STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BONITA BAY PROPERTIES, INC., JIM HOHNSTEIN, and EDWARD FISCHL,	)	
Petitioners,	)	
vs.	)	CASE NO. 95-2552RP
DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondent,	)	
and	)	
SAVE THE MANATEE CLUB; FLORIDA WILDLIFE FEDERATION; HIBISCUS POINTE AT BAY BEACH, LTD.; and IRA RAKATANSKY,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on July 31-August 4, 1995, in Tallahassee, Florida.

APPEARANCES

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For Intervenors: Hibiscus Pointe at Bay Beach, Ltd., and Ira Rakatansky

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STATEMENT OF THE ISSUE

The issue presented is whether the Department of Environmental Protection's proposed Rule 62N-22.005, Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

Pursuant to Section 120.54(4), Florida Statutes, Petitioners filed their Petition for Administrative Determination of Invalidity of Proposed Rules challenging Rule 62N-22.005, Florida Administrative Code, in its entirety as an invalid exercise of delegated legislative authority, challenging specific portions of that proposed rule which would establish speed zones in specific geographic areas in Lee County, and challenging the sufficiency of the economic impact statement developed by the Department of Environmental Protection for its proposed rule. Thereafter, Lee County's Petition for Leave to Intervene in support of Petitioners' challenge to the proposed rule was granted, and Save the Manatee Club and the Florida Wildlife Federation's Petition to Intervene in support of the Department of Environmental Protection's rule, and the Petition to Intervene in Support of Proposed Rule 6N-22.005, F.A.C. filed by Hibiscus Pointe at Bay Beach, Ltd., and Ira Rakatansky were granted.

At the final hearing, Petitioners presented the testimony of Grace Marie Johns, Ph.D.; Michael F. Stephen, Ph.D.; Bruce B. Ackerman, Ph.D.; R. Kipp Frohlich; James K. Hohnstein; Ross McWilliams; Joanne Bean; Dennis E. Gilkey, and by way of deposition, Stephen J. Boutelle, Edward T. Fischl, Michele Correia, and Patrick M. Rose. Additionally, Petitioners' Exhibits numbered 1-20, 24-37, 39, 40, 42, 43, 45, and 46 were admitted in evidence.

Intervenor Lee County presented the testimony of Thomas A. Kucharski. Additionally, Intervenor Lee County's Exhibit numbered 1 was admitted in evidence.

The Department of Environmental Protection presented the testimony of Scott Calleson, R. Kipp Frohlich, and Patrick M. Rose. Additionally, the Department's Exhibits numbered 1-3 and 5-9 were admitted in evidence.

Intervenors Save the Manatee Club and Florida Wildlife Federation presented the testimony of Frederick W. Bell, Ph.D., and Patricia J. Thompson. Additionally, Save the Manatee Club and Florida Wildlife Federation's Exhibit numbered 1 was admitted in evidence.

Intervenors Hibiscus Pointe at Bay Beach, Ltd., and Ira Rakatansky offered no evidence.

On September 21, 1995, Intervenor Lee County filed its Notice of Withdrawal voluntarily withdrawing from this proceeding based upon its settlement agreement with the Department of Environmental Protection whereby the Department of Environmental Protection, subsequent to the final hearing, has agreed to a number of amendments to its proposed rule and has agreed to publish a Notice of Change announcing the revisions subsequent to the conclusion of this proceeding.

The remaining parties except for Intervenors Hibiscus Pointe at Bay Beach, Ltd., and Ira Rakatansky have submitted post-hearing proposed findings of fact. A specific ruling on each proposed finding of fact can be found in the Appendix to this Final Order.

STIPULATED FACTS AND LEGAL CONCLUSIONS

A. Bonita Bay Properties, Inc. (hereinafter "Bonita Bay"), is the developer of a residential community in Lee County, which includes a full service marina consisting of 126 wet slips and 350 dry slips on the Imperial River. The development is an approved Development of Regional Impact pursuant to Chapter 380, Florida Statutes.

B. Jim Hohnstein (hereinafter "Hohnstein") is a resident of Lee County and holder of a captain's license issued by the U.S. Coast Guard to operate and navigate passenger-carrying vessels of not more than 50 gross tons within 50 miles of shore in the Atlantic Ocean and the Gulf of Mexico. Hohnstein is the manager of Bonita Bay Marina.

C. Edward Fischl (hereinafter "Fischl") is a resident of Lee County and holder of a captain's license issued by the U.S. Coast Guard to operate and navigate passenger-carrying vessels of not more than 50 gross tons within 50 miles of shore in the Atlantic Ocean and the Gulf of Mexico. Fischl is the owner and operator of a boat chartering business in South Estero Bay.

D. The Department of Environmental Protection (hereinafter "Department") is the State agency responsible for adopting rules pursuant to Section 370.12, Florida Statutes. Such a proposed rule is the subject of this rule challenge.

E. Save the Manatee Club (hereinafter "SMC") is a non-profit Florida corporation with over 550 members who reside within Lee County and whose main purpose is to protect and preserve Florida's remaining endangered West Indian manatee population, for the benefit of the manatees and of SMC and its members. Numerous members of the organization observe, study, and photograph manatees for educational and recreational purposes in the waters of Lee County sought to be regulated by the proposed rule. SMC sponsors and organizes outings to view, photograph, and study manatees in the waters of the State including areas for which speed limits are established by the proposed rule.

F. Florida Wildlife Federation, Inc. (hereinafter "FWF"), is a non-profit Florida corporation with over 15,000 members within the State, many of whom reside in and use the waters of Lee County. The main purpose of FWF is to protect and assist in the management of Florida's wildlife and its habitat for the benefit of FWF, its members, and all members of the general public who desire to participate in outdoor recreation in Florida. The members of FWF observe, study, and photograph manatees for educational and recreational purposes in the waters of Lee County sought to be regulated by the proposed rule.

