

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOUGLAS CRIST, and the)
CITY OF PUNTA GORDA,)
)
 Petitioners,)
)
vs.) CASE NO. 92-0534
)
STATE OF FLORIDA, BOARD OF)
TRUSTEES OF THE INTERNAL)
IMPROVEMENT TRUST FUND,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, this cause come on for hearing on June 3-4, 1992 in Punta Gorda, Florida before William R. Cave, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Joseph W. Landers, Jr., Esquire
John T. LaVia, III, Esquire
Post Office Box 271
Tallahassee, Florida 32302

For Respondent: M. B. Adelson, IV, Esquire
Edwin Steinmeyer, Esquire
Department of Natural Resources
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

Whether Petitioner's proposed dredging from the mouth of Snook Inlet to the Bass Inlet navigation channel comes within the exception provided for in Section 258.42 (3)(a)2. or 4., Florida Statutes, and, if so, should Petitioner be granted an easement over sovereign submerged lands to conduct such proposed dredging.

PRELIMINARY STATEMENT

Petitioners, Douglas Crist (Crist) and the City of Punta Gorda (Punta Gorda) submitted an application to the Board of Trustees of the Internal Improvement Trust Fund (Trustees) for an easement to conduct dredging across sovereign submerged lands within the Charlotte Harbor Aquatic Preserve. After reviewing the Petitioners' application, the Department of Natural Resources' staff recommended denial of the application on the basis that the proposed dredging did not come within any of the statutory exceptions to the general

prohibition on dredging in aquatic preserves. Thereafter, on October 22, 1991, the Governor and Cabinet, sitting as the Trustees, considered Petitioners' application. The Trustees approved the staff recommendation and denied Petitioners' application. This matter was transferred to the Division of Administrative Hearings by letter dated January 23, 1992, and received on January 29, 1992, for the assignment of a Hearing Officer to conduct a formal hearing pursuant to Section 120.57(1), Florida Statutes.

At the beginning of the hearing, in accordance with an ore tenus Motion To View by the Trustees, a ground viewing of Snook Inlet was conducted. In addition, the undersigned Hearing Officer and representatives of the parties viewed the entire Charlotte Harbor Aquatic Preserve by means of a helicopter tour.

At the hearing, the Petitioners presented the testimony of James Marvin Stillwell, Douglas Crist, James Kurt Culter, William M. Brady and Rufus C. Lazell. Petitioners' exhibits 1 through 22 and 24 through 28 were received as evidence in this case. Trustees presented the testimony of Robert W. Repenning, Leonard L. Nero, Michael E. Ashe and Pete Mallison. Respondent's exhibits 1 through 12 and 17 were received as evidence in this case. The parties' Joint Exhibit 23 was received as evidence in this case.

A transcript of this proceeding was filed with the Division of Administrative Hearings on June 22, 1992. The parties timely filed their Proposed Recommended Order. A ruling on each proposed finding of fact submitted by the parties has been made as reflected in an Appendix to the Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

BACKGROUND

1. Within the city limits of Punta Gorda lies a navigable man-made canal (Snook Inlet) dredged from uplands prior to January 9, 1952. The submerged lands located in Snook Inlet are owned by Petitioner, Punta Gorda. Snook Inlet is located between Fisherman's Village, a tourist attraction, to the east and Bass Inlet, an artificial canal leading to Punta Gorda Isles, to the west.

2. A navigation channel (Bass Inlet Channel) leads from Bass Inlet in a northeasterly direction then runs parallel with the shoreline approximately 400 feet waterward of the mouth of Snook Inlet.

3. A navigation channel (Snook Inlet Channel) extends north from the mouth of Snook Inlet and intersects with Bass Inlet Channel.

4. A "plug" has formed at the mouth of Snook Inlet. This plug is the result of accretion of material that eroded from adjacent fill areas located in Brown Park, and is partially covered with vegetation, including trees and grasses.

