STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL L. GUTTMANN, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION and ADR OF PENSACOLA, Respondents.	)	Case No. 00-2524

RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the Division of Administrative Hearings on November 30, 2000, in Pensacola, Florida, and on December 13, 2000, by video teleconference by its assigned Administrative Law Judge, Donald R. Alexander.

APPEARANCES

For Petitioner: Michael L. Guttmann, Esquire
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For Respondent: (agency) Charles T. Collette, Esquire
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For Respondent: (applicant) David A. Sapp, Esquire
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STATEMENT OF THE ISSUE

The issue is whether ADR of Pensacola should be issued a wetland resource permit and sovereign submerged lands authorization allowing the construction of a 30-slip docking facility on Big Lagoon, Escambia County, Florida.

PRELIMINARY STATEMENT

This matter began on May 15, 2000, when Respondent, Department of Environmental Protection, issued its Consolidated Notice of Intent to Issue Wetland Resource Permit and Sovereign Submerged Lands Authorization to Respondent, ADR of Pensacola. The permit and authorization allows the construction of a 30-slip docking facility on Big Lagoon in Escambia County, Florida.

On May 26, 2000, Petitioner, Michael L. Guttmann, who resides in a coastal home on Big Lagoon, filed his Petition for Administrative Hearing challenging the proposed activity. The matter was referred by the agency to the Division of Administrative Hearings on June 16, 2000, with a request that an Administrative Law Judge be assigned to conduct a hearing.

By Notice of Hearing dated July 20, 2000, a final hearing was scheduled on September 14, 2000, in Pensacola, Florida. By agreement of the parties, the matter was continued to November 30, 2000, at the same location. A continued hearing

by video teleconference was held on December 13, 2000, with the parties participating in Pensacola and Tallahassee, Florida.

At the final hearing, Petitioner testified on his own behalf and presented the testimony of Dr. Kenneth L. Heck, Jr., a marine biologist and ecologist and accepted as an expert in seagrass and animals in Big Lagoon; Dan R. Baird, a retired tug boat captain; Cindy Hobgood, who lives adjacent to the proposed project; James Veal, an architect; Harry Gaspard, a real estate broker; and Diana L. Athnos, an environmental supervisor II. Also, he offered Petitioner's Exhibits 1-13; all were received except Exhibit 11. Respondent, Department of Environmental Protection, presented the testimony of Diana L. Athnos, an environmental supervisor II and accepted as an expert in state sovereign submerged lands and wetland resource permitting of docks; and Larry O'Donnell, enviromental manager for permitting at the Pensacola District Office and accepted as an expert in wetland resource permitting. Respondent, ADR of Pensacola, presented the testimony of Ricky L. Faciane, an officer and director of Harbor Pointe of Pensacola, Inc., and Terrence C. Bosso, an environmental consultant and accepted as an expert in assessing the water quality, surface water management programs, inspection, compliance, enforcement, and biological and physical impacts of dock and seawall projects. Also, Respondents jointly

offered Respondents' Exhibits 1-15, which were received in evidence. Finally, at the agency's request, the undersigned took official recognition of Sections 253.77 and 373.414, Florida Statutes (2000), and Rules 18-21.004, 18-21.00401, 62-312.065, and 62-312.080, Florida Administrative Code.

At the beginning of the hearing, seventy-three identically-worded Motions to Intervene in support of Petitioner filed by nearby residents or property owners were denied on the grounds that they were filed one day before the hearing in contravention of Rule 28-106.205, Florida Administrative Code; the motions failed to state good cause for waiving the time requirements of the rule; and the motions failed to substantially comport with the Uniform Rules of Procedure. Such denial was without prejudice to the movants appearing as witnesses for Petitioner at the hearing. Also, Petitioner's Request for Judicial Recognition of an Escambia County Grand Jury Report rendered on June 10, 1999, was denied on the grounds that the facts in the report were irrelevant, and the report did not contain established facts beyond a reasonable dispute; thus, the document could not qualify for official recognition.

