STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONALD G. TUTEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-0186
	)	
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On May 2-3, 2006, a final administrative hearing was held in this case in West Palm Beach, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Frederick M. Dahlmeier, Esquire
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For Respondent: Francine M. Ffolkes, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is 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.

PRELIMINARY STATEMENT

On August 31, 2000, Petitioner applied for an Environmental Resource Permit (ERP) to dredge an extension, 50 feet wide by 300 feet long by 5 feet deep, to an existing man-made canal normal (perpendicular) to the Central and South Florida Flood Control (now South Florida Water Management District, or SFWMD) Rim Canal (the L-48 Borrow Canal), which is along the northwest shore of Lake Okeechobee. DEP sent a Request for Additional Information (RAI) on December 12, 2000, and denied the application on January 11, 2001--after Petitioner declined to waive the 90-day default period under Section 120.60(1), Florida Statutes, and before Petitioner responded to the RAI.

On appeal from DEP's denial of the application, the court in Tuten v. Dept. of Environmental Protection, 819 So. 2d 187, 189 (Fla. 4th DCA 2002)(Tuten I), resolved in Petitioner's favor the dispute between the parties as to when the 90-day default period began to run; held that Petitioner was entitled to a default permit; and remanded "to the DEP to issue a default permit after a hearing to determine if conditions should be imposed to insure the protection of the environment."

What happened next is described in Tuten v. Dept. of Environmental Protection, 906 So. 2d 1202, 1203-04 (Fla. 4th DCA 2005)(Tuten II):

> Almost two years later, with no default permit or evidentiary hearing in sight, Tuten filed [with the court] a Motion to Show Cause asking why a default permit without any conditions should not be granted because of the lack of an evidentiary hearing over this span of time. Eleven days later, the DEP issued a permit with general and specific conditions believed necessary to protect the interest of the public and the environment. Contained within the permit was a notice of Tuten's rights. Pursuant to sections 120.569 and 120.57, Florida Statutes, the default permit and all conditions set forth therein are final unless a sufficient petition for an administrative hearing is timely filed (21 days). Tuten failed to petition for an administrative hearing, choosing instead to file the instant appeal more than twenty-one days later, bringing the case to this court once again.
>
> 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).

On January 17, 2006, DEP referred its intended ERP with conditions to the Division of Administrative Hearings (DOAH), along with Tuten II and the court's August 5, 2005, Mandate "that such further proceedings be had in this cause as may be in accordance with the opinion of this Court, and with the rules of procedure and with the laws of the State of Florida."

On January 19, 2006, DEP filed a Motion for More Definite Statement as to Petitioner's disputed issues of material fact (indicating that DEP essentially viewed the court's mandate as merely extending the time for Petitioner to request a hearing on DEP's proposed permit with conditions). On January 27, 2006, Petitioner filed a Response in opposition and Motion to Strike and requested a hearing. On February 1, 2006, DEP filed a Reply to the Response and a Response in opposition to the Motion to Strike. The filings essentially disputed which party had the burden to plead and prove the conditions to be attached to the default permit. Oral argument was heard during the telephonic pre-hearing conference held on March 6, 2006. Based on the written and oral arguments, it was ruled on March 13, 2006, that under the appellate opinions remanding the case, DEP had the burden to plead and prove "'the reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to issuing a default permit.' Manasota-88, Inc. v. Agrico Chem. Co., 576 So. 2d 781, 783 (Fla. 2d DCA 1991)." In addition, it was ruled that DEP's proposed default permit with general and specific conditions, while reversed by the appellate court, was deemed to constitute DEP's pleading of the "reasonable mitigative conditions" DEP sought to impose on the default permit to be issued to the Petitioner. Finally, it was ruled that, in the absence of an applicable rule of procedure for this situation, and in order to frame the issues for

determination at the hearing being scheduled for May 2-4, 2006, Petitioner was required to file a paper identifying which of DEP's conditions were acceptable to Petitioner, if any.

Petitioner filed such a paper on March 24, 2006. In it, Petitioner denied any conditions "necessary to protect 'the interests of the public' unless said conditions are necessary to 'protect the environment.'" Petitioner also admitted "that any of DEP's general and specific conditions, which have been specifically adopted by established rule, as conditions applicable to 'default permits', may attach and become conditions to" the default permit. Petitioner pointed out that the 19 general conditions attached to DEP's suggested default permit "appear to be general conditions resembling those adopted by the South Florida Water Management District." Petitioner took the position that, instead, the 17 general conditions set out in DEP's Florida Administrative Code[1] Rules 62-4.160, entitled "Permit Conditions," and 62-4.070(7) (providing that "issuance of a permit does not relieve any person from complying with the requirements of Chapter 403, F.S., or Department rules") would apply and were acceptable to Petitioner. Petitioner apparently was unaware of DEP's Rules 62-330.200(4) and 62-4.001. Rule 62-330.200(4) adopts by reference SFWMD's general conditions, which are contained in Rule 40E-4.381 (1995)[2], for use in issuing permits like Petitioner's; and Rule 62-4.001 provides that "the provisions of this Part . . . shall not apply to activities

regulated under Part IV of Chapter 373, Florida Statutes." Petitioner's application was for an activity regulated under Part IV of Chapter 373, Florida Statutes.[3]

