STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANTHONY PARKINSON, MICHAEL CILURSO and THOMAS FULLMAN,	)	
Petitioners,	)	
vs.	)	Case No. 06-2842
REILY ENTERPRISES, LLC and DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on November 28-29, 2006, in Ft. Pierce, Florida.

APPEARANCES

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For Respondent Department of Environmental Protection (Department):

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STATEMENT OF THE ISSUE

The issue is whether the Department should issue Environmental Resource Permit and Sovereign Submerged Lands Authorization No. 43-0197751-003 to Reily.

PRELIMINARY STATEMENT

On April 19, 2006, the Department issued Environmental Resource Permit (ERP) and Sovereign Submerged Lands Authorization No. 43-0197751-003 (hereafter "the permit") to Reily. On or about July 3, 2006, Petitioners and The Jensen Beach Group filed a Petition for Administrative Hearing with the Department challenging the permit.

On August 7, 2006, the Department referred the petition to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge "to conduct all necessary proceedings required by law and to submit a recommended order to the Department." The notice of referral stated that the petition of The Jensen Beach Group was being dismissed with leave to amend. An Order of dismissal related to The Jensen Beach Group was not filed with DOAH, and if an

amended petition was filed by The Jensen Beach Group, it was never referred to DOAH.

On November 22, 2006, Petitioners filed an Amended Motion for Leave to File Second Amended Petition for Administrative Hearing. The motion was granted at the final hearing, as memorialized in the Order entered November 30, 2006, and the case proceeded on the Second Amended Petition for Administrative Hearing. The Department's motion to strike directed to the Second Amended Petition was denied at the final hearing, as memorialized in the Order entered November 30, 2006.

At the final hearing, Reily presented the testimony of Bruce Jerner and Don Donaldson; the Department presented the testimony of Jennifer Smith; and Petitioners testified in their own behalf and also presented the testimony of James Egan and the deposition testimony of Jeffrey Sanger. The following exhibits were received into evidence: Reily's Exhibits (R. Ex.) 1, 5, 6, 29 and 30; the Department's Exhibits 55 through 61; and Petitioners' Exhibits (Pet. Ex.) 5, 6, 7-1 through 7-34,[1] 10, 12, 15, 22, 24, 27, 52, 54, 65, and 66.

Official recognition was taken of Sections 177.28(1), 253.002, 258.39(9), 373.414, Florida Statutes (2006)[2]; Florida Administrative Code Rules 18-20.002, 18-20.003, 18-20.004, 18-20.006, 18-21.003, 18-21.004, 18-21.0051, 62-301.400, Chapter 62-330, 40E-4.021, 40E-4.301, 62-343.050, and 62-340.100 through

62.340.600; the Indian River Lagoon Aquatic Preserves Management Plan, Vero Beach to Ft. Pierce and Jensen Beach to Jupiter Inlet, adopted January 22, 1985, which is incorporated by reference in Florida Administrative Code Rule 18-20.004(7) (hereafter "the Management Plan"); the Operating Agreement Concerning Regulation Under Part IV, Chapter 373, F.S., and Aquaculture General Permits Under Section 403.814, F.S., between South Florida Water Management District and Department of Environmental Protection, dated October 27, 1998 (hereafter "the Operating Agreement"); and the ERP rules of the South Florida Water Management District (SFWMD), which have been adopted by reference by the Department.

The three-volume Transcript of the final hearing was filed on January 11, 2007. The parties were given 10 days from that date to file proposed recommended orders (PROs). The PROs were timely filed and have been given due consideration.

Petitioners filed a motion for attorney's fees and costs on January 10, 2007. Reily filed a motion for attorney's fees and costs on January 22, 2007. Responses to the motions were filed on January 22 and 29, 2007, respectively. The motions are hereby denied.

FINDINGS OF FACT

A. Parties

1. The Department is the agency that approved the permit at issue in this proceeding. The Department is responsible for protecting the water resources of the state in conjunction with the water management districts, and it is also responsible for authorizing the use of sovereignty submerged lands pursuant to a delegation of authority from the Board of Trustees of the Internal Improvement Trust Fund.

2. The activities authorized by the permit are as follows:

> The purpose of the project is to install a 395 linear foot upland retaining wall, with one 10 linear foot return, located at least 5-feet landward of the Mean High Water Line, and an 85 linear foot seawall, with one 10 linear foot return, located at the Mean High Water Line. Riprap shall be installed at a 2:1 (Horizontal:Vertical) slope along the 85 linear foot seawall, and will extend out a maximum of 4-feet waterward of the toe of the new seawall. . . . .[3]

3. Reily is the applicant for the permit. Reily owns approximately 17.74 acres of property along Indian River Drive in Jensen Beach, just north of the Jensen Beach Causeway. The Reily property extends from the Indian River on the east to Skyline Drive on the west.

4. Indian River Drive runs north and south through the east side of the property. The Reily property to the east of Indian River Drive is undeveloped except for an existing

restaurant, Dena's, which is on the southern end of the property. There is an existing "RV park" on the Reily property to the west of Indian River Drive.

5. The project will be located to the east of Indian River Drive. That portion of the Reily property is approximately one acre in size, and is only 149 feet wide at its widest point. The property is 24 feet wide at its narrowest point, and more than half of the property is less than 68 feet wide.

6. Petitioners live in single-family homes to the west of the Reily property. Each of their homes is within 300 feet of the Reily property to the west of Indian River Drive, but more than a quarter of a mile from the property on which the permitted activities will be located.

7. Petitioner Anthony Parkinson sometimes drives by the property where the permitted activities will be located when he takes his daughter to school; he has had breakfast at Dena's several times; he looks at the property from the causeway; and, on at least one occasion, he and his daughter looked at vegetation in the water adjacent to the Reily property for a school project.