5. Crist owns a parcel of land (lot 26) located on the western side of and adjacent to Snook Inlet, and has signed a contract to purchase the four other lots (lots 27-30) bordering the western side of Snook Inlet.

6. Crist owned lot 26 at the time the application that is the subject of this proceeding was filed in June, 1988.

7. Punta Gorda is a water-oriented boating community with a population of over 11,000. Approximately sixty-five miles of seawalled canals are located within the confines of Punta Gorda, and well over half of the residents of Punta Gorda resided on the canal system.

8. Punta Gorda owns Brown Park, a public park immediately west of and adjacent to Snook Inlet.

9. Punta Gorda is a riparian owner. Crist is not a riparian owner.

10. In June, 1988, Crist filed an application for an easement with the Trustees to maintenance dredge the Snook Inlet Channel over sovereign submerged lands to Snook Inlet. Subsequent to Crist filing the application, Punta Gorda joined Crist as a co-applicant.

11. The dimensions of the proposed maintenance dredging area for the Snook Inlet Channel are approximately 200 feet long by 75 feet wide to a depth of minus 5 feet mean low water. The total area is approximately one third of an acre.

12. On August 2, 1988, the United States Army Corps of Engineers (Corps) issued Crist a permit to maintenance dredge Snook Inlet. Snook Inlet is approximately 100 feet wide and 5 feet deep.

13. On August 2, 1988, the Corps issued Crist a permit to maintenance dredge the Snook Inlet Channel.

14. On June 23, 1988, the Florida Department of Environmental Regulation (DER) issued Crist a notice of exemption authorizing maintenance dredging of Snook Inlet.

15. On September 1, 1989, the DER issued Crist a permit to maintenance dredge the Snook Inlet Channel.

16. On July 7, 1988 the Trustees issued Crist a Notice of Exemption, indicating lack of jurisdiction in Snook Inlet landward of the Historical Mean High Water Line (HMHWL). The HMHWL for purposes of this hearing is located at 1.09NGVD.

17. The Snook Inlet Channel, permitted as maintenance dredging by both the Corps of Engineers and the DER, is the same area that is the subject of the easement application in this proceeding.

18. The permits obtained by Crist from the Corps of Engineers and the DER authorize Christ, without any further approvals, to dredge Snook Inlet approximately 100 feet wide to a depth of minus five feet mean low water up to the HMHWL. Thus, everything landward of the HMHWL, including the Snook Inlet "plug" may be removed without any further authorization.

19. The proposed maintenance dredging area of Snook Inlet Channel lies within the Charlotte Harbor Aquatic Preserve and is sovereign submerged lands.

20. On October 23, 1991, the Trustees denied Christ's and Punta Gorda's application for an easement to maintenance dredge Snook Inlet Channel.

DESCRIPTION OF SUBJECT AREA

21. The Charlotte Harbor Aquatic Preserve is not a developed urban aquatic preserve. Approximately 95% of the Charlotte Harbor Aquatic Preserve is in its natural state and approximately 5% of the preserve is developed and more urbanized. The proposed project is located in the more developed urbanized area of Charlotte Harbor Aquatic Preserve.

22. In June of 1988 a small tidal channel, approximately eight to twelve inches in depth, allowed an exchange of water at high tide between Snook Inlet and Charlotte Harbor. Again, in August of 1991, a small tidal channel allowed an exchange of water at high tide between Snook Inlet and Charlotte Harbor.

23. The existing shoreline in the Snook Inlet area and in the adjacent city-owned Brown Park is suffering from severe erosion.

EXISTING NAVIGATION CHANNEL

24. For nearly thirty years, between 1952 and 1981 a clearly discernible navigation channel (Snook Inlet Channel) was visible leading from Charlotte Harbor into Snook Inlet. As recently as 1981, boats could enter Snook Inlet via Snook Inlet Channel. A boat is currently wrecked and partially submerged in Snook Inlet.