The case was noticed for hearing in West Palm Beach on May 2-4, 2006, and an Order of Pre-Hearing Instructions was entered, which required the parties to file a pre-hearing stipulation, or unilateral statements if they could not stipulate.

In the two weeks leading up to the final hearing, Petitioner filed a Motion for Continuance, a Unilateral Pre-Hearing Stipulation, a Motion in Limine, and a Motion for View, and DEP filed a Motion for Protective Order, a Motion for Official Recognition, a Unilateral Pre-Hearing Statement, and responses in opposition to Petitioner's Motion in Limine and Motion for View. The Motion for Continuance was heard by telephone and denied. At the outset of the final hearing, the Motion in Limine and Motion for View were denied; the Motion for Protective Order was granted (if not moot); and the Motion for Official Recognition was granted. Petitioner also made an ore tenus motion for attorney's fees under Section 120.595, Florida Statutes, and ruling was reserved.

In its case-in-chief, DEP called: Lucy Blair, an expert in the areas of biology, ecology, water quality impacts of dredging and filling on water resources, and the ERP permitting rules and statutes; and Calvin Alvarez, an expert in the areas of water

quality, biology, impacts of dredging and filling on water resources, and the ERP permitting rules and statutes. DEP also had DEP Exhibits 1, 2, and 7 admitted into evidence. Petitioner called Gerald Ward, an expert in environmental permitting, including water resources, soils, wetlands, hydrographics, environmental agency process, excavation/dredging methods and related engineering. Petitioner also had Petitioner's Exhibits 1, 2, 3, 4, 5, 6, 8, 12, 13, 14, 15, 16, 18, 19, and 21 admitted into evidence. Ruling was reserved on DEP's relevance objection to Petitioner's Exhibit 7, which is now overruled.

After presentation of evidence, DEP requested a transcript of the final hearing, and Petitioner requested 15 days from the filing of the transcript in which to file proposed recommended orders (PROs), which was granted without objection. The Transcript was filed (in two volumes) on June 7, 2006, making PROs due to be filed June 22, 2006. However, the parties jointly requested an extension until June 30, 2006, which was granted. DEP timely filed its PRO, and Petitioner filed his PRO on July 3, 2006, which included his request for attorney's fees under Section 120.595, Florida Statutes. Both PROs have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Application and Default

1. Petitioner's application is to dredge an extension, 50 feet wide by 300 feet long by 5 feet deep, to an existing 650

foot-long man-made canal of the same width and depth, normal (perpendicular) to old Central and South Florida Flood Control (now SFWMD) Rim Canal (the L-48 Borrow Canal), which is along the northwest shore of Lake Okeechobee.

2. Petitioner's initial, incomplete application filed in DEP's Port St. Lucie office on August 31, 2000, included: the proposed project's location by County, section, township, and range; its legal description; a sketch of its general location and surrounding landmarks; a SFWMD letter verifying conformity with the requirements of a "No Notice General Permit for Activities in Uplands" of a drawing for a proposed pond expansion (to a size less than half an acre), "which will provide borrow material necessary for a house pad and access drive"; a description of water control Structure 127, together with its purpose, operation, and flood discharge characteristics, which were said to describe water levels in Buckhead Ridge, the name of the subdivision where the project was proposed; two virtually identical copies of a boundary survey for Petitioner's property (one with legal description circled) showing the existing canal, with boat basin off the canal on Petitioner's property near the L-48 Rim Canal, at a scale of one inch equals 200 feet; two more virtually identical copies of the boundary survey at the same scale showing the existing canal, with boat basin off the canal on Petitioner's property near the L-48 Rim Canal, and the proposed canal extension and house locations; and a copy of a

1996 aerial photograph of Petitioner's property and existing canal, and vicinity. The application did not describe a proposed method or any other details of construction, include any water quality information, or include a water quality monitoring plan.

3. On September 15, 2000, Petitioner filed an additional page of the application form with DEP's Punta Gorda office. The page added the information: "Digging to be done with trac-hoe." No other specifics of the proposed construction method were included.

