supported by competent substantial evidence of record; and I find the answer to that question to be in the affirmative. (Tr. Vol. 1, pp. 115-152)

2. The fact the technical information required in the Special Conditions approved by the ALJ is similar to the information previously requested from the Petitioner in the 2000 RAI does not warrant a determination that these proposed Specific Conditions are inappropriate in this administrative proceeding designed to determine what permit conditions are "necessary to protect the interests of the public and the environment." To the contrary, I conclude that the necessity of these Special Condition provisions

approved by the ALJ was adequately explicated at the final hearing by the testimony of DEP Environmental Manager, Calvin Alvarez. (Tr. Vol. 1, pp. 126-152)

3. The Petitioner also reiterates in these Exceptions his argument asserted in the DOAH proceeding that these Special Conditions approved by the ALJ should be rejected because DEP could have obtained the required technical information listed therein through diligent prehearing discovery. I again acknowledge that the issue of sufficiency of prehearing discovery in a formal administrative proceeding is an evidentiary-related matter apparently within the substantive jurisdiction of the ALJ. I also acknowledge that the related issues of admissibility and relevancy of evidence at a DOAH final hearing are matters within the sound discretion of the ALJ, as the "trier of the facts" in this administrative proceeding. See, e.g., Barfield v. Dept. of Health, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001); Heifetz, 475 So.2d at 1281.

4. The transcript of the DOAH final hearing indicates that the ALJ received into evidence, over the objection of Petitioner's counsel, DEP's proposed default ERP containing the Special Conditions challenged by the Petitioner in these Exceptions. (Tr. Vol. 1, pp. 122-124; DEP's Ex. 7) Once admitted into evidence, these Special Conditions are entitled to be considered on administrative review as any other evidence of record. I also agree with the ALJ that those Special Conditions approved by him in numbered paragraphs 18, 22, 23, 24, 27, 29, 31, 32, 34, and 35 of the Recommended Order are "necessary to protect the interests of the public and the environment."

In view of the above rulings, the Petitioner's Exception Nos. 5, 7, 8, 9, 10,11, 12, 13, 14, and 15 are denied.

Exception Nos. 16, 17, and 18

These related Exceptions object to Findings of Fact 37, 39, and 40 wherein the ALJ considers the propriety of DEP's proposed Specific Conditions 13, 15, and 16 requiring the Petitioner to use and maintain turbidity screens and staked filter cloth during the construction phase of the canal extension so that applicable water quality standards will not be violated. The ALJ found that Specific Conditions 13 and 15 are "appropriate subject to a demonstration by Petitioner that turbidity screens are not needed for the construction method committed to in Petitioner's PRO." The ALJ also found that Specific Condition 16 is "appropriate subject to a demonstration by Petitioner that staked filter cloth is not needed for the construction method committed to in Petitioner's PRO."

The Petitioner argues that Findings of Fact 37 and 39 should be rejected because the "unrebutted testimony of Petitioner's expert was that the turbidity screens with weighted skirts would not be necessary to protect the environment given the agreed to and mandated construction methodology for the Project." However, this quoted assertion in Exception No. 16 does not comply with the provisions of § 120.57(1)(k), F.S., requiring a party filing exceptions to findings of fact in a recommended order to "include appropriate and specific citations to the record." Therefore, it is not the duty of an agency head reviewing a DOAH recommended order to comb through the transcript of testimony in an effort to locate evidence arguably supporting a party's exceptions. Moreover, as properly cited to in DEP's Response, the necessity for the turbidity screen provisions of Specific Conditions 13 and 15 are

adequately supported by the expert testimony at the final hearing of Calvin Alvarez. (Tr. Vol. 1, pp. 153-157)

In the final sentence of Exception No. 16, the Petitioner states "the initial phase of the project will be done in uplands, not in wetlands or waters of the State." In Exception 17, the Petitioner also asserts "DEP lacks jurisdiction to control turbidity levels in waters outside its jurisdiction." Nevertheless, these assertions suggesting that DEP does not have regulatory jurisdiction over the Petitioner's proposed canal extension activities are directly inconsistent with the legal history of this proposed project. DEP's regulatory jurisdiction over the subject canal extension project along the northern shore of Lake Okeechobee is evident by the fact that the Petitioner has been litigating in the appellate courts for years (Tuten I and Tuten II) seeking a default ERP from this agency approving the proposed activity.