8. Mr. Parkinson testified that the project will negatively affect his quality of life because he "came to Jensen Beach because of the natural shoreline and the protection that it afforded to residents in terms of natural beauty" and that,

in his view, the project "just adds to the incredible bulk that we have here in the property in terms of building in our natural shoreline."

9. Petitioner Michael Cilurso drives by the property where the permitted activities will be located on a fairly regular basis. He goes onto the property "occasionally" to "look around." He has waded in the water adjacent to the property and has seen blue crabs, small fish, and underwater vegetation.

10. Mr. Cilurso testified that the project will affect him in two ways: first, he will no longer be able to "go from the road and just walk down and wade around in [the river] and enjoy the natural resources;" and second, the proposed development of the overall Reily property will affect his "quality of life" because "the density [is] going to be more than what we thought would be a fit for our community."

11. Petitioner Thomas Fullman can see the Indian River from his house across the Reily property. He and his family have "spent time down at the causeway," and they have "enjoyed the river immensely with all of its amenities" over the years. He is concerned that the project will affect his "quality of life" and "have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate."

B. The Permit

(1) Generally

12. The permit authorizes the construction of an 85-foot-long seawall and a 395-foot-long retaining wall on the Reily property and the placement of riprap on the sovereignty submerged lands adjacent to the seawall.

13. The seawall will be located on the mean high water line (MHWL). The riprap will be placed adjacent to the seawall, below the MHWL, and will consist of unconsolidated boulders, rocks, or clean concrete rubble with a diameter of 12 to 36 inches.

14. The retaining wall will be located five feet landward of the MHWL, except in areas where there are mangroves landward of the MHWL. In those areas, the retaining wall will be located "landward of the mangroves".

15. The permit does not require the retaining wall to be any particular distance landward of the mangroves or even outside of the mangrove canopy. The drawings attached to the permit show the retaining wall located under the mangrove canopy. The permit does not authorize any mangrove trimming.

16. The areas landward of the seawall and retaining wall will be backfilled to the level of Indian River Drive. There will be swales and/or dry retention areas in the backfilled

areas to capture storm water and/or direct it away from the river.

17. The retaining wall will connect to an existing seawall on the Conchy Joe property immediately to the north of the Reily property. The seawall will connect to the approved, but not yet built seawall on the Dutcher property immediately to the south of the Reily property.

18. The permit requires the use of erosion control devices and turbidity curtains during the construction of the walls in order to prevent violations of state water quality standards.

(2) Permit Application and Review by the Department

19. On or about June 23, 2005, Reily sought a determination from the Department that the seawall and retaining wall were not subject to the Department's permitting jurisdiction. The project, as initially proposed, did not include the placement of riprap along the seawall.

20. The Department informed Respondent in a letter dated October 11, 2005, that "the proposed seawall is within the Department's jurisdiction." The letter further stated that the Department was going to "begin processing [the] application as a standard general permit," and it requested additional information from Reily regarding the project.

21. The Department's request for additional information (RAI) asked Reily to "justify the need for a seawall" and to

"provide a detailed explanation" as to why the "use of vegetation and/or riprap is not feasible at the site" for shoreline stabilization. Reily responded as follows:

> Recent hurricanes have destroyed any vegetation that existed within the area of the proposed seawall. Shoreline has been lost and the DOT has had to backfill nearby upland areas and repair the roads due to significant erosion. The application is proposing to place riprap along the foot of the proposed seawall. There is no reason to believe that there will not be more storms in the near future and it is the applicants' [sic] position that the seawall for this area is the only way to assure permanent shoreline stabilization and would be in the public's best interest.

22. The RAI also asked Reily to provide "a detailed statement describing the existing and proposed upland uses and activities." (Emphasis in original). In response, Reily stated: "The existing upland use is an R.V. resort complex. The proposed use will remain the same."

23. The RAI also asked Reily to "provide details on the current condition of the shoreline at the site, including the location of mangroves and other wetland vegetation" and to "indicate if any impacts to these resources are proposed." (Emphasis supplied). In response, Reily stated: "Please see plan view drawing sheet 2 of 4 that clearly shows that the proposed retaining wall will be located landward of the existing mangroves."

24. The sheet referenced in the response to the RAI does not show the location of wetland vegetation as requested by the Department. The referenced sheet is also inconsistent with other drawings submitted by Reily (e.g., sheet 3 of 4), which show that the proposed retaining wall will be located under the mangrove canopy, not landward of the existing mangroves.

25. Reily's response to the RAI was submitted on or about February 23, 2006.

26. The Department gave notice of its intent to issue the permit on April 19, 2006. The permit included a number of general and specific conditions imposed by the Department.

27. The permit states a petition challenging the issuance of the permit must be filed "within 14 days of publication of the notice or within 14 days of receipt of the written notice, whichever occurs first."

28. Notice of the Department's intent to issue the permit was not published, and the record does not establish when Petitioners received written notice of the permit and the "notice of rights" contained therein. Mr. Cilurso acknowledged that he "found out about the DEP permit to Mr. Reily [approximately] six or eight months before [his] deposition in October [2006]" and then discussed it with the other Petitioners, but that testimony does not establish when the Petitioners received actual written notice of the permit.

29. Petitioners' challenge to the permit was filed with the Department on or about July 3, 2006.

(3) The Related Pitchford's Landing Project

30. Contrary to the representation made by Reily to the Department during the permitting process, the evidence presented at the final hearing establishes that Reily is proposing to change the use of the upland property from an RV park to a residential development known as Pitchford's Landing.

31. A master site plan for the Pitchford's Landing development was submitted to Martin County for approval in April 2006. The site plan (Pet. Ex. 10) shows extensive residential development to the west of Indian River Drive, including single-family lots and multi-story condominium buildings; construction of a sidewalk, bike path, pool, cabana, public pier, and riverwalk to the east of Indian River Drive; the refurbishment of Dena's restaurant; and the "proposed seawall."

