

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IAN AND KELI LINEBURGER, KIM)	
AND ROB MOREY, BONITA AND)	
RICHARD AGAN, VIRGINIA HALSEY,)	
CANDACE AND ROBY O'BRIEN, ANN)	
SACKETT, FRANK T. AND MARILYN)	
SHAY, PETER AND YVONNE PAV,)	
KIMBERLEY BENDER, EMANUEL ROUX)	
and ELIZABETH SCHUH,)	
)	
Petitioners,)	
)	
vs.)	Case No. 07-3757
)	
PROSPECT MARATHON COQUINA and)	
DEPARTMENT OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondents.)	
)	

RECOMMENDED ORDER

The final hearing in this case was held on January 3 and 4, 2008, in St. Petersburg, Florida, before Administrative Law Judge Bram D.E. Canter of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Daniel B. Schuh, Esquire
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For Respondent Department of Environmental Protection:

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For Respondent Prospect Marathon Coquina, LLC.:

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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether Respondent Prospect Marathon Coquina, LLC (PMC), is entitled to an environmental resource permit for the proposed expansion of a docking facility, and whether PMC is entitled to a modified sovereignty submerged land lease for the proposed project.

PRELIMINARY STATEMENT

On July 7, 2007, the Department of Environmental Protection (Department) issued notice of its intent to issue a consolidated environmental resource permit and modified sovereignty submerged land lease ("the proposed authorizations") to PMC for the expansion of an existing multi-family docking facility in St. Petersburg, Pinellas County, Florida. Ian and Keli Lineburger, Rob and Kim Morey, Bonita and Richard Agan, Virginia Halsey, Candace and Roby O'Brien, Ann Sackett, Frank and Marilyn Shay, Kimberley Bender, Emanuel Roux, and Daniel and Elizabeth Schuh,

filed a timely petition for administrative hearing and the matter was referred to DOAH to conduct an evidentiary hearing. Subsequently, Daniel Schuh withdrew as a party and continued in the proceeding solely as the attorney for the remaining Petitioners.

In response to PMC's Motion to Strike or, in the Alternative, Motion for More Definite Statement, paragraph 7 of the petition was stricken.

On December 18, 2007, Petitioners filed a Motion for Summary Order, contending that PMC did not qualify for a submerged lands lease because it had severed the riparian rights from the upland residences. At the final hearing, the Administrative Law Judge ruled that the issues raised in the motion would be ruled on in this Recommended Order.

At the final hearing, the parties' Joint Exhibits 1 through 34 were admitted into evidence. PMC presented the testimony of Craig Ward, a professional land surveyor; Michael Gaylor, a professional engineer; Tom Logan, a wildlife biologist; and Sandy Nettles, a professional geologist, all of whom were accepted as expert witnesses. PMC also presented the fact testimony of Doug Speeler. At the request of PMC, official recognition was taken of the Southwest Florida Water Management District's Basis for Review for Environmental Resource Permits (May 2, 2006). The Department presented the testimony of two

Department employees, Harry Michaels, Jr., and Allyson Minnick. Petitioners presented the fact testimony of Kim Morey, Kimberly Bender, Peter Pav, Emanuel Roux, and Bonita Agan. Petitioners also presented the expert testimony of David Crewz, a plant ecologist; and, through deposition transcripts, the expert testimony of John Reynolds, an expert in marine mammals; and Brian Winchester, a wildlife ecologist. Petitioners' Exhibits 6, 7, 9 through 13, and 54 were admitted into evidence.

The ALJ allowed public comments from Beth Connor, Francia Smith, and Laurie MacDonald.

The transcript of the final hearing was filed with DOAH and all parties filed proposed recommended orders which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. With the exception of Elizabeth Schuh, all Petitioners live in the Driftwood neighborhood, which is located across Big Bayou from the proposed project. All Petitioners use Big Bayou for various recreational purposes, including swimming and boating. Several Petitioners also use Big Bayou for nature observation. Petitioner Peter Pav owns waterfront property on Big Bayou. Respondents do not dispute Petitioners' standing.

2. The Department is charged with the responsibility to regulate construction activities in waters of the state. The Department has also been delegated authority from the Trustees of the Internal Improvement Trust Fund (Trustees) to process applications for submerged land leases for structures and activities that will preempt the use of sovereign submerged lands.

