STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

MICHAEL L. GUTTMANN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**OGC CASE NO. 00-1123**
	)	**DOAH CASE NO. 00-2524**
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND ADR OF PENSACOLA,	)	DRA-closed
	)	
Respondents.	)	

ORDER OF REMAND

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 administrative proceeding. A copy of the Recommended Order is attached hereto as Exhibit A. The Recommended Order indicates that copies were served upon counsel for Petitioner, Michael L. Guttmann ("Petitioner"), and Co-Respondent, ADR of Pensacola ("ADR"). Exceptions to the Recommended Order were filed on behalf of Petitioner, ADR, and DEP. A Response to Petitioners' Exceptions was subsequently filed on behalf of DEP. The matter is now before the Secretary of DEP for agency action.

BACKGROUND

On May 15, 2000, DEP issued a Consolidated Notice of Intent to Issue Wetland Resource Permit and Authorization to use Sovereign Submerged Lands Authorization in File No. 17-275679-001-DF. This preliminary agency action of DEP authorized ADR to construct a 30-slip boat docking facility on the northern shore of Big Lagoon in

Escambia County, Florida. Big Lagoon, located a few miles southwest of the City of Pensacola, is approximately six miles in length and is separated from the Gulf of Mexico by the barrier island, Perdido Key. The Petitioner, who resides in a nearby coastal home on Big Lagoon, filed a Petition for Administrative Hearing challenging this proposed agency action. DEP subsequently referred the matter to DOAH for formal proceedings and Administrative Law Judge, Donald R. Alexander ("ALJ"), was assigned to the case. The ALJ held a formal administrative hearing in this case on November 30, and December 13, 2000. Testimony and documentary evidence was presented at the formal hearing on behalf of each of the parties.

Recommended Order

On February 28, 2001, the ALJ entered the Recommended Order now on agency review. The ALJ concluded in his Recommended Order that the "evidence supports a conclusion that the proposed activity [dock facility] will adversely affect fish and their habitat" and "will adversely affect marine productivity because the fish nursery habitat will decline through a further thinning out of the seagrass colony in Big Lagoon." The ALJ also concluded that the negative impacts of the proposed dock facility outweigh the positive benefits and that "the project is contrary to the public interest and should not be permitted."[1] The ALJ thus recommended that DEP enter a final order denying ADR's application for a wetland resource permit and related authorization to use sovereign submerged lands.

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[1] Both the Petitioner and the ALJ erroneously cite to § 373.414(1)(a), F.S. (2000), as the statutory basis for the "public interest criteria " applicable to ADR's dock project proposed to be constructed in Escambia County. As more fully explained in the subsequent ruling granting DEP's Exception II, the correct statutory citation for the public interest criteria applicable to this proposed project within the jurisdiction of the Northwest Florida Water Management District is § 403.918(2)(a), F.S. (1991).

RULINGS ON ADR'S EXCEPTIONS

Exception Nos. 1and 2

These two related Exceptions of ADR essentially object to the fact that, in arriving at his critical factual findings in the Recommended Order related to the statutory "public interest criteria" set forth in § 403.918(2)(a), Florida Statutes (1991), the ALJ admittedly placed great weight on the opinion testimony presented at the formal hearing by the Petitioner's expert witness, Dr. Kenneth L. Heck, Jr. ADR suggests that the ALJ erred by finding that Dr. Heck's testimony concerning the adverse effects of the proposed dock facility on the existing seagrass colony and other marine life at the project site was "most persuasive." The Petitioner thus contends that the ALJ's primary reliance on Dr. Heck's expert testimony to support Finding of Fact Nos. 24 through 31 in the Recommended Order does not constitute "competent substantial evidence" under § 120.57(1)(l), Florida Statutes. I reject this contention of ADR for the following reasons:

1. It is uncontroverted that Big Lagoon presently contains a large colony of seagrass along its shoreline which is considered by DEP to be a most important resource. The potential effect of ADR's dock facility on the existing seagrass colony and related marine resources at the Big Lagoon project site was a key issue at the formal hearing. Dr. Heck, who as a doctorate degree in ecology and a master's degree in biology, was accepted by the ALJ as an expert in marine biology and ecology, specifically including the seagrasses and animals of Big Lagoon (Tr. Vol. I, p. 207). The record reflects that ADR's counsel had no objection to Dr. Heck's qualifications to render expert testimony in these areas.