32. Petitioners were aware that the plans for Pitchford's Landing included a seawall by April 2006, but the evidence was not persuasive that they had received written notice of the Department's intent to issue the permit at that time.

33. The Pitchford's Landing development will require changes to the land use designation of the Reily property in the Martin County Comprehensive Plan as well as zoning changes.

Those local approvals had not been obtained as of the date of the final hearing.

34. The plans for the Pitchford's Landing development are being revised based, at least in part, on opposition from Petitioners and others involved in an "association" known as The Jensen Beach Group. Petitioners Cilurso and Fuller are active members of the group, and Petitioner Parkinson has also participated in the group's activities.

35. Bruce Jerner, one of Reily's consultants, testified to his understanding that the pool, cabana, and riverwalk shown on the master site plan are being removed from the Pitchford's Landing development. However, there is no evidence to suggest that the Reily property to the east of Indian River Drive and/or the other improvements on that property (including the hardened shoreline authorized by the permit) are being removed from the Pichford's Landing develoment.

36. The more persuasive evidence establishes that the proposed seawall, retaining wall, and riprap are part of the larger Pitchford's Landing development. The walls were referred to on the master site plan for the development; they were depicted and discussed in an advertising brochure as an amenity of the development; and signs advertising Pitchford's Landing are located on the Reily property to the east of Indian River Drive on which the seawall and retaining wall will be located.

37. There is no evidence that the Pitchford's Landing development has received a permit from SFWMD under Part IV of Chapter 373, Florida Statutes.

38. The master site plan for Pitchford's Landing shows several "dry retention areas" to the west of Indian River Drive, and as noted above, there will be swales and/or dry retention areas in the backfilled areas behind the retaining wall and seawall to capture storm water and/or direct it away from the river. It cannot be inferred from that evidence alone, however, that the Pitchford's Landing development will require permits from SFWMD under Part IV of Chapter 373, Florida Statutes.

C. Merits of the Project

39. The Indian River in the vicinity of the Reily property is a Class III waterbody, an outstanding Florida water (OFW), and part of the Jensen Beach to Jupiter Inlet Aquatic Preserve.

40. The Jensen Beach to Jupiter Inlet Aquatic Preserve is one of three aquatic preserves that encompass the Indian River Lagoon system that extends from Vero Beach to Jupiter Inlet.

41. The Jensen Beach to Jupiter Inlet Aquatic Preserve is 37 miles long and encompasses approximately 22,000 acres of surface water area. The entire Indian River Lagoon system is 49 miles long, with approximately 33,000 acres of surface water area.

42. The Management Plan that was adopted for the Jensen Beach to Jupiter Inlet Aquatic Preserve in January 1985 described the Indian River Lagoon system, and explained its ecological importance as follows:

> The Indian River Lagoon area is a long, shallow lagoonal estuary important in this region for its value to recreational and commercial fishing, boating and prime residential development. The preserve is in a rapidly growing urban area affected by agriculture and residential drainage. The majority of the shoreline is mangrove fringed, with scattered development in single family residences and a few condominiums. The lagoon is bounded on the west by the Florida mainland and on the east by barrier islands. The Intracoastal Waterway runs the length of the lagoon, which is designated as a wilderness preserve.
>
> The estuary is an important home and nursery area for an extensive array of fish and wildlife. The major problems in the continued health of this area include the construction of major drainage networks that have increased the fresh water flow into the estuary, and the loss of wetland areas and water quality degradation associated with agricultural drainage and urban runoff. Additionally, the Intracoastal Waterway and the maintained inlets have changed the historical flushing and circulation within the lagoon system.

43. The Management Plan explained that the “major objectives of the aquatic preserve management program are to manage the preserve to ensure the maintenance of an essentially

natural condition, and to restore and enhance those conditions which are not in a natural condition."

44. The Management Plan recognizes "the rightful traditional uses of those near-shore sovereignty lands lying adjacent to upland properties," and with respect to bulkheads, the Management Plan states:

> Bulkheads should be placed, when allowed, in such a way as to be the least destructive and disruptive to the vegetation and other resource factors in each area. Approved uses which do destruct or destroy resources on state-owned lands will require mitigation. The mitigation will include restoration by the applicant or other remedy which will compensate for the loss of the affected resource to the aquatic preserve.

45. Most of the shoreline along the Reily property is a gently sloping sandy beach that has been previously disturbed, and is largely barren of vegetation. There are, however, areas along the shoreline where dense vegetation exists, including wetland vegetation and three stands of mature red and black mangroves.

46. Birds, fish, and wildlife have been observed on and around the Reily property. However, there is no credible evidence that any listed species use the uplands or near-shore waters where the project will be located.

47. The sovereignty submerged lands immediately adjacent to the Reily property on which the riprap will be placed are barren, sandy, and silty.

48. There are seagrasses in the vicinity of the Reily property, but they are 30 to 50 feet from the shoreline. The seagrasses include Johnson's seagrass, which is a listed species.

49. There are no significant historical or archeological resources in the vicinity of the Reily property, according to the Department of State, Division of Historical Resources.

50. In 2004, Hurricanes Frances and Jean made landfall in Martin County in the vicinity of the Reily property. The hurricanes washed out portions of Indian River Drive, including a portion of the road approximately one-half mile north of the Reily property.

51. After the hurricanes, Martin County considered placing bulkhead along the entire length of Indian River Drive to provide shoreline stabilization and to prevent further damage to the road in major storm events. The county did not pursue the plan because it determined that it was not financially feasible.

