

STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

FILED  
01 MAR 26 PM 2:25  
DIVISION OF  
ADMINISTRATIVE  
HEARINGS

MARINA SUITES ASSOCIATION, INC., )  
)  
Petitioners, )  
)  
vs. )  
)  
SARASOTA BAY HOTEL, INC., and )  
DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION, )  
)  
Respondents. )  
/

OGC CASE NO. 00-0688  
DOAH CASE NO. 00-2522 QHP

FINAL ORDER

An administrative law judge with the Division of Administrative Hearings ("DOAH") submitted his Recommended Order to the Department of Environmental Protection ("DEP") in this formal proceeding. The Recommended Order reflects that copies thereof were served upon counsel for Petitioners, Marina Suites Association, Inc. ("Petitioner"), and Co-Respondent, Sarasota Bay Hotel, Inc. ("SBH"). DEP and SBH will be sometimes referred to collectively herein as the "Respondents." A copy of the Recommended Order is attached hereto as "Exhibit A." The Applicant and DEP then filed their "Joint Exceptions to Correct Scrivener's Errors in the Recommended Order." The administrative law judge subsequently submitted to DEP certain "changes to the Recommended Order," which are attached hereto as "Composite Exhibit B." The matter is now before the Secretary of DEP for final agency action.

## BACKGROUND

SBH is the general partner of Hotel Associates of Sarasota, Limited ("Hotel Associates"), the owner of the real property involved in this administrative proceeding. SBH is also the authorized agent for Hotel Associates for the purpose of obtaining a permit from DEP to modify and expand the existing marina facility at the project site. Petitioners are associations of condominium owners whose properties are adjacent to and west of the project site.

The project site encompasses the Hyatt Hotel and appurtenant facilities located adjacent to and within a rectangular man-made basin (the "Basin") located west of U.S. Highway 41 in the City of Sarasota, Florida. There is a channel at the southern end of the Basin connecting it to Sarasota Bay. The Basin is classified as a Class III water body, and Sarasota Bay is classified as a Class III Outstanding Florida Water. The existing marina at the project site consists of perimeter docks adjoining the northern and eastern sides of the Basin, and includes eight finger piers. In addition, a perimeter dock extends around a restaurant built on pilings in the northeast end of the Basin.

In June of 1999, SBH filed an application with DEP's Southwest District Office seeking the issuance of an environmental resource permit for the marina expansion project (the "Permit"). The Permit application proposes to expand the approximately 6,700 square feet of existing dock space in the marina to approximately 7,000 square feet, thereby creating a marina with 32 designated boat slips. SBH agreed to various conditions to issuance of the Permit, including a limitation on the number of boats which may be moored at the facility at any time and the addition of storm water treatment capability to the existing storm water drainage system. SBH also agreed to reduce the

terminal end of the middle pier from 900 to 400 square feet. SBH further agreed to require that all long-term slip leases incorporate prohibitions against live-aboards and dockside boat maintenance.

Based on an analysis of SBH's application and supporting documentation, DEP's Southwest District Office entered a Notice of Intent to Issue the Permit on March 2, 2000. Shortly thereafter, the Petitioners filed a Petition for Administrative Hearing opposing the issuance of the Permit. DEP then referred the matter to DOAH and Administrative Law Judge, Arnold H. Pollock ("ALJ"), was assigned to preside over the case. A formal administrative hearing was held before the ALJ on November 21 and 22, 2000, in Sarasota, Florida. Testimony and exhibits were admitted into evidence at the formal hearing on behalf of the respective parties.

#### RECOMMENDED ORDER

On February 12, 2001, the ALJ entered the Recommended Order now on agency review. The Recommended Order contains various factual findings by the ALJ, including an unchallenged finding that the proposed marina expansion project would actually improve the water quality in the Basin. The ALJ also found that the anticipated impact of the project on fish and wildlife and on manatees and other threatened and endangered species would be minimal. The ALJ thus concluded that "SBH has provided the requisite reasonable assurances that the project is not contrary to the public interest." The ALJ ultimately recommended that DEP enter a final order issuing the Permit to modify and expand the subject existing marina facility.