G. Hibiscus Pointe at Bay Beach, Ltd. (hereinafter "Hibiscus Pointe"), is a limited partnership organized under the laws of Florida. Estero Island Partners is the general partner.

H. Ira Rakatansky (hereinafter "Rakatansky") is the owner of a unit in the Hibiscus Pointe Development, with exclusive rights to boat slip #90.

I. On April 28, 1995, the Department published notice in the Florida Administrative Weekly of its intent to adopt regulations establishing speed zones in Lee County pursuant to Section 370.12, Florida Statutes.

J. On May 18, 1995, Bonita Bay, Hohnstein, and Fischl timely filed a challenge to the proposed regulations.

K. All Petitioners and Intervenors in this proceeding have standing to challenge or defend proposed Rule 62N-22.005, Florida Administrative Code.

L. Manatee protection zones may be established in State waters where manatees are frequently sighted and it can be assumed that manatees inhabit such waters periodically or continuously.

FINDINGS OF FACT

BACKGROUND

1. The Department derives its authority to regulate the speed of motorboat traffic for the protection of the manatee from Section 370.12(2), Florida Statutes, the "Florida Manatee Sanctuary Act" (hereinafter "the Act").

2. Two provisions within this Act describe the standard that must be met before the Department may impose speed zones. Section 370.12(2)(j), Florida Statutes, authorizes speed zones within specific identified geographic areas "...where manatee sightings are frequent and it can be generally assumed that they inhabit these areas on a regular or continuous basis." Section 370.12(2)(n) authorizes the Department to identify other areas where manatees are "...frequently sighted and it can be assumed that manatees inhabit such waters periodically or continuously" and then establish appropriate speed zones. Although the specific authority for the challenged rule is subparagraph (n), in practice, the Department does not differentiate between subparagraphs (j) and (n) when establishing speed zones. The Department utilizes the same standards or process regardless of which subparagraph is applicable.

3. For the waters of Estero Bay, the Department proposes that North Estero Bay be regulated at 25 miles per hour at all times. Conversely, it proposes that South Estero Bay be regulated at "slow speed" at all times except for certain portions of two marked channels that would be regulated at 25 miles per hour. Rule 62N-22.002(7), Florida Administrative Code, defines slow speed as "...the speed at which a vessel proceeds when it is fully off plane and completely settled into the water."

4. The Bonita Bay residential community and marina is located on the Imperial River in Lee County, and a boat leaving the marina must travel west down the Imperial River and north through South Estero Bay to reach the Gulf of Mexico. Captain Hohnstein conducted a timed run from the Bonita Bay Marina to the Gulf of Mexico and found that it took approximately 18 minutes under existing regulations and approximately 40 minutes under the proposed rule. Thus, under the proposed rule, it will take over twice as long for a boat to make this trip, negatively impacting the demand for slips in the marina and the value of Bonita Bay's boat slips. Recreational and commercial use of South Estero Bay will also be greatly restricted if the proposed rule is adopted.

ECONOMIC IMPACT STATEMENT

5. Section 120.54(2)(b), Florida Statutes, requires the Department, under certain circumstances, to prepare an Economic Impact Statement (hereinafter "EIS") prior to rule adoption. Section 120.54(2)(c) then sets forth eight requirements that must be included within the EIS for it to be valid. These include:

> 2. An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;
> 3. An estimate of the impact of the proposed action on competition and the open market for employment, if applicable;
> * * *
> 8. A detailed statement of the data and methodology used in making the estimates required by this paragraph.

6. The Department prepared an EIS in conjunction with the proposed rule challenged herein. The Department has stipulated that Petitioners requested that an EIS be prepared and that request was made on an ongoing and continuous basis since early 1994.

Cost to Affected Persons

7. The Department contracted with Florida Atlantic University (FAU) to have FAU prepare the EIS for proposed Rule 62N-22.005, Florida Administrative Code. Michelle Correia was primarily responsible for its development. Aided by two research assistants who do not have degrees in economics, she prepared the EIS on a budget of approximately $1,600. She submitted her final draft of the EIS in January, 1995, and other than limited telephone contact with the Department, performed no further work on the EIS. The January draft of the EIS does not contain any reference to how the proposed rule would impact the demand for marina facilities such as the Bonita Bay Marina, nor did the Department's April 1995 EIS draft made available when the Department published its proposed rule which is the subject of this proceeding.

8. Four days before the formal hearing in this cause, on July 25, 1995, the Department produced another draft of the EIS that makes only cursory reference to marina facilities. This draft merely states that impacts to marinas are not quantifiable and would not be further considered unless "specific quantitative information is submitted." This statement was included in the July 25th EIS at the direction of Scott Calleson, a Department employee who is not an economist.

9. The Department's July 25 draft of the EIS does not estimate the cost of the proposed rule on marina facilities, a water-dependent industry. Further, the Department did not attempt to ascertain the rule's impact on marinas. FAU's attempt to do so was limited to telephone calls to two of Lee County's 24 marinas. One owner estimated a 50 percent loss of business and one estimated losing 100 percent of his business. Neither FAU nor the Department contacted Bonita Bay to try to quantify the impact Bonita Bay had been communicating to the Department for over one year.

10. Bonita Bay has made a substantial investment in its marina. It has recently added more slips and is currently not operating at a profit, although

it projects a profit within 10 years of the marina's initial construction. Bonita Bay had projected cost and revenue figures for the marina up to the year 2002 that it had relied upon in making its investment. The ability of the marina to achieve these projections and realize a profit will be substantially diminished by the proposed rule which would increase the time required to reach the Gulf of Mexico, restrict fishing and sightseeing in the back bay areas, and place Bonita Bay at a competitive disadvantage with other marinas.