2. Dr. Heck rendered his expert opinion at the formal hearing that the increased boat traffic attributable to ADR's proposed dock facility designed to eventually accommodate 30 boats would have a negative impact on this existing seagrass colony in Big Lagoon (Tr. Vol. I, pp. 205-237). Dr. Heck testified that the seagrasses in Big Lagoon stabilize the sediment and provide "nursery areas" for many fish and shellfish that are heavily dependent on the seagrass habitat during their earliest stages (Tr. Vol. I, p. 209). Dr. Heck further testified that there are "ten to a hundred times " as many fish and shellfish in areas where there is seagrass as compared to adjacent areas where there is no seagrass (Tr. Vol. I, p. 209). I conclude that this expert testimony of Dr. Heck constitutes competent substantial evidence supporting the ALJ's findings on the dock project's effect on the seven "public interest criteria," which include conservation of fish and wildlife or their habitat, fishing and recreational values, and marine productivity. These public interest criteria are set forth in full on pages 10 and 11 of this order.

3. ADR argues that the opposing testimony of DEP's expert witness, Diana Athnos, is more credible than Dr. Heck's testimony on the issue of whether the dock facility will be contrary to the "public interest criteria." However, a reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985).

4. Furthermore, the decision of an administrative law judge to accept one expert's testimony over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of competent substantial evidence of record from which the finding could be reasonably inferred. See Collier Medical Center v. State, Dept. of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); Florida Chapter of Sierra Club v. Orlando Utilities Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). I have previously ruled that the expert testimony of Dr. Heck constitutes competent substantial evidence supporting the ALJ's findings relating to the public interest criteria.

5. The conflicting expert testimony of Diana Athnos in this case does not invalidate the ALJ's findings and conclusions based primarily on the expert testimony of Dr. Heck. The Florida case law holds that, if there is competent substantial evidence to support the findings of fact of an administrative law judge (formerly "hearing officer"), it is irrelevant that there may also be competent substantial evidence to support contrary findings. Arand Construction Co. v. Dyer, 592 So.2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So.2d 622, 623 (Fla. 1st DCA 1986).

6. A related argument made by ADR in these Exceptions is that Dr. Heck's testimony on the public interest criteria issue is not competent substantial evidence because Dr. Heck lacked "site-specific" knowledge of the immediate dock project area. ADR thus concludes that Dr. Heck's recognized expertise on seagrass and animal life in Big Lagoon in general is not sufficient to render his testimony competent or substantial as to the status of the seagrass and animal life at the project site. This argument is also rejected. The Florida courts have held that the sufficiency of the facts

required to form the opinion of an expert normally reside with the expert, and purported deficiencies in such facts usually relate to the weight of the evidence, a matter also generally within the province of the ALJ as the trier of the facts. Gershanik v. Dept. of Professional Regulation, 458 So. 2d 302, 305 (Fla. 3rd DCA 1984), rev. den. 462 So.2d 1106 (Fla. 1985).

Based on the above rulings, ADR's Exception Nos. 1 and 2 are denied.

Exception No. 3

ADR's third Exception references paragraph 37 of the Recommended Order, wherein the ALJ correctly concluded that ADR has the burden of proving its entitlement to the subject dock construction permit and related authorization. ADR acknowledges its agreement with this legal conclusion of the ALJ, but maintains that it has met its evidentiary burden in this case. This contention is rejected for the reasons set forth in detail in my preceding ruling. I also reject the suggestion that the ALJ did not conclude in his Recommended Order that ADR has failed to meet its burden of proving its entitlement to the permit and authorization. In paragraph 49 of the Recommended Order, the ALJ concluded that "the project is contrary to the public interest and should not be permitted." The only reasonable interpretation of this conclusion is that the ALJ determined that ADR failed to meet its ultimate burden of proving its entitlement to the permit and authorization for the dock project. Accordingly, Exception No. 3 is denied.

Exception Nos. 4 and 5

ADR's fourth and fifth Exceptions object to the ALJ's conclusions of law in paragraphs 40 and 48 of the Recommended Order. The arguments presented by ADR in these two Exceptions are essentially the same as those presented in its Exception

Nos. 1 and 2. ADR again attempts to discredit the expert testimony of Dr. Kenneth Heck. ADR thus contends that these challenged legal conclusions are erroneous because they were derived by applying the governing statutory law to improper facts found by the ALJ in reliance on Dr. Heck's testimony. Exception Nos. 4 and 5 are denied for the same reasons set forth in my prior ruling denying ADR's first and second Exceptions.

