

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MANASOTA-88, INC. and ROY R.)	
LEWIS, III,)	
)	
Petitioners,)	
)	
vs.)	Case No. 06-3288
)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION and MANATEE COUNTY)	
PORT AUTHORITY,)	
)	
Respondents.)	
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RECOMMENDED ORDER

On October 30-31 and November 1, 2006, a final administrative hearing was held in this case in Bradenton, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners Manasota-88, Inc. and Roy R. Lewis, III:

John R. Thomas, Esquire
Thomas & Associates, P.A.
233 Third Street North, Suite 101
St. Petersburg, Florida 33701-3818

For Respondent Department of Environmental Protection:

W. Douglas Beason, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

For Manatee County Port Authority:

Kevin S. Hennessy, Esquire
R. David Jackson, Esquire
Lewis, Longman & Walker, P.A.
1001 Third Avenue West, Suite 670
Bradenton, Florida 34205-7848

STATEMENT OF THE ISSUES

The issues in this case are: whether the Department of Environmental Protection (DEP) should modify an Environmental Resource Permit (ERP) held by the Manatee County Port Authority (the Port) for expansion of its facilities at Port Manatee by eliminating a specific condition (SC) that prohibits the opening and use of those expanded facilities before DEP's "final success determination" concerning the Port's related seagrass mitigation ERP; and whether attorney's fees should be awarded.

PRELIMINARY STATEMENT

On February 10, 2005, the Port applied for modification of SC 5 of its ERP. DEP twice requested additional information relating to how the Port would provide reasonable assurance with respect to the requested permit modification, and the Port responded with additional information that was reviewed by DEP.

On April 7, 2006, DEP gave notice of its intent to approve the requested modification and issued a draft permit modification that also included modifications to the related seagrass mitigation ERP that were not requested by the Port. After DEP extended the time for the Port to file a petition, DEP and the Port met on July 5, 2006, and DEP issued a revised Notice of

Intent (NOI) and revised draft permit modification that granted the Port's application without the additional modifications.

On July 19, 2006, Manasota-88, Inc., and Roy R. Lewis, III (Robin Lewis) timely petitioned for a formal administrative hearing challenging the NOI and revised draft permit modification and seeking to reinstate the NOI and draft permit modification issued in April. DEP dismissed the petition with leave to amend based on DEP's determination that the petition included insufficient allegations as to how Petitioners' substantial interests were affected by the proposed agency action. On August 21, 2006, Petitioners filed an Amended Petition for Formal Administrative Proceeding (Petition), which DEP referred to (DOAH).

On September 8, 2006, the Port filed a Motion to Dismiss with Prejudice and a Motion to Expedite Final Hearing. On September 15, 2006, the final hearing was scheduled for October 11 and 12, 2006. On September 19, 2006, the Motion to Dismiss was denied, and the Motion to Expedite was granted, requiring discovery responses within 15 days.

On September 26 and 27, 2006, Petitioners filed a Motion to Impose Expedited Deposition Transcript Costs and an Emergency Motion to Continue Hearing and to Compel Discovery. A telephonic hearing was held on September 29, 2006, and the final hearing was continued until October 30-31 and November 1, 2006.

On October 27, 2006, the parties filed a Pre-Hearing Stipulation, and the Port filed a Motion in Limine seeking to exclude evidence relating to: other permits issued to the Port; DEP's Consent Order OGC File No. 05-2790; and seagrass mitigation success credit determinations made by DEP. The Port also filed a Motion for Attorney's Fees.

At the onset of the final hearing, the Motion in Limine was argued and denied.

During the final hearing, the Port, as applicant, called as witnesses: George F. Isiminger, Director of Engineering and Environmental Affairs for the Port Authority; Stephen G. Swingle, an environmental scientist; Raymond F. Dennis, III, an ecologist responsible for the monitoring of the sea grass mitigation at Port Manatee; and Thomas F. Ries, the current seagrass mitigation supervisor for the Port Manatee expansion project. The Port also designated excerpts from the deposition transcripts of Janet Llewellyn, Deputy Director of the DEP's Division of Water Resource Management, and Martin Seeling, an environmental administrator with the DEP, for admission as Port Exhibits 17 and 18. The other parties added excerpts for consideration as part of the exhibits. The Port also offered Port Exhibits 1 through 13, 15, 16, and 19 through 21, which were admitted in evidence without objection, along with Port Exhibits 17 and 18.

Petitioners called two witnesses: Robin Lewis, who is an environmental consultant and the former seagrass mitigation

supervisor for the Port Manatee expansion project; and Glenn Compton, Chairman of Manasota-88. Petitioners also had their Exhibits 3, 9, 24, 26, 34, 37, 41, 57, 64, 66, 69, 75, 88, 90, 93, 96 through 101, 105 through 108, and 116 admitted in evidence. Ruling was reserved on objections to Petitioners' Exhibits 21 and 109, which are sustained.

In rebuttal, the Port re-called Mr. Dennis and also called David Crewz of the Fish and Wildlife Research Institute.

After presentation of evidence, the parties arranged for preparation of a Transcript of the final hearing; the parties were given ten days from the filing of the Transcript in which to file proposed recommended orders (PROs); and the record was closed. However, at that point, Petitioners inquired about the status of the transcripts of the depositions of Don Deis and Cheryl Miller, consultants for DEP on seagrass mitigation success, which were filed at the outset of the proceedings but deferred pending an assessment of the need for them to be made after the presentation of other evidence; and the record was re-opened to reflect Petitioners' request that those transcripts be placed in evidence and to allow the other parties to respond. When the Port objected, the transcripts were marked as Petitioners' Exhibits 117 and 118, and the parties were given an opportunity to file argument on their admissibility and to designate excerpts from the transcripts to be considered, if admitted. Written arguments on admissibility and all

designations, together with the Port's additional objections to certain designations, were filed by November 13, 2006. Based on the written arguments, the objections are overruled, and the designated portions of Petitioners' Exhibits 117 and 118 are admitted in evidence.