11. To obtain permits for the construction of the marina, Bonita Bay was required to restrict by deed approximately 50,000 linear feet of shoreline, from the mouth of the marina along the Imperial River and South Estero Bay, to prevent the construction of any future boat docks. The marina also has six different manatee signs in the basin as well as manatee awareness placards, informative brochures, and a waterway map. All of these costly requirements help protect the manatee and raise boater awareness of manatee safety issues.

12. Petitioner Hohnstein, the manager of the Bonita Bay Marina, will also be impacted by the proposed rule. The imposition of a slow speed zone in South Estero Bay would limit access to the marina and restrict both commercial and recreational use of these waters. Since his employment and remuneration are related to the financial health of Bonita Bay's marina, Hohnstein is a person likely to be affected by the proposed rule.

13. Petitioner Fischl has owned and operated a boat chartering business out of the Bonita Bay Marina for the last eight years, spending approximately a thousand hours a year on the waters of South Estero Bay. Many of the sightseeing tours and fishing trips he conducts will be impossible or impractical under the proposed rule due to the increase in time to reach desired destinations or the impossibility of reaching these areas if his boat is required to travel through South Estero Bay at slow speed. Captain Fischl estimates that the proposed rule would result in a 40 to 50 percent reduction to his personal income. The EIS does not address the impact on Fischl or similar businesses.

14. The EIS does not address the impact to waterfront property values in Lee County. For example, waterfront property values at Bonita Bay would be adversely impacted by the proposed rule as a result of the increased time required to reach open water and the additional restrictions imposed on South Estero Bay. Although the Department asked Michelle Correia what methodology should be used to estimate property value impacts, neither FAU nor the Department attempted to estimate the impact of the proposed rule on property values.

Competition and Employment

15. The EIS also fails to estimate the impact of the proposed rule on competition and the open market for employment between those marina facilities affected and those unaffected by the proposed speed zones. Different marinas will be impacted by their location to the proposed speed zones. The Department conducted no case study or any other analysis to determine how the proposed speed zones would put one marina at a competitive advantage or disadvantage over another. Bonita Bay will be at a competitive disadvantage not shared by other marinas not impacted by the speed zones because of their location elsewhere in Lee County.

16. A nearby marina in Collier County with travel time constraints similar to those imposed by the proposed rule was forced to charge 8 percent less for

slip rentals than Bonita Bay and has a lower occupancy rate. A similar impact can be anticipated for Bonita Bay's fee structure and occupancy figures if the proposed rule is adopted, causing a loss to Bonita Bay of $70,000 per year or $186 annual income loss per slip.

Data and Methodology

17. Another statutory requirement missing from the EIS is a detailed statement of the data and methodology used by the Department in reaching the estimates that are included within the EIS. The EIS provides little or no information on how the Department derived its figures or conclusions in many areas, including the impacts on marinas, boat charter businesses and waterfront property values.

18. Although the Department contends data was not available in those areas, Lee County maintains and updates detailed information on Lee County's economy, including detailed information on marina facilities and other marine industries. This information could have been utilized by the Department in developing and interpreting the data and methodology for estimating impacts to this segment of the economy. The Department did not contact the office which maintains this information.

19. Rather, the Department improperly relied upon the Fishkind Study conducted for a four-county area on the east coast of Florida to assume the impact of the rule in Lee County. The EIS uses an $8.60 contingent value derived from this study relating to speed zones in Volusia County, not in Lee County. However, the $8.60 figure is based upon a survey question requesting an expression of funding support, not boating enjoyment, as was represented in the EIS. It is not a measure of the impact on marinas, charter businesses, or waterfront property values. The EIS contains no analysis of the similarities between or the difference in economies and populations of those counties and Lee County, which makes the EIS' reliance on the Fishkind Study inappropriate.

Failure to Consider Specific Information

20. Correspondence submitted by Bonita Bay to the Department contains detailed information and concerns as to the economic impact of this proposed rule on marinas and other marine dependent industries in Lee County. Bonita Bay received no response to these letters and this information was not considered by the Department in preparing the EIS. The Department acknowledged receipt of these letters in the July 1995 version of the EIS, four days before the final hearing in this cause.

21. The EIS also fails to consider specific economic information that was submitted to the Department by the Petitioners demonstrating the substantial economic impact of the proposed rule on Bonita Bay's, Fischl's and Hohnstein's operations. This failure to consider the information submitted substantially impairs the fairness of this rulemaking proceeding.

INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY

No Ascertainable Standards

22. To establish speed zones, the Department must determine whether manatees are frequently sighted in a particular area so that it can be assumed that they inhabit the area on a periodic or continuous basis. Neither Section 370.12, Florida Statutes, nor the rules promulgated pursuant to that statute

contain definitions of the terms "frequent", "periodic", or "continuous." Likewise, there exists no Department memorandum, position paper, or other document which defines these operative terms that establish the standards for establishing speed zones.

23. While the Department's witnesses stated that the word "frequently" is given its common dictionary definition, the Department is unable to state with any quantitative certainty how many sightings in a particular place constitute "frequent" sightings. In the Department's view, a single manatee seen in the same place every month would be a frequent sighting. In the Department's scheme, there is no difference between one manatee sighted monthly and one hundred manatees. Thus, so long as any manatee is sighted, the Department may determine frequency, assume periodic or continuous habitation, and establish speed zones without limitation.

24. In determining whether manatees are frequently sighted, the Department considers aerial survey data, manatee mortality data, radio telemetry data, anecdotal sightings and reports, geographic or habitat-related bathymetry, boating access points, and public opinion and input. The Department may also consider other information, but such information was not identified nor was it explained how it was used in formulating the proposed rule. Further, some of the data considered does not indicate the presence of manatee, such as boat access points.

25. The Department has no method of determining how it relates each of these data sources into a finding that manatees are "frequently sighted." There is no formula, matrix, ranking of importance, or any other method by which an individual could determine how this information is utilized to determine "frequency" or otherwise establish a speed zone.