## RULINGS ON JOINT EXCEPTIONS OF RESPONDENTS

The Joint Exceptions filed on behalf of the Respondents do not take exception to the ALJ's recommendation that the Permit should be issued in this case. These Joint Exceptions are described by Respondents as exceptions addressing "scrivener's errors in the Recommended Order." The purported scrivener's errors in the Recommended Order identified in the Respondent's Joint Exceptions are found in the second paragraph of the Preliminary Matters section, Finding of Fact No. 18, and Conclusion of law No. 31.

I agree that the designated portions of the Recommended Order, as submitted by the ALJ on February 12, 2001, do contain the "scrivener's errors" identified by the Respondents in their Joint Exceptions. Nevertheless, by letter dated March 2, 2001, the ALJ submitted to DEP a document referred to as "changes to the Recommended Order" previously submitted in this case. See Composite Exhibit B. These changes to the Recommended Order seem to correct the three scrivener's errors identified in the Joint Exceptions.<sup>1</sup> Accordingly, the Respondents' Joint Exceptions appear to have been rendered moot by these recent changes made by the ALJ to the Recommended Order and are denied.

### IT IS THEREFORE ORDERED:

A. The Recommended Order, as amended by the ALJ's subsequent "changes to the Recommended Order," is adopted and incorporated by reference herein.

---

<sup>1</sup> A copy of the Respondent's Joint Exceptions was filed with the agency clerk of DEP. However, the Joint Exceptions reflect that a copy thereof was also furnished to the DOAH agency clerk. Therefore, the ALJ apparently received a copy of the Joint Exceptions and made his own corrections of the three "scrivener's errors" identified by the Respondents.

B. The Department's Southwest District Office is hereby directed to ISSUE to SBH the Environmental Resource Permit in DEP File No. 58-01575793-001.

C. This Environmental Resource Permit is issued subject to the conditions set forth in the draft permit attached to the Notice of Intent to Issue dated March 2, 2000, which conditions are specifically incorporated by reference in this Final Order.

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this <sup>ed</sup>20 day of March, 2001, in Tallahassee, Florida.

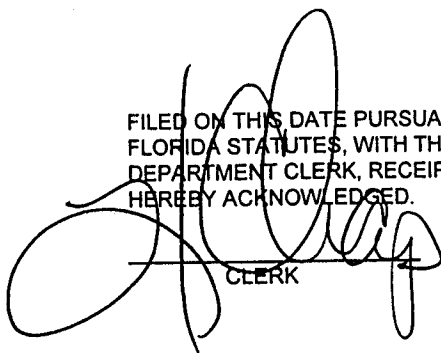
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION



DAVID B. STRUHS  
Secretary

Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,  
FLORIDA STATUTES, WITH THE DESIGNATED  
DEPARTMENT CLERK, RECEIPT OF WHICH IS  
HEREBY ACKNOWLEDGED.



CLERK

DATE 3/22/01

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Final Order has been sent by United States Postal Service to:

Barbara B. Levin, Esquire  
Scott A. Haas, Esquire  
Abel, Band, Russell, Collier,  
Pitchford & Gordon  
240 South Pineapple Avenue  
Sarasota, FL 34236

Mark A. Hanson, Esquire  
Law Offices of Lobeck & Hanson, P.A.  
2033 Main Street  
Suite 403  
Sarasota, FL 34237

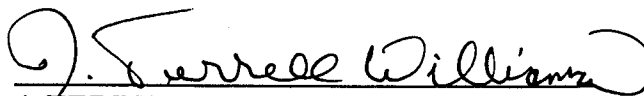
Ann Cole, Clerk and  
Arnold H. Pollock, Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550

and by hand delivery to:

Craig D. Varn, Esquire  
Department of Environmental Protection  
3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000

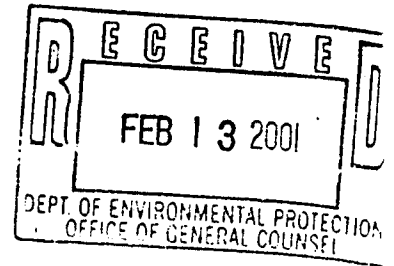
this 22nd day of March, 2001.

STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION

  
J. TERRELL WILLIAMS  
Assistant General Counsel

3900 Commonwealth Blvd., M.S. 35  
Tallahassee, FL 32399-3000  
Telephone 850/488-9314

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS



MARINA SUITES ASSOCIATION, INC., )  
)  
Petitioners, )  
vs. )  
)  
SARASOTA BAY HOTEL, INC. and )  
DEPARTMENT OF ENVIRONMENTAL )  
PROTECTION, )  
)  
Respondents. )  
\_\_\_\_\_ )

Case No. 00-2522

RECOMMENDED ORDER

A hearing was held in this case in Sarasota, Florida, on November 21 and 22, and December 15, 2000, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mark A. Hanson, Esquire  
Law offices of Lobeck and Hanson, P.A.  
2033 Main Street  
Suite 403  
Sarasota, Florida 34237

For Sarasota Bay Hotel:  
Barbara B. Levin, Esquire  
Ronald L. Collier, Esquire  
Scott A. Haas, Esquire  
Abel, Band, Russell, Collier,  
Pitchford and Gordon  
240 South Pineapple Avenue  
Sarasota, Florida 34236

For the Department:  
Craig D. Varn, Esquire  
Department of Environmental Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

## STATEMENT OF THE ISSUE

The issue for consideration in this case is whether the Department of Environmental Protection should issue a permit to Sarasota Bay Hotel, Inc., to modify and expand an existing marina facility associated with an existing adjacent hotel, based on reasonable assurances from the applicant that the proposed project satisfies the applicable statutory and rule criteria.

## PRELIMINARY MATTERS

On March 2, 2000, Bob Stetler, the Department of Environmental Protection's (DEP) Southwest District Environmental Administrator, published the Department's Intent to Issue relating to an environmental resource permit for the modification and expansion of an existing marina facility located adjacent to Sarasota Bay Hotel, Inc.'s (SBH) Hyatt Hotel in Sarasota, Florida. On May 25, 2000, after two extensions of time to file matters in opposition, the Petitioners (Marina Suites) property owners whose residential properties are located adjacent to the proposed project, filed a Petition for Administrative Hearing in which they opposed the proposed permit. This hearing ensued.

At the hearing, the Department presented the testimony of Rose H. Poyner, an environmental specialist for the Department's Southwest District office, and Randal Reed Cooper, a professional engineer II (storm water) at the Department's Tampa office. The Department also introduced Department's Exhibits 1 through 4. SBH presented the testimony of Stephen G. Mehas, general manager



of the Hyatt Hotel located adjacent to the marina in question; Kristina V. Tignor, an engineer and vice-president of the Tignor Group, an engineering and permitting consulting firm; Charles E. Githler, President of SBH, the general partner of Hotel Associates and owner of the property in question; and by depositions, Mary Duncan, an environmental specialist III with the Florida Fish and Wildlife Conservation Commission and an expert in permit review for impacts to manatees and their habitat, and Patricia Thompson, a staff biologist with Save the Manatee Club. SBH also introduced SBH Exhibits 1 through 16. Petitioner presented the testimony of Gary Stephen Comp, general manager of natural resources for Sarasota County; Joseph F. Hyland, Jack L. Neely, Philip M. Dasher, Granville H. Crabtree, Jr., and Hannelor Rimlinger, all residents of Marina Suites, Petitioners herein; and Steven C. Sauers, an environmental management consultant in private practice. Petitioner further presented the testimony of Randall Armstrong, partner in the Phoenix Environmental Group, consultants on the preparation and filing of dredge and fill permits. Petitioner also introduced Petitioner's Exhibits A through J, L through N, and P through X. Petitioner's Exhibits K and Y were offered but were rejected.