4. What happened after the filing of the application is described in Tuten I and Tuten II, which are the law of the case. However, those opinions do not explain the delay between Tuten I and the issuance of DEP's proposed ERP with conditions approximately two years later. The evidence presented at the final hearing explained only that counsel of record for DEP promptly asked district staff to draft a proposed default ERP with conditions that "would probably track the RAI that had been sent out prior to the default." DEP's district staff promptly complied and forwarded the draft to DEP's Office of General Counsel in Tallahassee, which did not provide any legal advice as to the draft ERP for almost two years. There was no further explanation for the delay.

5. As reflected in Tuten II and in the Preliminary Statement, it was DEP's position that the proper procedure to follow after its default was to issue a proposed ERP with

conditions and that it would be Petitioner's burden to request an administrative hearing to contest any conditions and to prove Petitioner's entitlement to a default ERP with conditions other than those in DEP's proposed ERP.

B. DEP's Proposed General Conditions

6. The conditions DEP wants attached to Petitioner's default permit include general conditions taken from SFWMD's Rule 40E-4.381, which are appropriate, as indicated in the Preliminary Statement and Conclusions of Law, and as conceded by Petitioner's expert.

7. While the Rule 40E-4.381 general conditions are appropriate, Petitioner takes the position (and his expert testified) that some of the general permit conditions contained in Rule 62-4.160, as well as Rule 62-4.070(7) (providing that "issuance of a permit does not relieve any person from complying with the requirements of Chapter 403, F.S., or Department rules"), are more appropriate general conditions to attach to Petitioner's default ERP, even if technically inapplicable, because the Chapter 62 Rules govern the operation of a permitted project (whereas the former govern the construction of a permitted project) and are "more protective of the environment." Actually, all of the rules contain general conditions that govern both construction and operation phases of an ERP, and all are "protective of the environment." There is no reason to add

general conditions taken from Rules 62-4.160 and 62-4.070(7) to the applicable general conditions contained in Rule 40E-4.381.

C. DEP's Proposed Specific Conditions

(i) In General

8. The conditions DEP wants attached to Petitioner's default permit also include specific conditions which essentially require that Petitioner provide the information in the RAI sent in December 2000, together with additional specific conditions thought necessary to protect the environment in light of the lack of detail in the application without the answers to the RAI.

9. Some DEP's proposed specific conditions are designed to ascertain whether the application would provide reasonable assurance that permitting criteria would be met. (They make the requested information subject to DEP "approval" based on whether reasonable assurance is provided.) In general, those specific conditions no longer are appropriate since DEP is required to issue a default permit. (Looked at another way, inclusion of those specific conditions effectively would un-do the default, in direct contradiction of the court's opinion Tuten I and Tuten II.) See Conclusion of Law 52, infra.

10. On the other hand, some of the RAI information was designed to ascertain the proposed method and other details of construction. Pending the "answers" to those "RAI conditions," DEP also wants broad specific conditions, including a baseline water quality investigation and a water quality monitoring plan,

designed to be adequate for a "worst case scenario" that could result from the project.

11. Petitioner opposes DEP's proposed broad specific conditions. He takes the position that it was incumbent on DEP in this proceeding to use discovery procedures to ascertain Petitioner's intended method of construction and tailor specific conditions to the method of construction revealed through discovery. At the same time, Petitioner opposes DEP's proposed specific conditions requiring RAI-type information, including the details of his proposed construction method.

12. Notwithstanding the positions Petitioner has taken in this case, his expert testified that Petitioner intends to use a steel wall inserted between the water and upland at the end of the existing canal, phased excavation from the upland side, and removal of the steel wall in the final phase of construction. Assuming that method of construction, Petitioner takes the position (and his expert testified) that the statutes, rules, and permit conditions acceptable to Petitioner, and which generally prohibit pollution of the environment, are adequate.

13. Even if the statutes, rules, and permit conditions acceptable to Petitioner would be adequate for the method of construction Petitioner now says he will use, Petitioner's application does not in fact commit to a method of construction. All Petitioner's application says is that he intends to dig with a trac-hoe. Without a binding commitment to a method of

construction, it was appropriate for DEP to take the position that specific conditions were necessary to ascertain the method of construction Petitioner would use and, pending the "answers" to those "RAI conditions," and to impose broad specific conditions, including a baseline water quality investigation and a water quality monitoring plan, designed to be adequate for a "worst case scenario" that could result from the project.

14. In his PRO, Petitioner committed to use the construction method described by his expert during the hearing, as follows:

> A. Excavation of any spoil shall be done by means of a mechanical trac-hoe;
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> B. Prior to the excavation of any soil, Petitioner shall first install an isolating wall, such as interlocking sheet pile, between the existing man-made canal, and the proposed canal extension;
>
> C. The mechanical excavation shall be done in such a manner such that the excavated soil is not deposited in wetlands or in areas where it might be reasonably contemplated to re-enter the waters of the State of Florida;
>
> D. After the proposed canal extension is excavated to its project limits in the foregoing manner, the side slopes of the canal extension shall be allowed to revegetate prior to removal of the isolating wall.

