STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MRS. IRWIN KRAMER, Petitioner, vs. DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	)	Case No. 00-2873

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 23-27, 2001, in West Palm Beach, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ronald K. Kolins, Esquire
Kara K. Baxter, Esquire
Greenberg Traurig, P.A.
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West Palm Beach, Florida 33401

For Respondent: Francine M. Ffolkes, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Respondent should issue Petitioner an environmental resource permit and a concurrent private lease to use sovereign submerged lands.

PRELIMINARY STATEMENT

On May 22, 2000, the Department of Environmental Protection (Respondent) filed a Consolidated Notice of Denial of Environmental Resource Permit and Private Easement to Use Sovereign Submerged Lands (Consolidated Notice of Denial) to the application of Mr. and Mrs. Irwin Kramer for an environmental resource permit and authorization to use sovereign submerged lands. The Consolidated Notice of Denial provided the basis or reasons for the denial. The applicants initially proposed to dredge approximately 3,500 cubic yards of sovereign submerged land material from 3.2 acres of open tidal water; however, the area to be dredged was subsequently reduced to approximately 1,400 cubic yards from 0.29 acres. This action is brought by Mrs. Irwin Kramer (Petitioner), whose husband is now deceased. On July 12, 2000, this matter was referred to the Division of Administrative Hearings.

At hearing, Petitioner presented the testimony of six witnesses, five of whom were experts, and entered 46 exhibits (Petitioner's Exhibits numbered 1, 3-9, 10(a)-(c), 11, 13, 15-17, 21-23, 25, 27-32, 36-39, 41-47, 49, 55(a)-(b), 56-58, 63, 64, and

77) into evidence. Respondent presented the testimony of six witnesses, all of whom were experts, and entered 17 exhibits (Respondent's Exhibits numbered 1-6, 10, 17, 18, 24, 26, 27, 30, 40, 44, 45, and 49) into evidence. Respondent's Exhibit numbered 50 was rejected.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript.

The Transcript, consisting of eight volumes, was filed on September 7, 2001. An extension of time was granted for the parties to file their post-hearing submissions. The parties timely filed their post-hearing submissions on November 21, 2001, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT[1]

Application and Project Site

1. On or about February 25, 1997, Petitioner and her husband, through a consulting engineer, Charles Isiminger (Isiminger), filed an application (First Proposed Project) with Respondent for an environmental resource permit (ERP) and for consent to use submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees). The First Proposed Project proposed to perform dredging on sovereign submerged land.

2. Petitioner and her husband wanted to perform dredging to allow them to navigate a private vessel, estimated to range from 30 to 40 feet, from their dock situated on their property, on which they reside, to an existing navigation channel leading to navigable waters. They already own a small private vessel and were going to purchase a larger vessel estimated to range from 30 to 40 feet in length. The proposed dredging would allow Petitioner and her husband to navigate the larger vessel to navigable waters.

3. The property owned by Petitioner and her husband is on the upland property (Upland Property) in Palm Beach County, Florida, adjacent to and east of the Lake Worth Lagoon. The proposed project is located immediately east of Bingham Island on the eastern shore of the Lake Worth Lagoon. The present dock is a 90-foot wooden dock extending from their Upland Property to the Lake Worth Lagoon.

4. The Lake Worth Lagoon is designated as Class III water of the State of Florida.

5. The First Proposed Project consisted of the following: dredging approximately 3,500 cubic yards from 3.2 acres of open tidal waters to increase the depth of the water leading up to the site of the dock to (-)5 feet mean low water (MLW); installation of four navigational channel markers; mangrove trimming; and

authorization to use state-owned submerged lands upon which the dredging was to be performed.

6. Respondent denied the application for the First Proposed Project. Petitioner and her husband requested that the application remain open but later withdrew the application.