A Transcript of the hearing (two volumes) was filed on December 29, 2000. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was

extended to January 31, 2001. The same were timely filed, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

a. Background

1. In this environmental permitting dispute, Petitioner, Michael L. Guttmann, who lives less than one mile from the project site, has challenged the proposed issuance by Respondent, Department of Environmental Protection (Department), of a Wetland Resource Permit (permit) and Sovereign Submerged Lands Authorization (authorization) which would allow Respondent, ADR of Pensacola (applicant), to construct a 30-slip docking facility on Big Lagoon, Escambia County, Florida. The facility will be part of a condominium project to be constructed on the upland portion of the property.

2. As grounds for contesting the permit, Petitioner contended that the Department failed to consider "the long term health of Big Lagoon," navigational hazards created by the project, or public safety; failed to impose an adequate "monitoring program"; did not provide for a "contingency plan for hurricane activity"; failed to consider that the activity

will degrade a nearby Outstanding Florida Water [OFW]; and failed to take into account "existing unused marina slips close by." The petition further alleged that the foregoing concerns constituted violations of Section 373.414, Florida Statutes (2000), and Rules 62-4.242, 62-302.300, 62-302.700, and 62-312.080, Florida Administrative Code. The cited statute identifies "additional criteria" for issuing a permit while the first three rules pertain to OFWs. The last rule contains general standards for the issuance or denial of a permit. Petitioner raised no issues concerning the issuance of the authorization in his initial pleading.

3. Until April 2000, the upland property was owned by the applicant. It was then sold to Harbour Pointe of Pensacola, Inc., which has subsequently entered into an agreement with the applicant allowing the applicant to construct the dock, operate the permit, and purchase a condominium unit. If the application is approved, applicant intends to construct a 442 feet x 4 feet access pier with seventeen 30 feet x 1.5 feet finger piers, thirteen 40 feet x 1.5 feet finger piers, and a 74 feet x 1.5 feet terminal platform, to form a 30-slip docking facility at 10901 Gulf Beach Highway on Big Lagoon, a Class III water in Escambia County, Florida. Approval to use the submerged lands is found in the authorization.

4. The dock will be located in a "fairly pristine area" in Big Lagoon a few miles southwest of Pensacola, Florida. That body of water is six miles in length and is separated from the Gulf of Mexico by a slender coastal barrier island known as Perdido Key, which lies approximately one statute mile south of the project. Continuing west along the shoreline next to the project site are a string of single-family homes with small dock facilities, most of which are less than 1,000 square feet in size and thus exempt from Department permitting requirements. To the east of the undeveloped property are more undeveloped lots and a private yacht club with extensive docking facilities. The facility being challenged here will not be a public marina; rather, it will serve the residents of a proposed upland condominium (consisting of two buildings) to be constructed at the same location. The project is more commonly referred to as the Harbour Pointe Marina. It is fair to infer that Petitioner and adjoining property owners object not only to the dock, but also to the condominium project.

b. <u>The application and project</u>

5. When the application was originally filed with the Department in July 1995, it contained plans for a longer dock and more slips. Due to a reduction in the length of the pier and number of slips to conform to Department rules, other

technical changes, and various requests by the Department for additional information, the draft permit was not issued by the Department until May 2000. The Department considers this a "major project" with "major [hydrographic and water quality] issues connected with it."

6. In reviewing the application, the Department considered whether reasonable assurance had been given by the applicant that water quality standards would not be violated, and whether the additional criteria in Section 373.414(1)(a)1.-7., Florida Statutes (2000), had been satisfied. The Department concluded that water quality standards would not be degraded, and that the project, as designed and permitted, was not contrary to the public interest.

7. In making the public interest determination, the Department typically assigns a plus, minus, or neutral score to each of the seven statutory factors. In this case, a neutral score was given to historical and archaeological resources [paragraph 373.414(1)(a)6.] since there were none, while the permanent nature of the project [paragraph 373.414(1)(a)5.] caused it to be rated "a little bit on the minus side"; all other factors were given a plus. Department witness Athnos then concluded that on balance the project "was a plus because it will not adversely affect any of these things."

8. The access pier (dock) runs perpendicular from the shoreline and stretches out some 442 feet to where the water reaches a depth of seventeen feet, which is the deepest point in Big Lagoon. The unusual length of the dock is required so that the boat slips will begin past the seagrass colony (which lies closer to the shore), to prevent boat propeller blades from cutting the top of the seagrass, and to reduce the amount of sedimentation stirred up by the boat propellers. Aerial photographs confirm that when completed, the dock will probably be the largest in Big Lagoon, and much larger than the neighboring docks to the west.