15. With a condition imposing this method of construction, fewer and narrower specific conditions will be necessary.

ii. Seriatim Discussion

16. DEP's proposed Specific Condition 1 requires a perpetual conservation easement prohibiting docking and mooring of water craft on all portions of Petitioner's property within the canal extension in order to "address cumulative impacts." But DEP did not prove that the proposed conservation easement was reasonably necessary to protect the interest of the public and the environment. First, DEP did not prove that there would be any cumulative impacts, much less unacceptable cumulative impacts, from Petitioner's project. See § 373.414(8), Fla. Stat.; Rule 40E-4.302(1)(b); and BOR § 4.2.8. Second, even if unacceptable cumulative impacts were proven, those could be addressed in other permit cases (assuming no DEP default in those proceedings), since the concept of cumulative impacts essentially requires an applicant to share acceptable cumulative impacts with other similar permittees, applicants, and foreseeable future applicants. See Broward County v. Weiss, et al., DOAH Case No. 01-3373, 2002 Fla. ENV LEXIS 298, at ¶¶54-58 (DOAH Aug. 27, 2002).

17. As Petitioner points out, the easement further described in Specific Condition 1 appears to be overly broad for its stated purpose in that it would cover "the legal description of the entire property affected by this permit and shown on the attached project drawings," which could be interpreted to include not just the canal extension but the entire extended canal, or

even the entirety of Petitioner's 6.6 acres of property. Indeed, the latter might have been the actual intention, since DEP's witness testified that Specific Condition 1 also was intended to address impacts from fertilizer runoff and septic tank leaching from new homes built along the canal. Although some of those impacts (as well as future construction of additional homes and docks) actually are secondary impacts, not cumulative impacts, it is possible that they can be addressed in DEP or SFWMD proceedings on future applications, as well as in Department of Health proceedings on septic tank installations.

18. DEP's proposed Specific Condition 2 requires that: spoil material from the dredging to be "used for the sole purpose of constructing a single-family fill pad" on Petitioner's property under a pending permit; spoil "be placed in a manner so as not to affect wetlands or other surface waters"; and the "spoil disposal location shall be shown in the drawings required by Specific Condition #4 below."

19. DEP did not prove that the first requirement was reasonably necessary to protect the interest of the public and the environment. First, it is unreasonable since Petitioner already has built the referenced single-family fill pad and a home on top of it. Second, the reason DEP's witness gave for this requirement was that, under an operating agreement with SFWMD (which was officially recognized), DEP only has jurisdiction to take action on single-family uses (which he

defined to include duplexes, triplexes, and quadriplexes) but not on larger multi-family and certain other projects. However, the operating agreement on jurisdiction is not a reason to place Specific Condition 1 on the use of spoil material on Petitioner's default permit. SFWMD can regulate, in permitting proceedings under its jurisdiction, the placement of fill material for multi-family construction or other projects not under DEP jurisdiction. In addition, under the operating agreement, jurisdiction can be "swapped" by written agreement in cases where deviation from the operating agreement would result in more efficient and effective regulation.

20. The second two requirements under Specific Condition 2 are reasonable and necessary to protect the interest of the public and the environment.

21. DEP's proposed Specific Condition 3 requires disclosure of all pending and issued permits for the property from SFWMD, Glades County, or the U.S. Army Corps of Engineers (USCOE). DEP did not prove that this is reasonable or reasonably necessary to protect the interest of the public and the environment. DEP probably has all such permits and can easily obtain any it does not have.

22. DEP's proposed Specific Condition 4 requires fully dimensional plan view and cross-sectional drawings of the property and area to be dredged, before and after dredging, including a north arrow and the water depths in and adjacent to

the dredge area. DEP's witness stated that the primary purpose of this part of the condition is to provide hydrographic information normally provided in an application (or required in an RAI) so that DEP's hydrographic engineer can ascertain flushing characteristics, which are pertinent primarily to the dissolved oxygen water quality parameter and to heavy metals from boat use. As previously indicated, requests for information relating to reasonable assurance and the public interest test generally no longer are appropriate since DEP is required to issue a default permit. See Finding 9, supra. However, information regarding flushing characteristics, combined with other specific conditions, is reasonable and necessary to protect the interest of the public and the environment. See Finding 27, infra.