52. The portion of Indian River Drive along the Reily property did not wash out during the 2004 hurricanes. Nevertheless, on November 4, 2004, because of concerns for the stability of the shoreline along the Reily property, the

Department issued an Emergency Field Authorization to the prior owner of the property allowing the installation of 160 linear feet of riprap along the shoreline.

53. The riprip authorized by the Emergency Field Authorization was to be placed considerably further landward than the structures authorized by the permit at issue in this case. The record does not reflect why the riprap was not installed.

54. The evidence was not persuasive that the Reily property has experienced significant erosion or that the project is necessary to protect Indian River Drive or the upland property from erosion. The project will, however, have those beneficial effects.

55. No formal wetland delineation was done in the areas landward of the MHWL or the areas that will be backfilled behind the proposed seawall and retaining wall and, as noted above, Reily did not identify the location of wetland vegetation and any impacts to such vegetation in response to the RAI.

56. Mr. Jerner testified that, in his opinion, there are no wetlands landward of the MHWL in the area of the seawall, and that any wetlands in the area of the retaining wall are waterward of that wall, which will be at least five feet landward of the MHWL. The Department's witness, Jennifer Smith, testified that it was her understanding that the wetlands did

not extend into the areas behind the seawall or retaining walls, but she acknowledged that she did not ground-truth the wetland boundaries and that wetland vegetation appeared to extend into areas that will be backfilled. Petitioners' expert, James Egan, testified that the wetlands likely extended into areas that will be backfilled based upon the topography of the shoreline and the wetland vegetation that he observed, but he made no effort to delineate the extent of the wetlands in those areas and he testified that he would defer to the Department's wetland delineation if one had been done.

57. The Department's wetland delineation rules in Florida Administrative Code Rule Chapter 62-340 contain a detailed quantitative methodology to be used in making formal wetland boundary delineations. That methodology is to be used only where the wetland boundaries cannot be delineated through a visual on-site inspection (with particular attention to the vegetative communities and soil conditions) or aerial photointerpretation in combination with ground truthing. Thus, the Department's failure to do a formal wetland delineation (with soil sampling, etc.) in the project area was not per se inappropriate, as Mr. Egan seemed to suggest.

58. That said, the more persuasive evidence fails to establish that Reily made an appropriate effort to delineate the landward extent of the wetlands in the project area. No

delineation of the wetland areas was provided in response to the RAI, and Ms. Smith's testimony raises more questions than it answers regarding the correctness of Mr. Jerner's conclusory opinion that the wetland boundary is waterward of the retaining wall.

59. Without an appropriate delineation of the wetland boundaries, it cannot be determined with certainty whether or not there are wetlands in the areas that will be backfilled. The evidence establishes there may be wetlands in those areas; and if there are, the impacts to those wetlands have not been assessed or mitigated.

60. Riprap is a better method of shoreline stabilization than a vertical seawall without riprap. The riprap helps to prevent shoaling by absorbing wave energy, and it also provides habitat for benthic organisms, crustaceans, and small fish. Native vegetation provides these same benefits, and all of the experts agreed that it is the best method of shoreline stabilization from an environmental standpoint.

61. The use of native vegetation to provide shoreline stabilization along the Reily property is not a reasonable alternative under the circumstances. First, the shoreline has not experienced any significant vegetative recruitment since the 2004 hurricanes. Second, the property is not wide enough to accommodate the amount of vegetation that would be needed to

stabilize the shoreline. Third, the properties immediately to the north and south of the Reily property are already (or soon will be) protected by seawalls and/or riprap, rather than native vegetation.

62. The project will not adversely affect the property of others. The evidence was not persuasive that the project will cause erosion or other impacts to the adjacent properties, particularly since the adjacent properties have, or soon will have hardened shorelines.

63. The project will not adversely affect the conservation of fish and wildlife and, to the contrary, the riprap will provide a benefit to fish and wildlife by providing shelter and habitat for benthic organisms, crustaceans, and small fish.

64. The project will not adversely affect endangered or threatened species or their habitat. The only listed species shown to exist in the vicinity of the project, Johnson’s seagrass, is 30 to 50 feet from the shoreline, which is too far away from the project to be affected even if, as suggested by Petitioners' experts, the impact of wave energy on the walls will cause increased turbidity and sedimentation.

65. The project will not adversely impact the fishing or recreational values or marine productivity in the area. The waters in the vicinity of the project are not shellfish

harvesting areas, and the riprap will provide beneficial habitat for small marine life.

66. The project will not adversely affect navigation. The riprap will extend only four feet into the Indian River in an area of shallow water far from the channel of the river.

67. The project will not cause harmful erosion or shoaling or adversely affect water quality in the area. The evidence was not persuasive that wave energy will routinely impact the retaining wall to an extent that will cause increased turbidity or sedimentation in the surrounding waters, and all of the experts agreed that the riprap will help to prevent this from occurring along the seawall. Moreover, the swales and/or dry retention areas behind the seawall and retaining wall will help to filter storm water runoff from Indian River Drive and the adjacent upland properties, which may enhance the water quality in the vicinity of the project.

68. The project will not result in any adverse secondary or cumulative impacts to the water resources. The adjacent properties already have hardened shorelines. The permit conditions include adequate safeguards (e.g., turbidity curtains and erosion control devices) to protect the water resources in the aquatic preserve during construction of the project.

69. Any impact (either positive or negative) of the project on the aquatic preserve and the Indian River Lagoon

system as a whole will be de minimus in light of size of the system in comparison to the small size of the project and its location between two hardened shorelines near a man-made causeway.

CONCLUSIONS OF LAW

70. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

A. Authority of the Department to Review and Take Final Agency Action on the Permit

71. The Department has permitting authority under the ERP program. See § 373.414, Fla. Stat. It also has been delegated authority by the Board of Trustees of the Internal Improvement Trust Fund to take final agency action on requests for authorization to use sovereignty submerged lands. See § 253.002(2), Fla. Stat.; Fla. Admin. Code R. 18-21.0051(1).