A Transcript of the proceedings was filed on December 11, 2000. Subsequent to receipt of the transcript counsel for Respondents joined in submitting a Joint Proposed Recommended

Order. Counsel for Petitioner also submitted proposed Findings of Fact, Conclusions of Law, and Recommended Order. The submittals of all the parties were carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Department of Environmental Protection (Department) was the state agency in Florida responsible for the review of environmental resource permit applications and for the regulation of water pollution in specified waters of the state. SBH is a Florida corporation and the general partner of Hotel Associates of Sarasota, Limited (Hotel Associates), the owner of the property in question. The complex at issue is composed of the Hyatt Hotel and certain submerged land underlying the proposed project. SBH is the authorized agency for Hotel Associates for the purpose of obtaining the permit in issue. Petitioners are associations of condominium owners whose properties lie adjacent and to the west of the site in question. The parties stipulated that all Petitioners had standing in this proceeding.

2. The site at issue, owned by Hotel Associates, consists of a portion of the submerged bottoms within a sea-walled, rectangular-shaped, man-made basin which runs in a north-south direction west of U.S. Highway 41 in Sarasota. It is connected by a narrowed channel to Sarasota Bay at its southern end. Hotel Associates owns approximately the northern one-third of the

basin, and Petitioners own approximately the western one-half of the southern two-thirds of the basin. Petitioners' property is not covered in the proposed permit. The remaining portion of the basin, comprised of the eastern one-half of the southern two-thirds, is owned by an entity which is not a party to this action, and that portion of the bottom also is not covered by the proposed permit. However, in order for boat traffic to reach the property in issue, the boats must traverse the southern two-thirds of the basin. Both Petitioners and the unconnected third owner maintain existing finger piers within their respective portions of the basin outside the portion in issue.

3. The basin in which the marina in question is located is classified as a Class III water body and is connected to Sarasota Bay, which is a Class III Outstanding Florida Water. Sarasota Bay is located approximately twelve hundred feet from the head of the basin and approximately eight hundred feet from the southern property line of the basin. As of the date of the hearing, the applicant, SBH, operated a permitted marina facility within the perimeter of the property in issue. This permit was issued years ago after the fact; that is, after the marina had already been constructed.

4. As it currently exists, the marina is made up of perimeter docks which adjoin the northern and eastern sides of the basin and includes eight finger piers which provide ten to fifteen slips. In addition, a perimeter dock extends around an

existing restaurant which sits on pilings over in the northeast end of the basin.

5. Repairs and modifications were made to the facility under then-existing exemptions in 1995. These included the replacement of numerous copper, chromium, and arsenic (CCA) treated pilings and the re-decking of existing walkways and finger piers with CCA-treated wood.

6. At the present time, seven of the finger-pier slips are under lease to a commercial charter fleet, Chitwood Charters, and one slip located along the perimeter dock is leased to a dive boat operation, Scuba Quest. At least one other finger-pier slip has a boat docked at it for an extended period. This boat is owned by Charles Githler, president of SBH. The remaining finger-pier and perimeter slips are ordinarily used on a transient basis by guests of the Hyatt Hotel and the restaurant.

7. The existing facility, including the finger piers slips and the perimeter slips, contains approximately 6,700 square feet of docking space and is designed to accommodate between twenty to thirty boats, depending upon the length of the boats. On occasion, however, as many as 40 to 60 boats have been docked at the facility. At times, when demand increases, the larger slips have been subdivided to allow up to four boats to be stern-moored per slip. Even more boats have been docked at the facility for boat shows by the use of stern mooring or "rafting," which calls

for boats to be moored tied together, side by side, out from the docks.