9. The use of boat slips will be limited to condominium owners. Only 19 slips will be constructed initially, since the applicant has secured approval at this time for only the first phase of the condominium project. When approval for the second phase is secured, the applicant intends to add an additional 11 slips.

c. Water quality

10. In his initial pleading, Petitioner made a general allegation that the Department failed to consider "the long term health of Big Lagoon"; there were no specific allegations regarding water quality standards. In his Proposed Recommended Order, however, he argues that the [a]pplicant failed to provide

reasonable assurances that water quality standards would not be violated."

11. Assuming arguendo that the issue has been properly raised, Petitioner has still failed to substantiate his allegation. That portion of Big Lagoon where the project will be located is a Class III water of the State. Studies on metals, greases, oils, and the like submitted by the applicant reflected that the "water quality [in that area] did not exceed the standards in Rule 62-302."

12. To provide further reasonable assurance regarding water quality standards, the applicant has voluntarily agreed to use concrete piling and aluminum docks. Unlike wooden piling and docks, these types of materials do not leach toxic substances such as arsenic, copper, and acromiom into the water. In addition, special permit conditions require that sewage pumpout equipment be located at the site so that boats will not discharge raw sewage into the waters. Liveaboards are prohibited, and fueling will not be available at the facility. Finally, the cleaning of fish is not allowed, and boat owners cannot scrape their boat bottoms while docked at the facility. All of these conditions are designed to ensure that water quality standards will not be violated.

13. Enforcement mechanisms for the above conditions are found in either the permit itself or Chapter 403, Florida Statutes. Also, one of the conditions in the draft permit expressly states that the applicant is not relieved of liability for harm or injury to humans, plants, or property caused by the construction of the dock. However, if a permit is issued, Condition 9 of the permit should be modified to require that trained personnel be available twenty-four hours per day, rather than just during standard business hours, to assist boaters with, and ensure that they use, the sewage pumpout equipment. Any permit issued should also require that boats be placed on lifts while using the docking facilities. This will prevent any leaching of paint from the boat bottoms into the waters. Otherwise, the paint would cause a degradation of the water.

14. The more persuasive evidence supports a finding that, with the additional conditions, reasonable assurance has been given that the state water quality standards applicable to Class III waters will not be violated.

d. Outstanding Florida Waters

15. In his complaint, Petitioner has contended that "the proposed activity will degrade an [OFW] as a result of its close proximity to the Gulf Islands National Seashore," and that

the"[D]epartment has made no analysis of this project['s] impact on the [OFW] which is adjacent to the proposed activity."

16. The record discloses that the southern portion of Big Lagoon has been designated as an OFW. This area includes the waters around Gulf Islands National Seashore and Big Lagoon State Park; they begin approximately 650 to 700 feet south of the end of the dock.

17. As noted earlier, the project is located within Class III waters. Because the Department found that no violation of state water quality standards in those waters would occur, it likewise concluded, properly in this case, that the project would have no impact on any OFW, even though such waters begin some 650 or 700 feet away. Under these circumstances, there would be no reason to assess the water quality in the OFWs or the projected impacts on those waters, as Petitioner suggests. In the absence of any credible evidence to the contrary, it is found that the project will not adversely impact an OFW.

e. Hydrographic characteristics

18. If a dock has more than ten boat slips, the Department routinely conducts a hydrographic (flushing) study to determine whether the structure will adversely affect the flow of the water in the area or cause erosion or shoaling on adjacent properties. In the summer of 1999, a Department engineer

conducted a hydrographic study using a dye tracer and concluded that flushing characteristics were excellent and that there would be no adverse effects caused by the project. This conclusion has not been credibly contradicted. Therefore, it is found that the dock will not adversely affect the flow of water or cause harmful erosion or shoaling.

f. Navigational issues

19. In his initial pleading, Petitioner raised a contention that the project will create "navigational hazards" because the dock "extends nearly into a navigation channel which routinely carries commercial towboats transporting hazardous material, the spill of which would adversely affect Big Lagoon." He also alleges that the rupture of a vessel could impact public safety.