Exception No. 6

ADR's final Exception objects to Conclusion of Law No. 47, wherein the ALJ concluded that the proposed dock facility would have a "neutral" effect on the public interest criterion relating to whether the project will adversely affect or enhance significant historical and archaeological resources. I concur with this conclusion of the ALJ. A "positive score" for this criterion would only be warranted if there was competent substantial evidence of record supporting a finding of fact by the ALJ that the proposed dock project would actually "enhance" a significant historical or archaeological resource. The Recommended Order does not contain such a factual finding and my review of the record did not identify any such evidence. Exception No. 6 is denied.

RULINGS ON PETITIONER'S EXCEPTIONS

The ALJ recommended that a final order be entered in this case denying ADR's permit application and authorization to use sovereignty lands, as requested by the Petitioner. The Petitioner, however, still filed 19 separately numbered Exceptions to the Recommended Order. My rulings on these Exceptions of the Petitioner are as follows:

Exception Nos. 1-7

These seven related Exceptions object to the ALJ's Finding of Fact Nos. 15-17, wherein he essentially concludes that ADR's dock project will not degrade the water quality of any nearby Outstanding Florida Water("OFW").[2] These "findings of fact" actually appear to be mixed statements of law and fact where the ALJ applies his pure factual findings to the governing standards relating to OFWs. I conclude that the ALJ's pure factual findings in paragraphs 15-17 of the Recommended Order are reasonable inferences drawn from the expert testimony at the formal hearing of Diana Athnos and Terrence Bosso.

It is undisputed that the site of ADR's dock project along the northern shore of Big Lagoon is classified as a Class III surface water body, not an OFW.[3] The ALJ properly found from the evidence presented at the hearing that ADR provided reasonable assurance that the proposed dock project would not violate any Class III water quality standards. The southern portion of Big Lagoon has been designated an OFW, but the ALJ found that the site of the dock project is approximately 650 to 700 feet away from the nearest OFW boundary.

I also concur with the reasoning approved by the ALJ that the absence of any projected Class III water quality violations at the project site warrants the conclusion by DEP permitting staff that there would be no potential degradation of water quality in any nearby OFW. The issue of whether a proposed project will degrade an OFW involves

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[2] An "OFW" is a surface water body that has been designated by the Environmental Regulation Commission as being entitled to special protection because of its natural attributes. Rule 62-302.200(17), F.A.C.

[3] Class III surface waters are designated to be used for "recreation, propagation and maintenance of a healthy, well-balanced population of fish and wildlife." Rule 62-302.400(1), F.A.C.

the application of the water quality standards set forth in Chapter 62-302, Florida Administrative Code. Petitioner's witness, Dr. Kenneth Heck, was accepted by the ALJ as an expert on marine biology and ecology, not on water quality issues.

In any event, it was within the sound discretion of the ALJ, as the finder of the facts, to give more weight to the expert testimony of Diana Athnos and Terrence Bosso than that of Dr. Heck on the issue of potential degradation of water quality in an OFW. I do not have the authority to overrule the ALJ on this evidentiary matter involving the respective weight to be given to the opinion testimony of various expert witnesses on the OFW water quality issue.

Exception No. 8

This Exception objects to the ALJ's Finding of Fact No. 35. The Petitioner's bare assertion without any citations to the record that DEP improperly calculated the maximum number of boat slips permissible at the site in question is summarily rejected. The ALJ's challenged factual finding appears to be amply supported by the expert testimony of Diana Athnos.

Exception No. 9

In this Exception, Petitioner contends that the ALJ erred by not addressing the issue of lease fees. I find that this contention is without merit. It is settled case law that the issuance or denial of permits by DEP must be based solely on compliance with applicable pollution control standards and rules. Taylor v. Cedar Key Special Water and Sewage District, 590 So.2d 481, 482 (Fla. 1st DCA 1991); Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So.2d 67, 68 (Fla. 3d DCA 1983). Thus, the ALJ correctly ruled in paragraph 34 of the Recommended Order that the Petitioner's

contention of an alleged decline in the values of nearby properties if the dock project is permitted is an economic issue beyond the subject matter jurisdiction of this administrative proceeding. See Ginnie Springs, Inc. v. Craig Watson, 21 FALR 4072, 4075 (Fla. DEP 1999).