8. By application dated May 18, 1999, and received by the Department's Tampa District office on June 16, 1999, SBH sought to obtain from the Department a permit to modify and expand its existing marina facility. It proposed to expand the existing approximately 6,700 square feet of dock space to approximately 7,000 square feet, thereby creating a marina with 32 designated slips. Conditions to issuance of the permit, agreed to by the applicant, include a limitation on the number of boats which may be moored at the facility at any time and the addition of storm water treatment capability to the existing storm water drainage system. SBH also agreed to reduce the terminal end of the middle pier from 900 to 400 square feet.

9. SBH also agreed to accept the imposition of several other permit conditions required by the Department, and to offset any impacts on wildlife and water quality as a result of the operation of the permitted facility. In addition to requiring that all long-term slip leases incorporate prohibitions against live-aboards and dockside boat maintenance, these conditions include the following:

15. Overboard discharges of trash, human or animal waste, or fuel shall not occur at the docks.

16. Sewage pump-out service shall be available at the marina facility.

\* \* \*

18. Fish cleaning stations, boat repair facilities and refueling facilities are not allowed.

20. There shall be no fueling or fueling facilities at the facility.

\* \* \*

28. The shoreline enhancement indicated on Attachment A shall be implemented within 30 days.

\* \* \*

30. The permittee shall perform water quality monitoring within the basin at the locations indicated on Attachment A semiannually (January and July of each year) for a period of 5 years.

\* \* \*

33. All piles shall be constructed of concrete with exception of 18 mooring piles identified in permit submittals.

34. This permit authorizes the mooring (temporarily or permanently) of a maximum of [32] watercraft at the subject facility. A harbormaster must be designated and maintained at the subject facility.

35. In order to be in compliance with this permit, the "OARS Ultra-Urban" hydrocarbon adsorbent insert, or Department approved equal, must be installed within the catch basin inlets as shown on the approved drawings.

36. At a minimum, the hydrocarbon adsorbent material shall be replaced and maintained in accordance with manufacturer's instructions. More frequent inspections and replacement of the filtration media may be required, depending on local conditions and results of the required water quality monitoring.

\* \* \*

39. The permittee/grantee/lessee shall ensure that:

1. In order to provide protection to manatees during the operation of this facility, permanent manatee information and/or awareness sign(s) will be installed and maintained to increase boater awareness of the presence of manatees, and of the need to minimize the threat of boats to these animals.

10. SBH has also agreed to replace existing CCA-treated wood decking with concrete and fiberglass decking and to replace approximately 80 existing CCA-treated wood pilings with concrete pilings.

11. Based on its analysis of the permit application and the supporting documentation submitted therewith, the Department, on March 2, 2000, entered a Notice of Intent to issue the permit for this project. Shortly thereafter, on March 25, 2000, after obtaining a minimal extension of time to file, the Petitioners filed a Petition for Administrative Hearing opposing the issuance of the proposed permit.

12. Departmental decisions on water quality permits such as that in issue here are dependent upon the applicant satisfying the Department's requirements in several identified areas. These include the impact of the project on water quality; impact of the project on the public health, safety, and welfare; impact of the project on the conservation of fish and wildlife, including threatened or endangered species; impact of the project on navigation, the flow of water, erosion and shoaling; impact of

the project on the immediate fishing, recreational values and marine productivity; impact of the project on archeological resources; impact of the project on the current condition and relative value of functions currently performed by areas to be affected; whether the project is permanent or temporary; and a balancing of the criteria, cumulative impacts, and secondary impacts.

13. Addressing each of these in turn, it is clear that the current quality of the water within the existing marina is below established standards. Respondents admit that Petitioner has shown that the existing marina operation has diminished water quality conditions and created an environment that has potential adverse impacts to the fish and wildlife which frequent the basin as well as some of the neighboring property owners. This is not to say that these impacts were envisioned when the basin was constructed. However, other than as they relate to fish and wildlife and to water quality, the problems created by the marina do not relate to most permit criteria.

14. The Respondent's experts calculate that due to its configuration and location, the basin naturally flushes approximately every 14.75 days. This is an inadequate time period to fully disperse any pollutants found in the basin. As a result of the inadequate flushing and the continuing use of the basin as a marina, there are resulting impacts to the water quality surrounding the existing facilities.



