

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PORT EVERGLADES AUTHORITY, )  
)  
Petitioner, )  
)  
vs. ) CASE NO. 86-0039  
)  
DEPARTMENT OF ENVIRONMENTAL )  
REGULATION, )  
)  
Respondent, )  
and )  
)  
FLORIDA CHAPTER SIERRA CLUB and )  
FLORIDA AUDUBON SOCIETY and )  
BROWARD COUNTY AUDUBON SOCIETY, )  
)  
Intervenors. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a public hearing in the above-styled case on November 12-14, 1986, in Tallahassee, Florida.

APPEARANCES

For Petitioner: David S. Dee, Esquire  
Martha H. Hall, Esquire  
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For Intervenor,  
Florida Chapter Peter B. Belmont, Esquire  
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For Intervenors,  
Florida Audubon  
Society and Charles Lee, Qualified Representative  
Broward County 1101 Audubon Way  
Audubon Society: Maitland, Florida 32751

## PRELIMINARY STATEMENT

At issue in this proceeding is whether the application of Petitioner, Port Everglades Authority, for a dredge and fill Permit to excavate an 18.37 acre turning notch from an existing 71 acre mangrove forest should be granted.

The transcript of hearing was filed with the Division of Administrative Hearings on December 2, 1986, and the parties were granted leave, at their request, until December 23, 1986, to file proposed findings of fact. Consequently, the parties waived the requirement that a recommended order be filed within 30 days of the date a transcript is filed. Rule 221-6.31, Florida Administrative Code. The parties' proposed findings of fact have been addressed in the appendix to this recommended order.

## FINDINGS OF FACT

1. On September 10, 1984, Petitioner, Port Everglades Authority (Applicant), filed an application with the Department of Environmental Regulation (Department) for a dredge and fill permit to construct a turning notch to serve a new container facility it proposes to construct. The application was deemed complete on September 16, 1985, and on December 13, 1985, the Department gave notice of its intent to deny the application. The Applicant filed a timely request for formal administrative review of the Department's action.

### The Applicant

2. The Applicant is a public corporation of Florida, a body politic, created by Special Act of the Legislature to further commerce in the state. The Applicant is a nonprofit entity whose profits are reinvested in port activities.

3. Under the Applicant's charter, approximately 2,500 acres of land are designated as the "Port Everglades Jurisdictional Area". This area includes most of the land south of 17th Street (Ft. Lauderdale), east of Miami Road and Federal Highway, north of the Dania Cut-off Canal, and west of the Atlantic Intercoastal Waterway (ICW). Within this area the applicant enjoys the right to exercise police powers; landuse, platting and zoning powers; and, the powers of eminent domain. Additionally, the Applicant has Ad Valorem taxing power within the boundaries of Broward County.

4. Currently, within its jurisdictional area, the Applicant owns approximately 750 acres of upland and 260 acres of submerged land in the turning basin, slips and channels. Much of the interface between land and water is occupied by steel and concrete bulkheads providing about 16,000 lineal feet of birthing for ships. About 230 acres of the property owned by the Applicant are undeveloped, and mostly used for the deposit of spoil from maintenance and new construction dredging.

### A New Container Facility

5. To meet a presumed need, the Applicant is proposing to construct a new container terminal (south port) adjacent to the western edge of the ICW and approximately 7,300' south of the Port Everglades turning basin. This facility, to consist of 2,800' of bulkhead immediately north of the Dania Cutoff Canal, is designed to simultaneously berth two of the new generation of container ships and one of the current generation.

6. Applicant owned lands available for construction of the facility presently consist of approximately 100 acres with 2,000' frontage on the ICW. These lands are located 800'-900' north of the Dania Cut-off Canal. To gain its desired 2,800' bulkhead line, the Applicant has undertaken condemnation proceedings against the owner (Hollywood, Inc.) of the property which abuts its southern boundary and extends to the Dania Cut-off Canal. Through this acquisition the Applicant will acquire an additional 91 acres to add to its holdings.

7. Located immediately north of the Proposed container terminal is a 71-acre mangrove forest. Within these lands, the Applicant proposes to excavate 18.37 acres to create a turning notch for ships using the new terminal. Impacts of the Proposed Turning Notch

8. The mangrove forest is roughly rectangular in shape, with its long axis running north to south adjacent to the ICW. The north boundary of the forest is formed by the Florida Power and Light Company (FP&L) discharge canal. From this canal, several tidal creeks penetrate the forest. Generally, the forest can be described as a mature and healthy fringe mangrove system. The system is well flushed in the areas near the tidal creeks and the ICW, but less well flushed as one moves to the southwest.