23. In addition, the plan view and cross-sectional drawings required by Specific Condition 4 are to include the location of navigational obstructions in the immediate area, any roads, ditches, or utility lines that abut the property; any encumbrances, and any associated structures. DEP's witness stated that the primary purpose of this information is to determine whether Petitioner has provided reasonable assurance that the "public interest" test under Rule 40E-4.302 is met, and make sure that management, placement, and disposal of spoil material do not infringe on property rights or block culverts and cause flooding. As previously indicated, requests for

information relating to reasonable assurance and the public interest test generally no longer are appropriate. See Finding 9, supra. However, information regarding the location of culverts to assure that management of spoil does not cause flooding is reasonable and necessary to protect the interest of the public and the environment.

24. In addition to objecting to having to provide RAI information as a "default permittee," Petitioner's expert asserted that the information requested in Specific Condition 4 would be provided as part of the "as-built" drawings required by General Condition 6. But General Condition 6 does not require "as-built" drawings. Rather, it requires an "as-built" certification that can be based on "as-built" drawings or on-site observation. Besides, the purpose of the "as-built" certification is to determine "if the work was completed in compliance with permitted plans and specifications." Without the information requested in Specific Condition 4, there would only be vague and general permitted plans and specifications and hydrographic information.

25. Finally as to Specific Condition 4, Petitioner objects to the requirement that the drawings be sealed by a registered professional engineer. However, Petitioner cites to General Condition 6, which requires that the "as-built" certification be given by a "registered professional" and cites Rule Form 62-

343.900(5), which makes it clear that "registered professional" in that context means a registered professional engineer.

26. DEP's proposed Specific Condition 5 requires Petitioner to submit for DEP approval, within 180 days of permit issuance and before any construction, reasonable assurance that the canal extension will not violate water quality standards due to depth or configuration; that it will not cause a violation of water quality standards in receiving water bodies; and that it will be configured to prevent creation of debris traps or stagnant areas that could result in water quality violations. The reasonable assurance is to include hydrographic information or studies to document flushing time and an evaluation of the maximum desirable flushing time, taking several pertinent factors into consideration.

27. As previously indicated, requests for information relating to reasonable assurance and the public interest test generally no longer are appropriate. See Finding 9, supra. In addition, Petitioner's expert testified without dispute that the information requested could take more than 180 days and cost approximately $20,000. However, it is reasonable and necessary to protect the interest of the public and the environment to include a specific condition that Petitioner's canal extension be configured so as have the best practicable flushing characteristics.

28. DEP's proposed Specific Condition 6 requires Petitioner to submit for DEP approval, within 180 days of permit issuance and before any construction, reasonable assurance that construction of the canal extension will meet all permit criteria set out in Rules 40E-4.301 and 40E-4.302 and in BOR § 4.1.1. As previously indicated, requests for information relating to reasonable assurance and the public interest test generally no longer are appropriate. See Finding 9, supra.

29. DEP's proposed Specific Condition 7 requires Petitioner to submit existing water quality information for DEP approval within 180 days of permit issuance and before any construction. In this instance, DEP's approval would not be a determination on the provision of reasonable assurance but a determination as to the reliability of the water quality information, which is necessary to establish a baseline for assessing and monitoring the impact of the project. For that reason, the information is reasonable and necessary to protect the interest of the public and the environment.

30. Petitioner's expert testified that the information could cost $2,000-$3,000 to produce (and more, if DEP rejects the information submitted, and more information is required). He also testified that water quality information already is available, including over 25 years worth of at least monthly information on all pertinent parameters except biological oxygen demand and fecal coliform, at a SFWMD monitoring station in the

Rim Canal at Structure 127 (a lock and pump station at the Hoover Levee on Lake Okeechobee) approximately 8,000 feet away from Petitioner's canal. DEP did not prove that the SFWMD information would not serve the purpose of establishing baseline water quality for Petitioner's canal for all but the missing parameters. For that reason, only water quality information for the missing parameters is reasonable and necessary to protect the interest of the public and the environment in this case.

31. DEP's proposed Specific Condition 8 requires that, if the water quality information required by Specific Condition 7 shows any violations of state ambient water quality standards, Petitioner must submit for DEP approval, within 180 days of permit issuance and before any construction, a plan to achieve net improvement for any parameters shown to be in violation, as required by Section 373.414, Florida Statutes. See also BOR § 4.2.4.1 and 4.2.4.2. Normally, if applicable, this information would be expected in an application or RAI response. Petitioner's expert testified that this condition would require Petitioner to help "fix Buckhead Ridge" (unfairly) and that it would cost lots of money. But Petitioner did not dispute that the law requires a plan for a "net improvement," which does not necessarily require a complete "fix" of water quality violations, if any. As previously indicated, requests for information relating to reasonable assurance and the public interest test generally no longer are appropriate, and Petitioner's ability to

construct the canal extension should not be dependent on DEP's approval of a net improvement plan. See Finding 9, supra. But a specific condition that Petitioner implement a plan to achieve net water quality improvement in the event of any water quality violations would be reasonable and necessary to protect the interest of the public and the environment.

