

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH BURGESS and THOMAS FULLMAN, )  
 )  
 Petitioners, )  
 )  
 vs. ) Case No. 11-2016  
 )  
 MARTIN COUNTY BOARD OF COUNTY )  
 COMMISSIONERS And DEPARTMENT )  
 OF ENVIRONMENTAL PROTECTION, )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This case was heard by David M. Maloney, Administrative Law Judge of the Division of Administrative Hearings on June 14-17, 2011, in Stuart, Florida.

APPEARANCES

For Petitioners: Virginia P. Sherlock, Esquire  
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For Respondent Martin County Board of County Commissioners:

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STATEMENT OF THE ISSUE

Whether the petition that initiated this case was timely as to Petitioner Fullman? If so, whether Petitioner Fullman has standing?

Whether Petitioner Burgess has standing?

Whether the record demonstrates reasonable assurances for approval of Martin County's application for a Consolidated Environmental Resource Permit and Sovereign Submerged Lands Lease to construct and operate a public mooring field in the Jensen Beach to Jupiter Inlet Aquatic Preserve and to construct and operate a "dinghy" dock immediately south of the Jensen Beach Causeway to support the mooring field?

PRELIMINARY STATEMENT

On December 24, 2009, the County applied to the Department for an Environmental Resources Permit (the "Permit") and a Sovereignty Submerged Lands Lease (the "Lease") to construct and operate a public mooring field and dinghy dock.

Pursuant to its permitting authority under Part IV of chapter 373 and chapter 253, Florida Statutes, the Department issued a Consolidated Notice of Intent that indicated its intent

to issue the Permit and enter the Lease on March 4, 2011. On March 17, 2011, the County published the Department's Consolidated Notice of Intent to Issue in the Stuart News.

The proposed mooring field would occupy 34.29 acres of the Jensen Beach to Jupiter Inlet Aquatic Preserve in the Indian River Lagoon, just south of the Jensen Beach Causeway, and would consist of 51 permanently anchored buoys that would accommodate vessels of 20 feet to 60 feet in length. The project would also authorize the construction and operation of a 1,832 square-foot L-shaped "dinghy dock" within an additional 0.178-acre area in the Aquatic Preserve to accommodate up to 18 vessels under Part IV of chapter 373 and chapter 253, Florida Statutes.

On March 31, 2011, the Petitioner Joseph Burgess, through counsel, filed a request for extension of time to file a petition for administrative hearing challenging the project. On April 5, 2011, the Department issued Petitioner Joseph Burgess an extension of time until April 14, 2011, to file the petition.

On April 14, 2011, Petitioners Joseph Burgess and Thomas Fullman filed a Petition for Administrative Hearing, which was forwarded to DOAH on April 19, 2011 for assignment of an administrative law judge. On April 27, 2011, the County filed a Motion for Summary Hearing. It was denied on May 9, 2011.

On June 10, 2011, the Department, without objection, filed a Request for Official Recognition of Part: IV of chapter 373,

and chapters 253 and 258, Florida Statutes; Florida Administrative Code Chapters 18-20, 62-330, 62-341, 62-343; the 1995 version of the South Florida Water Management District rules; the Indian River Lagoon Aquatic Preserve Management Plan adopted by the Board of Trustees on January 22, 1985; the Conceptual State Lands Management Plan adopted by the Board of Trustees on March 17, 1981, and amended July 7, 1981, and March 15, 1983; sections 120.569, 120.57, 120.60, 403.815, Florida Statutes; and Florida Administrative Code Chapters 28-106, 62-4, 62-110 and 62-113. The request was granted.

At the final hearing, Martin County presented the testimony of four witnesses: Christie Barrett, who was accepted as an expert in marine biology and is currently a Project Manager for Coastal Systems International, Inc. (CSI); Daniel Moretz, a former Department employee and permit processor for the Project, and current Project Manager for CSI; Timothy Blankenship, P.E., the Director of Engineering for CSI, who was accepted as an expert in coastal engineering; and Penny Cutt, the Regional Manager for CSI, who was accepted as an expert in marine biology and coastal zone management. Martin County offered 27 exhibits, marked for identification as MC Exhibits 1-6, 9-25, and 27-30. All were admitted.

The Department presented the testimony of one witness, Jennifer Smith, Program Administrator for the Submerged Lands

and Environmental Resource Program for the Southeast District Office of the Department, who was accepted as an expert in environmental resource permitting. Respondent Department moved into evidence its Exhibits 2 and 19, and both were admitted.