9. The proposed turning notch will occupy 18.37 acres in the southeast portion of the forest, abutting the new terminal and the ICW. The bottom dimensions of the notch will be 800' north to south and 900' east to west. Due to the 1:1 side slopes on the north and west sides of the notch, the top dimensions will measure 840' by 940'. The north and west sides of the notch will be constructed of rip-rap from a dredged depth of - 44' ML (mean low water) to + 6' MLW. A sheet pile bulkhead will be installed along the southern boundary of the notch.

10. The ICW is designated a Class III waterbody where it meets the notch area. The Applicant will take appropriate steps to minimize turbidity and water quality impacts during construction. Among other things, the Applicant will leave a "plug" adjacent to the ICW while the interior of the notch is dredged. To ensure compliance with Department standards, turbidity monitoring will be conducted during dredging activities. Built as proposed, and subject to the Department's conditions, the Applicant has provided reasonable assurances that construction of the proposed notch will not violate water quality standards. The Applicant has failed, however, to provide reasonable assurances that its project is not contrary to the public interest, as mandated by Subsection 403.918(2), Florida Statutes.

11. In determining whether a project is not contrary to the public interest, Subsection 403.91B(2)(a), Florida Statutes, requires that the Department consider and balance seven criteria. These seven criteria are as follows:

1. Whether the project will adversely affect the public health, safety or welfare or the property of others;
2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project 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.

12. The proof establishes that the proposed notch will be permanent, and will result in the loss of approximately 26 percent of a mature, healthy, and well flushed mangrove forest. This forest, as with all such forests, provides a natural-habitat, as well as the base of a complex food chain, which shelters and nurtures all the animals who live on the forest floor or in the adjacent waters. Consequently, in addition to the loss of 18.37 acres of habitat and the animals who dwell there, construction of the notch will also adversely impact the food source for animals who live in the surrounding areas.

13. The macroinvertebrate fauna (i.e.: crabs and snails) which dwell on the forest floor and the trees themselves include large populations of at least five species of crabs and two species of snails. An estimate of the population size of these crabs, the most obvious inhabitants of the forest floor, range from approximately 130,000 to an acre 50 yards west of the ICW to approximately 46,000 to an acre close to the western edge of the proposed notch. These numbers do not, however, include the population size of the tree-dwelling mangrove crab. Construction of the notch will result in the loss of all of the crabs and snails that occupy the site, as well as habitat for future generations. While placement of rip-rap within the notch will provide a substrate for organisms, such substrate will support an entirely different community than exists presently, and will not offer any replacement for the production of leave base which will be lost to the area.

14. The bird population which frequents the notch site is not unique, and no rare, endangered, or threatened species were observed. Three species of special concern were, however, seen on-site: the little blue heron, tricolored heron, and white ibis. While no evidence of nesting was observed, the notch area is deep enough to support it and the area provides a ready food source for both aquatic and land birds. This habitat would be lost through construction of the notch.

15. The warm waters discharged by FP&L into the canal which forms the northern boundary of the forest are habitat for the manatee, an endangered species. During the winter months, as the ambient water temperature begins to drop, these animals are attracted to the discharge canal. At these times, up to 236 manatee have been observed in the port area.

16. Manatee feed on a variety of aquatic plants; however, mangroves do not constitute a significant part of their diet and the removal of the mangroves in the area of the notch should have no adverse impact on the animals. Further, the increased ship traffic anticipated at the new terminal, 400-500 ships a year, should have no adverse impact on the manatee. These ships will be moving at a maximum speed of 5 knots in a channel that is at least 500' wide. Under such circumstances, the manatee should have little trouble avoiding injury.

17. While the manatee will not be adversely impacted by construction of the notch, the fish population of the area will lose a food source and habitat. A tidal creek enters the northeast corner of the forest from the discharge canal, and runs through the notch area. This tidal creek is quite deep on the high tide, and provides a protective habitat for small fish. Construction of the notch will eliminate approximately 800' of this small fish habitat, with a resulting loss of a food source to the predator fish in the area.