72. The Department is authorized to delegate its authority under the ERP program and its authority take final agency action on requests for authorization to use sovereignty submerged lands to the water management districts, see §§ 373.026, 373.046, Fla. Stat., Fla. Admin. Code R. 18-21.0051(2), and the Department has done so by rule and interagency agreement. See Fla. Admin. Code R. 62-113.100 and 62-113.200; Operating Agreement.

73. Petitioners contend that SFWMD (not the Department) should have reviewed, and should take final agency action on Reily's permit application because the activity authorized by the permit is a type of project for which the Department's permitting authority has been delegated to SFWMD under the Operating Agreement. In response, the Department and Reily contend that the Operating Agreement is nothing more a division of responsibility between the Department and SFWMD, and that it does not divest the Department of its authority to review permit applications such as the one at issue in this case.

74. Petitioner has the burden of proof on this issue. See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (burden of proof is on the party asserting the affirmative of the issue).

75. The Department and Reily rely on Tuten v. Department of Environmental Protection, 819 So. 2d 187 (Fla. 4th DCA 2002), in support of their position. In that case, an ERP application was filed with one of the Department's district offices and then transferred to another district office where Department staff determined that the application should be processed by SFWMD under the Operating Agreement. Id. at 188. The application was never transferred to SFWMD, and neither the Department nor SFWMD took any formal action on the permit within 90 days of the date that it was first filed with the Department. Id. As a result,

the court held that the applicant was entitled to a "default permit" based upon the plain language in Sections 120.60(1) and 373.4141(2), Florida Statutes. Id. at 189.

76. Nothing in Tuten gives the Department the authority to ignore the terms of the Operating Agreement or to review permit applications that fall within the SFWMD's responsibilities under the Operating Agreement. The case simply holds that the Department is responsible for ensuring that permit applications that it receives are reviewed by the correct agency under the Operating Agreement and acted on within the applicable statutory periods.

77. Moreover, the specific issue decided in Tuten -- i.e., the applicant's entitlement to a "default permit" -- is not implicated in this case. First, it has not been argued that Reily is entitled to a default permit. Second, a specter of a default permit is not looming in this case because the time periods for acting on the permit application have tolled while this case has been pending, see § 120.60(1), Fla. Stat. ("The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57."), and because a default permit could not be issued with respect to the authorization to use of sovereignty submerged lands sought by Reily. See § 373.427(1), Fla. Stat. ("Failure to satisfy these [s. 120.60] timeframes shall not result in approval by default

of the application to use board of trustees-owned submerged lands.”). Thus, contrary to the argument of the Department and Reily, Tuten is not controlling authority as to the issue raised by Petitioners.

78. The Operating Agreement is incorporated by reference in Florida Administrative Code Rule 62-113.100(3)(e) and, therefore, it has the force and effect of a rule.

79. The Department is bound to follow its own rules. See, e.g., Parrot Heads, Inc. v. Dept. of Business & Professional Reg., 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999) ("An administrative agency is bound by its own rules . . . ."); Cleveland Clinic Florida Hospital v. Agency for Health Care Admin., 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996) ("Without question, an agency must follow its own rules . . . .”); Marrero v. Dept. of Professional Reg., 622 So. 2d 1109, 1111 (Fla. 1st DCA 1993) ("The [agency] is bound to comply with its own rules until they have been repealed or otherwise invalidated . . . .").

80. The Operating Agreement provides that the Department shall review and take final action on permit applications for “shore protection structures,” except for structures that are “part of a larger plan of other commercial or residential development that has received or requires a permit under Part IV of Chapter 373, F.S.” See Operating Agreement, at § II.A.1.i.

81. It is undisputed that the proposed seawall, retaining wall, and/or riprap are "shore protection structures." Reily contends that the evidence fails to establish that those structures are part of a larger plan of development and, even if they are, there is no evidence that the larger plan of development has received or will require a permit under Part IV of Chapter 373, Florida Statutes.

82. As to Reily's first point, the more persuasive evidence establishes that the activity authorized by the permit is part of a larger plan of development, namely Pitchford's Landing. As to Reily's second point, no credible evidence was presented that the Pitchford's Landing development has received a permit under Part IV of Chapter 373, Florida Statutes, or that it will require such a permit.

83. In sum, Reily's permit application was properly reviewed by the Department under the Operating Agreement because Petitioners failed to prove that the larger Pitchford's Landing development (of which the permitted activity is clearly a part) has received or will require permits under Part IV of Chapter 373, Florida Statutes.

B. Timeliness of Petitioners' Challenge to the Permit[4]

84. Reily argues in its PRO (and its motion for attorney's fees and costs) that Petitioners' challenge to the permit is

untimely. The Department and Petitioners did not address this issue in their PROs.

85. Reily has the burden of proof on this issue.

86. Section 120.569(2)(c), Florida Statutes, provides that an untimely petition for hearing must be dismissed. See also Cann v. Dept. of Children & Family Servs., 813 So. 2d 237 (Fla. 2d DCA 2002) (strictly construing the timeliness requirement).

87. The filing deadline for a petition challenging the permit at issue in this case was 14 days of receipt of the Department's notice of intent to issue the permit. See § 373.427(2)(c), Fla. Stat.; Fla. Admin. Code R. 62-110.106(3)(a)1.; R. Ex. 1, at REILY00009.

88. Where, as here, notice of the Department's intent to issue the permit is not published, the time period for requesting a hearing on the permit does not commence until written notice of the permit is received. See Fla. Admin. Code R. 62-110.106(2); Accardia v. Dept. of Environmental Protection, 824 So. 2d 992 (Fla. 4th DCA 2002); Wentworth v. Dept. of Environmental Protection, 771 So. 2d 1279 (Fla. 4th DCA 2000); St. Cloud v. Dept. of Environmental Reg., 490 So. 2d 1356 (Fla. 5th DCA 1986); Henry v. Dept. of Administration, 431 So. 2d 677 (Fla. 1st DCA 1983).