25. In June of 1988, after the application that is the subject of this hearing was filed with the Trustees, it was possible to navigate a small boat or canoe from Charlotte Harbor through the Snook Inlet Channel into Snook Inlet.

26. As recently as May 7, 1992, an employee of the Trustees navigated a 21 foot boat through portions of the existing Snook Inlet Channel that are the subject of this easement application. Currently several pilings are in place marking the deeper portions of the Snook Inlet Channel.

27. A navigation channel as contemplated by Section 258.42 (3)(a) 4., Florida Statutes, exists in the area that is the subject of this easement application.

MAINTENANCE DREDGING

28. The term maintenance dredging is not defined in Chapter 253, Florida Statutes, or the rules adopted thereunder.

29. The DER reviewed the project and permitted it as maintenance dredging.

30. The Corps of Engineers reviewed the project and permitted it as maintenance dredging.

31. Charlotte County reviewed the project and determined that the Snook Inlet Project is a "maintainable navigation access way" as described in Policy 6.3 of the Charlotte County Comprehensive Plan.

32. The Punta Gorda Isles Canal Maintenance District considers the project to be maintenance dredging within its authority to complete.

33. In a letter dated October 13, 1988, the Trustees Planning Manager, referred to the proposed dredging as "maintenance dredging".

34. The dredging proposed as part of the easement application that is the subject of this hearing is maintenance dredging of an existing navigation channel as contemplated by Section 258.42(3)(a) 4., Florida Statutes.

DREDGING AUTHORIZED FOR THE CREATION OF DOCKS

35. On the uplands bordering the west side of the Snook Inlet, Crist plans a condominium development where he will build twelve associated twenty-five foot finger docks.

36. Although the Petitioners did not file an application for construction of docks within the Charlotte Harbor Aquatic Preserve or Snook Inlet, the Trustees were aware, prior to their decision to deny this application, of the planned docks to be created with Snook Inlet. The Trustees agenda item for this application specifically refers to the possibility of docks being constructed.

37. The Trustees agenda item lists this exception as "dredging as may be necessary for the construction or maintenance of docks".

38. On May 7, 1992, Crist filed an application for a permit to construct twelve 25 foot finger docks in Snook Inlet. The application is pending but cannot be processed by Punta Gorda at this time because local zoning regulations require that a principally permitted use be established by permit before a permitted accessory use such as docks can be processed and receive constructions permits. Approval of the application is anticipated.

39. Neither Chapter 258, Florida Statutes, nor the rules adopted thereunder specifically require that docks be created on sovereign lands within an aquatic preserve in order for the exception in Section 253.42(3)(a)2., Florida Statutes, to apply.

40. Snook Inlet is approximately 100 feet wide and five feet deep. The proposed project will result in the Snook Inlet Channel being 75 feet wide and 5 feet deep. Approximately 1350 cubic yards of spoil will be dredged from the Snook Inlet Channel and deposited on uplands.

PUBLIC INTEREST Environmental Benefits

41. As part of the permit to maintenance dredge the Snook Inlet Channel, the DER requires mitigation in the form of an 8,750 square foot wetland creation and bank stabilization project. The mitigation includes the stabilization of approximately 350 feet of the severely eroding shoreline of Brown Park, the creation of a barrier rock revetment at the HMMWL, the planting of emergent salt-tolerant grass (*spartina alterniflora*) the removal of exotic plant species including Australian Pine and annual monitoring to guarantee 80% survival of the *spartina alterniflora*. Crist is committed to completing the mitigation.

42. The DER permit to maintenance dredge Snook Inlet Channel imposes the following additional conditions on Crist: Crist must receive a stormwater permit from the Southwest Florida Water Management District (SWFWMD) and approval of the stormwater plan by the DER, and Crist must enter into a binding agreement prohibiting the sale of fuel, prohibiting any in-water boat or motor maintenance and prohibiting the use of non-biodegradable detergents within Snook Inlet. Crist also must submit water quality monitoring reports every six months to the DER.