18. While the Applicant suggests that construction of the running notch will improve navigation, the proof does not support its conclusion. The ships using the turning notch will range in size from 800' to approximately 1,000'. To successfully and safely turn ships of such magnitude would require an area of at least 800' by 1400'. Consequently, the Applicant will be using a minimum of 500' of the ICW as part of its turning notch, and during the course of such maneuver will impede navigation on the ICW. While ships using the Applicant's new facility may find the turning notch an improvement to navigation, it is at the expense of other traffic on the ICW.

19. While the proposed project will not adversely affect the public health, safety or welfare or the property of others, and will not adversely affect significant historical and archaeological sites, a balancing of the statutory criteria establishes that construction of the turning notch is contrary to the public interest. 2/

#### Alternative Site Location for the New Terminal

20. Prior to selecting south port as the site for its new container facility, the Applicant evaluated its other land holdings to determine whether an alternative site existed. In addition to south port, the Applicant identified two other sites that could conceivably accommodate the new terminal. These alternative sites would obviate the necessity of a turning notch in the forest area. 3/

21. The first alternative to the south port site, was to locate the terminal in the northern section of the port along berths 11, 16, 17, and 18, and to excavate from the area of berth 19 a 300' by 300' area. As envisioned, this alternative would provide a berthing area of 2,700', but would require that Slip No. 3 be filled, and a consequent loss of berths 12-15. Slip No. 3, and berths 12-15, are part of the Applicant's petroleum facility. Since it is extremely unlikely that there will be any reduction in the Applicant's petroleum business, the elimination of that capability to install a new container facility is not a viable alternative to the south port site.

22. The second alternative to the south port site, was to locate the terminal along the west side of the ICW, with a bulkhead line running north from the FP&L discharge canal a distance of 2,700'. Adoption of this alternative would require, however, that the port's dry dock and shipyard be closed and filled, and a loss of about 600 shipyard jobs to the community. This is not a viable alternative to the south port site.

23. The alternatives considered, the proof establishes that the selection of south port as the site for construction of the new container terminal was appropriate. The vacant lands existent at south port will accommodate the new facility without disrupting or curtailing the port's current petroleum, shipyard or other activities.

#### The Need for the Turning Notch

24. The new container facility will be located approximately 1 1/2 miles south of the Port Everglades turning basin, and on the western shore of the ICW. To accommodate the expected traffic, the Applicant has dredged the ICW from the ship channel, which provides access to the port from the Atlantic Ocean, to the terminal to a depth of 44' MLW and to a minimum bottom width of 500'. At such depth and width, the ICW will accommodate the container ships in their passage to and from the new terminal, but will not allow them the space needed to turn around. Consequently, absent a turning notch, the ships would be required to move astern on their inbound or outbound passage. This movement would require that the ships move astern under their own power or with the assistance of tugs.

25. The proof establishes that ships could not, within the confines of the ICW, safely or effectively back to or from the new facility solely under their own power. Ships are designed to travel through the water moving ahead. When a ship goes astern, there is no steering capability.

26. In addition to the loss of steerage, there are physical limitations on both steam turbine vessels and motor ships (diesel-powered ships) which prevent them from backing 1 1/2 miles, within the confines of the ICW under their own power. In the case of a steam turbine vessel, the portion of the engine which drives the ship astern is relatively small compared to the head turbine. That small turbine would overheat within 8 minutes of operation, and require that the ship's engine be put on dead slow ahead to cool the turbine. This maneuver would slow, if not stop, the backward momentum of the ship. A motor ship, while not possessed of the cooling problems of a steam turbine, generates so much torque that the engine would have to be started and stopped continuously to keep the ship's momentum astern, and at the same time not generate so much torque that the ship will turn sideways in the channel. To restart a diesel requires compressed air, and a motor ship does not have the compressed air capacity to restart her engine a sufficient number of times to traverse the ICW in one movement.

27. Use of tugs to either assist the ships or to tow the ship's dead (without using their engines) is the only viable alternative to a turning notch. The Applicant asserts, however, that such alternatives are not acceptable from a safety or economic view point, and that construction of a turning notch is essential. The proof does not support the Applicant's assertion.