20. Channel markers placed by the U.S. Army Corps of Engineers in the Intracoastal Waterway (of which Big Lagoon is a part) define a navigational channel for boats approximately 400-500 feet south of the end of the proposed dock. That channel is used by both recreational and commercial traffic, including barges and other large watercraft which regularly haul oil, chemicals, and other products through the Intracoastal Waterway to and from Pensacola, Panama City, and St. Marks, Florida. The water in the marked channel is only thirteen feet deep. Because

the U.S. Army Corps of Engineers has jurisdiction over the maintenance of the marked channel, the Department defers to that entity's judgment in determining whether a proposed structure will impede navigation in the marked channel.

21. The proposed dock ends near the deepest part of the natural channel where the water reaches a depth of seventeen feet. Because of the deeper water to the north, which allows the boat captain to "get better steerage," the commercial boat traffic sometimes tends to follow the natural channel, rather than the marked channel formed by the navigational aids. When they do so, however, they are straying from the so-called "legal" channel.

22. Petitioner's expert, a retired tugboat captain, opined that in a storm or squall, a commercial boat using the natural rather than the marked navigational channel might be blown extremely close to the dock or even strike it, thus causing a hazardous situation. He acknowledged, however, that he was not predicting more accidents because of the construction of the dock; he also admitted that the dock would not cause ships to "sudden[ly] have problems navigating that Big Lagoon."

23. The location of the proposed dock was shown to the U.S. Army Corps of Engineers and the Florida Marine Patrol, and there were no adverse comments regarding this issue by either

agency. In the absence of any negative comments by those agencies, and the acknowledgement by Petitioner's own witness that the dock will not cause accidents or create navigational problems for other boaters, the more persuasive evidence supports a finding that the project will not adversely affect navigation or public safety in Big Lagoon.

g. Seagrass and monitoring

24. Petitioner has alleged that Big Lagoon "is the healthiest body of water in Escambia County with a white sand bottom and abundant seagrass," and that the proposed project will adversely affect its "long term health." He also alleges that the Department has failed to provide a "remedy or punishment should the results [of the Department's monitoring plan] indicate that the seagrass has been harmed"; that the Department's monitoring plan is not "of sufficient duration to reasonably report the long-term effect of concentrated mooring and traffic" or "sufficiently specific to insure usable data"; and that the data relied upon by the Department [such as photographs] were not "sufficient" to determine the existing health of the seagrass.

25. The evidence reflects that a "nice, healthy seagrass community" is found in the area where the dock will be constructed. It stretches out several hundred feet from the

shoreline to where the water reaches a depth of around six feet. The Department considers seagrass to be a "most important resource" which should be protected. This is because seagrass is essential for "binding" the shoreline and stabilizing the sediments, and it serves as a nursery area for juvenile fish and shellfish. Indeed, due to these beneficial effects, far more species of shellfish are found in areas where seagrass thrives than in areas where no seagrass exists.

26. To protect the seagrass, the dock has been extended out 442 feet from the shoreline so that the first boat slip begins at a depth of seven feet, or just past where the seagrass ends. This will prevent the scarring of the grass by boat propellers and reduce turbidity that is typically caused by propeller dredging and boat wakes. Thus, at least theoretically, no boat activity by condominium owners is contemplated in waters of less than seven feet.

27. Because seagrass requires as much light as possible to survive, educational signs will be posted in the area to warn boaters that seagrass is found closer to the shoreline, and that mooring in that area is prohibited. There is, however, no enforcement mechanism to ensure that condominium owners or nonresidents comply with these warnings.

28. Under the draft permit, the Department is allowed to access the premises at reasonable times for sampling or monitoring purposes. A special section of the draft permit includes a number of requirements pertaining to the monitoring of turbidity levels during dock construction while another section requires the applicant to take photographs of the existing seagrass beds at numerous locations before, during, and after construction of the dock. Condition 14 requires that the permittee maintain "records of monitoring information" for at least three years.