32. DEP's proposed Specific Condition 9 requires Petitioner to submit for DEP's approval, at least 60 days before construction, detailed information on how Petitioner intends to prevent sediments and contaminants from being released into jurisdictional waters. DEP asserts that this specific condition asks for a detailed description of how the applicant will comply with various subsections of BOR § 4.2.4.1 that address short-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e). As previously indicated, requests for information relating to reasonable assurance and the public interest test generally no longer are appropriate, and Petitioner's ability to construct the canal extension should not be dependent on DEP's approval of information submitted. See Finding 9, supra. But it is reasonable and necessary to protect the interest of the public and the environment to include a specific condition that Petitioner's canal extension be constructed using adequate turbidity barriers; stabilize newly created slopes or surfaces in

or adjacent to wetlands and other surface waters to prevent erosion and turbidity; avoid propeller dredging and rutting from vehicular traffic; maintain construction equipment to ensure that oils, greases, gasoline, or other pollutants are not released into wetlands and other surface waters; and prevent any other discharges during construction that will cause water quality violations.

33. DEP's proposed Specific Condition 10 requires Petitioner to submit, at least 60 days before construction, detailed information regarding Petitioner's plans for handling spoil from dredging, including "discharge details, locations retention plans, volumes, and data used to size the disposal cell(s)." It allows this information to be combined with the Specific Condition 2 submittal. It also requires spoil to be properly contained to prevent return of spoil to waters of the State and to be deposited in a self-contained upland site that prevents return of any water or material into waters of the State.

34. DEP asserts that this specific condition (like Specific Condition 9) is necessary to comply with BOR § 4.2.4.1 by addressing short-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e). As previously indicated, requests for information relating to reasonable assurance and the public

interest test generally no longer are appropriate, and Petitioner's ability to construct the canal extension should not be dependent on DEP's approval of information submitted. See Finding 9, supra. But it is reasonable and necessary to protect the interest of the public and the environment to include a specific condition requiring spoil to be properly contained to prevent return of spoil to waters of the State and to be deposited in a self-contained upland site that prevents return of any water or material into waters of the State.

35. DEP's proposed Specific Condition 11 requires Petitioner to submit "as-built" drawings to DEP's Punta Gorda office with 30 days after completion of construction, "as required by General Condition #6." Petitioner's expert testified that this condition was unreasonable only because it duplicates General Condition 6 and two statutes. But General Condition 6 actually does not require "as-built" drawings, see Finding 9, supra, and it is not clear what statutes Petitioner's expert was referring to. For these reasons, and because it provides a filing location, Specific Condition 11 is reasonable and reasonably necessary to protect the interest of the public and the environment.

36. DEP's proposed Specific Condition 12 requires Petitioner to "maintain the permitted canal free of all rafted debris by removal and property upland disposal." DEP asserts that this specific condition is necessary to comply with BOR §

4.2.4.2 by addressing long-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e). Rafted debris, which may be of an organic or inorganic nature, can accumulate at the end of canals due to wind, waves, boats, or other forces. Such organic rafted debris may rot and, by creating a high biological oxygen demand, rob the water of dissolved oxygen. Petitioner's only expressed opposition to this condition is that the conservation easement in Specific Condition 3 might prevent compliance. While it is unclear how the easement would prevent compliance, the issue is eliminated if no conservation easement is required.

37. DEP's proposed Specific Condition 13 requires Petitioner to use turbidity screens during construction for compliance with BOR § 4.2.4.1 by addressing short-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e). The turbidity screen requirements detailed in this specific condition are typical best management practices that contractors use and are a standard condition placed in permits of this nature by DEP. Petitioner contends that turbidity screens are unnecessary given his intended construction method and that other conditions are sufficient to cover DEP's concerns. However, as indicated, the application does not commit to a method of construction. With

the application in its current state, Specific Condition 13 is appropriate subject to a demonstration by Petitioner that turbidity screens are not needed for the construction method committed to in Petitioner's PRO.

38. DEP's proposed Specific Condition 14 requires Petitioner to "ensure that any discharge or release of pollutants during construction or alteration are not released into wetlands or other surface waters that will cause water quality standards to be violated." Again, this condition is intended to ensure compliance with BOR § 4.2.4.1 by addressing short-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e). While this specific condition seems general and perhaps duplicates other conditions (which was Petitioner's only point of contention), DEP added it in an attempt to make sure the possible and not uncommon release of pollutants from construction equipment was addressed. As such, the condition is appropriate.