43. The DER is the state agency with the authority to regulate water quality in Snook Inlet and Snook Inlet Channel.

44. The permits obtained by Crist from the DER represent a determination that the project will not violate state water quality standards and will not degrade the aquatic preserve.

45. The current dissolved oxygen levels within Snook Inlet meet state water quality standards.

46. Currently there is only negligible flushing between Snook Inlet and Charlotte Harbor. Reopening Snook Inlet will result in an expected flushing time of the canal to be 6.8 tidal cycles or approximately 3.5 days. Reopening Snook Inlet will also result in increased detrital export from the mangroves adjacent to the canal into the Charlotte Harbor Aquatic Preserve.

47. The biological community currently present within Snook Inlet and the "plug" is not a natural shoreline community of the Charlotte Harbor system.

48. The western boundary of Snook Inlet is seawalled for its entire length. No organisms live on the seawall within Snook Inlet other than a thick accumulation of filamentous green algae. However, evidence of barnacle and oyster shells is present on the seawall indicating there once was a healthy benthic community within the canal.

49. The submerged bottom of Snook Inlet is covered with a thick accumulation of debris from the mangroves located on the eastern side of the canal. This layer of debris is at least a foot in depth (Culter, T-161, L-18-20). The only living benthic organism present in the entire canal was a single worm.

50. Within the debris located on the bottom of Snook Inlet evidence of the presence of sulfur bacteria exists. The presence of sulfur bacteria is indicative of an anaerobic system that will exclude all multicellular invertebrate species.

51. The debris has accumulated on the submerged bottom of Snook Inlet because of the lack of detrital exchange with Charlotte Harbor. The debris accumulated on the bottom of Snook Inlet will be removed as part of the permitted dredging of the canal prior to its reopening.

52. The existing aquatic habitat within Snook Inlet is of a very poor quality and is typically actively discouraged by regulatory agencies in Florida. The diversity and abundance of invertebrate species within the canal is extremely low and the canal is not a functional wetland.

53. The reopening of Snook Inlet will increase both the diversity and abundance of benthic organisms within Snook Inlet. In addition, reopening the canal will improve and enhance the water within the canal. Snook Inlet will be a more valuable habitat once it is opened.

54. The area between the "plug" and the Bass Inlet Channel is comprised primarily of intertidal and tidal flats. Tidal and intertidal flats are not a unique habitat and occur throughout the entire shoreline of the Charlotte Harbor Aquatic Preserve in areas that are not seawalled. Intertidal and tidal flats

make up nearly 90% of the shoreline of the Charlotte Harbor Aquatic Preserve and comprise thousands of acres within the preserve.

55. No seagrasses occur in the tidal and intertidal areas or in the Snook Inlet Channel.

56. Tidal and intertidal flats serve as foraging grounds for various wading birds. The dredging of 1/3 of an acre of tidal and intertidal flats will not adversely affect those species--they will be able to forage on any of the thousands of acres of tidal and intertidal flats within the preserve including those immediately adjacent to the Snook Inlet Channel. None of the birds that forage in the tidal and intertidal areas are listed as endangered, threatened or protected.

57. The depth of the existing Snook Inlet Channel varies from two to seven feet. The fauna located in the deeper portions of the existing Snook Inlet Channel are higher in number and diversity as compared to the tidal flat areas.

58. The deep channel areas, such as the Bass Inlet Channel, in the vicinity of Snook Inlet are healthy and exhibit a high density and diversity of species. The dredging of the 1/3 of an acre of tidal and intertidal flats in the Snook Inlet Channel will increase the diversity and abundance of species in those areas and enhance the naturally occurring habitat.

59. The maintenance dredging of the Snook Inlet Channel will not cause any negative impacts on the estuarine benthic ecology in the Charlotte Harbor Aquatic Preserve.