28. The maneuver of piloting a ship of up to 1,000' between the ship channel and the new facility, if the ship could move ahead using her own power, would normally require the assistance of two tugs of at least 4,000 shp each. The same two tugs could turn the vessel in a turning notch next to the terminal,

under average conditions of wind and current. Under conditions of stronger than average wind and current, a third tug would have to be called out to insure that the maneuver could be safely completed. 4/ Assuming the ship were turned on the inbound leg of her trip, it would take approximately 1 1/2 hours to move her from the sea buoy, turn her and berth her. The outbound leg would take approximately 1 hour and 10 minutes.

29. At the present time, there are three tugs based at Port Everglades. One tug has 4,200 shp, and the other two have 2,000 shp. Since the two smaller tugs have 2,000 shp each, a vessel of the size contemplated would need to use all three existing tugs, under average conditions of wind and current, even if it moved ahead under its own power while transiting the ICW and maneuvering in a turning notch. To effect such a maneuver under most conditions would require that at least one additional tug be added to the fleet based at Port Everglades.  
5/

30. If there were no turning notch available, the ships could be backed either to or from the new terminal. This maneuver would be accomplished by either using tugs to tow a dead ship or using tugs to assist a ship backing under its own power.

31. A dead ship maneuver would require a combination of tugs having a total of at least 15,000 shp under average conditions of wind and tide. Under less than average conditions (i.e.: an incoming tide when the vessel wishes to proceed outbound, or vice versa), a dead ship might have to await a slack tide and, thereby, be delayed up to 5 hours in making her movement. This is, of course, a worst case scenario, which assumes that the ship is positioned such that it is necessary to back her, as opposed to having her move ahead. It is, however, reasonable to design the facility so that ship movements can be accomplished under most conditions without unnecessary delays. Consequently, backing a dead ship to or from the terminal is not a viable alternative to a turning notch.

32. The use of tugs to counteract a motor vessel's torque and to assist her in backing under her own power to or from the terminal, however, appears to be a viable alternative to construction of the turning notch. Using such a maneuver, a ship could be backed to the new terminal under average conditions in approximately 2 hours, and her outbound transit time would be the same as with a turning notch (1 hour and 10 minutes). The Applicant offered no proof that under less than average conditions the time of transit, using this maneuver, would be substantially increased or that this maneuver would require tugs of any greater horsepower than would be required were a turning notch built. Interestingly, if a turning notch were built as proposed by the Applicant, ships would still have to be backed up to 2,800' between the notch and the terminal under the same conditions they would have to endure were they backed the whole way to the facility. Consequently, not only is the Applicant's assertion that such maneuver is not safe or economical contrary to the proof, it is also not credible.

33. While motor vessels could be safely and effectively backed to or from the new terminal with tug assist, the same does not hold true for steam turbine vessels. The small turbine which drives the ship as term would quickly overheat even with a tug assist, and inordinately protract the time necessary to transit the ICW. The proof fails, however, to establish that the new terminal will have to accommodate steam turbine vessels, as opposed to diesel powered vessels.

34. The Applicant is proposing the new terminal to meet a perceived need for additional container capacity, and has purportedly designed it to accommodate the new generation (fifth generation) of container vessels. These vessels will be 983' long, with a beam of 105' and a draft of 39' and will carry 4,000 TEU's (ten foot equivalent units) at 20+ knots. The Applicant offered, however, no proof concerning the power mode of these new vessels. Consequently, there being no proof to the contrary, it is reasonable to conclude that they, as with the preceding two generations, will be diesel powered and that the new terminal will have no need to accommodate steam turbine vessels. 6/

35. The Applicant's assertion that ship owners, absent a turning notch, would reject the new terminal as unsafe and uneconomical is not credited. The proof establishes that the ships reasonably expected to use the terminal can be safely backed to or from it with the assistance of tugs, and with no apparent increase in cost over that which would be incurred if a turning notch is utilized. Even if additional tugs were needed, that cost would only add \$1,200-\$1,500 for each additional tug. The Applicant offered no evidence of the cost of utilizing the facility, with or without the notch, and did no marketing studies. Consequently, the Applicant's conclusion that ship owners would find the new terminal uneconomical absent a turning notch is unpersuasive.

#### Other Considerations

36. In view of the finding that the Applicant failed to demonstrate any need for a turning notch, it is unnecessary to address the issue of alternative placement of the notch or the Applicant's mitigation proposal.

#### CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

38. The Department's review of the application at issue in this case is governed by Sections 403.91-403.929, the "Warren S. Henderson Wetlands Protection Act of 1984" (The Henderson Act). Pertinent to this case Section 403. 918, Florida Statutes, provides:

403.918 Criteria for granting or denying permits. -

(1) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that water quality standards will not be violated. The department, by rule, shall establish water quality criteria for wetlands within its jurisdiction, which criteria give appropriate recognition to the water quality of such wetlands in their natural state.

(2) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest....



(a) In determining whether a project is not contrary to the public interest ... the department shall consider and balance the following criteria:

1. Whether the project will adversely affect the public health, safety or welfare or the property of others;

2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project 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.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project....

39. The Henderson Act establishes two criteria which must be satisfied before a dredge and fill project may be permitted. First, the applicant must provide reasonable assurance that water quality standards will not be violated. Section 403.918(1), Florida Statutes. Second, the applicant must provide reasonable assurance that the project is not contrary to the public interest. Section 403.918(2), Florida Statutes. In this case, the Applicant has satisfied the first criteria, but has failed to satisfy the second criteria. 7/

40. Where, as here, an applicant's project does not satisfy the public interest criteria established by subsection 403.918(2)(a), its project may be permitted if it can establish, pursuant to subsection 403.918(2)(b), that it is "unable to otherwise meet the criteria" set forth in subsection 403.918(2)(a) and proposes an acceptable plan to mitigate the adverse affects of its project.

The Intervenor's assert that if reasonable alternatives exist to avoid adverse impacts to the environment, the applicant has failed to establish that it is unable to otherwise meet" the requirements of subsection 403. 918(2)(a), and consideration of any mitigation proposals are inappropriate. I agree with the Intervenor's.

41. In interpreting legislative intent one must look to the plain language of the statute at issue. Furthermore, the legislature must be assumed to know the meaning of the words it has used and to have expressed its intent by the use of the words found in the statute. See: *Thayer v. State*, 335 So.2d 515 (Fla. 1976) and *Carson v. Miller*, 370 So.2d 10 (Fla. 1979).

42. In construing the meaning of ordinary words used in a statute the courts have routinely turned to dictionary definitions. The dictionary defines "otherwise" to mean "in another manner" or "differently". Webster's New World Dictionary, College Edition. Therefore, I conclude that in construing the plain language of the statute that it requires an applicant to show that it is unable in another manner, i.e.: through alternatives, to meet the criteria set forth in subsection 403.918(2)(a) before the Department has authority to consider mitigative measures. I can find no other reasonable interpretation of the word "otherwise" as used in the statute. I also cannot ignore the word because one should never assume that language in a statute is mere surplusage. One must presume that the legislature has inserted language for a purpose. See: *Stein v. Biscayne Kennel Club*, 199 So. 364 (Fla. 1940).

43. As I have noted in my findings of fact, the Applicant has not demonstrated that its new container terminal cannot be operated safely or economically without the construction of the turning notch. Although the Applicant may prefer its design scheme, its "no action alternative" to construction of the notch (the use of tugs) satisfies the mandate of subsection 403.918(2)(a) and permits it to realize the development potential of its new terminal.

44. In reaching this conclusion, I am not unmindful of the fact that the legislature found that Florida's wetlands perform essential economic and recreational functions, that continuation of the past practice of alteration and development of the state's inventory of wetlands will cause extensive damage to the state's economic interests and recreational values, and that the current state policy is to preserve and to protect the state's remaining wetlands to the greatest extent practicable. See: Chapter 84-79, Laws of Florida, 1984.

#### RECOMMENDATION

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

RECOMMENDED:

That the application of Port Everglades Authority for a dredge and fill permit be DENIED.

DONE AND ORDERED this 20th day of February, 1987, in Tallahassee, Florida.

---

WILLIAM J. KENDRICK  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32301  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 20th day of February, 1987.