26. The Department, in setting speed zones, begins with the premise that idle or slow speed is necessary to protect manatees. A Department witness responsible for administering the rule considers any speed regulation faster than slow speed to be a concession by the Department to gain the cooperation of local government.

27. Within regulated areas, the top speed zone in Lee County is 25 miles per hour under the proposed rule. In other counties, however, speed zones range up to 30 and 35 miles per hour. The Department has no scientific basis or formula for establishing the top speeds allowed. The disparity in speeds among counties is the result of political compromise.

28. The Department's regulations for establishing speed zones, whether developed under the authority of Section 370.12(2)(j) or (2)(n), Florida Statutes, require that it not generally regulate areas so as to unduly interfere with the rights of boaters, fishermen, and waterskiers. To accomplish this, the Department is required to limit the geographic area of speed zones to only that area warranted for manatee protection. Further, the Department must consider the timing of the rule so that it is enforced only when necessary to protect manatees. Thus, if manatees were frequently sighted in a waterbody only during a particular season, then only seasonal speed zones can be established, so as not to unduly interfere with the rights of boaters, fishermen, and waterskiers.

29. The definition of "undue interference" is contained in Rule 62N-22.002, Florida Administrative Code. Before proposing a speed zone, the Department considers the use of the area by boaters, fishermen, and waterskiers to avoid "unduly interfering" with these persons. The Department conceded,

however, that it has no formula, policy, or any other identifiable procedure or standard to explain how it factors the recreational use of the waters by these persons into a determination that a rule should or should not be implemented in a particular geographic area. In the case of South Estero Bay, the proposed rule effectively prohibits boaters from using substantial portions of the water previously accessible only at higher planing speeds due to the shallow nature of those areas.

30. There exists no statutory definition of the term "continuous" to guide the Department in applying its standard for establishing speed zones. Using the common understanding as to what this word means, the Department witness who oversees all management aspects of manatees under the purview of the Department conceded that manatees do not inhabit Estero Bay on a continuous basis.

31. Likewise, there exists no statutory definition of the term "periodic" to guide the Department. A Department witness who was involved in all aspects of the rule's development relies on the dictionary definition of the term "periodic" and does not necessarily interpret the term "periodic" to be the same as "seasonal."

32. That witness further testified that if manatees hypothetically were present in the Orange River during the winter months, that could be described as a periodic appearance, and if they appeared only every other year, that would be periodic as well. In the Orange River, the Department has established periodic speed zones to coincide with the manatees' use of that area during the winter months.

33. In the Department's current view, manatees seen in an area every few years could justify the imposition of speed zones.

INTERNAL INCONSISTENCY OF THE RULE

Habitat Comparison

34. As applied to Estero Bay, the Department proposes different speed regulations for North and South Estero Bay based on habitat differences. Both bays are very shallow, with 90 percent of North Estero Bay and over 90 percent of South Estero Bay being less than one meter in depth at mean low water. The remaining 10 percent of North and of South Estero Bays have water depths greater than one meter. The deeper water is found, in both bays, close to tidal passes or maintained channels. In both bays manatees, when seen, are found in these deeper water areas.

35. There is no significant difference in freshwater sources or quantities between North and South Estero Bays nor are there any warm water sources in either of these bays. Similarly, there is no appreciable difference in either the amount or dispersion of seagrasses in either of the bays. The zip codes surrounding both bays have a similar number and type of registered vessels, and there is no appreciable difference in boat traffic. The bathymetry of each bay is essentially the same, and there exists no physical characteristic of either bay that would support different boat speed regulations for the protection of manatees. The Department treats Estero Bay as a functional unit in collecting data but divided the Bay into North and South for the purpose of establishing different speed zones in its proposed rule.

North and South Estero Bay, Use of Manatee Data

36. The aerial survey data relied upon by the Department consists of a 48-flight study conducted in 1984 and 1985. The data indicates little difference in manatee use between North and South Estero Bays and that manatees are not typically sighted in all parts of either the North or South Estero Bay system. This is substantiated by more recent data collected by the Department in October 1994 through May 1995 which indicates that only 2 percent of the total manatee sightings in Lee County are in North Estero Bay and only another 2 percent are in South Estero Bay. The Department relied on the 10-year-old data in promulgating its proposed rule and not the current data.

37. The aerial survey data also demonstrates that the manatees that are seen in Estero Bay are located in close proximity to channels of at least six feet in depth from which aquatic vegetation is available. In the bay waters outside these channels, which make up the vast majority of Estero Bay, manatees typically are not sighted. Moreover, there have been few manatee sightings in the middle or east portions of South Estero Bay.

38. This aerial survey data is consistent with the experience of Petitioners Hohnstein and Fischl. Although he is on the waters of South Estero Bay on a daily basis, Fischl seldom sees manatees and the few he does see are confined to specific areas with deeper water, not throughout the shallow waters which comprise most of Estero Bay. Hohnstein has seen very few manatees in South Estero Bay, causing his belief that additional boat speed regulation in this area is unnecessary and overly restrictive.

39. In the winter months of November, December, January and February the Department's data indicates that manatees are seldom sighted in Estero Bay. In fact, approximately 80 percent of all manatees sighted in Lee County are in the Caloosahatchee and Orange Rivers with the remaining 20 percent spread throughout the remainder of Lee County. As Estero Bay is but one bay system in Lee County, it is fair to conclude from this data that the combined percentage of manatee sightings for both North and South Estero Bay during the winter months is less than 1.5 percent of the manatees in Lee County. These figures are confirmed by studies conducted by the Department.

40. In Estero Bay, Department data collected for a study of the Lee County/Collier County border area indicates that during the 6-month period of November through April, the mean number of manatee sightings in Estero Bay never rose above .5 or one manatee per two surveys.