29. The evidence supports a finding that if a permit is issued, a mapping of the seagrass should be made prior to construction of the dock and during the height of the growing season (September and October). When the photographing of the area is performed, the applicant should use a sampling protocol that is based on a scientifically determined method. Also, both affected and unaffected areas should be monitored to compare the effect of the additional boat traffic on the seagrass after the dock is constructed. All of these conditions should be incorporated into any issued permit.

30. According to Dr. Heck, a marine biologist who specializes in the study of seagrass and testified as an expert on behalf of Petitioner, seagrass beds in Big Lagoon have been

"shallowing up" or thinning out in recent years due to decreasing water clarity. In other words, as the water becomes cloudier from more and more boat activity, the sunlight cannot penetrate and the seagrass will not thrive. The seagrasses most susceptible to disappearing are those that are found at the deepest depth. Doctor Heck attributed the decline in seagrass to increased human activity in the area. This activity is related not only to the existing homeowners in the area, but also to the non-resident boaters (both recreational and commercial) who use the waters in that area.

31. A Department study conducted in 1995 confirmed that the only seagrass area in North Florida "significantly affected" by propeller scarring was an area in Big Lagoon known as Scallop Cove, near Spanish Point. This study is consistent with those studies performed by Dr. Heck in the late 1990's, and one as recently as last year, that support a finding that seagrass in Big Lagoon is on the decline due to both propeller scarring and increased turbidity caused by wakes from larger recreational boats. For this reason, Dr. Heck concluded that the addition of thirty boats at the project site, some of which would be as large as 30 feet or so, would have a "negative effect" on the seagrass colony. This in turn will cause a negative effect on the marine productivity in the area, as well as the conservation

of fish and their habitat. Doctor Heck's testimony on this issue is found to be the most persuasive.

h. Other concerns

32. Petitioner further contends that the Department failed to provide a "meaningful contingency plan for hurricane activity." This matter, however, is beyond the permitting jurisdiction of the Department. Petitioner has also contended that the Department failed to take into account "existing unused marina slips close by" which could be used by the condominium owners. Like the prior issue, this matter is not a consideration in the permitting scheme. Another issue raised by Petitioner, albeit untimely, was that the construction of this dock could lead to further development in Big Lagoon. There was, however, no evidentiary support for this contention. Indeed, there is no evidence that future permit applications with impacts similar to this application can reasonably be expected in the area.

33. At hearing, Petitioner raised for the first time a contention that the applicant no longer owns the upland property and thus a permit/authorization cannot be issued to that entity. Aside from this issue being untimely, the fact that a permit holder does not own the upland property is not unusual. If this occurs, permits and authorizations (leases) are routinely

transferred to the new owner once the Department receives the necessary title information. It is not a ground to defeat the application.

34. Petitioner also raised for the first time at hearing a contention that the site plan approval for the condominium has expired under a provision of the Escambia County Land Development Code and therefore the permit should be denied. Again, the issue is untimely; more importantly, it should be addressed in another forum since the Department has no jurisdiction over this issue. Likewise, a legitimate concern by an adjoining property owner, witness Hobgood, and an area realtor, that Hobgood's single-family property would probably decline in value if the project is built is nonetheless beyond the Department's jurisdiction.

35. Finally, a contention that the Department improperly calculated the maximum number of boat slips for an 88-unit condominium project has been rejected. The record contains a lengthy explanation by witness Athnos which shows that the Department's calculation under Rule 18-21.004(4)1., Florida Administrative Code, was correct. Those calculations are also detailed in Respondents' Exhibit 14.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2000).

37. As the party filing the application, the applicant bears the burden of proving its entitlement to a permit and authorization. See, e.g., Cordes v. State, Dep't of Envir. Reg., 582 So. 2d 652, 654 (Fla. 1st DCA 1991).

38. Because the proposed activity will occur "in, on, or over surface waters or wetlands," the "additional criteria" found in Section 373.414, Florida Statutes (2000), apply here. Subsection (1) requires that an applicant provide "reasonable assurance that state water quality standards applicable to waters . . . will not be violated and reasonable assurance that such activity . . . is not contrary to the public interest."

39. If, however, an activity is within, or outside but "significantly degrades," an OFW, reasonable assurance must be provided that the proposed activity is "clearly in the public interest." Because the evidence shows that the proposed activity will not significantly degrade, nor is it within, an OFW, the applicant here need only comply with the less stringent

test of giving reasonable assurance that the activity is not "contrary to the public interest."