3. PMC is a Florida limited liability corporation that owns 2,786 linear feet of upland shoreline contiguous to the state-owned submerged lands of Big Bayou. PMC is the developer of the multi-family residential condominium development on Coquina Key that the proposed project would serve, known as Coquina Key North.

The Affected Waterbody

4. Big Bayou is near the southern end of the St. Petersburg peninsula. The mouth of the bayou opens to Tampa Bay. Big Bayou is part of the Pinellas County Aquatic Preserve, which includes most of the coastal waters of Pinellas County. Like all aquatic preserves in Florida, the Pinellas County Aquatic Preserve is also designated as an Outstanding Florida Water.¹

5. Florida Administrative Code Rule 18-20.001 states that the aquatic preserves in Part II of Chapter 258 (which include the Pinellas County Aquatic Preserve) "were established for the

purpose of being preserved in an essentially natural or existing condition so that their aesthetic, biological and scientific values may endure for the enjoyment of future generations." The term "essentially natural condition" is defined as "those functions which support the continued existence or encourage the restoration of the diverse population of indigenous life forms and habitats to the extent they existed prior to the significant development adjacent to and within the preserve." Fla. Admin. Code R. 18-20.003(24).

6. In the 1960s and 1970s, development activities throughout Tampa Bay caused the loss of about 80 percent of its seagrasses and significant degradation of water quality. The seagrasses and water quality in Big Bayou were also adversely affected by filling and other development activities, including the filling and bulkheading of Coquina Key where the proposed project would be located. In more recent years, the water quality in Big Bayou has improved. Although trash sometimes washes up on the shoreline and one can sometimes see a sheen on the water surface caused by gasoline or oil, the water quality in Big Bayou is generally good, with high dissolved oxygen and low nutrient concentrations. The seagrasses have also recovered to a large extent.

7. A variety of seagrasses grow in Big Bayou, including shoal grass, manatee grass, turtle grass, widgeon grass, and a

relatively uncommon species, palm grass. Seagrasses are the foundation for the marine food web. They also serve as a nursery for small fish and invertebrates, stabilize sediment, and improve water quality.

8. Manatees regularly enter and use Big Bayou because it provides good habitat. The manatees in this area are part of the Southwest Florida manatee subpopulation. Based on data collected through 2001, that subpopulation is either stable, or possibly declining.

9. Pinellas County is not one of the 13 Florida counties that were required to develop and implement manatee protection plans. There are two areas of Pinellas County that the Florida Fish and Wildlife Conservation Commission (FWCC) has identified as needing additional manatee protection measures, but Big Bayou is not one of them.

The Proposed Project

10. The proposed authorizations would allow PMC to expand an existing multi-family, residential docking facility on the north end of Coquina Key, along an existing seawall and adjacent to the Coquina Key North condominiums that PMC converted from a former apartment complex.

11. The proposed project would add 60 boat slips to the existing 30 boat slips at the project site. The new slips could

accommodate boats up to 25 feet in length. PMC would restrict use of the boat slips to Coquina Key North condominium owners.

12. In converting the former apartment complex to condominiums, PMC retained ownership of a strip of land immediately upland of the submerged lands on which the proposed project would be constructed. The ground for Petitioners' Motion for Summary Order is that the ownership retained by PMS, because it does not include ownership of the upland residences, does not entitle PMS to obtain a submerged land lease for the proposed project. That legal argument is addressed in the Conclusions of Law.

Direct Impacts

13. An earlier plan for the proposed project was to place 30 new boat slips on the north side of the existing docks and 30 new slips on the south side. However, to avoid direct impacts to seagrasses, the plan was modified to avoid an area of seagrasses on the south side. The proposed project now would add 38 boat slips on the north side and 22 slips on the south side.

14. The over-water dock structures would be placed waterward of the seagrasses that currently grow along the seawall. The seagrasses adjacent to the proposed project are not likely to be harmed by wave action or turbulence from

boating activity around and in the slips because of the distance between the slips and the seagrasses.