Petitioners Joseph Burgess and Thomas Fullman testified as fact witnesses, and Petitioners also called: Daniel Moretz; George Jones, the Executive Director for the Indian Riverkeeper Treasure Coast Environmental Defense Fund, who was accepted as an expert in the areas of natural resource management and protection, mooring field operation and management, and recreational and sport boating; James Egan, the Executive Director of the Marine Resources Council of East Florida, who was recognized as an expert in environmental science; and Kathy Fitzpatrick, P.E., Martin County's coastal engineer. Petitioners moved into their evidence Exhibits 9, 10, 29, 31, and 36, all of which were admitted.

The Hearing Transcript was filed with DOAH on July 6, 2011. The parties were given until August 8, 2011, to file proposed recommended orders. Proposed Recommended Orders were timely submitted by all three parties and have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The County, the Lagoon and the Aquatic Preserve

1. Martin County (the "County") is located on the Atlantic Coast in southeast Florida.

2. The Indian River Lagoon (the "Lagoon") runs along the eastern edge of the County in a north-south direction parallel to the coast. The Lagoon is separated from the Atlantic Ocean by barrier islands except for a connection to the ocean through the St. Lucie Inlet.

3. The Lagoon is designated an "Outstanding Florida Water" ("OFW") and its waters are classified as Class III by the Department.

4. The portion of the Lagoon within the County's boundaries is part of the state-designated Jensen Beach to Jupiter Inlet Aquatic Preserve (the "Aquatic Preserve"), one of three aquatic preserves in the Lagoon.

5. The waters and submerged lands of the Aquatic Preserve are used extensively by the public for commercial, recreational, and scientific purposes consistent with statutory authority that allows uses other than preservation. Uses include commercial docking facilities, defined by rule 18-20.003(16) as "docking facilities for an activity which produces income, through rental or any other means . . . ."

## The Parties

### a. Martin County Board of County Commissioners

6. The Martin County Board of County Commissioners (the "Board of County Commissioners") is the County's governing body.

7. In the name of the Board of County Commissioners, the County applied for the permit and sovereignty submerged lands lease that is the subject of this proceeding.

8. The Permit and Lease will allow the County to construct and operate a managed mooring field for boats (the "Mooring Field" or the "Project") to be located within a near-shore area of the Aquatic Preserve. Boats now commonly anchor in the area in a random, un-regulated manner and will continue to do so without the permit and the lease.

### b. The Department

9. The Department is the state agency with responsibility to conserve, protect, and control water resources pursuant to Part IV, chapter 373, Florida Statutes, and chapter 62, Florida Administrative Code.

10. The Department also has the authority to administer the state's program for leases of sovereignty submerged lands, unless such responsibility has been delegated by the Board of Trustees to a water management district or the Department of Agriculture and Consumer Services by an operating agreement.

11. The parties agree that the Department has the authority to administer the sovereignty submerged lands lease applied for in this case. See Petitioners' Proposed Recommended Order, para. 3 at 6; Martin County's Proposed Recommended Order, para. 5 at 7; and the Department's Proposed Recommended Order, para. 2 at 6.

#### Petitioners

12. Petitioner Joseph Burgess resides with his wife in an unincorporated area of the County known as Jensen Beach. He has a direct view of the Lagoon from the rear deck of his home, approximately six-tenths of a mile west of the Project site. Mr. Burgess's wife holds record title to the property, acquired before their marriage. He has a spousal interest in the homestead. He helped his wife to design and build their home on the property and the two have lived there for the past 14 years. They intend to live there for the foreseeable future.

13. Mr. Burgess visits the area of the Project several times a week. He frequently takes his grandchildren and out-of-town friends to the area to appreciate the beauty of the Aquatic Preserve, watch the fishermen, and enjoy the environmental diversity of the Lagoon.

14. When Mr. Burgess drives to the area by way of the Jensen Beach Causeway (the "Causeway") he often finds it difficult to find a parking spot.



15. Mr. Burgess attended community meetings when the Mooring Field was proposed and discussed its impact to the area with other members of the community including Petitioner Fullman. He contacted the Department regarding the status of the Project and requested notice of permit activity. Notice, however, was not provided to him directly; he learned of the Department's intent to issue the permit from counsel.

16. Mr. Burgess has a number of concerns about the Project. He fears it will diminish his way of life and the character of the area in which he resides. He worries that it will add congestion to a near-by rotary for vehicular traffic that he negotiates to get to and from his home nearly every day. He is concerned that the Project will destroy habitat for marine life and the birds which nest and feed in the ecosystem of the Aquatic Preserve and the Lagoon.

17. Petitioner Thomas Fullman owns and resides in a home in Jensen Beach overlooking the Project site. He and his family have enjoyed the Lagoon and the Aquatic Preserve for the past 20 years and he has a deep appreciation for them.