41. Because 80 percent of all manatees are sighted in the Caloosahatchee and Orange Rivers in the winter months, the Department has established seasonal speed zones in this area to coincide with the high population of manatees in the winter and their dispersal in the spring. Although it is undisputed that this seasonal pattern likewise exists in Estero Bay, the Department has not proposed seasonal speed regulation, choosing instead to regulate year-round. The Bonita Bay Marina is a seasonal business with its busiest activity taking place during the winter months, when very few manatees are seen in Estero Bay.

42. There are many more manatee sightings in Lee County during the winter months than there are in the summer. During the summer months much of the manatee population leaves Lee County and goes either north or south before returning again in the winter to warm water refuges.

43. During the winter manatees congregate and remain close to these warm water refuges. There are no warm water refugees in South Estero Bay. There is a warm water refuge northeast of North Estero Bay known as the Ten-Mile Canal where manatees have been sighted with frequency during the winter months. Manatees travelling to warm water refuges would take a fairly direct route and travel in one to two meters of water.

44. The mortality data in Lee County relied upon by the Department has been collected since approximately 1974. From January 1974 through December 1994, or 21 years, the data indicates there have been seven watercraft-related manatee mortalities in North Estero Bay and five watercraft-related manatee mortalities in South Estero Bay. On average, therefore, there has been less than one mortality attributed to watercraft in South Estero Bay every four years. There is no obvious trend demonstrating an increase in mortality in either North or South Estero Bay.

45. The Department does not consider a single watercraft related manatee mortality to be acceptable. While conceding that the elimination of all human-caused mortalities is unrealistic, the Department is unable to articulate and has no formula or standard to determine how many watercraft-related mortalities would be acceptable for a given area or for a specific speed zone.

46. The overall population of manatees in Lee County has increased since 1974. Moreover, the manatee mortality data for South Estero Bay over the last 20 years does not indicate an increasing trend generally or in boat-related deaths.

47. In the vast majority of cases the Department does not know where a watercraft-related manatee mortality actually occurred. Manatees can become ill or injured in one area and swim to another area before dying, and the carcass may drift for several days before being discovered. The Department's data, therefore, simply indicates where the carcass of the animal was recovered, not the location where a watercraft struck a manatee.

48. In developing the proposed rule the Department also relied upon data collected by tracking radio tagged manatees in Lee County. The manatees were tagged in the Caloosahatchee River and tracked by the Department for approximately eighteen months. The data indicated that manatees stayed in the Caloosahatchee River during the winter months until spring, when the majority of these animals disperse down the Caloosahatchee River. Most manatees then head north to the Charlotte Harbor area and beyond, up to Tampa Bay. Throughout this study period, no radio-tagged manatee was located in either North or South Estero Bay. The Department concedes that this study is representative of overall manatee behavior in Lee County.

49. The Department also relies on anecdotal data when establishing speed zones. The Department presented no evidence that it had received more informal reports of manatees in South Estero Bay than in North Estero Bay. In contrast, Petitioners Hohnstein and Fischl, who have spent thousands of hours on the waters of Estero Bay, have both seen as many or more manatees in North Estero Bay.

50. The Department chose to regulate North and South Estero Bay differently for two primary reasons: (1) because of the presence of marked channels in South Estero Bay which the Department did not believe existed in North Estero Bay, and (2) in order to provide for some recreational

opportunities in the Estero Bay system. Neither of these reasons is recognized under Section 370.12, Florida Statutes, which provides the only authority for the establishment of speed zones.

CONCLUSIONS OF LAW

51. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Sections 120.54(4) and 120.57(1), Florida Statutes.

52. Petitioners' Motion to Strike was filed on October 3, 1995. Page 22 of Respondent's Proposed Final Order argues that Petitioners lack standing to challenge the EIS because they failed to request that an EIS be prepared for the proposed rule. As correctly asserted in the Motion, the Department stipulated during the final hearing that Petitioners had an ongoing and continuous request that the Department prepare an EIS for the proposed rule. The Department's unilateral attempt to set aside post hearing a stipulation it entered into during the final hearing will not be countenanced. Further, the Department's assertion is contrary to the uncontroverted facts in this case. Petitioners' Motion to Strike is granted.

53. All Petitioners and Intervenors are substantially affected by the proposed rule and have standing, pursuant to the stipulation of the parties. Further, Petitioners have standing to challenge the proposed rule based upon the EIS.

54. In addition to challenging the entire proposed rule as an invalid exercise of delegated legislative authority, Petitioners contend that Subsections (2)(d) 12 and 13, (2)(g)(1), and (2)(g)3.a-e of proposed Rule 62N-22.005, Florida Administrative Code, are invalid even if the entire proposed rule is not. Subsection (2)(g)(1) establishes a 25 m.p.h. speed zone at all times in North Estero Bay. The Petition for Administrative Determination of Invalidity of Proposed Rule filed by Petitioners attacks those specific portions of the proposed rule relating to South Estero Bay. Although the parties presented evidence regarding North Estero Bay as it relates to Estero Bay as a whole and as part of Petitioners' challenge to the proposed rule to show its internal inconsistency, Petitioners did not specifically attack the speed zone for North Estero Bay in their Petition. Therefore, any specific challenge to Subsection (2)(g)(1) is not considered herein.

55. The Department's argument that Petitioners cannot specifically challenge Subsection (2)(d)13 is without merit. That subsection imposes a slow speed restriction at all times on the Imperial River. The Department argues that the subsection causes no change since boat traffic on the Imperial River is currently restricted to slow speed by county ordinance. A county ordinance is not the same as a State agency rule. Since Subsection (2)(d)13 would make the year-round slow speed restriction on the Imperial River a State law, and since Bonita Bay residential community is bordered on one side by the Imperial River and the Bonita Bay Marina is on the Imperial River, Petitioners have properly challenged that subsection.