7. On January 20, 1999, Petitioner, through Isiminger, filed another application (Second Proposed Project) with Respondent for an ERP and for consent to use submerged lands owned by the Board of Trustees. The Second Proposed Project contained revisions in an attempt to address concerns raised by Respondent with the First Proposed Project. Petitioner reduced the area proposed to be dredged to approximately 2,700 cubic yards of sovereign submerged land material from 0.6 acres of the Lake Worth Lagoon. Additionally, the proposed navigational water depth was changed to (-)5 feet National Geodetic Vertical Data (NGVD) [(-)4 feet MLW].

8. Because Petitioner's proposed dredging was on sovereign submerged land, Respondent's staff was required and did review the Second Proposed Project, as they had the First Proposed Project. Respondent issued a Preliminary Evaluation Letter (PEL), explaining Respondent's position on the importance of the seagrasses and seagrass habitat located at Petitioner's site. Further, Respondent's staff met with Petitioner's representatives

to discuss the Second Proposed Project, Respondent's position, and other options or recommendations.

9. On May 22, 2000, Respondent issued a Consolidated Notice of Denial to Petitioner's application for the Second Proposed Project.

10. Petitioner submitted a Proposed Mitigation Plan and later, a Revised Proposed Mitigation Plan. The purpose of each was to propose alternative and joint measures to mitigate any adverse effects of the Second Proposed Project, including the restoration of seagrass habitat, placement of channel markers and signage, minimization of the proposed dredging, and/or contribution of financial assistance toward seagrass transplantation/preservation efforts.

11. Additionally, on July 16, 2001, Petitioner further modified its Second Proposed Project, reducing the bottom width of the proposed channel to 40 feet (previously, 80 feet), thereby reducing the proposed dredging to approximately 1,400 cubic yards (previously, approximately 2,700 cubic yards) of sovereign submerged land material from 0.29 acres (previously, 0.6 acres). This reduction was the minimum amount of dredging that would allow Petitioner to safely navigate a vessel the size desired by Petitioner, which is 30 to 40 feet.

12. Respondent did not change its position on the denial of Petitioner's Second Proposed Project.

Impact To Seagrasses And Other Natural Resources

13. Primarily two species of seagrasses, Halophila species, will be affected by Petitioner's Second Proposed Project: Halophila johnsonii ("Johnson's seagrass") and Halophila decipiens ("Paddle grass"). Johnson's seagrass and Paddle grass are the two main seagrasses at the proposed project site.

14. A functioning and viable seagrass habitat exists in the state-owned submerged land that Petitioner proposes to dredge. Johnson's seagrass comprises primarily the habitat, with some Paddle grass mixed-in.

15. Under the federal endangered species, Johnson's seagrass is listed as a threatened species.

16. Johnson's seagrass is fragile, diminutive in size, and loosely attached to the sediment. As a result, its growth is more easily disturbed. Johnson's seagrass grows in patchy, non-contiguous distributions and can grow in low densities of Paddle grass, as it does at the proposed project site. Johnson seagrass at the proposed project site is also sparse and appears year after year.

17. Paddle grass is an annual seagrass, regrowing from a seed bank. Paddle grass continuously reappears at the proposed project site.

18. The proposed project site is a suitable habitat for Johnson's seagrass and Paddle grass.

19. Johnson's seagrass is extremely productive. It grows rapidly and, after ten to 15 days, synoecizes and decomposes, thereby becoming a part of the detrital food chain. Consequently, the biomass of Johnson's seagrass and other Halophila species turns over rapidly.

20. Johnson's seagrass also provides organic material to the sediment due to the rapid decomposition. The organic material is used by fauna that graze on decomposing plant and animal tissue.

21. As a result, Johnson's seagrass provides the same benefits as larger seagrasses by providing a variety of ecological functions and comprising part of a healthy estuarine ecosystem.

22. Petitioner's Second Proposed Project removes all seagrasses in the dredged area so that a private navigational channel can be created. Furthermore, the proposed channel requires periodic maintenance dredging. Petitioner provides no certainty as to the frequency maintenance dredging will be required to maintain the desired depth of the proposed private access channel.