15. Mr. Armstrong, Petitioner's water quality expert, indicated the project as proposed would lengthen even further the flushing time because of the addition of new boats and, to a lesser degree, the additional pilings and dock structure. These additions would, he contends, result in additional obstructions to water movement and cause a resultant increase in flushing time. While flushing is not a requirement of the permit, it has a bearing on water quality which is a consideration.

16. Petitioners also argue that the mitigation measures proposed in the permit are inadequate and attack the qualifications of Mr. Cooper, the Department's storm water engineer. They point out alleged errors in Cooper's analysis and cite Mr. Armstrong, an individual with significant experience in water quality monitoring and analysis, to support their other witnesses' conclusions that more boats will increase the risk of hydrocarbon pollution from gasoline and diesel engines. Petitioners urge that the increased contamination, when coupled with the slow flushing action, would tend to settle down to where the pollutants enter the water - in the basin.

17. Since it is clear these impacts would exist and continue even were the pending project not constructed, the issue, then, is whether the proposed project will worsen these environmental impacts. Respondents' authorities calculate they would not. In fact, it would appear the proposed changes called for in the permit, the removal of CCA-treated wood and its

replacement with concrete piling and decking and the installation of storm water treatment apparatus, would reduce the adverse impacts to water quality within the basin and, in fact, improve it. It is so found.

18. An issue is raised in the evidence as to the actual number of boats which can effectively use the marina at any one time. SBH contends the present configuration calls for between twenty to thirty boats. Evidence also shows that at times, during boat shows for example, many more boats are accommodated therein through "rafting." Even if the facility is expanded by the most significant number of slips, there is no concrete evidence there would be a significantly increased usage. The current usage is normally well below capacity. Modifications proposed under the pending permit could add as many as ten to fifteen additional slips. The Department has considered it significant that SBH has agreed to limit the number of boats that can be docked in this marina, even after modification. Unfortunately, no specific figure has been given for this limit, and, therefore, it cannot be shown exactly how much long-term water quality benefit can be expected. Nonetheless, it is a reasonable conclusion to draw, as the Department has done, that if the number of boats is limited to a figure at or even slightly higher than that which is currently experienced, a long-term benefit can be expected with the implementation of the other

mitigation conditions. This benefit currently cannot be quantified, however.

19. What can be established, and all parties agree, is that the basin currently does not meet water quality standards for copper and dissolved oxygen. The proposed permit addresses the issue of dissolved oxygen by requiring SBH to follow best management practices in the operation of the marina; to treat storm water discharge which enters the marina; and to provide a sewage pump-out station at the marina which would prevent the discharge of sewage into the water. The issue of the water's copper level is addressed by the removal of the CCA-treated pilings and decking and their replacement with concrete and fiberglass; the treatment of the storm-water discharge before its discharge into the basin; and the hiring of a harbor master to ensure that the prohibition against hull scraping at the basin is complied with. A restriction on the number of boats allowed into the marina at any one time would also treat the copper problem by reducing the exposure to anti-fouling paint containing copper. This is a condition of the permit.

20. It is important to note that under existing statutory and rule exemptions, SBH could repair or replace the existing dock structure without the need for a permit. However, the issuance of a permit which permits modification and a slight expansion of the facility will prohibit the replacement of the existing CCA-treated wood with CCA-treated wood. The concrete

and fiberglass pilings and decking will not leach copper into the water and, in time, should result in a lower concentration of that substance in the water.

21. Another consideration of the permitting authorities relates to the impact the project would have on public health, safety, and welfare. Petitioners expressed concern that an increase in the number of slips called for in the proposed project would cause an increase in the number of boats that utilize the basin. Currently, though there are a limited number of slips available, there is no limitation on the number of boats which may use the facility. A reasonable estimate of capacity, considering the configuration of the docks and slips and the permit limitations established, indicates that no more than thirty-two boats will be permitted to use the basin at any one time. If this limitation is followed, it is reasonable to expect an improvement in the water quality.