56. Petitioners have the burden of establishing by a preponderance of the evidence that the challenged rule is invalid. Agrico Chemical Co., et al. v. Dept. of Environmental Regulation, 365 So.2d 759, 763 (Fla. 1st DCA 1979). They have met their burden of proving the invalidity of Rule 62N-22.005 in its entirety and of Subsections (2)(d)12 & 13 and (2)(g)3.a-e.

57. A petitioner may seek to invalidate a rule by challenging the EIS on the grounds that (A) the agency failed to adhere to the procedure for preparation of the EIS provided by Section 120.54(2), Florida Statutes, or (B) the agency failed to consider information submitted to it regarding specific concerns about the economic impact of the rule which failure substantially impaired the fairness of the agency's rulemaking. Section 120.54(2)(d), Florida Statutes. Petitioners have challenged the EIS prepared for the proposed rule on both grounds.

58. In the event an agency prepares an EIS for a proposed rule, the agency is obligated to provide specific information which includes:

> (2) An estimate of the cost or the economic benefit to all persons directly affected by the proposed action;
> (3) An estimate of the impact of the proposed action on competition and the open market for employment, if applicable;
> * * *
> (8) A detailed statement of the data and methodology used in making the estimates required by this paragraph.

Section 120.54(2)(c), Florida Statutes. An agency's failure to include any of the above requirements is grounds for invalidating a proposed rule. E. L. "Shorty" Allen; Wigwam, Inc., et al. v. Honorable Bob Martinez, et al., DOAH Case No. 88-5797R (March 20, 1989) (EIS found deficient for failing to estimate the cost to all persons directly affected by the rule and failing to include a detailed statement of the data and methodology used in its preparation); Stuart Yacht Club & Marina, Inc. v. Dept. of Natural Resources, 625 So.2d 1263 (Fla. 4th DCA 1993) (EIS found deficient for failing to consider the economic impact to a marina, failing to estimate the impact on competition and employment, and failing to include a detailed statement of the data and methodology used in reaching the estimates made).

59. The Department has failed to adhere to the procedures necessary to prepare an adequate EIS for proposed Rule 62N-22.005, Florida Administrative Code, as required by Section 120.54(2)(c), Florida Statutes, by failing to include the information required to be included by Subsections (2), (3), and (8). The Department's failure substantially impaired the fairness of its rulemaking proceeding.

Estimate of Costs to all Persons

60. The January 1995 draft of the EIS prepared by FAU did not estimate the cost of the proposed rule to Petitioner Bonita Bay's marina facilities or marina facilities in Lee County generally. The Department's July 1995 EIS likewise does not include a cost estimate to marina facilities, though such costs were and are reasonably ascertainable. Both the Petitioners' and Lee County's economic experts testified that the EIS was deficient in this area and SMC/FWF's expert stated that he would have included marinas as an impacted industry and analyzed the impact of the speed zones to that industry.

61. Consistent with the plain meaning of Section 120.54(2)(c)(2), Florida Statutes, the EIS must contain an estimate of the cost of a rule to all affected persons. Petitioners, as owners and operators of a marina and marina-related

businesses, were never considered until four days prior to hearing and then the Department only concluded that no cost of the rule impact could be estimated. However, no attempt to estimate that impact was made.

62. In this case, the preponderance of the evidence establishes that the EIS did not consider the cost of the rule to marina facilities. It is also undisputed that the EIS did not consider the impact of the rule on the value of waterfront property in Lee County, though Petitioners and Lee County presented evidence that the rule would significantly impact waterfront land values. As was found in Stuart Yacht Club & Marina, Inc., these deficiencies invalidate the EIS and substantially impact the fairness of the Department's rulemaking.

Competition and Employment

63. The undisputed evidence in this cause is that the imposition of speed zones would put certain marinas at a competitive advantage (or disadvantage) over others, depending upon their location. In Florida Ass'n of Academic Nonpublic Schools, et al. v. Dept. of Health and Rehabilitative Services, DOAH Case No. 86-2272R (October 3, 1986), the Hearing Officer struck down the agency's EIS for, among other things, failing to include an analysis of the impact on competition and the open market for employment. In this case, as in Florida Ass'n, the EIS does not address competition or employment and is therefore inadequate.

Data and Methodology

64. The Department has failed to include within the EIS a detailed statement of the data and methodology used in reaching its conclusions. An individual reading the EIS would in many instances have no indication how the Department's figures were derived.

65. In one area where the methodology is included within the EIS, it references data collected in a study of a four-county area on the east coast of Florida which is not applicable to show impacts in Lee County. First, the $8.60 contingent value derived from the study relates to speed zones not shown to have any similarity with speed zones in Lee County. Second, the survey question that this figure is estimated from requested an expression of funding support, not boating enjoyment, as was represented in the EIS. Third, a vast difference exists in economies and populations between those east coast counties and Lee County. Use of this study in the EIS for Lee County is, accordingly, misleading and deceptive.

66. In E. L. "Shorty" Allen, supra, the Hearing Officer found the proposed rule to be an invalid exercise of delegated legislative authority because, in part, the Department failed to prepare an adequate EIS since it did not include a detailed statement of the data and methodology used in making each of its estimates. Likewise, in this case there is often no hint of the data and method used, if any, in reaching many of the conclusions in the EIS. This omission, standing alone, requires its invalidation.

Failure to Consider Submitted Information

67. The Department failed to consider information submitted by the Petitioners and, accordingly, substantially impaired the fairness of its rulemaking. For over a year Petitioners corresponded with the Department requesting that an EIS be prepared and submitting detailed concerns regarding

the economic impact of the proposed rule. Petitioners have satisfied the requirements of Section 120.54(2)(d), Florida Statutes.

68. In Dept. of Health and Rehabilitative Services v. Wright, etc., 439 So.2d 937 (Fla. 1st DCA 1983), the Court held:

> [T]he absence or insufficiency of an economic impact statement is harmless error if it is established that the proposed action will have no economic impact...or if it is shown that the agency fully considered the asserted economic factors and impact. Id. at 941.