89. The record fails to establish the date that written notice of the permit was received by Petitioners,[5] but the

evidence was not persuasive that Petitioners received written notice of the Department's intent to issue the permit more than 14 days prior to the date that their original petition was filed with the Department, as argued by Reily. Therefore, Reily failed to meet its burden to prove that the petition is untimely.

C. Petitioners' Standing to Challenge the Permit[6]

90. Petitioners have the burden to prove their standing to challenge the permit. See Agrico Chemical Co. v. Dept. of Environmental Reg., 406 So. 2d 478 (Fla. 2d DCA 1981).

91. To do so, they must establish "1) that [they] will suffer injury in fact which is of significant immediacy to entitle [them] to a section 120.57 hearing, and 2) that [their] substantial injury is of a type and nature which the proceeding is designed to protect." Id. at 482. See also § 403.412(5), Fla. Stat. ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted

affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.”).

92. Petitioners did not prove their standing.

93. First, the general “quality of life” concerns raised by Petitioners relate more to the Pitchford’s Landing development than to the permitted activities. Issues related to the density of the Pitchford’s Landing development and its impact on the Jensen Beach community are beyond the scope of this proceeding.

94. Second, Petitioners have no legal right to go across the Reily property in order to “look around” or otherwise use and enjoy the shoreline along the river or the adjacent submerged lands. Thus, the extent to which the construction of the seawall and retaining wall will preclude Petitioners from doing so in the future does not give them standing to challenge the permit.

95. Third, even though the shoreline along the Reily property is largely undeveloped, it is far from pristine and is not in a natural condition. The evidence was not persuasive that the aesthetic values of the existing shoreline enjoyed by Petitioners from afar will be materially diminished by the permitted activities, particularly since the permit prohibits impacts to the mangrove stands on the property.

96. In sum, the evidence fails to establish that the project will affect Petitioners' use or enjoyment of the water resources in the vicinity of the Reily property or the aquatic preserve as a whole.

D. Merits of the Project

97. It is not necessary to consider the merits of the project in light of the determination above regarding Petitioners' lack of standing. However, the merits of the project will be addressed in an abundance of caution in the event that the Department (or an appellate court) determines that Petitioners have standing.

(1) Scope of the Department's Jurisdiction Over the Permitted Activities

98. The Department and Reily contend that the only portion of the project that the Department has jurisdiction over is the placement of the riprap below the MHWL because the other aspects of the project (i.e., the seawall and retaining wall) are landward of the MHWL. This argument is rejected.

99. First, the Department took the position early in the permitting process that "the seawall is within the Department's jurisdiction." Reily did not challenge that determination at the time it was made, and it is estopped from doing so now.

100. Second, on its face, the permit includes authorization for not only the riprap, but also the seawall and

retaining wall, which is consistent with the expert testimony that the riprap is intended to operate in conjunction with the seawall, not independent of the wall.

101. Third, the evidence establishes that there are wetlands landward of the MHWL on the Reily property and that the wetlands may extend into some of the areas that will be backfilled behind the seawall and retaining wall pursuant to the permit, which gives the Department jurisdiction over the activities in those areas under Section 373.414(1), Florida Statutes.

102. In sum, the entire project -- consisting of the seawall, retaining wall, and riprap -- is subject to the Department's jurisdiction.

(2) General Standard of Review

103. Reily has the burden to prove by a preponderance of the evidence that its permit application should be approved. See J.W.C. Co., 396 So. 2d at 788.

104. This is a de novo proceeding and no presumption of correctness attaches to the Department's preliminary approval of the permit; however, as explained in J.W.C. Co.:

> as a general proposition, a party should be able to anticipate that when agency employees or officials having special knowledge or expertise in the field accept data and information supplied by the applicant, the same data and information, when properly identified and authenticated

> as accurate and reliable by agency or other witnesses, will be readily accepted by the [administrative law judge], in the absence of evidence showing its inaccuracy or unreliability.

Id. at 789.

105. Once the applicant makes a preliminary showing of its entitlement to the permit through "credible and credited evidence," the Administrative Law Judge is not authorized to deny the permit "unless contrary evidence of equivalent quality is presented by the opponent of the permit." Id.

106. Reily has the burden to provide "reasonable assurances" that the project will not violate the applicable statutes and rules. The "reasonable assurance" standard does not require Reily to provide absolute guarantees, nor does it require Reily to eliminate all speculation concerning what might occur if the project is developed as proposed. Instead, Reily is only required to establish a "substantial likelihood that the project will be successfully implemented." See, e.g., Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

(3) Applicable Statutory and Rule Provisions

107. The challenged permit gives Reily proprietary authorization to use sovereignty submerged lands as well as regulatory approval of the project under the ERP program. See generally § 373.427, Fla. Stat. (authorizing concurrent permit

review for certain activities); Fla. Admin. Code R. 18-21.00401 (establishing procedures for concurrent permit review).

108. Issues related to the proprietary authorization are governed by Chapters 253 and 258, Florida Statutes, and Florida Administrative Code Rule Chapters 18-20 and 18-21. Issues related to the regulatory approval are governed by Part IV of Chapter 373, Florida Statutes (primarily Section 373.414, Florida Statutes), and the SFWMD rules incorporated by reference by the Department in Florida Administrative Code Rule Chapter 62-330.