On November 13, 2006, Petitioners also filed a Request for Official Recognition of the Florida Conceptual State Land Management Plan and ERP No. 0129291-003-EI (with related NOI), which were identified as Petitioners' Exhibit 1 and 5, respectively (although Petitioners also proposed that the latter be identified as Petitioners' Exhibit 119). The other parties filed objections, which are overruled; and the Request for Official Recognition is granted.

The Transcript (745 pages in six volumes) was filed on December 11, 2006. The parties filed timely PROs. In addition, Petitioners filed a Motion for SLAPP Fees and Response to Port Manatee Fee Motion. (The PROs filed by Petitioners and the Port also addressed the Port's Motion for Attorney's Fees.) On January 2, 2007, the Port filed a Response in Opposition to Petitioners' Motion for SLAPP Fees. On January 3, 2007, Petitioners filed an Amended PRO in compliance with the 40-page limit in Florida Administrative Code Rule 28-106.215. (Unless otherwise indicated, all rule references are to the current Florida Administrative Code, and all statute references are to the 2006 codification of the Florida Statutes.)

FINDINGS OF FACT

A. The Parties

1. DEP is an executive agency of the State of Florida under Article IV, Section 6, of the Florida Constitution. DEP administers the Environmental Resource Permit Program pursuant to Chapter 373, Part IV, Florida Statutes, for various activities, including "dredging and filling" by Florida's seaports.

2. The Port operates and sets policy for Port Manatee, a public deepwater commercial seaport located in the northern part of Manatee County on Tampa Bay.

3. Manasota-88, Inc., is a Florida corporation not for profit that has at least 25 current members residing within Manatee County. Manasota-88 was formed, more than one year before the Port filed its application for the permit modification that is the subject of this proceeding, for the purposes of protection of public health and the environment, fish and wildlife resources, and air and water quality.

4. A substantial number of the members of Manasota-88 fish, swim and snorkel, watch birds, and enjoy wild life observation in Tampa Bay around Port Manatee.

5. Robin Lewis is president and principal ecologist for Lewis Environmental Services, Inc., an environmental consulting firm. Mr. Lewis is a wetlands scientist with extensive expertise in ecology, restoration, and creation of marshes, mangrove forests, and seagrass meadows.

6. Robin Lewis had been involved in many projects relating to seagrass protection and restoration in Tampa Bay and the area where the Project is located. At the inception of the Port Manatee expansion project, Mr. Lewis objected to the Port's underestimation of the acreage of seagrass that would be impacted by the expansion project. Mr. Lewis was subsequently hired by the Port on a contract basis to map seagrass in the impact and mitigation areas of the Port's expansion project.

7. Mr. Lewis owns two boats that he sometimes uses for fishing and shallow water recreation. The boats are equipped with poles so that he can pole into motorized vessel restriction zones. Mr. Lewis has fished the area around Port Manatee many times over the course of most of his adult life. Mr. Lewis is also a wildlife and bird watching enthusiast. The Tampa Bay area around Port Manatee, including the area of project impacts and the mitigation areas, provide opportunities for wildlife observation and bird-watching, and Mr. Lewis has engaged in those activities in the Port Manatee area many times over the years.

B. DEP Permits, Port Authority Application, and Mitigation Credit Correspondence

8. In August 1994, the Port began the permitting process for a substantial expansion of Port Manatee by applying to DEP's Bureau of Beaches and Coastal Systems for authorization for dredging and filling and other activities in the coastal waters and wetlands around Port Manatee.

9. In December 1999, the Board of Trustees of the Internal Improvement Trust Fund and DEP issued ERP No. 0129291-001-EC, a "Conceptual Permit" for enlargement of the main access channel at the entrance to Port Manatee, construction of a ship turning basin, expansion of Berth 5, and construction of new Berths 4 and 12 (Phase II) at Port Manatee (the Expansion Project).

10. Conceptual Permit SC 5 provided that the Port would have to obtain individual ERPs for the various conceptually approved activities. The Conceptual Permit's "Description of Activities" section on page 1 summarized that the Port proposed to offset 12.7 acres of seagrass habitat impacts by transplanting the existing seagrass and by creating, restoring, and enhancing seagrass habitat in Tampa Bay.

11. Conceptual Permit SC 9 specified that DEP had to deem the seagrass mitigation to be successful before the Port could initiate dredging.

12. The requirement to achieve 12.7 seagrass mitigation success credits was specified in ERP No. 0129291-002-EI (the "Seagrass Mitigation Permit"), which was issued to the Port on August 29, 2000. Procedures for documenting seagrass mitigation success are included in the Seagrass Mitigation Permit and an attached July 2000 Seagrass Mitigation Plan, authored principally by Robin Lewis, which authorize and describe all of the seagrass mitigation requirements for the Expansion Project.

13. Pursuant to SC 9 of the Seagrass Mitigation Permit, the requirements of SC 8 must be met for the mitigation to be considered successful, but the Port is allowed to request a determination that any portion of the mitigation is successful at any time.