#### ENDNOTES

- 1/ The Applicant currently holds a permit from the Department to construct 2,000' of bulkhead on its existent property. This application to construct a turning notch is a separate application dealing with the same project. Additionally, the Applicant will need a separate permit for the southerly 800' of bulkhead when it acquires the Hollywood, Inc., property, and a ground water discharge permit since excavation of the turning notch would pierce the Biscayne Aquifer. Why this project was allowed to proceed in such a piecemeal fashion is unexplained on this record.
- 2/ The Applicant concedes its project is contrary to the public interest. See: Applicant's proposed findings of fact and conclusions of law, page 30.
- 3/ At hearing, no party offered any evidence that the new terminal could be accommodated at any site other than those addressed by the Applicant.
- 4/ The proof fails to reflect the horsepower rating needed for this third tug.
- 5/ The applicant made much ado about the cost of purchasing additional tugs if it were required to back the ships to the new facility. The tugs at Port Everglades are, however, operated by a private company. Notwithstanding a cost of \$1,500,000 for a 2,000 shp tug, it is reasonable to assume additional tugs would be added to the fleet if there were a demand. It is not the cost of the tugs but, rather, the towing charges that are germane to this proceeding. The impact of those charges on the Applicant's ability to attract business at its new facility are discussed infra. Suffice it to say at this point that, even moving ahead, the port will need at least one additional tug.
- 6/ The third generation of container vessels were delivered between the late 1960's and mid 1970's. These vessels were 800- 950' long, 100' beam, and carried between 1,500-2,000 TEU's. When the price of fuel increased in 1974 and again in 1978 these vessels proved to be uneconomical to operate at standard speeds (27-35 knots) and were slowed to operational speeds of 19-20 knots. Part of these vessels were subsequently converted to diesel and the remainder sold to the U.S. Navy as part of its rapid deployment fleet. The fourth generation of container vessels were constructed in the late 1970's and early 1980's. These vessels were 800'-900' long, with a 105' beam and draft of 41', carried 1,800-2,500 TEU's, and were diesel power (Petitioner's exhibit 2, Chapter IV, page 5).

7/ During the course of the proceedings the Intervenor's contended that evidence outside of matters affecting environmental considerations should not be weighed for purposes of determining whether the project will not be contrary to the public interest. At hearing, the Applicant offered proof concerning non-environmental factors such as the creation of jobs by the new facility, and potential economic losses to the community if the facility is not built. I tend to agree with the Intervenor's. The construction of any project, whether it be a single family residence or a port facility, will have both short and long term impacts on the demand for goods and services and, therefore, the economy. Such matters would not, however, appear to be appropriate considerations under The Henderson Act. See: Grove Isle, Ltd. v. Department of Environmental Regulation, 454 So.2d 571 (Fla. 1st DCA 1984) and Mandarin Landing Association, Ltd. v. Department of Transportation, 8 FALR 633 (DER 1985). However, it is not necessary to address this issue in the instant case in light of my finding that the Applicant's new container facility does not require a turning notch to prove feasible.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 86-0039

The Applicant's proposed findings of fact are addressed as follows:

1. Addressed in paragraph 2.
- 2-3. Addressed in paragraph 1.
4. Addressed in paragraph 3.
5. Addressed in paragraphs 5 and 7.
6. Not necessary to result reached.
7. Addressed in paragraphs 3, 6 and 34.
8. Addressed in paragraph 24.
- 9-12. Addressed in paragraphs 24-35.
13. Rejected as contrary to the proof.
14. Addressed in paragraphs 28-29, 31-32.
15. Addressed in paragraph 31.
16. Addressed in paragraph 35.
17. Addressed in paragraphs 32 and 35.
- 18-23. Not necessary to result reached.
24. Not necessary to result reached.
25. Addressed in paragraph 21.
26. Addressed in paragraph 22.
- 27-28. Not necessary to result reached.
29. Addressed in paragraphs 7 and 8.
30. Addressed in paragraph 9.
- 31-33. Addressed in paragraph 10.
- 34-36. Addressed in paragraphs 8 and 12.
37. Addressed in paragraph 13.
- 38-39. Addressed in paragraph 17.
40. Addressed in paragraph 14.
41. Addressed in paragraphs 15-19.
- 42-49. Addressed in paragraphs 15 and 16.
- 50-70. Not necessary to result reached.
71. First two sentences addressed in paragraph 19. Third sentence not necessary to result reached.
- 72-76. Not necessary to result reached.
77. First sentence addressed in paragraph 12. Second

- sentence not necessary to result reached.
- 78-86. Not necessary to result reached.
  - 87. Addressed in paragraphs 12 and 17.
  - 88-90. Not necessary to result reached.