(a) Proprietary Authorization

109. The MHWL is "the boundary between the foreshore owned by the state in its sovereign capacity and upland subject to private ownership." § 177.28(1), Fla. Stat. The lands lying below the MHWL are "sovereignty submerged lands" owned by the state. Id.; Fla. Admin. Code R. 18-21.003(56).

110. Use of sovereignty submerged lands requires proprietary approval by the Board of Trustees of the Internal Improvement Trust Fund or the agency to which the Board's authority has been delegated. See § 253.77(1); Fla. Admin. Code R. 18-21.004, 18-21.00401.

111. The only aspect of the project that will be located on sovereignty submerged lands is the riprap; the remainder of the project will occur landward of the MHWL. Thus, the only

aspect of the project that requires proprietary approval is the riprap.

112. Florida Administrative Code Rule Chapter 18-21 contains the general standards and criteria governing to the use of sovereignty submerged lands.

113. Florida Administrative Code Rule 18-21.004(1)(a) provides that "all activities on sovereignty lands must not be contrary to the public interest, except for sales which must be in the public interest."

114. As used in that rule, "public interest" means:

> demonstrable environmental, social, and economic benefit which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use . . . of . . . sovereignty lands . . ., the board shall consider the ultimate project and purpose to be served by said use . . . .

Fla. Admin. Code R. 18-20.003(46).

115. Florida Administrative Code Rule 18-21.004(2) provides in pertinent part:

> (a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or

interfere with the primary purpose may be allowed.

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

* * *

(e) . . . . Other activities involving the placement of fill material below the ordinary high water line or mean high water line shall not be approved unless it is necessary to provide shoreline stabilization, access to navigable water, or for public water management projects.

(f) To the maximum extent possible, shoreline stabilization should be accomplished by the establishment of appropriate native wetland vegetation. Rip-rap materials, pervious interlocking brick systems, filter mats, and other similar stabilization methods should be utilized in lieu of vertical seawalls wherever feasible.

* * *

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

116. The more persuasive evidence establishes that the riprap authorized by the permit is "not contrary to the public interest" and that it satisfies the applicable criteria in Florida Administrative Code Rule Chapter 18-21. The riprap will

provide a shore protection function and provide habitat for marine life; the riprap will have a de minimus impact on fish and wildlife habitat; and the environmental and other benefits of the riprap clearly exceed the environmental and other costs of the riprap.

117. Florida Administrative Code Rule Chapter 18-20 contains supplemental standards and criteria applicable to the use of sovereignty submerged lands in aquatic preserves. See Fla. Admin. Code R. 18-20.002(1), 18-20.004.

118. The boundary of the Jensen Beach to Jupiter Inlet Aquatic Preserve on the Reily property is the MHWL. See § 258.39(9), Fla. Stat. Lands below the MHWL are in the aquatic preserve; lands upland of the MHWL are outside of the aquatic preserve.

119. The only aspect of the project that will occur in the aquatic preserve is the riprap; the remainder of the project will occur landward of the MHWL. Thus, the only aspect of the project that is subject to the standards and criteria applicable to aquatic preserves is the riprap. See Fla. Admin. Code R. 18-20.002(1) ("These rules shall only apply to those sovereignty lands within a preserve described in Part II of Chapter 258, Florida Statutes, title to which is vested in the Board . . . .").

120. Aquatic preserves are to be managed in accordance with goals that include protecting and enhancing the biological, aesthetic or scientific values of the preserve, and discouraging activities that would degrade those values or the quality or utility of the preserve; maintaining the beneficial hydrologic and biologic functions of the preserve; and protecting and enhancing the waters of the preserves so that the public may continue to enjoy the traditional recreational uses of those waters such as swimming, boating and fishing. See Fla. Admin. Code R. 18-20.001(3).

121. Shore protection structures are permitted in aquatic preserves. See Fla. Admin. Code R. 18-20.004(1)(e)7. However, it must be demonstrated that "no other reasonable alternative exists which would allow the proposed activity to be constructed or undertaken outside of the preserve." Fla. Admin. Code R. 18-20.004(1)(g).

122. In evaluating whether to authorize the use of sovereignty submerged land in an aquatic preserve, "a balancing test will be utilized to determine whether the social, economic and/or environmental benefits clearly exceed the costs." See Fla. Admin. Code R. 18-20.004(2).

123. The proposed use of sovereignty submerged lands in an aquatic preserve may not "unreasonably infringe upon the traditional, common law and statutory riparian rights of upland

riparian property owners adjacent to sovereignty lands." Fla. Admin. Code R. 18-20.004(4). Accord Fla. Admin. Code R. 18-21.004(3).

124. The proposed use of sovereignty submerged lands in an aquatic preserve must be in compliance with the standards and criteria in the management plan applicable to the aquatic preserve. See Fla. Admin. Code R. 18-20.004(3)(a), (7).

125. The cumulative impacts of the project on the aquatic preserve must also be assessed. See Fla. Admin. Code R. 18-20.006.

126. The more persuasive evidence establishes that the riprap is a shore protection structure, and under the circumstances of this case, the placement of the riprap within the aquatic preserve is the only reasonable alternative in light of the location of the seawall on the MHWL; the riprap will not interfere with the riparian rights of upland or adjacent property owners; the riprap will have a de minimus environmental impact on the aquatic preserve, individually and on a cumulative basis; the riprap is not inconsistent with the Management Plan for the preserve; and the environmental and other benefits of the riprap clearly exceed the environmental and other costs of the riprap.

(b) Regulatory Approval

127. Section 373.414, Florida Statutes, contains the standards and criteria governing approval of an ERP. Subsection (1) of that statute requires the applicant to provide reasonable assurances the regulated activity will not violate state water quality standards and where, as here, the activity is in an OFW, the statute requires the applicant to provide reasonable assurances the proposed activity "will be clearly in the public interest."