14. In furtherance of the conceptually approved Expansion Project, on December 17, 2002, the Port obtained ERP No. 0129291-003-EI authorizing the requested construction activities. Subsequently, ERP No. 0129291-003-EI was the subject of an application for a major modification to authorize more dredging for enlargement of the channel widenings, which resulted in issuance of ERP No. 0129291-009-EM (the Construction Permit) on June 10, 2004.

15. SC 5 of the Construction Permit identified the seagrass mitigation criteria and specific seagrass acreage DEP would require to determine the seagrass mitigation successful for purposes of authorizing dredging (referred to as "initial success" or "dredging success"), and established a second threshold of seagrass mitigation success necessary for authorization to use the new facilities: "The final success determination, showing 12.7 credits have been achieved, must be documented prior to opening of Berths 4, 5, and Phase II of Berth 12 to shipping."

16. By letter dated February 7, 2005, the Port requested a minor modification of the Seagrass Mitigation Permit to extend

the mitigation construction deadline five years, to August 29, 2010, "to be on the safe side." On May 11, 2005, this minor modification was granted as ERP 0129291-011-EI.

17. On February 10, 2005, the Port filed the instant application to modify the Construction Permit by eliminating the last sentence of its SC 5 of so that the Port could open and begin beneficial use of the new berths it had constructed before DEP's "final success determination" concerning the Port's related seagrass mitigation.

18. On March 11 and April 14, 2005, DEP transmitted requests for additional information (RAIs) relating to how the Port would "provide reasonable assurance in a documented commitment plan to full success of the seagrass mitigation credits required by permits 0129291-002-EI and 0129291-003-EI, as well as assurance for financial commitment to accomplish the action plan."

19. On March 14, 2005, the Port responded to the first RAI, asserting that reasonable assurance was provided by the Port's 2003/2004 seagrass mitigation monitoring report that requested 10.44 mitigation credits. The Port further contended that the mitigation was trending toward success and the necessary additional credits would become available in the next year. DEP's second RAI acknowledged those assertions, but in a letter dated April 18, 2005, DEP also requested that the Port submit a remedial action plan for the failed transplantation of Thalassia

testudinum (also referred to as T. testudinum and commonly called turtle grass) from the impact area to Mitigation Areas 1, 2, and 3.

20. On September 9, 2005, DEP responded to the Port's 2003/2004 seagrass mitigation monitoring report and seagrass mitigation credit request, granting approval of only 6.1 of the 10.44 mitigation credits requested. In addition, DEP commented that "pursuant to the requirements of the mitigation plan, MCPA shall prepare and submit a remedial action plan to the Department for review and approval." This comment referred to the failed transplantation of T. testudinum.

21. On September 29, 2005, the Port submitted its Resolution PA 05-16 reaffirming the Port's commitment to fully comply with the conditions of its permits, "including, but not limited to, conditions relating to seagrass mitigation."

22. By letter dated October 25, 2005, Martin Seeling explained to Petitioners why DEP staff was recommending at the time that the pending application to modify the Construction be granted:

All the originally required mitigation activities have now been completed, and some additional planting in Mitigation Sites 1-4 was completed this September. Based both on the permittee's reports and the Department's inspections, about half of the seagrass mitigation credits have been achieved, and the rest of the mitigation is clearly trending toward success. We anticipate that nearly all the remaining credits will be achieved with the next year.

The purpose of the referenced permit condition was to provide a strong incentive for the permittee to complete the mitigation in a timely manner and to provide the Department with assurance that the loss of seagrasses could indeed be mitigation. Both of those goals appear to have been accomplished. At this point, the main thing needed for the mitigation success is additional time.

Since there is no real advantage to be gained by keeping the berths closed, Department staff have recommended issuance of the permit modification. One of our requirements for the Port to complete this application was for them to provide some alternate form of assurance that the mitigation would be completed. Our first suggestion of a surety bond was not feasible, but the Port was able to provide assurance by way of a . . . Resolution (our second recommendation). In addition to the resolution, we can also add new (or revise existing) permit conditions to strengthen the assurance that the Port will actively pursue mitigation success until it is achieved.

23. On December 12, 2005, Martin Seeling advised the Port that, according to DEP's Office of General Counsel, contrary to earlier indications, the requested modification to SC 5 of the Construction Permit "would require a major modification to the permit"; and DEP requested the permit application fee that applies to a major modification application.

24. On February 15, 2006, the Port submitted an Annual Progress and Mitigation Success Report claiming entitlement to 13.06 seagrass mitigation success credits.

25. On April 7, 2006, DEP issued a proposed agency action that not only granted the Port's requested permit modification by

eliminating the last sentence of SC 5 of the Construction Permit, but also combined and modified the Construction Permit Seagrass Mitigation Permit Special Conditions to:

a. clarify the actions required and mitigation ratios applied to the various mitigation Sites as shown in the Seagrass Mitigation Table included in proposed amended SC 2;

b. clarify the reporting and coordination of monitoring between the seagrass mitigation supervisor and DEP in proposed amended SC 4e, f and g;

c. clarify that Mitigation Site 9B would be removed from the mitigation program because of seagrass impacts in that Site caused by an unauthorized discharge of clay during construction activities in proposed amended SC 5f;

d. clarify the use of Areas of Interest in the methodology for documenting seagrass mitigation success in proposed amended SC 8;

e. clarify that an evaluation of "overall net change" within Mitigation Sites 1, 2, 3, 8 and 9 would be required in addition to the Area of Interest analysis in proposed amended SC 8e;

f. require analysis of the propeller scar recovery areas by monitoring and characterizing the seagrass species and density in 10 propeller scars selected by the mitigation supervisor in proposed amended SC 8g;

g. required submittal of a seagrass planting plan for mitigation of impacts in the flushing channels at Mitigation Site 7, including "information regarding the pre-impact seagrass community (density and species composition) to assist the Department's determination of restoration success" in proposed amended SC 8; and

h. required submittal of a Remedial Action Plan within 60 days, including planting to re-establish T. testudinum to "compensate for the temporal loss of approximately 3 acres of T. testudinum" in proposed amended SC 14.