15. The proposed authorizations include specific conditions that prohibit numerous activities that could cause adverse water quality impacts at the proposed project site, such as the discharge of trash, human or animal waste, or fuel; fish cleaning stations; boat repair facilities; fueling facilities; hull cleaning, painting or other external boat maintenance; and boat maintenance or repair activities requiring removal of a boat from the water, or removal of major portions of the boat for purposes of routine repair or maintenance on site, except where removal is necessitated by emergency conditions. No liveaboards would be allowed at the proposed project.

16. PMC intends to incorporate these conditions into its agreements with the condominium owners who use the boat slips.

17. Because Big Bayou is an Outstanding Florida Water, PMC is required to provide reasonable assurances that the project will not result in the lowering of existing ambient water quality. Florida Administrative Code Rule 62-4.242(2)(c) defines "existing ambient water quality" as the better water quality of either what existed on the date that the water body was designated an Outstanding Florida Water or what existed in the year prior to the permit application. Because the current water quality is better than it was in 1972 when the Pinellas

County Aquatic Preserve was created, the current water quality is the standard to apply in this case.

18. Although some incidental non-compliance with the conditions of the proposed authorizations could occur, such incidental non-compliance would not likely result in significant² degradation of the existing ambient water quality in Big Bayou.

Secondary Impacts - In General

19. Petitioners' primary concerns with the proposed project are with the secondary impacts that would be caused by increased boating activity in Big Bayou. Petitioners contend that the additional boats using the 60 new boat slips would adversely affect water quality, seagrasses, manatees, and other natural resources. Petitioners also assert that the additional boating activity would cause erosion of the north shoreline of Big Bayou and impair Petitioners' recreational uses of the bayou.

20. It is reasonable to assume that there would be more boat trips on Big Bayou if the proposed project were built than if it were not built. However, it is impossible to say how many more boat trips would be generated by the proposed project. It cannot be assumed that because there would be 60 more boat slips, there would be 60 more boats on Big Bayou each day, each week, or even each month.

21. Moreover, the number of boats on Big Bayou on any given day fluctuates because it depends not only on the whims of the boat owners who have boat slips in Big Bayou, but also on the whims of the boat owners who anchor their boats in the open waters of Big Bayou, launch their boats from the public boat ramps on Big Bayou, or enter Big Bayou from Tampa Bay or more distant waters.

Secondary Impacts - Erosion

22. Petitioners did not present competent evidence to support their claim that the proposed project would cause erosion of the north shoreline of Big Bayou.

Secondary Impacts - Water Quality

23. The Department has adopted by reference the Southwest Florida Water Management District's Basis for Review for Environmental Resource Permits (Basis of Review) to apply to applications for environmental resource permits for projects over which the Department retains permitting authority. For docking facilities, Section 3.2.4.3 of the Basis of Review requires the applicant to provide hydrographic information to demonstrate that the "flushing time" (the time required to reduce the concentration of a pollutant) is sufficiently short to prevent the accumulation of any pollutants to the point of violating water quality standards. PMC's hydrographic analyses indicate that Big Bayou is well-flushed. The water of the bayou

moves a half mile to a mile during a normal tide. The fact that the current water quality in Big Bayou is good indicates that contamination associated with the current level of boating activity in the bayou is not accumulating. Incidental discharges of contaminants from boats using the proposed project would likely be rapidly dispersed and diluted.

24. Petitioners argued that PMC's hydrographic analyses did not address every part of Big Bayou. The rule requires hydrographic characterization of "the project site and surrounding waters." As the challengers, Petitioners needed to rebut PMC's prima facie case regarding the hydrographic characteristics in the bayou with competent evidence showing PMC's findings were inaccurate, or show that the scope of PMC's hydrographic analyses did not conform with any reasonable interpretation of the applicable rule. Petitioners presented no such evidence or showing.

25. Some additional, incidental contamination can be expected to occur as a result of the operation of the boats that would use the proposed project. However, PMC provided reasonable assurance that the addition of these contaminants would not significantly degrade the existing ambient water quality of Big Bayou nor cause any other applicable water quality standard to be violated.