In that case, in striking down the EIS the court found impacts to adult congregate living facilities and their residents caused by a rule were ignored. Here, similarly, impacts to marinas and related facilities were ignored. Section 120.54(2), Florida Statutes, and relevant case law mandate substantial compliance with all relevant EIS requirements. An EIS is not sufficient if it fails to address all areas required by Section 120.54(2)(c), Florida Statutes. Florida League of Cities, Inc. v. Dept. of Environmental Regulation, 603 So.2d 1363, 1371 (Fla. 1st DCA 1992).

69. Further, such failure with respect to Petitioners has substantially impaired the fairness of the proceedings. While expert witnesses for all parties agree that impacts (and quite likely substantial impacts) to marinas, ancillary businesses and waterfront land values will be caused by these rules, the Department has ignored those impacts.

70. The Department's argument that Petitioners are required to perform the studies necessary to show the impact on marinas, marina-related businesses, and waterfront property values finds no support in the law and is not persuasive. Petitioners did what is required of them by Section 120.54(2)(d), Florida Statutes; they provided the Department with sufficient information to make the Department aware of their specific concerns. The Department, on the other hand, failed to do what is required of it by Section 120.54(2)(c) by failing to estimate the cost and impact on Petitioners and by failing to disclose how that estimate was formulated.

INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY

71. Section 120.52(8), Florida Statutes, provides as follows:

> "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(7);

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
(e) The rule is arbitrary or capricious.

72. Rule 62N-22.005 and Subsections (2)(d)12 and 13 and (2)(g)3.a-e, Florida Administrative Code, exceed delegated legislative authority and enlarge, modify, and contravene Section 370.12(2)(n), Florida Statutes. Section 370.12(2)(n) authorizes the Department to designate by rule State waters where manatees are frequently sighted, and it can be assumed such waters are periodically or continuously inhabited by manatees. Rules may be adopted to prevent harmful collisions with motorboats and protect manatees from harassment.

73. The preponderance of the evidence establishes that manatees do not frequent waters less than one meter in depth, and more than 90 percent of North and of South Estero Bay is less than one meter in depth at mean low water. Substantially all water within Estero Bay, other than improved channels, that is deeper than one meter at low water is located near the western edge of North and South Estero Bays near passes connecting to the Gulf of Mexico. Manatees are sighted in the deeper water along this western perimeter and in the Imperial River. With the exception of Ten Mile Canal northeast of North Estero Bay, manatees are not typically sighted in North or South Estero Bay during the winter months of November through April. Manatee mortality statistics for 1974 to 1995 reveal no trend of increased boat-related mortalities.

74. Yet, all of South Estero Bay except portions of two channels has been designated slow speed even though manatees are only sighted with any frequency at all in discreet deepwater areas along the western edge of the Bay. In addition, the only-periodic habitation by manatees in the summer months has not been considered, and there is no evidence to suggest boaters' rights have been considered as to South Estero Bay.

75. Further, the Department has used "recreational opportunity" and the presence of marked channels as shown on navigation charts to establish different speed zones between North and South Estero Bay. On the face of the statute, recreation and marked channels should be no basis for differentiation, all other factors being equal.

76. Rule 62N-22.005 and Subsections (2)(d)12 and 13 and (2)(g)3.a-e, Florida Administrative Code, are vague, fail to establish adequate standards for agency decisions, and vest unbridled discretion in the agency. Critical terms contained within Section 370.12(2)(n) such as "frequently sighted" and "periodically or continuously inhabited" are not defined within the statute or by the challenged rule. Rather, Department staff testified that the words have their ordinary dictionary definitions.

77. Nonetheless, testimony revealed the standard is, in essence, no standard. There is no quantitative number for Lee County, North or South Estero Bay, or, for that matter, the State of Florida that constitutes "frequent" sighting of manatees. Similarly, "periodic" can mean "seasonal" or a variety of other possibilities including once a month, on an annual basis, or once every few years. Continuous habitation of manatees is defined in a similarly vague way.

78. Department staff testified that they use a number of factors in establishing motorboat speed zones. The factors include such items as manatee mortality data, aerial survey data, satellite telemetry, manatee sightings, scar catalogs, and expert opinions. However, when asked to explain how these criteria were used in determining speed zones, Department answers varied from concluding that it was somewhat a political decision to testifying that it varies from place to place based upon their professional judgment and discretion.

79. Critical terms have meanings that vary from location to location according to Department interpretation or other factors. The ultimate conclusions regarding whether manatees are frequently sighted and periodically or continuously inhabit a particular area is, therefore, an exercise of unbridled discretion by Department staff.

80. The consequence of such a process is that there are no ascertainable quantitative criteria, standards or analytical process which can be applied to determine how and where manatee speed zones should be established. Such unbridled discretion and application of a vague, standardless process requires rule invalidation. Merritt v. Dept. of Business and Professional Regulation, Bd. of Chiropractic, 654 So.2d 1051 (Fla. 1st DCA 1995). In Merritt, the court found the proposed rule to be an invalid exercise of delegated legislative authority (and arbitrary and capricious) because it failed to apply the statutory standard set forth by the Legislature, thus providing no clear guidance for those impacted by the rule. The court stated:

> Rather than elaborate the statutory standard, the challenged rule replaces that standard with the personal judgment of the members of the peer review committee. Id. at 1053.
>
> * * *
>
> The rule thus serves more to obfuscate the statutory language than to elaborate statutory criteria or standards. Id. at 1054.

Likewise, in this case, the rule leaves the meaning of operative terms entirely within the judgment of Department staff rather than clarifying the standard for establishing speed zones.