26. The NOI issued with the April 7, 2006, proposed agency action explained that additional assurances in the Seagrass Mitigation Permit would be required and that remedial action for the loss of Thalassia would also be required.

27. The Port received a draft of the April 7, 2006, proposed agency action and submitted a "White Paper" explaining that it considered many of the requirements to be new requirements, not included in the Seagrass Mitigation or Construction Permits, that "raised the bar," making it more difficult for the Port to achieve seagrass mitigation success. DEP's mitigation credit consultants, Cheryl Miller and Don Deis of PBS&J Corporation, responded with a memo refuting the Port's contentions and defending the April 7, 2006, proposed agency action. Ms. Miller, Mr. Deis and Martin Seeling, Environmental Administrator for DEP's Bureau of Beaches and Coastal Systems continue to support the April 7, 2006, proposed agency action and do not consider it to "raise the bar." The current seagrass mitigation supervisor Thomas Ries supported most the permit modifications proposed by DEP and thought they were necessary. However, the Port disputed the addition of minor Seagrass Mitigation Permit modifications to the major Construction Permit modification the Port requested. DEP gave the Port an extension

of time to file a petition for an administrative hearing while the matter was further discussed.

28. On April 18, 2006, DEP transmitted a draft Seagrass Mitigation Credit Assignment letter dated April 21, 2006, that approved 10.86 of the requested 13.06 seagrass mitigation success credits.

29. The Port met with DEP on April 28, 2006, and advocated for additional credits. As a result of this meeting, DEP's Deputy Director of the Division of Water Resource Management, Janet Llewellyn, on behalf of DEP, decided that the Port should be granted an additional .59 mitigation credits for a combined Area of Interest (AOI) 8A/8B. On May 10, 2006, DEP issued a credit assignment letter granting 11.45 credits, including the additional credits assigned in the combined AOI 8A/8B.

30. During the meeting on April 28, 2006, DEP and Port representatives also agreed that the additional permit modifications proposed by DEP in the April 7, 2006, proposed agency action would be removed from the proposed major modification of the Construction Permit, discussed, and negotiated; and that the Port would apply for modification of the Seagrass Mitigation Permit to incorporate some or all of those modifications in the Seagrass Mitigation Permit, including a requirement to implement a Turtle Grass Remedial Action Plan. The Port subsequently continued to characterize DEP's demand for

a Remedial Action Plan addressing the loss of Turtle Grass as "raising the bar" and opposed it.

31. On July 5, 2006, DEP issued a Revised NOI regarding the requested permit major modification and a revised permit modification that granted the Port's request to be allowed to open and begin using the expanded berth facilities and included only limited other edits and clarifications. Specifically, the language at issue in SC 5 was changed to read:

The final success determination, showing that 12.7 credits have been achieved, must be documented and approved by the Department prior to the original-expiration date of this permit (December 17, 2007).

The Revised NOI explained that Port Resolution PA-05-16 and the 2005 annual monitoring report documenting 11.45 credits provided reasonable assurance of seagrass mitigation success without the additional modifications proposed in the April 7, 2006, proposed agency action.

32. Petitioners supported issuance of the April 7, 2006, proposed agency action or denial of the major modification. When the revised NOI was issued, Petitioners requested an administrative hearing to oppose the major modification of the Construction Permit unless the minor Seagrass Mitigation Permit modifications were added back in.

33. The Port had not yet submitted an application for the modifications of the Seagrass Mitigation Permit. The Port continued to characterize the requirement to implement a Remedial

Action Plan addressing the temporal loss of Turtle Grass as "raising the bar" and has not yet committed to remedial actions by the end of the final hearing in this case.

C. Significance of Turtle Grass Transplant Failure

34. The Expansion Project is between two aquatic preserves, Cockroach Bay Aquatic Preserve to the north and Terra Ceia Aquatic Preserve to the south, waterward of the Cockroach Bay State Buffer Preserve, and includes several types of seagrass as well as a relatively productive benthic community, supporting a wide array of corals, worms, crabs, fish, invertebrates, and dolphins.

35. Seagrass beds expand and contract, move with the sediment around them, may be buried and unburied in sediments, and have been observed to appear to "come and go" over areas as large as 50 acres in Tampa Bay. These changes may occur seasonally and over time depending on climate, water quality and other factors. Three types of seagrass were identified in the Impact Areas, Thalassia testudinum, Halidule wrightii, and Syringodium filiforme--commonly called Turtle Grass, Shoal Grass, and Manatee Grass. Approximately 3 acres of Turtle Grass and 2.33 acres of Shoal Grass were transplanted from the Impact Areas.

36. Shoal Grass is a diminutive type of seagrass with roots that occupy only the first few inches of sediment. Shoal Grass has less bio-mass, less weight, less leaf structure and less

rhizome structure that Turtle Grass. Shoal Grass grows and colonizes rapidly in shallow shoals and commonly proliferates in the summer when waters are warm and loses leaves and dies back in the winter when the water cools. Through persistence of buried rhizomes, Shoal Grass can survive being exposed during very low tides. Rain can adversely affect Shoal Grass by rapidly changing salinity and nutrient loads carried by stormwater. Shoal Grass is an early successional species that is adapted to being uprooted and moved by currents and re-anchoring and re-rooting.