39. DEP's proposed Specific Condition 15 provides details on the use of turbidity screens. Petitioner's primary points of contention are that turbidity screens are not needed for his intended construction method and that other conditions are sufficient without this condition. As such, the relevant issues already have been addressed in connection with Specific Condition 13. With the application in its current state, Specific

Condition 15 is appropriate subject to a demonstration by Petitioner that turbidity screens are not needed for the construction method committed to in Petitioner's PRO.

40. DEP's proposed Specific Condition 16 requires Petitioner to used staked filter cloth to contain any turbid run-off and erosion from created slopes of the canal extension. This is the most common best management practice and is a standard condition for ERP permits dealing with side slopes that may affect water quality. Unstable slopes can result in chronic turbidity, which is detrimental to wildlife. Unstable slopes also can lead to upland runoff being deposited into the water along with debris and sediment. Such runoff can bring deleterious substances such as heavy metals and nutrient-loaded substances that might impact dissolved oxygen levels in the water.

41. Petitioner's primary points of contention on Specific Condition 16 are that, like turbidity screens, staked filter cloth is not needed for Petitioner's intended construction method and that other conditions are sufficient without this condition. (Petitioner also questions why the condition gives Petitioner up to 72 hours from "attaining final grade" to stabilize side slopes, but the condition also requires side slope stabilization "as soon as possible," and the 72-hour outside limit seems reasonable.) As such, the relevant issues already have been addressed in connection with Specific Condition 13 and 15. With

the application in its current state, Specific Condition 16 is appropriate subject to a demonstration by Petitioner that staked filter cloth is not needed if he uses the construction method committed to in Petitioner's PRO.

42. DEP's proposed Specific Condition 17, 18, 19, and 20: details required long-term water quality monitoring and reporting [#17]; establishes sampling intervals and requires Petitioner to submit a "plan to remediate" if monitoring shows water quality violations or "a trend toward future violations of water quality standards directly related to the permitted canal" [#18]; allows "additional water quality treatment methods" to be required if water quality monitoring shows it to be necessary [#19]; and allows water quality monitoring requirements to be modified (which "may include reduction in frequency and parameters . . . or the release of the monitoring process"), "based on long term trends indicate that the permitted canal is not a source to create water quality violations [#20]." These conditions are intended to ensure compliance with BOR § 4.2.4.2 by addressing long-term water quality to aid in providing reasonable assurance that water quality standards will not be violated, as required by Section 373.414(1), Florida Statutes, and Rule 40E-4.301(1)(e).

43. The evidence was that these specific conditions are standard for ERP permits where a constructed system may lead to water quality violations in the long term. Contrary to Petitioner's contentions, conditions of this kind are not

dependent on a post-construction finding of water quality standard violations (even though DEP defaulted on Petitioner's application). Besides contending that monitoring requirements in Specific Conditions 17 and 18 are unnecessary, Petitioner also contends that they are too extensive and not tailored to Petitioner's intended construction, but DEP proved their necessity, even assuming the construction method committed to in Petitioner's PRO. Petitioner complains that Specific Condition 19 is vague and that Petitioner's ERP does not provide for "water quality treatment." But the present absence of post-construction water quality treatment should not preclude the possible future imposition of some kind of water quality treatment if monitoring shows it to be necessary. For this kind of condition, the absence of detail regarding the kind of treatment to be imposed is natural since it would depend on future events.

44. DEP's proposed Specific Condition 21 merely requires that Petitioner's project comply with State water quality standards in Florida Administrative Code Rules 62-302.500 and 62-302.530. Petitioner contends that this is duplicative and unnecessary. But it certainly is not unreasonable to be specific in this regard.

D. No Improper Purpose

45. As part of his request for attorney's fees under Section 120.595, Florida Statutes, Petitioner necessarily contends that DEP participated in this proceeding "for an

improper purpose"--i.e., "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." Even assuming that DEP should be considered a "nonprevailing adverse party," Petitioner's evidence did not prove that DEP's participation was for an "improper purpose." To the contrary, DEP "participated" initially because Petitioner filed an application. DEP's denial of Petitioner's application was not proven to be "for an improper purpose" but rather for the purpose of attempting to protect the environment. The propriety of the denial was litigated in Tuten I, which made no finding that the denial was "for an improper purpose" and which ordered DEP to participate in a hearing for purposes of determining "reasonable mitigative conditions." The two-year delay between Tuten I and Tuten II was not fully explained, but Tuten II also made no finding that the denial, or the delay, or DEP's proposed ERP with conditions were "for an improper purpose" and again ordered DEP to participate in a hearing for purposes of determining "reasonable mitigative conditions." While DEP's views on the nature of the hearing to be conducted for purposes of determining "reasonable mitigative conditions" was rejected, it was not proven that DEP argued its views "for an improper purpose" or that its participation, once its views were rejected, was "for an improper purpose," as defined by statute. To the contrary, 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 are accepted in this Recommended Order.