Exception No. 10

Petitioner contends in this Exception that the ALJ erred by not allowing into evidence at the formal hearing a proffered grand jury report. Matters involving the admissibility, relevancy, and weight to be given to evidence proffered or presented at a DOAH formal hearing are evidentiary matters within the province of the ALJ, as the finder of the facts. I decline to substitute my judgment for that of the ALJ on this evidentiary matter.

Exception Nos. 11 through 19

These related Exceptions all deal with the ALJ's Conclusions of Law Nos. 40 through 49, wherein he construes the public interest criteria set forth in § 403.918(2)(a), Florida Statutes (1991), in light of the material facts presented in this case. The cited 1991 statutory provisions read, in pertinent part, as follows:

> (2) A permit may not be issued...unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. .
>
> (a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:
> 1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;
> 2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
> 3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;
5. Whether the project will be of a temporary or permanent nature;
6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

I agree with the Petitioner's basic contention that the ALJ erred in his scoring and summation of the negative, positive, and neutral impacts of the dock project in numbered paragraph 49 of the Recommended Order. However, I disagree with both the ALJ and the Petitioner as to the manner in which the cited public interest criteria should be balanced in this case.

As noted in my prior ruling denying ADR's Exception No. 6, a positive score should only be given to a public interest criterion if there is a finding that the proposed project will actually improve or enhance the subject matter set forth in that criterion. A finding that a project will "not adversely affect" the subject matter of a particular criterion constitutes a finding of no negative impact, rather than a finding of actual improvement or enhancement. Thus, a finding by the ALJ that ADR's dock project will "not adversely affect" the subject matter of a public interest criterion should result in a "neutral," rather than a "positive" score being assigned.

In view of the above, the Petitioner's Exception Nos. 11 through 19 are granted in part and denied in part by the following modifications to the Recommended Order:

(a) The last line of Conclusion of Law No. 42 is modified by substituting the word "neutral" in lieu of the existing word "positive."

(b) The first line of Conclusion of Law 49 is revised to read: "In summary, there are three neutral, and" . . .[4]

Notwithstanding my ruling that ADR's dock project will not produce any positive benefits with respect to the public interest criteria, I agree with the ALJ's conclusion that the project will have an adverse impact on four of the public interest criteria. Based on the record before me, I also concur with the ALJ's ultimate determination that the dock project, "is contrary to the public interest." Thus, the ALJ's conclusions assigning three positive and only one neutral score to the public interest criteria are deemed to be harmless errors.

RULINGS ON DEP'S EXCEPTIONS TO RECOMMENDED ORDER

Exception I

DEP's first Exception adopts the Exceptions to Recommended Order filed on behalf of ADR. This Exception of DEP is denied for the reasons set forth in detail in the prior rulings denying ADR's Exceptions to Recommended Order.

Exception II

In its second Exception, DEP's points out a technical error in the ALJ's references in numbered paragraphs 6, 7, 38, and 40 of the Recommended Order to § 373.414(1)(a), Florida Statutes (2000), as the statutory source of the public interest criteria applicable to ADR's proposed dock project in Big Lagoon. There is no dispute over the fact that the site of ADR's dock project is located in Escambia County, within

[4] Sections 403.918, F.S. (1991), and 373.414, F.S. (2000), are statutes within the scope of the regulatory duties and powers of DEP and their interpretation is thus a matter within the substantive jurisdiction of this agency. The designated legal conclusions of the ALJ are modified for the reasons set forth in detail in the above rulings. Pursuant to § 120.57(1)(l), F.S., I find that my substituted legal conclusions are as reasonable or more reasonable than the conclusions of the ALJ that were modified.

the jurisdiction of the Northwest Florida Water Management District ("NWFWMD"). Therefore, as correctly noted in this Exception of DEP, § 403.918(2)(a), Florida Statutes (1991), continues to be the governing statutory basis for the public interest criteria applicable to ADR's proposed dock project. See § 373.4145(1)(b), Florida Statutes (2000), and Rule 62-312.060(5)(b), Florida Administrative Code.

Accordingly, DEP's Exception II is granted, and the ALJ's findings of fact and conclusions of law are modified by substituting "§ 403.918(2)(a), Florida Statutes (1991)," in lieu of the existing citations to "§ 373.414(1)(a), F.S. (2000)." I would note, however, that the public interest criteria set forth in § 403.918(2)(a), F.S. (1991), are virtually identical in substance to the criteria set forth in § 373.414(1)(a), F.S. (2000). I thus conclude that the ALJ's mistaken statutory citations in the Recommended Order to § 373.414(1)(a), Florida Statutes (2000), constitute harmless errors.