23. The initial dredging would kill all functioning and viable benthic infauna populations existing at the proposed dredging site. Regeneration would occur but it would take at least a year. Each maintenance dredging would again kill all the

functioning and viable benthic infauna populations and the cycle of regeneration would begin again, with regeneration taking at least one year.

24. Dredging by itself has not been demonstrated to be beneficial to the reproduction of Johnson's seagrass by way of recruitment by fragmentation.

25. The effects of maintenance dredging on water quality at the proposed project site would not be favorable as compared to water quality in and around an inlet area.[2] Water flow and flushing rate (energy levels) are lower at the proposed project site. Water clarity at the proposed site is much less clear due to the much lower flushing rate.

26. Site evaluations were performed and considered not only the proposed dredging area, but also the area on both sides of the proposed project and the conditions surrounding the area of the proposed project. Site evaluations demonstrated the existence of a healthy estuarine ecosystem.

27. When ERP applications are reviewed by Respondent, as in Petitioner's situation, Respondent requests the assistance of Florida's Fish and Wildlife Conservation Commission (FWCC) and the Florida Marine Research Institute.

28. FWCC's Bureau of Protected Species Management in the Office of Environmental Services reviewed Petitioner's Second Proposed Project at the point in time when Petitioner proposed to

dredge an 80 foot wide channel, therein proposing to dredge approximately 2,700 cubic yards of sovereign submerged land material from 0.6 acres of Lake Worth. FWCC considered the proposed project area, the surrounding area, and the conditions surrounding the area of Petitioner's proposed project.

29. FWCC made findings, which included that Johnson's seagrass was found by Respondent at the proposed project; that FWCC found Johnson's seagrass at docks within 2,000 feet both north and south of the proposed project site; that the proposed project site is a portion of a functioning seagrass community; that the level of seagrass damage will likely increase from the proposed project as a result of additional impacts from erosion due to sloughing of the channel sides and elevated turbidity from sediment resuspension; that the seagrass species found at the proposed project site provide many environmental functions in addition to being a food source for numerous organisms, including marine turtles and manatees; and that the preservation of seagrass communities, especially when dealing with a threatened species such as the manatee and sea turtle, by addressing the cumulative loss of seagrass habitat has become increasingly important.

30. FWCC recommended that, due to its findings and to the loss of a significant portion of an existing seagrass community, Petitioner's Second Proposed Project not be approved.

31. At the time of hearing, only one application, reviewed by FWCC in conjunction with Respondent, for a private dredging project that impacted seagrasses had been recommended for approval by the FWCC. That particular dredging project was denied by Respondent on the basis of seagrass impact.

32. The Marine Research Institute also recommended that Petitioner's Second Proposed Project not be approved on the basis of seagrass impact.

Impact To Marine Life--Manatees

33. Florida has designated manatees as an endangered species. The federal government considers manatees as an endangered species and includes them as a protected species.

34. Manatees have been observed traveling and feeding in and around the Bingham Islands, which are approximately 200 yards from the proposed project site. Manatees have been observed traveling and feeding in the area of and around the proposed project site.

35. The area along the shoreline of the proposed project and around Bingham Island is a year round, slow speed managed area zone for manatee protection. The manatee protection zone includes Petitioner's existing dock and the water front along Petitioner's property.

36. A habitat for seagrasses is provided around and by the proposed project site. Among other things, seagrasses provide

forage for manatees. Johnson's seagrass and Paddle grass, which are both present on Petitioner's proposed project site, are among the seagrasses on which manatees feed.

37. The manatee forging habitat would be reduced in that the foraging habitat at the proposed project site would be eliminated by the proposed dredging. Petitioner has submitted a mitigation proposal which, as will be addressed later, fails to offer a reasonable assurance for the restoration of Johnson's seagrass or Paddle grass at the proposed project site once removed.