60. In summary, the benefits that will accrue to the Charlotte Harbor Aquatic Preserve as a result of this project include: the elimination of erosion into the preserve by stabilization of the shoreline of Brown Park; the creation of valuable habitat in the form of spartina alterniflora grassbeds contiguous to the preserve; an increase in both diversity and abundance of benthic organisms in the Snook Inlet Channel; an increase in detrital export from Snook Inlet into the preserve; and the removal of exotic species such as Australian Pine from habitat contiguous to the preserve.

Economic and Social Benefits

61. The Trustees have not yet conducted an analysis of the social and economic costs and benefits associated with this project.

62. Punta Gorda is currently implementing a comprehensive waterfront redevelopment project. Part of that project includes a riverwalk that passes adjacent to and directly south of Snook Inlet.

63. Currently, Snook Inlet is an "obnoxious eyesore" emanating unpleasant odors and has become blighted as a result of the presence of unsightly debris, monofilament line, gill nets and a wrecked boat. Punta Gorda has received a large number of complaints from citizens regarding Snook Inlet's appearance and odor.

64. Punta Gorda and Crist have entered into a Developers Agreement. The Developers Agreement represents a unique public/private partnership. Under the terms of the Developers Agreement, Christ will pay all of the costs of dredging Snook Inlet and Snook Inlet Channel, and in addition all of the costs of the

wetland creation and bank stabilization mitigation project along the city-owned Brown Park.

65. The estimated cost of completing the dredging of Snook Inlet is \$40,000, and the estimated cost of completing the wetland creation and bank stabilization along Brown Park is \$60,000. Thus, as a result of this project, Punta Gorda and its citizens will realize a direct economic benefit of \$100,00, will have the severe erosion of Brown Park halted, and will have the eyesore that Snook Inlet currently represents removed.

66. The improvements to Brown Park will transform the park into an integral portion of the Punta Gorda waterfront with the ultimate result being improvement of public land use and management.

67. Reopening Snook Inlet will positively affect the public safety and aesthetic attributes of the project area.

68. Crist intends to construct condominiums with an approximate market value of \$4 million dollars on his property adjacent to Snook Inlet. Without Snook Inlet being reopened, Crist's property is not developable. The increased value of Crist's property will result in increased property tax assessment for Charlotte County, Charlotte County School District, Punta Gorda, and SWFWMD.

69. The Trustees' Division Director of the Division of State Lands believes that the economic benefits of the proposed project to the upland property outweigh the costs.

70. The proposed project as designed and located will have no significant impact on navigation in the area.

71. The proposed project is consistent with the Charlotte County/Punta Gorda Local Comprehensive Plan.

72. The proposed project is consistent with the applicable local zoning code and building regulations.

CONCLUSIONS OF LAW

73. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, this proceeding pursuant to Section 120.57(1), Florida Statutes.

74. Contrary to the assertion of the Trustees, a petition for formal proceedings pursuant to Section 120.57(1), Florida Statutes, commences a de novo proceeding intended to formulate agency action and not to review action taken earlier and preliminarily by an agency. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So.2d 778,785 (1 DCA Fla. 1981) quoting McDonald v. Department of Banking, 346 So.2d 569, 584 (1 DCA Fla. 1977); Hamilton County v. Department of Environmental Regulation, 587 So.2d 1378, 1387 (1 DCA Fla. 1991).

75. Section 258.42(1)and (3)(a)2. and 4., Florida Statutes, provides as follows:

The Board of Trustees of the Internal Improvement Trust Fund shall maintain such aquatic preserves subject to the following provisions:

(1) No further sale, lease, or transfer of sovereignty submerged lands shall be approved or consummated by the trustees except when such sale, lease, or transfer is in the public interest....

. . .
(3)(a) No further dredging or filling of submerged lands shall be approved by the trustees except the following activities may be authorized pursuant to a permit:

. . .
2. Such minimum dredging and spoiling as may be authorized for the creation and maintenance of marinas, piers, and docks and their attendant navigation channels.