Secondary Impacts - Seagrasses

26. The maximum water depth at which most seagrasses can grow is between five and six feet because of their need for light. When boaters attempt to cross shallow areas where seagrasses are located, they sometimes damage the grasses with the boat propellers, leaving areas of torn grass and "prop scars," furrows in the bottom. Even when boat propellers do not touch the bottom, but come close, they can disturb the loose sediments and cause turbidity. It can be especially harmful when boats run aground, because the boater will sometimes grind away at the seagrasses in an attempt to move the boat to deeper water, causing holes 10 or 12 feet in diameter. Different seagrasses recover from such damage at different rates. In some cases, it can take years for a prop scar to become re-vegetated.

27. A 1995 study of prop scars by the Florida Marine Research Institute found that the Tampa Bay area is one of four areas of Florida with the greatest acreage of moderate and severe scarring.

28. There are prop scars visible in the bottom of Big Bayou and Petitioners testified about seeing boats run aground in Big Bayou.

29. The main navigation channel on the north side of Big Bayou ranges in depth from slightly less than 8 feet to over 17 feet. There are channel markers to help boaters find and stay

in this channel, but some of the original markers are missing. In addition to the main navigation channel, there is an area along the north side of Coquina Key that is used by the residents living along that shoreline to get to and from Tampa Bay. This second route, which is not marked, is much shallower than the main channel and its use by boaters at low tide is a threat to seagrasses in the area.³

30. If more boaters in Big Bayou stayed in the main navigational channel, there would be a decreased threat to the seagrasses. However, the evidence shows that boaters often travel out of the main channel, either by inadvertence or to take a shortcut, and cross shallow areas where the seagrasses are located.

31. It was the opinion of David Crewz, a plant ecologist who specializes in seagrasses, that increased boating activity in Big Bayou could decrease the habitat quality of the bayou. He said that one can expect more prop scarring and more turbidity caused by stirring up the bottom sediments. He was most concerned about boats larger than 16 feet in length that do not stay in the marked navigation channel.

32. The 1995 Florida Marine Research Institute study of prop scarring, which Mr. Crewz co-authored, recommended a four-point approach to reduce prop scarring: (1) boater education, (2) channel marking, (3) enforcement, and (4) speed zones. The

conditions contained in the proposed authorizations would implement two of the four points recommended by the study.

33. PMC would install informational signs about seagrasses at the proposed project and at Grandview Park so that boaters using the proposed project and boaters using the boat ramp at the park would be less likely to operate their boats in a manner harmful to seagrasses.

34. PMC would replace all missing markers along the main navigation channel. The current distance between some of the channel markers may be causing some boaters to stray from the channel.

35. PMC would mark the location of seagrasses adjacent to the navigation channel.

36. The operation phase of the environmental resource permit would not become effective until the channel markers and seagrass markers have been installed.

37. The proposed educational displays, channel markers, and seagrass markers would probably reduce boat traffic across seagrass areas, but they would not eliminate it. However, because the displays and markers would be viewed by boaters using Big Bayou other than just the 60 boaters who would use the slips at the proposed project, the "net" effect of the proposed project would likely be no significant increase in prop scars or related adverse impacts to seagrasses in Big Bayou due to the

proposed project. Therefore, PMC provided reasonable assurance that the proposed project would not result in significant adverse impacts to seagrasses.

38. To go further, however, and contend as PMC does that, even with the addition of 60 boats, the effect of the proposed project would be to significantly reduce the current incidents of prop scarring, boat grounding, and other adverse impacts to seagrasses, is mere speculation without a statistical analysis of boater behavior or other evidence that was not presented in this case.

39. PMC would also limit the use of its boat slips to vessels with a draft that would provide at least a twelve-inch clearance between the vessel's draft in a motor-down position and the top of submerged resource at mean low tide. This condition appears to be intended to track similar wording used in Florida Administrative Code Rule 18-20.004(5)(b)8., but because the condition leaves unstated the depth of the submerged resources and the water level of Big Bayou at mean low tide, a prospective renter of a boat slip would not know whether his or her boat would comply with the condition. The rule cannot be more specific because it applies to all waterbodies, but the specific condition in the proposed authorizations can and should be more specific to provide for adequate notice and enforcement.

40. PMC provided reasonable assurance that the proposed project would not cause significant adverse impacts to seagrasses.