22. Petitioners also express concern that an increase in the number of authorized boats using the marina will result in an increase in the number of boats traveling at excessive speeds in entering and exiting. No evidence was introduced in support of this theory, but, in any case, Respondents counter-hypothesize that the increase in allowed boats will result in an increase in long term lessors over transients, and suggest that long term users are more considerate than transients. Neither side presented any substantial evidence in support of its positions.

23. The impact on the conservation of fish and wildlife is a mandated consideration by the agency. No evidence was presented by either side regarding the existence of fish and wildlife in the area, much less threatened species, other than manatees. To be sure, these noble creatures inhabit the marina at times in appreciable numbers. The threat to them, however, comes from boat strikes, and no evidence was presented as to the number of strikes caused by boats in the marina or its approaches or the seriousness of these strikes. The agency to which the review of impacts to manatees was left, the Florida Fish and Wildlife Conservation Commission (FWCC) opined that the permit cap of 32 boats would keep to a minimum the potential impact to manatees from this project. Any increase in the number of boats, and the minimal impact increase thereby, should, it was considered, be offset by compliance with permit conditions. This opinion was contradicted by Mr. Thompson, Petitioner's manatee expert, who argued against any increase of boat traffic in manatee areas. This position is not the policy of the Department and is not controlling here. Further, it would appear this expert did not consider any mitigation factors proposed by SBH, as the Department is required to do. Taken together, the weight of the evidence supports a finding that the expected impact of this project on fish and wildlife, including those threatened and endangered species, is minimal.

24. Based on the evidence of record, it is found that the expected impact of this project on navigation, the flow of water, erosion, and shoaling in the vicinity is virtually non-existent. The only factor bearing on this issue is the number of boats which will use the facility and its approach. Permit conditions call for a limitation on the number of water craft which will use the facility to be permitted to a number lower than that which uses it, at times, under current conditions. The water is a dead-end harbor, with no through traffic. There is no evidence of either erosion or shoaling now. It would not likely increase. A reduction in traffic as would occur under the conditions imposed by the permit can do nothing but reduce the potential for propeller dredging by boat traffic and the water turbidity that would accompany such strikes. This would improve navigation slightly, and there should be no adverse impact to the flow of water.

25. The evidence presented at hearing did not establish any negative impact on fishing or marine productivity in the vicinity of the proposed project, which is permanent in nature. By the same token, no adverse effect to significant historical or archaeological resources was shown by the evidence of record.

26. The facility in issue is currently a commercial activity consisting of a docking facility and a restaurant. No evidence was introduced to show that the project proposed would have an adverse impact on the current condition and relative

value of the current function. In fact, the evidence indicates that the facility would be improved. Though not raised by the evidence, it should be noted that Petitioners presented no evidence that their property values as adjacent property owners, would be adversely effected by this project.

27. In balancing the criteria, cumulative impacts and secondary impacts of the proposed project on the immediate and surrounding area, it appears that the applicant has provided reasonable assurances that the project is not contrary to the public interest. The marina supports the hotel and restaurant which is on it. Adjoining property owners, the Petitioners, expressed concern that the modifications to the existing marina will result in a decrease in water quality in the basin; will increase the potential for fuel spills with their related short term discomforts and long term damages; and will increase the danger to the manatee population which periodically uses the basin. While they are entitled to the quiet enjoyment of their property, it is unreasonable for those who live on the water to expect that the benefits of living by the water would not carry with it the potential for some periodic discomfort created by waterfront activity.

29. The weight of the evidence presented in this case indicates no significant cumulative adverse impacts from this project. To the contrary, the state of the evidence suggests an improvement in water quality and navigation in the basin and its

approaches, and any secondary impacts resulting from the accomplishment of the project would be minimal.

#### CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case. Section 120.57(1), Florida Statutes.

31. The Petitioner has challenged the Department's proposed intent to issue a permit to SBH to modify and expand the existing marina adjacent to its hotel facility on the edge of Sarasota Bay. The existing marina was constructed without permit, but the proposed modifications must be permitted pursuant to Sections 373.413, 373.414, and 373.416, Florida Statutes, and Chapter 40D-4.301, Florida Administrative Code. As applicant, SBH carries the burden of proving by a preponderance of the evidence its entitlement to the permit sought by providing reasonable assurances that the project will not cause pollution that would violate applicable statutes or rules. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

32. The evidence of record indicates that the current water quality at the site of the proposed project is in violation of standards required for both copper and dissolved oxygen. Therefore, under the provisions of Section 373.414, Florida Statutes, the Department cannot issue a permit of the kind sought here unless the applicant provides reasonable assurances, through



creditable plans, tests, and other relevant evidence, that the project will result in a net improvement in water quality.

33. Rule 40D-4.301(1), Florida Administrative Code, provides the standards to be used in reviewing applications for permits such as here, and requires a showing that the project, as pertinent here:

(a) will not cause adverse water quality impacts to receiving waters and adjacent land;

\* \* \*

(d) will not adversely impact the value of functions provided to fish and wildlife, and listed species including aquatic and wetland dependant species, . . . ;

(e) will not adversely affect the quality of receiving waters, such that the water quality standards . . . will be violated;

(f) will not cause adverse secondary impacts to the water resources;

\* \* \*

(j) will be conducted by an entity with financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and condition of the permit, if issued.

34. Petitioners argue that SBH has not given, by a preponderance of the evidence, the required reasonable assurances that the proposed project would result in any net improvement in the copper and dissolved oxygen levels in the water of the basin or that the proposed project will not otherwise cause pollution or adversely affect water quality in the subject area. The

evidence or record, however, demonstrates that the interventions proposed by SBH will result in a net improvement both as to copper and dissolved oxygen levels in the water. The restriction on the number of boats which will be permitted to dock in the basin, as well as the implementation of the other proposed items, such as the use of a harbor-master and the treatment of storm water discharged into the basin, will tend to reduce pollution of the basin waters, and taken together, would support the conclusion that the water quality within the basin, while still not up to standards, will improve as a result of the actions required by the permit.

35. Much the same can be said regarding the cumulative impacts of the project on water quality. It is unlikely the waters of the basin will ever become pristine again. Development and commercialization of the surrounding area will preclude that from happening. However, a strict adherence to the conditions imposed on the granting of this permit will result in far less adverse cumulative impact that would be the case if the pilings and docks were not to be replaced with materials that do not contribute to an increase in copper and other pollutants.

36. Under the circumstances as described herein, it appears clear that SBH has provided the requisite reasonable assurances that the project is not contrary to the public interest.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department of Environmental Protection enter a Final Order issuing to Sarasota Bay Hotel the requested permit to modify and expand the existing marina facility located adjacent to the existing Hyatt Hotel at 1000 Boulevard of the Arts in Sarasota, Florida.

DONE AND ENTERED this 12<sup>th</sup> day of February, 2001, in Tallahassee, Leon County, Florida.



ARNOLD H. POLLOCK  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6947  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 12<sup>th</sup> day of February, 2001.

COPIES FURNISHED:

Barbara B. Levin, Esquire  
Scott A. Haas, Esquire  
Abel, Band. Russell, Collier,  
Pitchford & Gordon  
240 South Pineapple Avenue  
Sarasota, Florida 34236

Graig D. Varn, Esquire  
Department of Environmental  
Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

Mark A. Hanson, Esquire  
Law Offices of Lobeck & Hanson, P.A.  
2033 Main Street  
Suite 403  
Sarasota, Florida 34237

Kathy C. Carter, Agency Clerk  
Office of the General Counsel  
Department of Environmental  
Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

Teri L. Donaldson, General Counsel  
Department of Environmental  
Protection  
3900 Commonwealth Boulevard  
Mail Station 35  
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.