37. Turtle Grass is a much more robust species, typically five to ten times the bio-mass of shoal grass, including larger leaves, rhizomes, and roots. Turtle Grass grows more slowly and is more resistant to being dislodged because its roots and rhizomes are larger and grow 6 to 8 inches deep in the sediment. Turtle Grass is a climax species in terms of succession in Tampa Bay. Turtle Grass plants must be handled carefully because of their unique growing pattern that relies on a number of leaves to provide food to a buried rhizome that then feeds a growing tip or meristem that grows horizontally.

38. Turtle Grass has broader leaves that extend upward together and move in the water, providing greater protection for certain species that other seagrasses provide. Turtle Grass provides a much more distinct fish nursery and shrimp nursery function. Because Turtle Grass grows in deeper water, it provides more refuge for fish. Turtle Grass provides habitat for

species like scallops and larger shrimp. Turtle Grass rhizomes store a great deal of energy which enables Turtle Grass to withstand adverse conditions to a greater degree than other sea grasses.

39. The loss of approximately 3 acres of Turtle Grass represented a substantial loss of habitat. This loss of habitat had a substantial adverse effect on fish and wildlife utilization in the Port Manatee Expansion Project area. The reduced fish and wildlife utilization associated with the loss of turtle grass substantially affected recreational fishing, birding, and wildlife observation opportunities in the Port Manatee Expansion Project area.

40. The NOI issued in conjunction with the Seagrass Mitigation Permit includes a lengthy summary at page 5 describing the Port's proposed seagrass mitigation activities, including specifically that Turtle Grass from the impact area would be transplanted to Mitigation Sites 1, 2, and 3.

41. The Seagrass Mitigation Plan requires the Port to map the specific types of seagrasses found in the Impact Areas and describes the details for the seagrass mitigation effort, including on page 11 that "All turtlegrass in areas A and B to be dredged will be transplanted to mitigation Sites 1, 2, and 3."

42. The "Monitoring Required" section on page 16 of the Seagrass Mitigation Permit states DEP may require remedial

actions if the mitigation is not successful pursuant to the permit conditions.

43. The Seagrass Mitigation Plan describes the remedial actions required for transplantation failure, requiring remedial planting if seagrass transplanted to Sites 1, 2, and 3 was not successful due to bioturbation or excessive currents.

44. The Seagrass Mitigation Plan includes a Success Assessment Methodology Summary that explains in relevant part:

If the mitigation is not successful, remedial action will be taken to ensure success. Reasonable assurance of success is provided by advanced transplanting, the mitigation ratios, over-design of mitigation opportunities, and a remedial action plan.

45. The Expansion Project was time-sensitive due to financing opportunities, resulting in the need to use unproved techniques to timely accomplish the transplantation. The Seagrass Mitigation Plan describes a process for selecting a contractor and the contractor's proposed method. The Plan describes "proven" and "alternative" methods for transplanting seagrasses at a high rate by maximizing the size of sod units.

46. The Port began its seagrass mitigation program in early 2000 with the "Early Start Program" involving small-scale transplanting experiments. The Seagrass Mitigation Plan documents that the planting of seagrass began on April 3, 2000, and that the transplanting of Turtle Grass from the impact areas into mitigation site 1, 2, and 3 was scheduled to begin as soon as possible after DEP issued the Permit.

47. The Port retained a firm known as ASISI, owned by Jim Anderson, to provide seagrass transplantation services, including the large-scale or "mega-unit" transplants needed to expedite the project, and ASISI developed a system for transplanting Shoal Grass units and a system for transplanting 4-foot by 5-foot sods of Turtle Grass from the Impact Areas to Mitigation Sites 1, 2, and 3. The sod transplanting machine developed by ASISI used a process referred to in the Seagrass Mitigation Plan as one of the "alternative methods," the "modified tree spade" method.

48. In July 2001, Robin Lewis reported to the Port regarding Mr. Lewis' seagrass transplantation monitoring. Mr. Lewis cautioned the Port that ASISI's test planting of several Turtle Grass sod units had been too rough on the Turtle Grass sod units and that they were not likely to survive and persist.

49. During the summer of 2001, ASISI began to mechanically transplant about three acres of Turtle Grass from the Impact Areas to Mitigation Sites 2 and 3. This up-front seagrass transplantation was intended to provide immediate partial mitigation for the seagrass impacts.

50. In August 2001, Mr. Lewis warned the Port that ASISI's mega-unit transplant efforts using the modified tree spade method were failing. Mr. Lewis asserted that the sod units were not being handled gently enough and were not being installed carefully into excavated holes with their surfaces flush with or

below grade, as required by the Seagrass Mitigation Plan. Pursuant to the Seagrass Mitigation Plan, Mr. Lewis urged the Port to consider changing the methods employed to transplant seagrass. Mr. Lewis recommended to the Port that it at least immediately retain divers to follow ASISI's sod transplanting machine to manually re-install Turtle Grass plants that were damaged or improperly planted by the mechanical system. The Port approved this "diver mop-up" program in November 2001, and diver mop-up efforts were incorporated into the transplantation process. These efforts proved to be successful only to a limited extent because they were too late after most of the transplanting had already taken place and most of the sod had washed away.