Secondary Impacts - Manatees

41. In Florida, between 25 and 30 percent of the annual manatee deaths are caused by collisions with boats. From 2002 to 2006, in Pinellas County waters, 41 percent of the manatee deaths of a known cause were watercraft-related. That percentage exceeds the state average and corresponds to an average of 3.2 deaths per year caused by boats. However the study area from which these statistics were compiled does not include Big Bayou.

42. Dr. John Reynolds, a marine mammal expert, believes that boat speed is the primary factor in manatee deaths from boat collisions. At higher speeds, boaters and manatees have less time to avoid a collision and the severity of the injury to a manatee is generally greater when the manatee is struck by a boat moving at higher speeds. There are no boat speed zones currently established in Big Bayou.

43. Thirty-three years of data collected by the Florida Fish and Wildlife Conservation Commission (FWCC) indicate that there are no known boat-related manatee deaths within two and a half miles of the project site. There have been two dead

manatees discovered in Big Bayou, but their deaths were not attributed to boat collisions.

44. Increasing the number of boats in an area used by manatees increases the potential for boat/manatee collisions. To minimize the potential for boat/manatee collisions, PMC would implement the standard manatee protection measures that apply during the construction of the proposed docks. PMC would also implement and maintain a manatee education program approved by the FWCC, including informational signs regarding manatees at the proposed project.

45. Although reducing speeds by establishing, posting, and enforcing idle speed or slow speed zones in the bayou would probably be the most effective measure for the protection of manatees, PMC cannot be required by the proposed authorizations to control boat speeds because boat speed zones must be established by Pinellas County and the Florida Marine Patrol.

46. The proposed authorizations incorporate the conditions recommended by the FWCC for the protection of manatees. Tom Logan, the former FWCC endangered species coordinator and now a consultant who focuses on endangered species and their habitat, believes that the special conditions included in the proposed authorizations provide adequate protection for manatees. The U.S. Fish and Wildlife Service also concluded that the proposed project is not likely to adversely affect manatees.

47. PMC provided reasonable assurance that the proposed project would not cause significant adverse impacts to manatees.

Secondary Impacts - Recreation

48. Petitioners claim that their recreational uses of Big Bayou for fishing, swimming, canoeing, kayaking, and windsurfing would be diminished by the proposed project. However, Big Bayou is large enough to accommodate the additional boat trips associated with the proposed project and Petitioners' recreational uses. A public water body like Big Bayou must be shared by persons living along or near its shores with all other citizens of Florida. Although some Petitioners would prefer that the bayou had the feel of a more remote or wild place, the Pinellas County Aquatic Preserve is recognized to have a "highly developed, urban nature." Fla. Admin. Code R. 18-20.019. It already has the attributes of an urban preserve.

49. PMC provided reasonable assurance that the proposed project would not prevent or significantly impair the existing recreational uses of Big Bayou.

Cumulative Impacts

50. Florida Administrative Code Rule 18-20.006 and Section 3.2.8 of the Basis of Review require that cumulative impacts be evaluated in determining whether to issue, respectively, a submerged lands lease or an environmental resource permit. PMC and the Department state in their Proposed Recommended Orders

that the consideration of cumulative impacts is limited to projects that are existing or under construction, but Florida Administrative Code Rule 18.006(1) also requires, for a sovereignty submerged lands lease, consideration of "the number and extent of similar human actions within the preserve which have previously affected or are likely to affect the preserve." Because the principal source of potential adverse impacts associated with the proposed project is boating activity, the existing docking facility at Coquina Key North, the other docks in Big Bayou, and the boat ramp at Grandview Park are existing structures generating boating activity that must be taken into account in the cumulative impacts analysis.

51. Although the proposed project, with the conditions on its construction and operation, would, alone, have no significant adverse impact on water quality, seagrasses, manatees, or recreational uses in Big Bayou, the cumulative impacts to Big Bayou from all similar activities in the preserve have created significant (material) adverse impacts to Big Bayou in the form of trash, water contamination, damage to seagrasses, and prop scars.

Public Interest Criteria

52. Section 258.42(1)(a), Florida Statutes, requires that a lease of sovereignty submerged lands within an aquatic preserve by the Trustees must be "in the public interest."

Florida Administrative Code Rule 18-21.003(46) defines "public interest" in this context as "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."