. . .
4. Such other maintenance dredging as may be required for existing navigation channels.

76. Section 258.43(1), Florida Statutes, provides as follows:

(1) The Board of Trustees of the Internal Improvement Trust Fund shall adopt and enforce reasonable rules and regulations to carry out the provisions of this act and specifically to provide regulation of human activity within the preserve in such a manner as not to unreasonably interfere with lawful and traditional public uses of the preserve, such as sport and commercial fishing, boating, and swimming. (Emphasis supplied).

77. The statutory framework under which this case must be analyzed provides for exceptions to a general prohibition against dredging and filling within aquatic preserves and further provides that certain traditional public uses of the preserves shall not be unreasonably restricted. If a project qualifies for at least one of the enumerated exceptions, and the project is found to be in the public interest, then the Trustees may approve the project. In the instant case, Petitioners assert that their application for an easement over sovereignty submerged lands qualifies as minimum dredging authorized for the creation of docks; and maintenance dredging for an existing navigation channel under Section 258.42(3)(a) 2. and 4., Florida Statutes. Further, Petitioners assert that the application is in the public interest and should be approved by the Trustees.

78. The Trustees, acting in their proprietary capacity as owners of sovereign submerged lands in the state are different than other state agencies acting in a regulatory capacity. Board of Trustee v. Barnett, 533 So.2d 1202, 1206 (3 DCA Fla. 1988). However, the Trustees are not exempt from the operation of Chapter 120, Florida Statutes. See, Barnett, 533 So.2d at 1205; Decarion v. Martinez, 537 So.2d 1083, 1084 (1 DCA Fla. 1989). The Trustees are an "agency" as that term is defined in Section 120.52(1)(b), Florida Statutes, and thus are compelled to adopt rules based on their organic statutes and to take final agency action that is consistent with those rules and statutes. See, Decarion, 537 So.2d at 1084. In addition, although it is true that the Trustees acting in their proprietary capacity, as owners of sovereign submerged lands, are given discretion to determine how submerged lands will be used, the discretion is not

unbridled-- the Trustees must adhere to the provisions of Chapter 258, Florida Statutes and Chapter 18-20, Florida Administrative Code. See, Decarion, 5327 So.2d at 1084.

79. An agency's interpretation of its statute is entitled to great deference and will not be overturned unless clearly erroneous or is not supported by competent, substantial evidence. *Drost v. Department of Environmental Regulations*, 559 So.2d 1154, 1155 (3 DCA Fla. 1990) and the cases cited therein. Unreasonable interpretations distort fundamental principles of statutory construction and mandate the use of reasonable interpretations. *Drost*, 559 So.2d at 1156 and the cases cited therein.

80. "Maintenance dredging" and "navigation channel" are not defined by Chapter 258, Florida Statutes, or by the Trustees' rules. However, the Trustees' staff takes the position that in order for dredging to qualify as "maintenance dredging" an "existing navigation channel" must be navigable throughout its entire length.

81. From a thorough reading of Part II, Chapter 258, Florida Statutes, commonly referred to as the Florida Aquatic Preserve Act of 1975, it is clear that the legislature intended to set aside the aquatic preserves for the benefit of future generations and to provide for the regulation of human activity within the preserves in such a manner as not to unreasonably interfere with the lawful and traditional recreational uses of the aquatic preserves, such as sport and commercial fishing, boating and swimming. It does not appear that it was the intent of the legislature to put such a narrow interpretation on the term "existing navigation channel" as would require an "existing navigational channel" to be navigable at all times throughout its entire length in order to qualify for "maintenance dredging". In fact, such a requirement yields the absurd result of allowing only preventative, before-the-fact dredging, as maintenance dredging.