81. The Department argues that its interpretation of the terms "frequent", "periodic", and "continuous" found in Section 370.12(2)(n), Florida Statutes, involves agency expertise and is, therefore, entitled to great deference. Yet, the Department's witnesses testified that they have interpreted and applied those words only in accordance with the common, dictionary definition of each. Accordingly, no agency expertise is involved, and the Department's argument is contrary to the evidence in this cause and not persuasive.

82. Rule 62N-22.005 and Subsections (2)(d)12 and 13 and (2)(g)3.a-e, Florida Administrative Code, are arbitrary and capricious. Further, the rule is not reasonably related to the purpose of the enabling legislation. As explained in Agrico Chemical Co., et al.,

> A capricious action is one which is taken without thought or reason and irrationally. An arbitrary decision is one not supported by

> facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Id. at 763.

Competent substantial evidence of arbitrary and capricious behavior can include identification of rule provisions which are internally inconsistent or simply irrational. A rule that is internally inconsistent is both irrational and illogical. St. Johns North Utility Corp. v. Florida Public Service Comm'n, 549 So.2d 1066, 1069 (Fla. 1st DCA 1989) (failure to provide a reasonable explanation for inconsistent results based on similar facts violates Chapter 120, Florida Statutes, and the equal protection guarantees of the Florida and federal constitutions).

83. The evidence in this cause demonstrates that there are no substantial differences in habitat between North and South Estero Bays. Yet, they are treated radically different as to speed zones. Bathymetry is similar. Seagrass distribution and density is comparable. There are no warm water refuges to attract winter populations of manatees.

84. Similarly, the evidence demonstrates there are no substantial differences in the frequency of manatee sightings between North and South Estero Bays. There also appears to be no difference in either numbers or seasonality (periodicity) of occurrence of manatee within North and South Estero Bays, and the Department's data does not even differentiate between the two. In sum, the Department's own data does not demonstrate any more interference with or endangerment to manatees in South Estero Bay than in North Estero Bay. Accordingly, the proposed rule is internally inconsistent in its disparate treatment of North Estero Bay and South Estero Bay.

85. The Department's use of 10-year-old aerial survey data in developing this proposed rule, without considering the 1994-95 data being collected by it or without waiting for the conclusion of its current study and then analyzing that data, is itself arbitrary and capricious. The Department's own rules regulating the establishment of speed zones require it to consider "all available information." Rule 62N-22.001, Florida Administrative Code.

86. Finally, the one reason provided for establishing 25 mile per hour speed zones within North Estero Bay as opposed to South Estero Bay was to provide recreational opportunities within North Estero Bay. No evidence was offered as to why recreational opportunities should not be provided in South Estero Bay.

87. The Department proved that its policy is to establish speed zones pursuant to Section 370.12(2)(n), Florida Statutes, in accordance with the standards found in Subsection (2)(j) which prohibits the Department from regulating boat speeds generally "...thereby unduly interfering with the rights of fishermen, boaters, and water skiers using the areas for recreational and commercial purposes." However, under its proposed rule, the Department has deviated from that policy by establishing a slow speed year-round requirement for all of South Estero Bay despite the fact that over 90 percent of the water is too shallow for manatee to use most of the time. Since the evidence reveals that the Department proposes to regulate in waters not used by manatee, and since the evidence reveals that manatee are sighted in the deeper areas only part of the year, the proposed rule regulates excessively, both as to area and as to time. Accordingly, Subsections (2)(d)12 and 13 and (2)(g)3.a-e of Rule

62N-22.005, Florida Administrative Code, unduly interfere with the rights of fishermen, boaters, and water skiers using South Estero Bay for recreational and commercial purposes.

88. The radically-different treatment of similar water bodies, the general and excessive regulation of South Estero Bay, and the failure of the proposed rule to provide any ascertainable standards require a determination that the rule is arbitrary and capricious.

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

ORDERED and CONCLUDED that the Department's proposed Rule 62N-22.005, Florida Administrative Code, and Subsections (2)(d)12 and 13 and (2)(g)3.a-e of that proposed rule are an invalid exercise of delegated legislative authority.

DONE and ORDERED this 12th day of December, 1995, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of December, 1995.

APPENDIX TO THE RECOMMENDED ORDER IN CASE NO. 95-2552RP

1. Petitioners' proposed findings of fact numbered 1-11, 13-42, and 44-50 have been adopted either verbatim or in substance in this Final Order.
2. Petitioners' proposed findings of fact numbered 12 and 43 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.
3. The Department's proposed finding of fact numbered 33 has been adopted either verbatim or in substance in this Final Order.
4. The Department's proposed findings of fact numbered 3, 5, 17-19, 24, 25, 37, 41, and 45 have been rejected as being irrelevant to the issues under consideration in this cause.
5. The Department's proposed findings of fact numbered 8-11, 15, 16, 21, 23, 28, 40, 44, 47, and 53 have been rejected as being subordinate to the issues herein.
6. The Department's proposed findings of fact numbered 39 and 46 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.
7. The Department's proposed findings of fact numbered 4 and 31 have been rejected as not being understandable.
8. The Department's proposed findings of fact numbered 1, 2, 6, 7, 12-14, 20, 22, 26, 27, 29, 30, 32, 34-36, 38, 42, 43, 48-52, 54, and 55 have been rejected as not being supported by the weight of the competent, credible evidence in this cause.

9. Save the Manatee Club and Florida Wildlife Federation's findings of fact numbered 9, 18-23, and 58 have been rejected as not being supported by the weight of the competent, credible evidence in this cause.

10. Save the Manatee Club and Florida Wildlife Federation's proposed findings of fact numbered 12-17 and 47-49 have been rejected as being subordinate to the issues herein.

11. Save the Manatee Club and Florida Wildlife Federation's proposed findings of fact numbered 10, 11, 24-46, 50-57, and 59 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, recitation of the testimony, or a stipulation of the parties.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68. Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.