Water Quality

38. Petitioner provided reasonable assurance that standards for water quality will not be violated. Moreover, water quality is not at issue in this matter.[3]

Direct, Secondary, And Cumulative Impacts

39. A seagrass community exists at the proposed project site and has existed since, at least, 1996. Lug worms and amphipods are housed at the proposed project area. No known macroinvertebrates can live only on Johnson's seagrass or Paddle grass. Petitioner's Second Proposed Project would remove the seagrass community, thereby removing the functioning system, and such would impact the functions that the seagrass community provides to fish, wildlife, and listed endangered and protected species, manatees and sea turtles.

40. Johnson's seagrass and manatees are the two main threatened and endangered species of concern which will incur unacceptable impacts.

41. Nearby seagrass resources will incur secondary impacts by the proposed dredging. The accumulation of organic debris vegetation and dense accumulation of decaying matter has been observed in dredged channels in the Lake Worth area, near Boynton Beach.

42. Fish utilize seagrass communities as a habitat and as a food source and the seagrass communities are, therefore, a popular fishing spot. Removal of the seagrass community would cause a loss of productivity, diversity, and function provided by the seagrass resource.

43. Conservation of fish and wildlife, including threatened species or their habitats, will be adversely impacted by the proposed dredging. The proposed project site has a persistent, threatened seagrass community. Manatees and sea turtles feed on such a seagrass community.

44. Adjacent surrounding areas also contain seagrass communities. Petitioner's proposed dredging will affect the adjacent surrounding areas, expanding beyond the footprint of the proposed dredging.

45. Unacceptable cumulative impacts upon wetlands and other surface waters in the Lake Worth Lagoon will be caused by

Petitioner's proposed dredging project. In the past, Respondent has received similar applications to Petitioner's application, requesting to dredge private access channels, in the Lake Worth Lagoon area. Respondent estimates that 42 property owners, situated along the shoreline of Lake Worth Lagoon in and around Petitioner's shoreline site, can also apply for dredging channels for single family use.

46. Petitioner's Second Proposed Project will occur on state-owned submerged land. Petitioner applied for an ERP, which is a regulatory approval, and for consent to use state-owned submerged lands, which is a proprietary authorization. The regulatory approval and the proprietary authorization are a linked process in that Respondent cannot grant one and deny the other. Once the regulatory approval was denied, the proprietary authorization was automatically denied. Furthermore, the proprietary authorization was also denied because Respondent determined that Petitioner's Second Proposed Project was contrary to the public interest in that Respondent determined that the proposed project would cause adverse effects to fish and wildlife resources and overall, cause adverse effects to a public resource.

Petitioner's Mitigation Proposal

47. Petitioner submitted a Revised Mitigation Plan to Respondent. The Revised Mitigation Plan's main aim, relating to

this matter, is to offset the loss of seagrass that will occur as a result of Petitioner's Second Proposed Project. Petitioner proposes, among other things, removing the existing Johnson's seagrass at the functioning habitat at the proposed project site and replanting the Johnson's seagrass to an artificially engineered area by Petitioner.

48. The scientific community, which deals with seagrasses, has many uncertainties or unknowns regarding Johnson's seagrass, such as Johnson's seagrass' recruitment, how it grows, how the patches of Johnson's seagrass move around, and the conditions that are a perquisite to sustain a population. Moreover, the scientific community is not certain of what conditions are required for Johnson's seagrass to be effectively transplanted.

49. At the time of the hearing, even though methodology existed for conceivable successful transplantation, no successful transplantation of any Halophila species for more than a few months had been demonstrated. No successful transplanting to produce a persistent bed of Johnson's seagrass had occurred.

50. Transplantation studies of Halophila species have occurred in the northern part of Indian River Lagoon. The sediment in the Indian River Lagoon is firm, whereas the sediment at the proposed project site is silty and fine. The evidence does not demonstrate that the methodology for transplantation

used at the northern part of Indian River would be successful at the proposed project site.