51. In 2001, while ASISI was mechanically transplanting Turtle Grass from the Impact Areas to Sites 2 and 3, Mr. Lewis' company was staking, preparing final designs, and implementing the Piney Point mitigation projects in Mitigation Sites 4A and 6A, involving scrape-down of deposited sediments and Shoal Grass planting. The Port's engineer testified to his concern that Mr. Lewis was not around to supervise and assist ASISI's mega-unit Turtle Grass transplantation, but the Port had advised Mr. Lewis that he was not to monitor ASISI's transplanting efforts because ASISI's principal, Jim Anderson, did not want him to do so.

52. During 2002, Mr. Lewis informally monitored ASISI's mega-unit transplants and found that just over 100 units had

survived out of a total of 12,000 units transplanted. Subsequent monitoring found that virtually none of the Turtle Grass units survived and persisted. Turtle Grass is slow-growing, and only less than an acre has grown throughout the mitigation area.

D. Disputed Credit Determinations

53. Mr. Lewis' 2002 annual monitoring of all of the mitigation sites established a sufficient acreage of new seagrass to allow the Port to initiate dredging for part of the Expansion Project. Nonetheless, the Port rejected Mr. Lewis' analysis of the seagrass mitigation acreage and expressed disappointment Mr. Lewis would not include additional seagrass acreage the Port wished to claim as mitigation that Mr. Lewis considered pre-existing seagrass.

54. In late 2002, the Port determined that it would not renew its contract with Lewis Environmental Services for 2003. After some disagreement about Mr. Lewis' remaining responsibilities under the existing contract, Mr. Lewis agreed to prepare the annual monitoring report for 2002 but refused to prepare or certify the November 2002 credit report submitted by the Port. In a December 31, 2002, letter to the Port's George Isiminger, Robin Lewis submitted his resignation as the Mitigation Supervisor of record "on the basis of personal and professional ethics."

55. In early 2003, DEP accepted that the Port's November 2002 seagrass mitigation success report documented at least 5.66

acres of new seagrass in the mitigation sites and authorized the Port to begin dredging for the Expansion Project.

56. The Port subsequently retained Thomas Ries as the successor mitigation supervisor and continued to monitor the seagrass mitigation and submit annual progress reports and credit requests.

57. Robin Lewis maintained an interest in the seagrass mitigation project and requested copies of the Port's submittals and submitted comments and concerns regarding the Port's credit requests and documentation. Mr. Lewis' submittals were considered by DEP in determining how much credit to approve. In some cases, Mr. Lewis and DEP found that the Port requested more credits than it was entitled to and employed analyses that were not completely correct. Subsequent discussions revealed disagreements regarding the meaning of permit conditions and how to document seagrass mitigation success. As result of these discussions, DEP corrected some errors and did not award all of the requested credit.

58. Due to extensive discussion of disagreements concerning the Port's credit request for 2003, DEP recommended that a combined credit request for 2003 and 2004 be submitted in 2005. The combined credit request for 2003/2004 was submitted on March 4, 2005. It requested a cumulative total of 10.44 credits. After discussion, an RAI, and a DEP inspection, DEP granted

approval of a cumulative total of 6.1 credits by letter dated September 9, 2005.

59. The Port's next credit request was submitted in February 2005 and was for a cumulative total of 13.06 credits. After discussion, DEP granted 11.45 credits in April 2006.

60. The Port proved that it was entitled to at least 10.86 credits under the Seagrass Mitigation Permit through 2005. The only real remaining credit determination issue is whether the Port is entitled to 10.86 or 11.45 credits. (Since the Port did not challenge the credit determination, it waived the right to credit in excess of 11.45 credits.) This determination depends on the use of combined AOI 8A/8B.

61. The use of AOI was a concern to DEP and a point of contention because it is possible for the selection of AOIs to introduce bias in the monitoring. In the case of combined AOI 8A/8B, an AOI where mitigation credit was to be earned by increasing seagrass coverage by excluding motorized boats and allowing seagrass to recover in prop scars, there was no aerial photography for the baseline year 1999 for use in determining increased coverage in 8B. However, the Port interpreted the language of the Seagrass Mitigation Permit to allow the Port to assume complete coverage in the baseline year for 8B (and no increased coverage there), measure increased coverage in 8A, and calculate credits based on the increases in 8A, multiplied by a mitigation ratio that applied to the acreage of the combined AOI

8A/8B, since the increased seagrass coverage in Site 8A was great enough mathematically to meet the percentage increase required for credit for both Area 8A and 8B. This interpretation and calculation resulted in a request for .59 credits for the combined AOI 8A/8B.

62. Because this interpretation assumed complete coverage in Site 8A in baseline year 1999, the Port argued that it was a "conservative" approach. After the meeting on April 28, 2006, Ms. Lewellyn agreed.

63. Petitioners contended that this "conservative" approach in effect would award mitigation credit for Site 8B even if seagrasses contracted or even were eliminated in Site 8B after the baseline year 1999. Although such a result probably was not intended, the approach taken with respect to AOI 8A/8B was not inconsistent with the literal language of the Seagrass Mitigation Permit.

64. In addition, on more than one occasion, DEP could have advised the Port that it would not approve credits for the combined AOI 8A/8B because aerial photography for the baseline year 1999 was not available, mitigation success in Site 8B could not be verified, and credit could not be awarded for Site 8B. Ms. Llewellyn thought that, after letting those opportunities pass, it would be unfair for DEP to now deny the credits requested by the Port for the combined AOI 8A/8B through 2005.

Based on the totality of the evidence, it is found that the Port is entitled to 11.45 credits at this time.