128. The following criteria are to be balanced in determining whether the proposed activity will be clearly in the public interest:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity will adversely affect or will enhance significant

> historical and archaeological resources under the provisions of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat.

129. Impacts of a project on wetlands or other water resources must be adequately mitigated. See § 373.414(1)(b), Fla. Stat.

130. The ERP rules adopted by SFWMD in Florida Administrative Code Rule Chapter 40E-4 have been adopted by reference by the Department, with certain exceptions not relevant here. See Fla. Admin. Code R. 62-330.200(4). Those rules are to be used by the Department when it considers ERP applications. See Fla. Admin. Code R. 62-330.100.

131. Florida Administrative Code Rule 40E-4.301 contains general conditions for issuance of an ERP. Florida Administrative Code Rule 40E-4.302 contains additional conditions for issuance of an ERP, which are the same factors listed in Section 373.414(1)(a), Florida Statutes. The Basis of Review document adopted by SFWMD elaborates on the standards and criteria contained in the rules.

132. The more persuasive evidence establishes that, on balance, the riprap portion of the project is clearly in the public interest based upon the standards in Section 373.414(1)(a), Florida Statutes, and the implementing rules.

133. The evidence establishes that there are wetlands landward of the MHWL and that the wetlands (including areas under the mangrove canopy) may extend into the areas that will be backfilled behind the seawall and/or retaining wall. The boundaries of the wetland areas were not delineated by Reily, and no mitigation was required by the Department for any impacts to those areas. The potential impacts of the project on the water resources cannot be fully determined without a more precise delineation of the wetland boundaries than was provided in the testimony of Mr. Jerner and Ms. Smith. As a result, Reily failed to provide reasonable assurances that that the project as a whole is clearly in the public interest.

(4) Summary

134. In sum, Reily provided reasonable assurances that the riprap (which is the only portion of the project subject to the proprietary authorization) is "not contrary to the public interest" under Florida Administrative Code Rule Chapter 18-21; that the riprap is consistent with the additional standards and criteria in Florida Administrative Code Rule Chapter 18-20; and that the riprap is clearly in the public interest as required by Section 373.414, Florida Statutes. On these issues, the evidence presented by Petitioners in opposition to the project was not of equivalent quality to that presented by Reily and the Department in support of the project.

135. Reily failed to provide reasonable assurances that the other aspects of the project (which are also subject to the Department's regulatory authority) are clearly in the public interest as required by Section 373.414, Florida Statutes, because the evidence establishes that there may be wetlands in some of the areas landward of the MHWL that will be backfilled behind the retaining wall and seawall, and that the impacts to those areas have not been appropriately quantified or assessed. On this issue, Reily failed to meet its initial burden to present credible and credited evidence regarding the non-existence of wetlands in the areas to be impacted by the project; the testimony of Mr. Jerner and Ms. Smith on that issue was not persuasive.

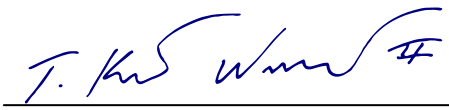
136. Except for this issue, Reily provided reasonable assurances that the project is clearly in the public interest based upon the standards in Section 373.414(1)(a), Florida Statutes, and the implementing rules. Thus, if it had been shown through a formal wetland delineation (or more persuasive evidence than the testimony of Mr. Jerner and Ms. Smith) that the upland aspects of the project will be located outside of the mangrove canopy and any other wetland areas landward of the MHWL, then the permit could have been approved.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department issue a final order dismissing Petitioners' challenge to the permit/authorization for a lack of standing, but if the Department determines that Petitioners have standing, it should issue a final order denying permit/authorization No. 43-017751-003 absent an additional condition requiring an appropriate wetland delineation to show that the upland aspects of the project will occur outside of the mangrove canopy and any other wetland areas landward of the MHWL.

DONE AND ENTERED this 12th day of February, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 12th day of February, 2007.

ENDNOTES

[1]/ Pet. Ex. 7-1 through 7-34 are contained in the exhibits to Mr. Sanger's deposition. See Pet. Ex. 6, Tab 1.

[2]/ All statutory references are to the 2006 version of the Florida Statutes.

[3]/ R. Ex. 1, at REILY00003 (emphasis supplied). The permit application includes a similar description of the project. See Pet. Ex. 52 ("Construct a 395' +/- Upland Retaining Wall" and "Construct an 85' +/- Seawall lined with 13 cubic yards of riprap"). Notwithstanding the descriptions of the project in the application and the permit, the Department and Reily contend that the only aspect of the project subject to the Department's jurisdiction is the riprap. That argument is rejected in Part D(1) of the Conclusions of Law, and as used in this Recommended Order, "the project" or "the permitted activities" refer to the proposed seawall, retaining wall and the riprap.

[4]/ The timeliness of Petitioners' challenge to the permit was not framed as an issue in the pre-hearing stipulation filed by Reily and the Department. That omission does not necessarily preclude consideration of the issue. See Endnote 6.

[5]/ The original petition for hearing (and the Second Amended Petition) allege that after learning of the Pitchford's Landing development, the Petitioners made "frequent and repeated verbal inquiries" to the Department regarding the status of permits related to the development; that they were told that no applications related to the development had been filed; and that Petitioners did not receive written notice of the permit until June 23, 2006, when they reviewed the file at the Department's Port St. Lucie office. No evidence on those allegations was presented at the final hearing.

[6]/ Petitioners argue in their PRO that "Respondents have waived any challenge they may have asserted to the standing of Petitioners to bring this proceeding" by not raising the issue in the pre-hearing stipulation. Petitioners cite no authority for the proposition that an issue not raised in the pre-hearing stipulation is deemed waived. Moreover, the issue was effectively tried by consent at the final hearing because each of the Petitioners was asked on direct examination how he will be affected by the project, which goes to the issue of standing.

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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.