51. At the time of hearing, no tried, tested, and successful scientific protocol for transplanting of Johnson's seagrass existed. Furthermore, at the time of hearing, no successful mitigation project with Halophila species existed.

52. Petitioner's Revised Mitigation Plan is at present experimental and lacks reasonable assurances that the transportation of the Johnson's seagrass will be successful.

53. Respondent has adopted the rules of the South Florida Water Management District (SFWMD) relating to acceptable mitigation ratios. The revised mitigation plan failed to meet the acceptable mitigation ratios in the rules.

54. Additionally, the revised mitigation plan failed to meet the acceptable mitigation ratios in Respondent's operations and procedures manual. Respondent's manual does not list Johnson's seagrass or Paddle grass because neither has been successfully transplanted as part of a mitigation project.

55. The SFWMD's rules adopted by Respondent provide that an ERP application, as submitted or modified, must be denied if the ERP application fails to meet the conditions of issuance. Moreover, the rules do not require the acceptance of mitigation. Respondent determined that Petitioner's Second Proposed Project,

as last amended, failed to meet the conditions for issuance of an ERP.

56. Petitioner's Revised Mitigation Plan is inappropriate.

Alternatives Proposed By Respondent

57. As an alternative to Petitioner's Second Proposed Project, which purpose is to dredge to obtain navigable access to Petitioner's property for a larger boat, Respondent proposed alternatives to the proposed project to Petitioner. Respondent proposed the construction of a longer dock that would extend to deeper water; exploration of the option of purchasing a larger shallow-draft boat; and housing the larger boat at a marina.

58. Regarding extending the dock, Petitioner would need to extend the dock approximately 312 feet, which would cause the existing dock to measure approximately 400 feet long. The Town of Palm Beach (Town) requires docks to extend no more than 150 feet from the Town's bulkhead line. Extending a dock longer than 150 feet would be a violation of the Town's code. A variance would need to be requested by Petitioner. The Town has never approved an application for such a variance. A representative of the Town advised Petitioner's representative that there would be no chance of Petitioner being successful in obtaining such a variance and applicants have been discouraged from making application for the variance.

59. In the past, Respondent, in its proprietary capacity, has appeared before city councils on behalf of applicants to request the city councils to waive their regulatory rules to allow for construction of longer docks. Respondent has appeared before councils in Manalapan, City of Lake Worth, and City of West Palm Beach, and the councils have approved Respondent's requests in each situation. In the Lake Worth Lagoon, one council approved a private dock extending 500 feet.

60. Petitioner never requested Respondent to appear on her behalf before the Town to request a waiver or a variance of the code prohibiting docks beyond 150 feet.

61. Petitioner never made application to the Town for a waiver or variance of the 150 feet limitation for the length of docks.

62. Respondent's alternative proposal of a longer dock is reasonable. Petitioner was unreasonable in not requesting the assistance of Respondent and requesting a variance or waiver from the Town. Petitioner failed to make inquiry as to Respondent's experience with applicants in the Town.

63. Regarding housing the larger boat that Petitioner intends to purchase at a marina, such an alternative is contrary to the purpose of Petitioner's Second Proposed Project. This alternative is considered a "no project" alternative because it

contemplates not performing the project on state-owned submerged lands.

64. As to exploring the option of purchasing a larger shallow-draft boat, such a larger boat would require Petitioner to secure the larger boat to buoy and go to and from the dock in a smaller boat. Securing the larger boat with a buoy in the navigable water would be a navigational hazard and, therefore, not allowed. Further, going back and forth from the dock on a jet boat would more than likely result in prop dredging and scarring of seagrass. This alternative is also considered a "no project" alternative.

65. Respondent's suggesting of "no project" alternatives is permissible and acceptable under Respondent's proprietary rule.

66. The alternatives suggested by Respondent are reasonable alternatives to Petitioner's dredging project, which eliminate or significantly reduce the impacts of the dredging project on the public resources.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes.