53. Florida Administrative Code 18-20.004(2) sets forth the public interest criteria to be considered and balanced by the Trustees in determining whether to issue a submerged land lease or other authorization to use sovereignty submerged lands. The Rule identifies public boat ramps and "marking navigation channels to avoid disruption of shallow water habitats" as examples of public benefits. These benefits, however, must "clearly exceed" the "costs," such as degraded water quality, degraded natural habitat and function, harm to endangered or threatened species and habitat, and adverse cumulative impacts.

54. For issuance of the environmental resource permit, a determination is required that the proposed project is "clearly in the public interest," because Big Bayou is part of an Outstanding Florida Water. Fla. Admin Code R. 62-4.242(2). This determination requires the consideration and balancing of a number of criteria set forth in Section 3.2.3 of the Basis of Review:

(a) Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

(b) Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

(c) Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

(d) Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

(e) Whether the activity will be of a temporary or permanent nature;

(f) Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

(g) The current condition and relative value of functions being performed by areas affected by the proposed activity.⁴

55. As explained in the Conclusions of Law, the "clearly in the public interest" test does not require the applicant to demonstrate that the intended activity would have a net public benefit. The counter-intuitive result is that, to meet the "in the public interest" test for the sovereignty submerged land lease, PMC must demonstrate a net public benefit, but to meet the "clearly in the public interest test" for the environmental resource permit, PMC does not have to show a net public benefit.

56. The measures that PMC has agreed to undertake to meet the public interest criteria for the proposed authorizations are as follows:

- (a) Contribute \$300,000 to the construction of a second boat ramp at the current Sutherland Bayou Boat Ramp project in Palm Harbor;
- (b) Install and maintain navigational aides marking the main channel in the bayou;
- (c) Install markers indicating the location of seagrass beds;
- (d) Install and maintain an informational display at the public boat ramp in Grandview Park, relating to the protection of seagrasses and natural resources within the bayou; and
- (e) Install and maintain an aerial map at the Grandview Park boat ramp depicting the location of the navigation channel and the seagrass beds in the bayou.

57. The \$300,000 contribution for the boat ramp was based on a similar contribution (\$5,000 per slip) that was made previously by the developer of another docking facility in Pinellas County. The Department had originally suggested that PMC contribute to a spoil island restoration project to satisfy the public interest criterion. However, due to the Trustees' and/or Department's concern about the reduction in the number of boat slips available to the general public,⁵ the Department proposed that PMC contribute \$300,000 to Pinellas County's Sutherland Bayou Boat Ramp project in Palm Harbor.

58. The definition of "mitigation" in Florida Administrative Code Rule 18-20.003(35) states that, "Cash payments shall not be considered mitigation unless payments are specified for use in a previously identified, Department endorsed, environmental or restoration project." No evidence was presented to show that the Sutherland Bayou Boat Ramp project is an "environmental or restoration project," and it does not appear to qualify as such.

59. Implicit in the boat ramp contribution proposal is the view that the public interest in providing more recreational boaters with access to Pinellas County waters outweighs the negative impacts to marine resources that are associated with increased boating activity. No evidence was presented, however, to explain or support this view.

60. The strange result here is that PMC would be mitigating for the adverse impacts associated with increasing the boating activity in Big Bayou by helping to increased boating activity in other county waters where seagrass losses have been greater, prop scarring is a bigger problem, and more manatees are being killed by boat collisions.⁶

61. Dr. Reynolds stated that the Sutherland Bayou Boat Ramp project in Palm Harbor could be a benefit to Big Bayou if the boat ramp project took boat traffic away from the bayou, but he did not know whether it would. A reasonable inference can be

made that, being so far away, the Sutherland Bayou Boat Ramp project is unlikely to add to or subtract from boat traffic in Big Bayou.

62. As found above, the adverse environmental impacts of the proposed project, taking into account the proposed conditions, would be insignificant. However, because the record evidence shows that the Sutherland Bayou Boat Ramp project would put boats into county waters (and aquatic preserve waters) where there has been greater seagrass losses, more prop scarring, and more manatees killed by boat collisions than in Big Bayou, PMC's \$300,000 contribution to the boat ramp project actually increases the secondary impacts and cumulative impacts of PMC's proposed project and causes it to fail to meet the public interest criteria.