E. Unauthorized Discharges of Sediment and Other Violations of DEP rules; O.G.C. File No. 05-2790

65. During the summer of 2004, there was an inadvertent release of dredged material from a disposal area into Mitigation Site 9B in conjunction with the Port's implementation of the Expansion Project under the Construction Permit. This violated SC 14, 17, and 18 of the Construction Permit, and SC 5 of the Seagrass Mitigation Permit, and killed about 2.52 acres of mixed seagrass beds consisting of Turtle Grass and Shoal Grass growing in Mitigation Site 9B. The Port promptly notified DEP and initiated corrective action. The matter was resolved by issuance of a Consent Order, which was not challenged. As of July 2006, the Port had removed the sediment, but destruction of these 2.52 acres of Turtle Grass and Shoal Grass remained un-mitigated as of the time of the hearing.

66. Clearly, the additional loss of approximately 2.52 acres of Turtle Grass and Shoal Grass in Mitigation Site 9B represents an additional substantial loss of habitat and the functions performed by the habitat. This additional habitat loss will have a substantial affect on fish and wildlife utilization in the Port Manatee area. However, Petitioners' attempt to characterize these as part of the "cumulative impacts" of the Expansion Project is not well-founded. Rather, they are an inadvertent permit violation that has been resolved by consent

order. As such, those matters do not bear on whether the pending permit modification request should be granted.

F. Consideration of the Relevant Factors

67. Reasonable assurance of successful mitigation for the impacts of the Expansion Project was predicated on four factors identified in the Seagrass Mitigation Plan: the upfront transplantation of seagrass; the mitigation ratios; the credits available in the program; and the remedial action requirements.

68. As found, the purpose of the last sentence of Construction Permit SC 5--making the opening and use of the new facilities contingent on documentation of the "final success determination, showing 12.7 credits have been achieved"--was to provide DEP reasonable assurance that the loss of seagrasses would be successfully mitigated in a timely manner by establishing a strong incentive for the permittee to complete the mitigation promptly.

69. As found, the Port is entitled to 11.45 credits for its seagrass mitigation efforts to date. The mitigation project is trending towards continued success in terms of credits, and it is not unreasonable to expect 12.7 credits to be achieved in the near future due to natural processes alone. For these reasons, it is found that the permit modification requested by the Port and now also proposed by DEP would not delay achievement of 12.7 credits.

70. It is less clear whether the permit modification requested by the Port and now also proposed by DEP would delay the "final success determination," including remediation of the Turtle Grass component of the upfront transplantation, which could include planting Turtle Grass. Through the final hearing, the Port and DEP had not come to an agreement on what such remediation should include. (While not clear from the evidence, it seems possible that the Port even may take the position that the "final success determination" will occur when 12.7 credits are documented regardless of the failure of the Turtle Grass transplantation.) It is Petitioners' position that SC 5 of the Construction Permit is an important incentive for the Port to timely remediate the failure of the Turtle Grass transplantation and that it should not be modified without clarification at least as to the remediation required for the failure of the Turtle Grass transplantation. Under the totality of the circumstances of this case, Petitioners' position has merit.

G. Improper Purpose

71. Even if Petitioners ultimately prevail do not prevail, the evidence did not establish that they participated in this proceeding primarily to harass or to cause unnecessary delay, or for frivolous or improper purpose or to needlessly increase the Port's cost to obtain the approval. Rather, their purpose has been to protect the natural resources of Tampa Bay, in particular its seagrass habitat.

CONCLUSIONS OF LAW

H. Standing

72. Section 403.412(5), Florida Statutes, gives Manasota-88 standing to petition to challenge proposed agency action.

73. Petitioners have a substantial interest in mitigation of the seagrass habitat impacts of the Expansion Project which is cognizable under the permitting criteria applicable to the subject permit applications. As a result, Petitioners have substantial interests that will be affected by the proposed agency action. As such, Petitioners have standing pursuant to Sections 120.52(12)(b) and 120.569(1), Florida Statutes. See also § 403.412(5)-(6), Fla. Stat.

74. The Petitioners have established an immediate injury-in-fact sufficient to allow them to participate as parties, and they have standing to challenge the proposed agency action.

J. Burden of Proof

75. As the applicant, the Port has the burden of showing by preponderance of the credible and credited evidence that it is entitled to the approval at issue here. Department of Transportation v. J.W.C. Co., 396 So. 2d 778, 789 (Fla. 1st DCA 1981).

76. If the Port makes a prima facie showing of reasonable assurances, the burden shifts to Petitioners to present evidence of equivalent quality. J.W.C. Co., 396 So. 2d at 789.

I. Permit Criteria

77. ERP conditions of approval are set forth in Chapter 373, Florida Statutes, and in Rule Chapter 62-330, which incorporates certain Southwest Florida Water Management District (SWFWMD) rules in effect in 2005, including Rules 40D-4.301 and 40D-4.302, and the 2005 SWFWMD Basis of Review. To demonstrate entitlement to the major modification, the Port is required to provide reasonable assurance to DEP that it will meet these conditions of approval.

78. "Reasonable assurance" means "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); Save Anna Maria, Inc. v. Department of Transportation, 700 So. 2d 113, 117 (Fla. 2d DCA 1997). Reasonable assurances must take into account contingencies that might reasonably be expected, but an applicant is not required to eliminate all contrary possibilities, however remote, or to address impacts which are only theoretical and not reasonably likely.