68. The ultimate burden of proof is upon Petitioner, as the applicant, to demonstrate by a preponderance of the evidence that

she is entitled to the permit and authorization. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 646 (Fla. 3d DCA 1992).

69. Respondent does not argue water quality, but does argue public interest issues, in support of its denial of Petitioner's project in the proposed Conclusions of Law of its Proposed Recommended Order. An inference is drawn that Respondent did not intend to address water quality and that water quality is not at issue for determination. Consequently, only public interest will be addressed in these Conclusions of Law in this Recommended Order.

70. Article X, Section 11, Florida Constitution, provides:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

71. Section 253.03, Florida Statutes, provides in pertinent part:

> (1) The Board of Trustees of the Internal Improvement Trust Fund of the state is vested and charged with the acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by, or which

> may hereafter inure to, the state or any of its agencies, departments, boards, or commissions, . . . Lands vested in the Board of Trustees of the Internal Improvement Trust Fund shall be deemed to be:
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> (b) All lands owned by the state by right of its sovereignty;
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> (7)(a) The Board of Trustees of the Internal Improvement Trust Fund . . . has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this act.

72. The Board of Trustees is comprised of the Governor and Cabinet.

73. Section 253.002, Florida Statutes, provides in pertinent part:

> (1) . . . Unless expressly prohibited by law, the board of trustees may delegate to the department [Respondent] any statutory duty or obligation relating to the acquisition, administration, or disposition of lands, title to which is or will be vested in the board of trustees. . . .
>
> (2) Delegations to the department [Respondent] . . . of authority to take final agency action on applications for authorization to use submerged lands owned by the board of trustees, without any action on behalf of the board of trustees, shall be by rule. . . .

74. Rule 18-21.004, Florida Administrative Code, provides in pertinent part:

The following management policies, standards, and criteria shall be used in determining whether to approve, approve with conditions or modifications, or deny all requests for activities on sovereignty submerged lands.

(1) General Proprietary
(a) For approval, all activities on sovereignty lands must be not contrary to the public interest . . .

* * *

(2) Resource Management
(a) All sovereignty lands shall be considered single use lands and shall be managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming. Compatible secondary purposes and uses which will not detract from or interfere with the primary purpose may be allowed.
(b) Activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed.
(c) The Department of Environmental Protection [Respondent] biological assessments and reports by other agencies with related statutory, management, or regulatory authority may be considered in evaluating specific requests to use sovereignty lands. Any such reports sent to the department [Respondent] in a timely manner shall be considered.
(d) Activities shall be designed to minimize or eliminate any cutting, removal, or destruction of wetland vegetation (as listed in Rule 17-4.020(17), Florida Administrative Code) on sovereignty lands.

* * *

(g) Severance of materials from sovereignty lands shall be approved only if the proposed dredging is the minimum amount necessary to accomplish the stated purpose and is designed to minimize the need for maintenance dredging.

* * *

(i) Activities on sovereignty lands shall be designed to minimize or eliminate adverse impacts on fish and wildlife habitat. Special attention and consideration shall be given to endangered and threatened species habitat.

* * *

(3) Riparian Rights
(a) None of the provisions of this rule shall be implemented in a manner that would unreasonably infringe upon the traditional, common law riparian rights . . . of upland property owners adjacent to sovereignty submerged lands.

75. Section 253.141, Florida Statutes, provides in pertinent part:

(1) Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the

> riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

76. Rule 18-21.003, Florida Administrative Code, provides in pertinent part:

> (40) "Public interest" means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials.

77. Rule 18-21.002, Florida Administrative Code, regarding the rules adopted by the Board of Trustees, provides in pertinent part:

> (1) These rules are to implement the administrative and management responsibilities of the board and department regarding sovereign submerged lands. Responsibility for environmental permitting of activities and water quality protection on sovereign and other lands is vested with the Department of Environmental Protection. These rules are considered cumulative. Therefore, a person planning an activity should consult other applicable department rules as well as the rules of the Department of Environmental Protection.