Moreover, there is no indication in the Recommended Order on review or in the underlying DOAH record that DEP's regulatory jurisdiction over the subject canal extension project was raised by the Petitioner in the DOAH proceeding as a disputed issue to be considered by the ALJ at the final hearing. To the contrary, the apparent uncontroverted evidence of record in this case is that: "[p]ursuant to Operating Agreements executed between the Department [DEP] and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department is responsible for reviewing and taking final agency action on this [proposed canal extension] activity." (DEP Ex. 7, p. 1)

In light of the above rulings, Exception Nos. 16, 17, and 18 are denied.

Exception Nos. 19 and 20

These related Exceptions of the Petitioner take exception to Findings of Fact 42 and 43 wherein the ALJ approves DEP's proposed Specific Conditions 17, 18, 19, and 20. These challenged Special Conditions require the Petitioner to implement long-term water quality monitoring and reporting procedures in order to aid in the prevention of violations of applicable water quality standards in the "permitted canal" and in the connected Rim Canal.

The Petitioner's only objection to Finding of Fact 42 is that the last sentence thereof is purportedly a legal conclusion by the ALJ, rather than a finding of fact as designated in the Recommended Order. I agree that this last sentence of Finding of Fact 42 is essentially a legal conclusion on the part of the ALJ, and Petitioner's Exception 19 is thus granted. However, I concur with and adopt this conclusion of law in this Final Order. See, e.g., Battaglia Properties v. Fla. Land and Adjudicatory Commission., 629 So.2d 161, 168 (Fla. 5th DCA 1993) (concluding that, if findings of fact or conclusions of law are mislabeled in a recommended order, the labels should be disregarded and the provisions treated as though they were correctly labeled).

The Petitioner's main grievance with Finding of Fact 43 seems to be with the ALJ's assertion that the these Specific Conditions requiring the Petitioner to implement long-term water quality monitoring and reporting procedures after the canal extension construction is completed "are standard for ERP permits where a constructed system may lead to water quality violations in the long term." (emphasis supplied) The Petitioner argues that the word "may" as used by the ALJ and by the supporting testimony of DEP's expert, Calvin Alvarez, is too speculative or hypothetical to support

the necessity of these proposed long-term water quality monitoring and reporting permit conditions, and they should be rejected in this Final Order.

I do not find Petitioner's speculative or hypothetical argument to be persuasive. The actions taken by DEP approving applications seeking permits from this agency necessarily involve future actions to be taken by the permittees after issuance of the permits. Therefore, these agency permitting decisions are all based on determinations and projections by DEP officials as to the potential success of the permittees' proposed future activities. DEP thus cannot demand that permit applicants provide "absolute guarantees" that future construction projects will be successfully implemented in order to be entitled to receive regulatory permits from this agency. Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 788-89 (Fla. 1st DCA 1981); Ginnie Springs, Inc. v. Craig Watson, 21 F.A.L.R. 4072, 4080 (Fla. DEP 1999); Save our Suwannee, Inc., v. Piechocki, 18 F.A.L.R. 1467, 1472 (Fla. DEP 1996).

I find that the ALJ's challenged finding in the first sentence of Finding of Fact 43, including the disputed term "may," is supported by the above-cited case law and by the expert testimony in this case of DEP witnesses, Lucianne Blair and Calvin Alvarez. (Tr. Vol. 1, pp. 44-49, 158-161) I decline to comply with the Petitioner's request that I rule in this Final Order that the expert testimony of Mr. Alvarez is not entitled to any weight because such testimony consists of a "bare conclusion without factual support."

The decision to accept the opinion testimony of an expert witness at a formal administrative hearing is a matter within the sound discretion of the ALJ that cannot be altered, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See, Collier Medical Center v. State, Dept. of

HRS, 446 So. 2d 83, 85 (Fla. 1st DCA 1985); and Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). Also, the sufficiency of the facts required to form the opinion of an expert must normally reside with the expert and any purported deficiencies in such facts relate to the weight of the evidence, a matter also within the province of the ALJ, as the trier of the facts. Gershanik v. Dept. of Professional Regulation, 458 So. 2d 302, 305 (Fla. 3rd DCA 1984), rev. den. 462 So. 2d 1106 (Fla. 1985).

Based on the above rulings, Exception No. 19 is granted on procedural grounds and Exception No. 20 is denied.