Exception III

DEP's third Exception contains two alternative contentions. The first contention is that the ALJ erred as a matter of law in re-weighing the seven public interest criteria based primarily on the expert testimony of Dr. Kenneth Heck. The second contention is that the ALJ erred by recommending that a final order be entered denying the permit and authorization without affording ADR an opportunity to propose mitigation measures for consideration by DEP.

DEP's first contention is rejected for the reasons set forth in detail in my prior rulings denying ADR's Exceptions to the Recommended Order. In addition, I would note that the balancing of the statutory "public interest criteria" is a policy matter that must be ultimately determined by this agency, not the ALJ. In this case, however, I

conclude that there are no purely positive impacts of ADR's dock project on the animal or plant life of Big Lagoon or on the other public interest criteria that would arguably outweigh the adverse impacts of the project.

DEP's alternative contention that, prior to the entry of any final order denying the permit for the dock project, ADR should have been afforded an opportunity to propose additional measures that may be deemed by DEP to be sufficient to mitigate the adverse impacts to the public interest criteria appears to have merit. A primary legal authority cited in DEP's Exceptions as support for its alternative contention is Rule 62-312.060(10), Florida Administrative Code, which reads as follows:

> (10) During the processing of the permit application, the Department shall determine whether or not the application, as submitted, meets the criteria contained in Sections 403.918(1) and (2)(a) 1.-7. and 403.919, F.S. If the project, as designed, fails to meet the permitting criteria, the Department shall discuss with the applicant any modifications to the project that may bring the project into compliance with the permitting criteria. The applicant shall respond to the Department, in writing, as to whether or not the identified modification to the proposed project is practicable and whether the applicant will make the identified modification. The term "modification" shall not be construed as including the alternative of not implementing the project in some form. When the Department determines that the project, as submitted or modified, fails to meet the criteria contained in Sections 403.918(1) and (2)(a)1.-7. and 403.919, F.S., the applicant may propose mitigation measures to the Department as provided in Chapter 62-312, Part III, F.A.C. Nothing herein shall imply that the Department may not deny an application for a permit, as submitted or modified, if it fails to meet the criteria in Section 403.918(2)(a), F.S., or that mitigation must be accepted by the Department. (emphasis supplied)

The above-quoted provisions of Rule 62-312.060(10) provide that, in order for an permit applicant to qualify for consideration of mitigation, DEP must first make a determination that the project, as submitted or modified, fails to meet applicable water

quality standards or the statutory public interest criteria. Accord VQH Development, Inc. v. Dept. of Environmental Regulation, 15 FALR 3407, 3433 (Fla. DER 1993). In this case, DEP permitting staff made a preliminary determination that ADR's dock project, as modified, complied with applicable water quality standards and the public interest criteria. In addition, ADR went into the formal hearing with DEP staff actively supporting issuance of its permit application, as modified. Thus, the mitigation portion of Rule 62-312.060(10) did not become applicable in this case until the entry of this Order of Remand, wherein I concur with the ALJ's findings and conclusions that ADR's dock project failed to comply with the statutory public interest criteria.

I am aware that DEP has the exclusive final authority to determine the sufficiency of mitigation measures proposed by or acceptable to a permit applicant, and that the "findings" of an administrative law judge pertaining to the sufficiency of mitigation are essentially nonbinding conclusions of law. See, e.g., Save Anna Maria, Inc. v. Dept. of Transportation, 700 So.2d 113, 116 (Fla. 2d DCA 1997); 1800 Atlantic Developers, 552 So.2d 946, 955 (Fla. 1st DCA 1989). Nevertheless, it is still the function of the ALJ to make initial findings of fact regarding any disputed factual issues (excluding the issue of sufficiency) underlying mitigation measures proposed by ADR. Id. at 955.

The legal issue of whether a permit applicant should be afforded a further opportunity to propose mitigation measures involves a construction of the above-quoted Rule 62-312.060(10). DEP is the agency that adopted this rule and has the responsibility of its implementation and enforcement. Thus, the interpretation of Rule 62-312.060(10) is a matter over which this agency has "substantive jurisdiction" under

§ 120.57(1)(l). Based on the application of Rule 62-312.060(10) to the unique facts and procedural posture of this case, I conclude that the appropriate action to be taken at this time is to remand this matter back to DOAH for further proceedings on the limited issue of mitigation.