79. The test in this case is not whether DEP properly evaluated the original application, but whether the Port provided reasonable assurance that the applicable conditions for issuance of the major modification have been satisfied. When a permittee seeks to modify an existing permit, regulatory review includes only that portion of the existing permit that is proposed to be modified. See Friends of the Everglades, Inc. v. Dept. of

Environmental Reg., 496 So. 2d 181, 183 (Fla. 1st DCA 1986); Behrens v. Boran, ORDER NO. SWF 02-052, 2 ER FALR 257 (SWFWMD Aug. 27, 2002), DOAH Case No. 02-0282, 2002 Fla. ENV LEXIS 192 (DOAH July 29, 2002); Kunnen v. Southwest Fla. Water Mgmt. Dist., ORDER NO.: SWF 02-003, DOAH Case No. 01-2571, 2002 Fla. ENV LEXIS 4 (SWFWMD Jan. 29, 2002; DOAH Dec. 17, 2001). The "reasonable assurance" requirement applies to the activities for which permitting is presently sought and does not burden the applicant with "providing 'reasonable assurances' anew with respect to the original project already constructed in accordance with a valid permit." Friends of the Everglades, supra at 183. Therefore, a determination of whether the Port has provided reasonable assurances to the DEP is limited to a review of those portions of the proposed permit modification that are different from the Construction Permit it is modifying.

80. The proposed permit modification does not authorize any additional construction activities or any additional impacts, it merely provides for utilization of already constructed facilities prior to a final determination of complete seagrass mitigation success. The question is whether the Port will continue to provide reasonable assurance without the last sentence of SC 5 of the Construction Permit.

81. Section 373.413, Florida Statutes, and Rule 40D-4.301 relate to the construction, alteration, operation, maintenance, removal, or abandonment of a storm water management system. The

Construction Permit does not authorize any upland activities requiring the development of a stormwater management system since the authorized construction is dredging in the waters of Tampa Bay.

82. Pursuant to Section 373.414(1), Florida Statutes, an ERP applicant must provide reasonable assurance that the proposed activity "is not contrary to the public interest" based upon a balancing of the factors listed in Section 373.414(1)(a), and taking into account measures proposed by the applicant to mitigate adverse effects as contemplated by Section 373.414(1)(b), Florida Statutes.

83. Section 373.414(1)(b), Florida Statutes, provides in relevant part that:

It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

In this case, the regulated activity is dredging and filling in Tampa Bay, including dredging in the Impact Areas where approximately 5.33 acres of seagrass existed. To offset these seagrass impacts, the Port proposed and agreed to the mitigation required by the Seagrass Mitigation Permit and the Construction Permit, including the requirement the Port seeks to modify in this proceeding.

84. Rule 40D-4.302(2) requires DEP to take into consideration the rule violations that resulted from the inadvertent release of dredged material, as well as the efforts

taken by the Port to resolve the violations, when determining whether the Port has provided reasonable assurance that permitting standards will be met. The Port's rule violations addressed in the Consent Order are substantial and significantly adversely affect the existing Turtle Grass and other habitats in the Port Manatee area. However, the Port has cooperated to the extent of entering into the Consent Order and agreeing to mitigate for the impacts. The adverse impacts to Turtle Grass and Shoal Grass in the Expansion Project area have not yet been fully mitigated, but progress is being made in that direction. Since the violations were inadvertent, and have been resolved by the Consent Order, they are not valid reasons to deny the permit modification requested by the Port and now also proposed by DEP.

85. Pursuant to Section 373.414(8)(a), Florida Statutes, DEP is required to "consider the cumulative impacts upon surface water and wetlands" of certain types of activities. But the loss of seagrasses by the inadvertent, unauthorized discharge of sediment in 2004 should not be considered cumulative impacts for purposes of this major modification application, and they have been addressed in the Consent Order.

86. Opening the new berths is in the public interest if it will not delay implementing the seagrass mitigation program. Among other things, SC 14 of the agency action proposed on April 7, 2006, would clarify that a Remedial Action Plan for the temporal loss of Turtle Grass is required by the Seagrass

Mitigation Permit and must be performed. As found, if the requested modification to SC 5 of the Construction Permit is to be granted, the Port should be required to submit a Remedial Action Plan within 60 days in accordance with and as set forth in amended SC 14 proposed by DEP on April 7, 2006.

87. Attorney's fees are awardable to the prevailing party under Section 120.595(1), Florida Statutes. If this Recommended Order is adopted, the Port would not be considered the prevailing party for purposes of that statute. Even if the Port were the prevailing party, attorney's fees are not awardable under the statute because, as found, it was not proven that Petitioners participated in this proceeding primarily to harass or to cause unnecessary delay, or for frivolous or improper purpose or to needlessly increase the Port's cost to obtain the approval.

RECOMMENDATION

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

RECOMMENDED that DEP grant the requested modification to SC 5 of the Construction Permit with a condition that the Port submit a Remedial Action Plan within 60 days in accordance with and as set forth in amended SC 14 proposed by DEP on April 7, 2006.

DONE AND ENTERED this 6th day of February, 2007, in
Tallahassee, Leon County, Florida.

S

J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of February, 2007.

COPIES FURNISHED:

Lea Crandall, Agency Clerk
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Tom Beason, Acting General Counsel
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Michael W. Sole, Secretary
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

W. Douglas Beason, Esquire
Department of Environmental Protection
The Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

John R. Thomas, Esquire
Thomas & Associates, P.A.
233 Third Street North, Suite 101
St. Petersburg, Florida 33701-3818

Kevin S. Hennessy, Esquire
R. David Jackson, Esquire
Lewis, Longman & Walker, P. A.
1001 Third Avenue West, Suite 670
Bradenton, Florida 34205-7848

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.