Exception Nos. 21 and 26

These related Exceptions take exception to the ALJ's Finding of Fact 45 and corresponding Conclusion of Law 54. In these two paragraphs of the Recommended Order, the ALJ finds that DEP did not participate in this administrative proceeding "for an improper purpose" under § 120.595(1), F.S.; and, based on this finding, the ALJ concludes that Petitioner's request for an award of attorney's fees from DEP should be denied.

I have no authority to modify or reject this finding by the ALJ of no improper purpose on the part of DEP and his related conclusion that Petitioner is not entitled to an award of attorney's fees from DEP in this proceeding for the following reasons:

1. The plain language of § 120.595(1)(b), F.S., states that:

> The final order in a proceeding under s. 120.57(1) shall award reasonable costs and attorney's fees to the prevailing party only where the non-prevailing party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose. (emphasis supplied)

The above-quoted statutory condition precedent requiring the ALJ to first determine that DEP has participated in this proceeding for an improper purpose obviously has not been fulfilled in this case. To the contrary, the ALJ expressly found in Finding of Fact 45 that "the evidence was that DEP participated in this proceeding in an attempt to place conditions on Petitioner's permit which DEP thought were necessary to protect the environment, many (although not all) of which [conditions] are accepted in this Recommended Order."

2. The case law of Florida construing § 120.595 also holds that the question of whether a party intended to participate in an administrative proceeding for an improper purpose under this statute is a factual matter within the prerogative of the ALJ, rather than the reviewing agency head. Burke v. Harbor Estates Associates, 591 So.2d 1034, 1037 (Fla. 1st DCA 1991). Thus, the attorney's fee issue raised by the Petitioner in these Exceptions is not a matter within this environmental agency's regulatory expertise. See G.E.L. Corporation v. Dept. of Environmental Protection, 875 So.2d 1257, 1263 (Fla. 5th DCA 2004) (concluding that DEP did not have substantive jurisdiction over the issue of attorney's fees under § 120.595).

3. It is undisputed that this § 120.57(1) proceeding was conducted for the sole purpose of determining what, if any, necessary permit conditions should be imposed in the default ERP; and that DEP's participation was compelled by direction of the court in the Tuten I and Tuten II opinions. Thus, no "improper purpose" could reasonably be attributed to DEP's participation in this administrative proceeding where DEP was simply complying with the mandate of an appellate court.

Based on the above rulings, Exception Nos. 21 and 26 are denied.

Exception No. 22

This Exception takes issue with the ALJ's Finding of Fact 46. The ALJ finds therein that it is necessary for the Petitioner to conduct his canal extension activities in compliance with environmental statutes and rules; and that, "without any water quality information or monitoring, DEP's enforcement of those laws and rules will be hamstrung." These challenged factual findings in paragraph 46 of the Recommended Order are supported by the expert testimony of Lucianne Blair and Calvin Alvarez and are adopted in this Final Order. I decline the Petitioner's suggestion that I supplement these findings of the ALJ with additional findings that the Petitioner is not the only party capable of obtaining water quality information and monitoring. Accordingly, Exception No. 22 is denied.

Exception No. 23

In this Exception, the Petitioner objects to Conclusion of Law 47 for the reason that "it fails to fully describe the type of reasonable mitigative conditions DEP is authorized to impose after hearing." I conclude, however, when Conclusions of Law 47-53 and the ALJ's recommendation are construed together with DEP Ex. 7 (the default ERP), the mitigative conditions DEP will be authorized to impose after such conditions become final agency action are set forth in sufficient detail. For instance, the ALJ's ultimate recommendation identifies with specificity that the default ERP should include: "DEP's proposed General Conditions 1-19; DEP's proposed Specific Conditions 4 and 11-21; DEP's proposed Specific Conditions 2, 5, and 7-10, as modified by the Findings of Fact; and the construction method committed to in Petitioner's PRO (see Finding 14, supra)." Consequently, Exception No. 23 is denied.

Exception No. 24

The Petitioner's Exception No. 24 objects to Conclusion of Law 51 on the basis that Rule 40E-4.381(2), F.A.C., quoted therein "is inapplicable to this case." However, there is no indication in Conclusion of Law 51 or elsewhere in the Recommended Order that the ALJ concluded that the quoted provisions of Rule 40E-4.381(2) are applicable to this case. The fact that a rule is quoted in a paragraph of a recommended order without comment does not warrant a conclusion on review that the provisions of this rule are being applied to the facts of the case. To the contrary, in this case, the ALJ expressly rejected DEP's contention of this rule's applicability by ruling in Conclusion of Law 52 that the Rule 40E-4.381(2) permitting criteria "do not apply to default permits." I agree with and adopt this legal conclusion of the ALJ in paragraph 52. Therefore, Exception No. 24 is denied.