The Department's proposed findings of fact are addressed as follows:

- 1. Addressed in paragraphs 1 and 7.
- 2. Addressed in paragraphs 24-36.
- 3. Addressed in paragraphs 7 and 8.
- 4-7. First sentence of paragraph 4 addressed in paragraph 8. Remainder not relevant or not necessary to result reached.
- 8-15. Not necessary to result reached.
- 16-18. Addressed in paragraph 15-16.
- 19. Not necessary to result reached.
- 20. Not necessary to result reached.
- 21. Rejected. The project, the new terminal facility, may increase economic development but the notch will not. construction of the notch is not essential to the development of the facility.
- 22. Not necessary to result reached.
- 23. Not relevant and not necessary to result reached.

The Intervenor's proposed findings of fact are addressed as follows:

- 1-8. Addressed in paragraphs 15-16.
- 9. First two sentences rejected as not supported by competent proof. Last sentence not relevant.
- 10-19. To the extent necessary addressed in paragraphs 8 and 12, otherwise not necessary to the result reached.
- 20-21. Addressed in paragraph 17.
- 22-28. Not necessary to result reached.
- 29-42. Not necessary to result reached.
- 43. Addressed in paragraph 35.
- 44. Addressed in paragraphs 24-35.
- 45. Not necessary to result reached.
- 46-64. Not necessary to result reached.
- 65-66. Addressed in paragraph 13.
- 67-69. Not necessary to result reached.
- 70. Addressed in paragraph 17.
- 71. Not necessary to result reached.
- 72-75. Addressed in paragraph 17.
- 76. Not necessary to result reached.
- 77. Addressed in paragraphs 13, 17 and 19.
- 78-79. Not necessary to result reached.
- 80-83. Addressed in paragraph 14.
- 84-94. Not necessary to result reached.

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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

PORT EVERGLADES AUTHORITY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 86-0039
	)	
STATE OF FLORIDA, DEPARTMENT	)	
OF ENVIRONMENTAL REGULATION	)	
	)	
Respondent,	)	
and	)	
	)	
FLORIDA CHAPTER SIERRA CLUB,	)	
FLORIDA AUDUBON SOCIETY, and	)	
BROWARD COUNTY AUDUBON SOCIETY,	)	
	)	
Intervenors.	)	
_____	)	

SUPPLEMENTAL RECOMMENDED ORDER

By order dated April 6, 1987, the Department of Environmental Regulation (Department) remanded the above-styled case to the under signed Hearing Officer to enter findings of fact addressing the applicant's proposed mitigation plan, and to assess the permissibility of the project in light of the applicant's mitigation proposal. The Hearing Officer accepts the Department's remand, and enters the supplemental findings of fact which follow in accordance with the Department's request.

SUPPLEMENTAL FINDINGS OF FACT

1. The applicant has proposed, as part of its project, certain mitigation activities designed to offset the adverse environmental impacts that would be caused by the dredging of the proposed turning notch. These proposals consist of (a) the creation of 23 acres of new mangrove forest in the John U. Lloyd State Recreation Area (Park) which lies across the ICW from the proposed notch; (b) the construction of approximately 7300 linear feet of riprap along the eastern edge of the ICW to protect existing and proposed mangrove areas from excessive tidal or wave action; (c) the enhancement of 16 acres of existing mangrove forest in the Park; (d) the deepening of an existing tidal creek in the Park to create a manatee sanctuary; and (e) the grant of a conservation easement to the Department which would prohibit any future development in the remaining acres of mangrove forest adjacent to the proposed notch.

2. The 23 acres on which the applicant proposes to create a new mangrove forest are presently vegetated with exotic plants, primarily Australian pine and Brazilian pepper. The applicant proposes to remove the exotics, scrape the area to an appropriate inter tidal elevation, and handplant approximately 165,000 red mangrove seedlings on three foot centers. The new mangroves will be monitored and maintained for seven years, with at least an 80 percent survival rate. 1/

3. To evaluate its plan for creating new mangrove areas, the applicant planted 3,800 red mangroves in a pilot project along the east side of the, ICW, adjacent to the Park. Following the passage of two years, those mangroves have evidenced a survival rate of approximately 80 percent, and white and black mangrove recruits have established themselves on the site.

4. The applicant has provided reasonable assurances that its' mangrove project will survive, and that its character will be similar to the well-flushed fringe mangrove forest that will be displaced by the notch. The new mangroves should develop a canopy in four to six years, at which time the production of leaf litter will be maximized. When the canopy develops, the per acre productivity of the new mangrove forest should be similar to the present productivity of the mangroves in the notch.