In view of the above, DEP's Exception III is granted to the limited extent that this case is remanded to DOAH for the sole purpose of affording ADR an opportunity to propose mitigation measures to DEP to offset the adverse impacts to the public interest criteria identified in this order. In all other aspects, this Exception is denied.

CONCLUSION

This case arrived on agency review in a rather unusual posture. The ALJ recommended that ADR's proposed dock project be denied in a *de novo* proceeding where DEP staff had made a preliminary determination that the project complied with applicable water quality standards and with the public interest criteria. DEP even presented expert testimony at the formal hearing in favor of issuance of the permit and authorization for the dock project.

Nevertheless, a DOAH formal proceeding is not merely an administrative review of prior preliminary agency action, but is a *de novo* proceeding intended to formulate final agency action. See, e.g., Hamilton County Commissioners v. State Dept. of Environmental Regulation, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); and McDonald v. Dept. of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Thus, the parties were properly allowed to present evidence and contentions at the DOAH formal hearing that were not presented to or considered by the Department staff during the permit review process. Relying heavily on expert testimony presented on behalf of the

Petitioner at the formal hearing, the ALJ concluded that ADR's dock project failed to comply with the public interest criteria. I have concurred with this critical conclusion of the ALJ in this Order of Remand.

In this agency review stage of the formal administrative proceeding, I function in a quasi-judicial role, rather than as a fact-finder and/or investigator. See Ridgewood Properties, Inc. v. Dept. of Community Affairs, 562 So.2d. 322 (Fla. 1990). I thus conclude that it would not be appropriate to enter a final order denying the requested permit and authorization without first affording ADR an administrative forum for proposing mitigation measures for consideration by DEP.[5] I further conclude that it would be inappropriate for me to *sua sponte* devise a mitigation plan to offset the adverse impacts of ADR's dock project where there are no factual findings by the ALJ or competent substantial evidence of record upon which a sufficient mitigation plan could be reasonably based.

IT IS THERFORE ORDERED:

A. A ruling on the ALJ's ultimate recommendation that a final order be entered denying ADR's requested consolidated wetlands resource permit and sovereign submerged lands authorization is reserved until after a subsequent DOAH order is submitted in response to this Order of Remand.

B. I also reserve rulings on the ALJ's suggested additional permit conditions described in paragraphs 13 and 29 of the Recommended Order on the ground of prematurity.

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[5] As expressly provided in Rule 62-312.060(10), F.A.C., DEP is not bound to accept any mitigation measures proposed by ADR that are determined by DEP to be insufficient to mitigate the adverse impacts of the dock project.

C. As modified and limited hereinabove, the findings of fact and conclusions of law in the Recommended Order are adopted herein.

D. This cause is hereby remanded to DOAH for the sole purpose of providing ADR an opportunity to propose mitigation measures acceptable to DEP to offset the adverse impacts of the dock project on the public interest criteria set forth in numbered paragraphs 2, 4, 5, and 7 of § 403.918(2)(a), Florida Statutes (1991).

E. DOAH is requested to hold such further proceedings under §§ 120.569 and 120.57(1), Florida Statutes, as are deemed appropriate in light of the rulings herein.

F. Exceptions and Responses to Exceptions addressing a subsequent DOAH order entered in response to this Order of Remand shall be filed and served within the same time periods prescribed by § 120.57(1)(k), Florida Statutes (2000), and Rule 28-106.217, Florida Administrative Code.

DONE AND ORDERED this 13 day of April, 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

4/13/01
DATE

CERTIFICATE OF SERVICE

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

Michael L. Guttmann, Esquire
314 South Baylen Street, Suite 201
Pensacola, FL 32501-5949

David A. Sapp, Esquire
1017 North 12th Avenue
Pensacola, FL 32501-3306

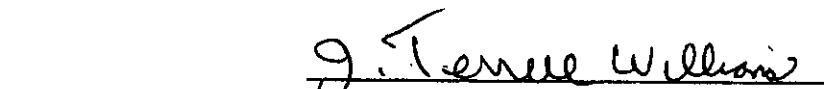
Ann Cole, Clerk and
Donald R. Alexander, Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550

and by hand delivery to:

Charles T. Collette, Esquire
Department of Environmental Protection
3900 Commonwealth Blvd., M.S. 35
Tallahassee, FL 32399-3000

this 13th day of April, 2001.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



TERRELL WILLIAMS
Assistant General Counsel

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