78. Rule 18-21.0051, Florida Administrative Code, provides in pertinent part:

> (2) The Secretary of the Department of Environmental Protection . . . delegated the authority to review and take final agency action on applications to use sovereign submerged lands when the application involves an activity for which that agency has permitting responsibility . . . .

When exercising this delegated authority, Respondent must act in accordance with Article X, Section 11 of the Florida Constitution, and the provisions of Chapter 253, Florida Statutes, and Rule 18-21, Florida Administrative Code.

79. Section 373.427, Florida Statutes, regarding concurrent review, provides in pertinent part:

> (1) The department [Respondent], in consultation with the water management districts, may adopt procedural rules requiring concurrent application submittal and establishing a concurrent review procedure for any activity regulated under this part [Chapter 373, Part IV, Florida Statutes] that also requires any authorization, permit, waiver, variance, or approval described in paragraphs (a)-(d). The rules must address concurrent review of applications under this part and any one or more of the authorizations, permits, waivers, variances, and approvals described in paragraphs (a)-(d). Applicants that propose such activities must submit, as part of the permit application under this part, all information necessary to satisfy the requirements for:
> (a) Proprietary authorization under chapter 253 . . . to use submerged lands owned by the board of trustees . . . .

80. Rule 63-343.075, Florida Administrative Code, provides in pertinent part:

(1) A single application shall be submitted and reviewed for activities that require an individual or standard general environmental resource permit under Part IV of Chapter 373, F.S., and a proprietary authorization under Chapters 253 . . ., F.S., to use sovereign submerged lands. In such cases, the application shall not be deemed complete, and the timeframes for approval or denial shall not commence, until all information required by applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under Chapters 253 . . ., F.S., and rules adopted thereunder for both the environmental resource permit and the proprietary authorization is received.

(2) No application under this section shall be approved until all the requirements of applicable provisions of Part IV of Chapter 373, F.S., and proprietary authorization under Chapters 253 . . ., F.S., and rules adopted thereunder for both the individual or standard general environmental resource permit and the proprietary authorization are met. The approval shall be subject to all permit conditions imposed by such rules.

(3) For an application reviewed under this section for which a request for proprietary authorization to use sovereign submerged lands has been delegated to the Department [Respondent] . . . to take final action without action by the Board of Trustees of the Internal Improvement Trust Fund, the Department . . . shall issue a consolidated notice of intent to issue or deny the environmental resource permit and the proprietary authorization within 90 days of receiving a complete application under this section. . .

* * *

(5) The issuance of the consolidated notice of intent to issue or deny, or upon issuance of the recommended consolidated notice of

intent to issue or deny pursuant to Subsection (4), the Department . . . shall be deemed to be in compliance with the timeframes for approval or denial in Section 120.60(2), F.S. Failure to satisfy these timeframes shall not result in approval by default of the application to use sovereign submerged lands. Also, if an administrative proceeding under Section 120.57, F.S., is properly requested on both the environmental resource permit and the proprietary authorization under this section, the review shall be conducted as a single consolidated administrative proceeding. If an administrative proceeding under Section 120.57, F.S., is properly requested on either the environmental resource permit or the proprietary authorization under this section, final agency action shall not be taken on either authorization until the administrative proceeding is concluded.

(6) Appellate review of any consolidated order under this section is governed by the provisions of Section 373.4275, F.S.

81. Section 373.414, Florida Statutes, provides in pertinent part:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the . . . department [Respondent] shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance

that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, 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 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.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the . . . department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the

> applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity. . . .
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> * * *
>
> (8)(a) The . . . department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:
> 1. The activity for which the permit is sought.
> 2. Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.
> 3. Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

82. Reasonable assurance, according to Metropolitan Dade County, supra, "contemplates . . . a substantial likelihood that the project will be successfully implemented." At 648. The project is the activity for which the permit, here, an environmental resource permit, is sought.