40. In determining whether an activity is contrary to the public interest, Section 373.414(1)(a), Florida Statutes (2000), provides that the Department shall "consider and balance" the following criteria:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity 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.

41. The balancing test takes into account the positive, negative, and neutral effects of the proposed activity. The

Department then weighs or balances the criteria collectively, taking into account any positive or negative findings, and makes an overall determination as to whether the activity is contrary to the public interest. In making this determination, the positive effects of one or more of the criteria may outweigh the negative impacts of other criteria. Higgins and Coe v. Roberts and Dep't of Envir. Reg., 9 F.A.L.R. 5045-A (DER, Sept. 11, 1987). Likewise, it follows that under certain circumstances, the negative effects of one or more criteria may outweigh the positive impacts of other criteria.

42. The more persuasive evidence shows that the activity will not adversely affect the public health, safety, or welfare or the property of others. This conclusion is based on findings that there are no environmental hazards to public health or safety, and no environmental impacts to the property of others. Therefore, the Department's assessment that the project will have a positive benefit has been accepted.

43. The evidence supports a conclusion that the proposed activity will adversely affect fish and their habitat by virtue of the applicant's docking thirty boats in a small area just beyond a healthy seagrass colony. This conclusion is based on the accepted testimony of Dr. Heck. As to this criterion, then, the project will have a negative effect.

44. The evidence supports a conclusion that the proposed activity will not affect navigation, flow of water, or cause harmful erosion or shoaling. In reaching this conclusion, the undersigned has considered, and rejected, Petitioner's contention that the cases of Council of Civic Assn., Inc. v. Koreshan Unity Foundation and Dep't of Envir. Prot., 20 F.A.L.R. 4460-A (DEP, Sep. 16, 1998), and Burgess v. Dep't of Envir. Reg., DOAH Case No. 98-2900 (DER, Oct. 13, 1993), support his position. Neither case, however, is analagous to the facts here. In Koreshan, a proposed footbridge across a small river with pilings which effectively divided the river into six segments of no more than 14 feet each was found to be a navigational hazard. In Burgess, a permit to construct a small dock, platform, boardwalk, and A-frame on the Choctawhatchee River was denied because the applicant failed to put on any proof to satisfy the public interest test, including the navigation criterion. In fact, that application was apparently filed only for the purpose of allowing Petitioner to exhaust his administrative remedies before filing an inverse condemnation action in circuit court. See State, Dep't of Envir. Prot. v. Burgess, 772 So. 2d 540 (Fla. 1st DCA 2000).

45. The evidence supports a conclusion that the proposed activity will adversely affect marine productivity because the

fish nursery habitat will decline through a further thinning out of the seagrass colony in Big Lagoon. This conclusion is based on the testimony of Dr. Heck, whose testimony was the most persuasive on this issue.

46. The activity is permanent in nature. Therefore, it can be expected to be more harmful than a temporary activity.

47. There are no significant historical or archeological resources in the area. Therefore, this criterion does not apply and should be assigned a neutral score.

48. In assessing the impact of the project on "the current condition and relative value of functions," the facts show that Big Lagoon is a "fairly pristine" waterbody containing a large colony of seagrass along the shoreline which is considered by the Department to be "a most important resource." The benefits or functions of seagrass are detailed in Finding of Fact 25. The "current condition" and "relative value" of these functions will be negatively impacted if the dock is constructed. Given these considerations, it is concluded that, as to this criterion, the project will have a negative effect.

49. In summary, there are three positive, one neutral, and four negative benefits or impacts associated with the project. In the undersigned's judgment, the negative impacts outweigh any positive benefits. Under these circumstances, it is concluded

that the project is contrary to the public interest and should not be permitted.

50. Petitioner's Request for Official Recognition of Section 4.0608 of the Escambia County Land Development Code is denied on the ground that the document (and the issue raised therein) is irrelevant to this proceeding.

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 denying the application of ADR of Pensacola for a wetland resource permit and sovereign submerged lands authorization.

DONE AND ENTERED this 28th day of February, 2001, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2001.

COPIES FURNISHED:

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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 render a final order in this matter.