5. In addition to creating 23 acres of new mangroves to replace the 18 acres lost by construction of the notch, the applicant's project will improve the health and productivity of those mangroves presently growing in the Park. This will be accomplished by the removal of the exotics which currently shade A the existing mangroves and by the improvement of the tidal circulation.

6. In conjunction with its mangrove planting project, the applicant will install approximately 7,300 feet of riprap along the eastern shore of the ICW, an area subject to severe erosion. The riprap, which will be constructed to a height of +6 feet MLW (mean low water), will protect the shoreline, the existing mangroves, and the newly planted mangroves from erosion, turbulent water and floating debris. 2/

7. Fish populations and fishing values will directly benefit from the riprap and new mangroves by providing shelter and a food source. While large fish and materials will not generally pass through the interstitial spaces in the riprap, small fish and other marine organisms will. 3/ These small fish will be protected from predators part of the time, but at low tide they will be forced through the riprap and into the ICW where they will provide a food service for larger fish.

8. The macroinvertebrate population of the area will increase in number and diversity as a result of the mitigation plan. In the long-term, the macroinvertebrate habitat of the mitigation area will be similar to that presently existing in the notch area. Additionally, new macroinvertebrate communities will emerge along the riprap.

9. The mitigation proposal will also create a net benefit to the local and migratory bird population found in the area. The creation of 23 acres of mangroves, together with the enhancement area, infra, will provide additional habitat and improved food source for the birds.

10. The third feature of the applicant's mitigation proposal is the enhancement of approximately 16 acres of mangroves in the interior of the Park. These mangroves are presently stressed and poorly flushed. The applicant proposes to excavate ditches from the enhancement area to Whiskey Creek, a tidal creek running through the interior of the Park, and scrape, certain upland areas to create inter tidal elevations between Whiskey Creek and the enhancement area. As a result of the ditching and the removal of upland areas, there will be improved tidal penetration and circulation within the enhancement ,area. This will translate to increased leaf litter production, and the export of more detritus to the marine environment.



11. In the fourth part of its mitigation plan, the proposes to construct a manatee refuge in a U-shaped cove in the Park. While manatee should not be adversely impacted by the proposed projet, the proof did establish that boats are the largest cause of manatee injury and mortality. Construction of the proposed refuge outside the active waters of the ICW should, therefore, increase the survival rate of this endangered species.

12. Finally, the applicant has agreed to grant the Department a conservation easement to the 53 acres of mangrove forest that will remain after construction of the turning notch. The dedication of a permanent conservation easement over the remaining mangrove forest will ensure that future construction projects are not undertaken in this area, and that adverse cumulative impacts do not occur.

13. At hearing, the Department announced its intention to impose all of the conditions contained in its September 16, 1986, draft permit, except for condition number, 11, which dealt with the removal of exotics within the conservation easement. The Department also added two new conditions designed to provide additional protection for the manatee. The new conditions would require, all work boats to observe idle speed restrictions in the manatee sanctuary at all times during construction. The Department would also require that the applicant receive approval from the Department of Natural Resources before working in open waters during the manatee season. The applicant agreed to accept and comply with all of the Department's proposed conditions.

14. The proof establishes that the applicant's mitigation plan, built as proposed and subject to the Department's permit conditions, will produce a net benefit for the environment. On balance, this benefit outweighs the negative impact to the environment that would be occasioned by the construction of the turning notch and renders the project not contrary to the public interest.

#### SUPPLEMENTAL RECOMMENDATION

Based on the foregoing Supplemental Findings of Fact and the Department's order of remand, dated April 6, 1987, it is

#### RECOMMENDED:

That the subject dredge and fill permit be ISSUED, subject to the Department's proposed permit conditions.

DONE AND ORDERED this 27th day of May, 1987, in Tallahassee, Florida.

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WILLIAM J. KENDRICK  
Hearing Officer  
Division of Administrative Hearings  
The Oakland Building  
2009 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of May, 1987.

ENDNOTES

1/ The applicant has its own mangrove nursery. Consequently, if any of the young trees fail to mature, the applicant can promptly replace it.

2/ Some sand particles could pass through the riprap and settle on the bottom, but this should not occur to any significant degree because the water in the ICW is relatively sediment-free. Accordingly, there should be no siltation problem which would adversely affect the mangrove plantings.

3/ The applicant, at the Department's request, has agreed to incorporate larger openings in some areas of the riprap so that larger fish can move through the area.

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