83. Section 373.414, Florida Statutes, is prohibitory. Metropolitan Dade County, supra, at 648. Before a project is

begun, reasonable assurance must be provided that water quality and the public interest will not be violated. Ibid. Respondent cannot allow an applicant to proceed with a project with no idea as to what the effect will be on water quality and the public interest. Ibid.

84. In the determination of adverse impacts, secondary impacts caused or enabled by the proposed project, as well as the direct impacts of the proposed project, should be considered. The Conservancy, Inc. v. A. Vernon Allen Builders, Inc., 580 So. 2d 772, 779 (Fla. 1st DCA 1991); Florida Power Corporation, Inc. v. Department of Environmental Regulation, 605 So. 2d 149, 152 (Fla. 1st DCA 1992).

85. As an applicant for an environmental resource permit, Petitioner "need not show any particular need or net public benefit as a condition of obtaining the permit." 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946, 957 (Fla. 1st DCA 1989). However, in cases where the proposed activity "would substantially degrade water quality or materially harm the natural environment, the fact that a substantial public need or benefit would be met by approving the project may be taken into consideration in balancing adverse environmental effects. This is a purpose of the public interest test and the seven statutory criteria." 1800 Atlantic Developers, supra.

86. No permit is required for maintenance dredging activities associated with manmade channels, provided that no more dredging is to be performed than is necessary to restore the channel to its original design specifications or configurations. Section 403.813(2)(f), Florida Statutes; Rule 40E-4.051(2)(a), Florida Administrative Code [FWMD rule, as adopted by Respondent].

87. The evidence fails to demonstrate a reasonable assurance that the Second Proposed Project is not contrary to the public interest, as used and defined. The seven-prong public interest test is a balancing test. Applying the seven-prong public interest test, the impacts to natural resources and marine wildlife outweigh the extent to which the public interest is served by allowing a private navigational channel for a single family residence. The evidence demonstrates that, if Petitioner's proposed project is approved, public resources would suffer.

88. Petitioner's Second Proposed Project is inconsistent with Rule 18-21.004(2)(b), Florida Administrative Code. Petitioner's revised mitigation plan is inadequate and experimental, and Respondent provided Petitioner with reasonable alternatives.

89. Further, Petitioner's Second Proposed Project is inconsistent with Rule 18-21.004(2)(i), Florida Administrative

Code, in that the proposed initial dredging project and the periodic maintenance dredging activities did not adequately minimize or eliminate the adverse impacts on fish and wildlife habitat. Special attention and consideration were given to both endangered marine mammals (manatees) and threatened seagrass (Johnson's seagrass), which forms a part of the manatee habitat, involved in the case at hand.

90. In evaluating Petitioner's proposed project pursuant to the seven prong balancing test, the function of the proposed project can be considered. As a result, consideration can be given to the cumulative impacts that would reasonably be expected to occur if the other riparian owners living in the Lake Worth Lagoon area were to each apply for individual navigation access channels.

91. Consequently, the evidence fails to demonstrate a reasonable assurance that the adverse effects of the proposed project will be outweighed by the benefits of the proposed project or fully offset by the revised proposed mitigation offered by Petitioner. A reasonable assurance that the proposed project is not contrary to the public interest, as used and defined, is not demonstrated.

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 Mrs. Irwin Kramer for an environmental resource permit and consent to use sovereign submerged lands to dredge a private navigation channel in the Lake Worth Lagoon.

DONE AND ENTERED this 26th day of February, 2002, in Tallahassee, Leon County, Florida.

ERROL H. POWELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2002.

ENDNOTES

[1/] These Findings of Fact are made having considered and weighed the testimony of all the experts and witnesses, including their credibility, and having considered all the evidence presented in accordance with the required burden and standard of proof.

[2/] See Findings of Fact numbered 38.

[3/] See Conclusions of Law numbered 69.

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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 issue the final order in this case.