62. Without the \$300,000 contribution to the Sutherland Boat Ramp project, PMC would meet the "clearly in the public interest" test for the environmental resource permit because the other mitigation offered by PMC would offset the secondary and cumulative impacts of the proposed project.

63. However, a different result would occur in the case of the sovereignty submerged land lease. Eliminating the \$300,000 contribution to the Sutherland Boat Ramp project would result in a situation where the public benefits of the proposed project do

not "clearly exceed" the costs of the project and, therefore, PMC would not meet the "in the public interest" test.

64. Although the record in this case is insufficient to demonstrate that PMC's contribution to the boat ramp project would cause the benefits of the project to clearly exceed its costs, the record evidence is sufficient to support issuance of the lease modification if PMC were able to get the appropriate government authorities to establish a boat speed zone in Big Bayou, or if PMC contributed to the enforcement of boat speed zones in the aquatic preserve.

65. As restated in the Conclusions of Law, whether the proposed mitigation is sufficient to offset the adverse impacts of the proposed project is a determination that rests exclusively with the Trustees and the Department, based on the record evidence.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding.

67. Petitioners have standing to initiate this legal proceeding because their interests in using the waters of Big Bayou for recreational purposes and for nature observation are substantial interests which this proceeding was designed to

protect and the interests would be affected by the proposed project.

68. Petitioners contend that PMC does not have the requisite upland interest to be entitled to a sovereignty submerged land lease. Section 258.42, Florida Statutes, prohibits the erection of structures within an aquatic preserve, except for certain described projects, including "Private residential multislip docks". § 258.42(3)(e)(2), Fla. Stat. Florida Administrative Code Rule 18-21.003(42) defines "Private residential multi-family dock or pier" as follows:

"Private residential multi-family dock or pier" means a dock or pier on a common riparian parcel or area that is intended to be used for private recreational or leisure purposes by persons or groups of persons with real property interest in a multi-family residential dwelling such as a duplex, a condominium, or attached single-family residences or a residential development such as a residential or mobile home subdivision.

Petitioners argue that this definition requires that PMC have "some real property interest in the upland residential area," which PMC does not have. PMC retained ownership only of a narrow strip of land at the shoreline.

69. It was undisputed that PMC owns uplands contiguous to Big Bayou and that the proposed project is intended to be used for private recreational or leisure purposes. Use of the proposed project is restricted to condominium owners in Coquina

Key North. Therefore, the definition of "Private residential multi-family dock or pier" does not support Petitioners' argument.⁷

70. Petitioners also cite Section 258.42(3)(e)(1), Florida Statutes, which refers to allowing private residential docks "for reasonable ingress or egress of riparian owners," arguing, in essence, that the condominium owners are not riparian owners. However, the reference in Section 258.42(3)(e)(2), Florida Statutes, to "private residential multislip docks," does not contain the wording about reasonable ingress or egress of riparian owners.

71. An applicant for a submerged lands lease must demonstrate satisfactory evidence of sufficient upland interest which is defined in Florida Administrative Code Rule 18-21.003(55) as documentation which "clearly demonstrate[s] that the holder has control and interest in the riparian uplands adjacent to the project area and the riparian rights necessary to conduct the proposed activity." Satisfactory evidence of sufficient upland interest can include leases and easements on the uplands, indicating that the Trustees did not think it was necessary to limit submerged land leases to riparian landowners. The Trustees' rule defining multi-family docks to include those used by condominium owners and members of homeowners

associations is another indication of the Trustees' willingness to accommodate non-traditional upland ownership situations.

72. The interpretation of the governing statutes and rules by the Trustees and the Department as qualifying PMC to obtain a submerged land lease is a reasonable interpretation because it preserves the legislative intent to restrict new residential docks to those persons who reside along the shore of the aquatic preserve.

73. Petitioners argue that the condominium documents do not clearly restrict use of the boat slips to the condominium owners. The Department stated at the hearing that use of the boat slips must be restricted to use by condominium owners. That should be an express condition of the proposed authorizations.⁸ With that condition in the lease, it is concluded that PMC would qualify to apply for a submerged land lease.