46. As Petitioner accepts and points out, it remains necessary for Petitioner to construct and operate his project in a manner that does not violate environmental statutes and rules. But without any water quality information or monitoring, DEP's enforcement of those laws and rules will be hamstrung.

CONCLUSIONS OF LAW

47. Tuten I and Tuten II are the law of the case. Under those decisions, the issue for determination in this case is 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.

48. As reflected in the Preliminary Statement, it is concluded that DEP has the burden to plead and prove "'the reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to issuing a default permit.' Manasota-88, Inc. v. Agrico Chem. Co., 576 So. 2d 781, 783 (Fla. 2d DCA 1991)." DEP's proposed default permit with general and specific conditions, while reversed by the appellate court in Tuten II, was deemed to constitute DEP's pleading of the "reasonable mitigative conditions" DEP seeks to impose on the default permit to be issued to the Petitioner.

49. DEP's proposed General Conditions 1-19 are taken from Rule 40E-4.381, which DEP adopted by reference under Rule 62-330.200(4). These conditions apply to and are binding on all ERP permits located within the geographic jurisdiction of the SFWMD, unless waived or modified upon a determination that the conditions are inapplicable to the activity authorized by the permit. In the absence of such a determination, these General Conditions are "standard conditions," and they are "substantive requirements of [the applicable permitting statute]." See generally Op. Att'y Gen. Fla. 78-169 (1978). Ultimately, Petitioner agreed to General Conditions 1-19.

50. DEP's Rule 62-4.001 states that "the provisions of this Part . . . shall not apply to activities regulated under Part IV of Chapter 373, F.S." Tuten's proposed canal extension is an activity regulated under Part IV of Chapter 373, Florida Statutes. Therefore, contrary to Petitioner's contention, the provisions of Rule Chapter 62-4, Part I, including the permit conditions contained in Rules 62-4.070(7) and 62-4.160, do not apply in this case.

51. Rule 40E-4.381(2) provides:

> In addition to those general conditions set forth in subsection (1), the Governing Board shall impose on any permit granted under this chapter and chapter 40E-40 F.A.C., such reasonable project-specific special conditions as are necessary to assure that the permitted system will not be inconsistent with the overall objectives of the District or will not be harmful to the water resources

> of the District, as set forth in District rules.

52. DEP contends that Rule 40E-4.381(2), along with Attorney General Opinion 78-169, authorizes the imposition of requirements that Petitioner provide RAI responses and reasonable assurance of compliance with permitting criteria under Rules 40E-4.301, entitled "Conditions for Issuance of Permits," and 40E-4.302, entitled "Additional Conditions for Issuance of Permits." But it is concluded that those permitting criteria do not apply to default permits and are not the kind of "standard conditions" referred to in Attorney General Opinion 78-169, which answered the specific question:

> May an agency place as conditions in a default license issued pursuant to s.120.60(2), F.S., standard conditions such as the reporting of water quality violations, periodic operating reports, and monitoring requirements which are routinely placed in agency licenses which do not call for project design changes, or impose other such substantive requirements of Ch. 403, F.S., or rules duly adopted thereunder?

Otherwise, the default statute would be rendered meaningless, and instruction of Tuten I and Tuten II to determine the "reasonable mitigative conditions [that] are necessary to protect the interest of the public and the environment" would be ignored.

53. On the other hand, as found, other specific conditions proposed by DEP are "reasonable mitigative conditions [that] are necessary to protect the interest of the public and the environment." Specifically, Specific Conditions 4, 5, and 11-21

are reasonable as proposed. Specific Conditions 2 and 5-10, as modified by the Findings of Fact, are appropriate.

54. Attorney's fees under Section 120.595(1), Florida Statutes, may be awarded only upon a finding that the "nonprevailing adverse party" participated in the proceeding "for an improper purpose," defined as "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." Based on the findings, Petitioner's request for such an award from DEP should be denied in this case.

RECOMMENDATION

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

RECOMMENDED 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 14, supra.

DONE AND ENTERED this 11th day of August, 2006, in Tallahassee, Leon County, Florida.

S

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 11th day of August, 2006.

ENDNOTES

[1]/ Except for Rule Chapter 40E-4, or unless otherwise stated, all Rule references are to the current version of the Florida Administrative Code.

[2]/ All references to Rule Chapter 40E-4 are to the 1995 version of the Rule, which is the version adopted by Rule 62-330.200(4).

[3]/ Unless otherwise stated, all statutory references are to the 2005 codification of the Florida Statutes.

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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.