Exception No. 25

This Exception of Petitioner addresses what may be clerical errors in Conclusion of Law 53. The Petitioner points out that the ALJ's assertions that Specific Condition 5 is reasonable, as "proposed"; and that Specific Condition 6, as modified, is an appropriate default permit condition in this case appear to be inconsistent with Findings of Fact 26-28. These assertions pertaining to Specific Conditions 5 and 6 also appear to be inconsistent with the ALJ's ultimate recommendations on page 34 of the Recommended Order.

In its Response, DEP essentially agrees with Petitioner's position in Exception No. 25. Accordingly, the second and third sentences of Conclusion of Law 53 are modified to read as follows:

> Specifically, Specific Conditions 4 and 11-21 are reasonable as proposed. Specific Conditions 2, 5, and 7-10, as modified by the Findings of Fact, are appropriate.

The Petitioner's Exception No. 25 is thus granted, but the mistaken Special Condition references in Conclusion of Law 53 are deemed to be harmless clerical errors.

Exception No. 27

The Petitioner's final Exception objects to the proposed canal extension dimensions of 50 feet wide by 300 feet long by 5 feet deep as set forth in the ALJ's recommendation on page 34 of the Recommended Order. These stated measurements are the same as found by the ALJ in Finding of Fact 1 and are adopted herein for the reasons set forth in the above rulings denying Petitioner's Exception Nos. 2 and 3. Exception No. 27 is thus denied.

CONCLUSION

There are no statutory or rule provisions establishing a set procedure for implementing the "default permit" provisions of § 120.60(1), F.S. Moreover, case law guidelines on issuing such default permits under § 120.60(1) are very limited. Compare Tuten I, 819 So.2d at 189; Manasota-88, Inc. v. Agrico Chem. Co., 576 So.2d 781, 783 (Fla. 2d DCA 1991) (concluding the statutes allow DEP to hold a hearing "to determine reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to issuing a default permit"). Therefore, the delay in issuing the subject ERP that can be fairly attributed to DEP must be viewed in the context of this absence of any established process for issuing default permits.

In this case, the ALJ presided over a court-mandated formal administrative hearing held for the limited purpose of determining "whether, and what, reasonable

mitigative conditions are necessary to protect the interest of the public and the environment prior to issuing Petitioner's default permit." After hearing the testimony of several expert witnesses, including DEP officials, the ALJ recommended that Petitioner's default permit be issued subject to certain general and specific conditions identified on page 34 of the Recommended Order.

It is therefore ORDERED:

A. Numbered paragraphs 19 and 53 of the Recommended Order are modified by the clerical corrections noted in the above rulings granting the Petitioner's Exception Nos. 6 and 25.

B. With the minor modifications noted in paragraph A. above, the Recommended Order is adopted and incorporated by reference herein as Exhibit A, and all of the ALJ's recommendations are accepted.

C. The Petitioner is hereby ISSUED an ERP for the canal extension activity described in more detail in the DEP document "Environmental Resource Permit" dated February 27, 2004, bearing No. 22-0174873-001, and introduced into evidence in this case as "DEP Ex. 7."

D. The ERP is subject to the terms and conditions set forth in DEP Ex. 7, except that: Specific Conditions 1, 3, and 6 are deleted as recommended by the ALJ; and Specific Conditions 2, 5, and 7-10 are modified as recommended by the ALJ in numbered paragraphs 19, 27, and 29-34 of the Recommended Order.

E. The ERP is also subject to the construction method committed to in Petitioner's PRO and described in numbered paragraph 14 of the Recommended Order.

F. The construction phase of this ERP shall expire five years from date of issuance of this Final Order.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 12 day of October, 2006, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Colleen M. Castille

COLLEEN M. CASTILLE
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Kay Buchanan
CLERK

10/13/06
DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Frederick M. Dahlmeier, Esquire
Cromwell & Dahlmeier, P.L.
760 U.S. Highway One, Suite 301
North Palm Beach, FL 33408

Ann Cole, Clerk and
J. Lawrence Johnston, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Francine M. Ffolkes, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 13th day of October, 2006.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

J. Terrell Williams

J. TERRELL WILLIAMS
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000
Telephone 850/245-2242