74. As the applicant, PMC bears the burden of proving that it has satisfied the criteria for approval of both the environmental resource permit and the modified submerged land lease. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

75. "Reasonable assurance" in this context means a demonstration that there is a substantial likelihood of compliance with standards, or "a substantial likelihood that the

project will be successfully implemented." Metropolitan Dade County, v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

76. The reasonable assurance standard requires the applicant to address reasonably foreseeable contingencies. See Rowe v. Oleander Power Project, L.P., 1999 Fla. Env. Lexis 5752 (DEP 1999); Chipola Basin Protective Group, Inc. v. Fla. Chapter Sierra Club, 1988 Fla. Env. Lexis 112 (DER 1988).

77. Proceedings under Section 120.57, Florida Statutes, are intended to formulate final agency action, not to review action taken earlier and preliminarily. J.W.C., supra, 396 So. 2d at 785 (quoting McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)). Therefore, modifications to a project can be made when they are supported by record evidence and the due process rights of the parties are preserved.

78. For purposes of the modified lease, the public interest evaluation requires the application of a balancing test "to determine whether the social, economic and/or environmental benefits clearly exceed the costs." Fla. Admin. Code R. 18-20.004(2). The costs and benefits to be considered are those that relate to the same aquatic preserve within which the proposed project is to be located.

79. In 1800 Atlantic Developers v. Dept. of Environmental Regulation, 552 So. 2d 946, 957 (Fla. 1st DCA 1989), the court held that the "clearly in the public interest" standard that must be met for proposed activities in an Outstanding Florida Water does not require a demonstration of "net public benefit." It is sufficient to show that the project has no material negative impacts or that any such impacts are clearly offset by public benefits.

80. Because the proposed contribution of \$300,000 to the Sutherland Bayou Boat Ramp Project causes the proposed project to have additional adverse secondary and cumulative impacts to the Pinellas County Aquatic Preserve that were not addressed by PMC or the Department and which cause the proposed project to be contrary to the public interest, PMC failed to provide reasonable assurance of its compliance with the public interest criteria.

81. It is acknowledged that the Department and Trustees have the exclusive final authority to determine, based on the record evidence, whether the proposed mitigation measures are sufficient, to offset the expected adverse impacts of the proposed project. Save Anna Maria, Inc. v. Department of Transportation, 700 So. 2d 113, 116 (Fla. 2d DCA 1997), 1800 Atlantic Developers at 955.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Environmental Protection enter a final order denying Environmental Resource Permit No. 52-0258984-001 and the modification of Sovereignty Submerged Land Lease No. 520224543.

In the event the Trustees determine to issue the submerged land lease, it is recommended that the lease be modified to add a condition that the boat slips shall only be subleased or sold to residents of Coquina Key North condominiums.

DONE AND ENTERED this 21st day of March, 2008, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2008.

ENDNOTES

- ^{1/} Big Bayou is also a Class II waterbody, but it is not approved for shellfish harvesting.
- ^{2/} The word "significant" is used throughout this Recommended Order for its meaning "to be material or meaningful." It is not used as a synonym for "substantial."
- ^{3/} This discussion of boats that can cause harm to seagrasses, as well as the subsequent discussion about boat/manatee collisions, is meant to refer generally to boats with props and not to small draft, un-motorized boats such as canoes and kayaks.
- ^{4/} The parties stipulated that the proposed project would not adversely affect water flow or fishing, nor would it cause flooding or environmental damage to the property of others. No evidence was presented to suggest the proposed project would harm historical or archaeological resources.
- ^{5/} Undisputed evidence was presented that the "Tampa Bay area has a critical shortage of boat slips and has lost 1,500 over the past two years that have gone into private development."
- ^{6/} A reasonable inference can be made because of the large distance between Palm Harbor and Big Bayou, that few boaters who launch at Palm Harbor will show up in Big Bayou.
- ^{7/} If PMC intends to operate the proposed project as an income-producing enterprise, albeit for the exclusive use of condominium owners, it might also qualify as an "revenue generating/income related docking facility" under the Trustees' rules.
- ^{8/} The parties referred to such a condition at the final hearing, but the Administrative Law Judge could not find it in Joint Exhibit 1, which contains the proposed authorizations.

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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.