82. Additionally, such narrow interpretation of the term "existing navigation channel" does not comport with the provision of Section 258.43(1), Florida Statutes, not to unreasonably interfere with the lawful and traditional recreational uses of the preserves in regulating the human activities within the preserves. A well-settled tenet of statutory construction requires that statutes on the same subject matter be read in harmony with each other without destroying their clear intent. See, *Mann v. Goodyear Tire & Rubber Co.*, 300 So.2d 666 (Fla. 1974).

83. The construction placed on Section 258.42(3)(a)2., Florida Statutes, by the Trustees' staff requiring that docks be located solely within an aquatic preserve to qualify for the exception in this subsection is without merit. Under this construction, a person with a dock located outside an aquatic preserve who already has water access from the dock to the preserve, but in need of minimum dredging within the aquatic preserve to utilize such access, would not qualify for this exception, and therefore, would be unreasonably prevented from enjoying the lawful and traditional recreational uses of the preserve. Such a construction does not appear to comport with the legislative intent expressed in the Florida Aquatic Preserve Act of 1975.

84. In addition to qualifying for one of the exceptions enumerated in Section 258.42(3)(a), Florida Statutes, the Petitioners must show that the project is in the public interest. Rule 18-20.003(25), Florida Administrative Code, defines "public interest" as follows:

"Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials.

85. Rule 18-210.004(2), Florida Administrative Code, establishes public interest assessment criteria, and provides that in evaluating requests for easements a balancing test will be utilized to determine whether the social, economic and environmental benefits clearly exceed the costs. In applying the balancing test to benefits provided by the proposed project the evidence clearly establishes that the proposed project is in the public interest.

86. Petitioners, as the parties asserting the affirmative of an issue before an administrative tribunal, have the burden to prove by a preponderance of the evidence that they qualify for an exception to the general prohibition against dredging in an aquatic preserve, and that the proposed project is in the public interest. Department of Transportation v. J, W. C. Company, Inc., 396 So.2d 778 (1 DCA Fla. 1981). The Petitioners have sustained their burden in this regard.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Trustees of the Internal Improvement Trust Fund enter a final order granting Petitioners to maintenance dredge a navigation channel over sovereign submerged lands as more fully described in Petitioners' Exhibit 8 (DER Permit/Certification No. 081510235).

DONE and RECOMMENDED this 8th day of October, 1992, at Tallahassee, Florida.

WILLIAM R. CAVE, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of October, 1992.

The following constitutes my specific rulings, pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties in this case.

Rulings on Proposed Findings of Fact
Submitted by the Petitioner

1. Proposed Findings of Fact 1 through 72 are adopted in substance as modified in Findings of Fact 1 through 72.

Rulings on Proposed Findings of Fact
Submitted by the Respondent

1. Proposed Findings of Fact 1, 2, 3, and 4 are adopted in substance as modified in Findings of Fact 10, 1, 19, and 20, respectively.

2. Proposed Findings of Fact 5, 6, 7, 10, and 12 are rejected as not being supported by competent substantial evidence in the record.

3. Proposed Findings of Fact 8 and 9 are adopted in substance as modified in Finding of Fact 36.

4. Proposed Findings of Fact 11, 13, 14, 15, 16, 17, and 19 are adopted in substance as modified in Findings of Fact 21, 25, 9, 9, 4, 4, and 11, respectively.

5. Proposed Finding of Fact 8 is not relevant, but see Finding of Fact 42.

6. Proposed Finding of Fact 20 is not relevant since the SWIM Plan has not been adopted.

COPIES FURNISHED:

Joseph W. Landers, Jr., Esquire
John T. LaVia, III, Esquire
Post Office Box 271
Tallahassee, Florida 32302

M. B. Adelson, IV, Esquire
Edwin Steinmeyer, Esquire
Department of Natural Resources
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Kenneth Plante
General Counsel
Board of Trustees of the
Internal Improvement Trust Fund
3900 Commonwealth Boulevard
Mail Station #10
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

All parties have the right to submit written exceptions to the Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should consult with the agency that will issue the final order in this case concerning their rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.