18. Mr. Fullman's concerns for the Aquatic Preserve and the Lagoon led him to challenge the issuance of a permit to construct a seawall in another administrative proceeding. The seawall was proposed to be constructed on the opposite side of the Causeway several hundred feet north of the proposed Mooring

Field. The challenge was successful. See Reily Enterprises, LLC v. Fla. Dep't of Env'tl. Prot., 990 So. 2d 1248 (Fla. 4th DCA 2008).

19. Mr. Fullman boated in the Lagoon frequently when his children were growing up. He now boats in the Lagoon once or twice a year. He enjoys fishing in the Lagoon. He is an avid bird-watcher who enjoys looking for osprey and hawks in particular. Mr. Fullman often walks by the site proposed for the Project and enjoys the natural scenery and wildlife that populates the Lagoon and the Aquatic Preserve. He frequently visits the Causeway Park adjacent to the Project site to observe the scenery and wildlife and to picnic with his family.

20. In his practice as a family therapist, Mr. Fullman occasionally takes clients to the Causeway to view the Lagoon and the Aquatic Preserve because they provide a pleasant setting conducive to productive therapeutic discussion.

21. Mr. Fullman plans to remain in his home. He is concerned that the Mooring Field, if installed, will affect his continued enjoyment of his property, cause an increase in vehicular traffic and traffic safety hazards on the route he takes to and from his home daily, limit public parking on the parkway he frequents for recreation and professional purposes, and cause harm to the Lagoon and Aquatic Preserve environmental resources important to him and his family.

22. Mr. Fullman learned of the Department's intent to issue the permit through counsel and authorized counsel to request an extension of time to file a petition for a formal proceeding on his behalf. Mr. Burgess was "taking the lead on keeping in touch with DEP," tr. 714, but Mr. Fullman did not have a formal arrangement with Mr. Burgess regarding securing an extension of time for the filing of an administrative hearing.

23. The Department issued an Order on April 5, 2011, that granted "a request made by the Petitioner, Joe Burgess, to grant an extension of time to file a petition for an administrative hearing." The Order extended the time for the filing to April 14, 2011. The Order did not mention Mr. Fullman.

24. On April 14, 2011, a petition was filed with the Department on behalf of both Mr. Burgess and Mr. Fullman. Unlike Mr. Burgess, however, Mr. Fullman, had not been granted an extension of time for the filing of a petition on his behalf at the time the petition was filed.

#### The County's Application

25. The County submitted its application for the Permit and the Lease on December 24, 2009. The application was prepared by a consulting firm, Coastal Systems International ("CSI"), whom the County had hired to obtain the necessary approvals for the Project from the Department and the U.S. Army Corps of Engineers (the "Corps").

26. The Department acknowledged receiving the County's application in a letter to the County dated January 22, 2010. Beginning with a request for additional information ("RAI") included with that letter, the Department conducted a review process that included more RAIs from the County and from other State agencies. Nearly a year later, the Department notified the County by letter dated January 26, 2011, that the application had been deemed complete.

27. After the application was deemed complete but before the Consolidated NOI (see, below) was issued, the County's consultant submitted additional information to the Department that included copies of documents submitted to the Corps in response to the Corps' requests for additional information. The additional information was overlooked by the Department and, therefore, was not incorporated into the Permit and Lease.

28. During the review process, significant changes were made to the Project proposed by the application. For example, the configuration or "footprint" of the mooring field was made smaller than originally proposed and the number of buoys allowed was lowered. The dinghy dock was relocated and altered in design and materials. Additional terms and conditions were added to the operational requirements. The Project was modified to address the site specific conditions in the Preserve and the possible adverse impact of shading on seagrasses. (This

included reduction and relocation of the Mooring Field, re-siting of the Dinghy Dock, and elimination of a proposed "wave attenuator.") The design of the Project considered the characteristics of the vessels that would use the Project, both in the Mooring Field and at the Dinghy Dock.

29. On February 22, 2011, the Board of Trustees determined pursuant to rule 18-20.004(1)(b) that it is in the public interest to lease approximately 34.47 acres of sovereignty submerged lands to the County for 25 years for the Project. The amount of acreage to be leased is 25% less than what was originally proposed, consistent with the changes made to the Project during the review process.

The Consolidated NOI, the Project Design and its Location

30. On March 4, 2011, the Department issued a Consolidated Notice of Intent to Issue an Environmental Resource Permit and State Lands Authorization (the "Consolidated NOI") to the County.

31. The Consolidated NOI authorizes the County to construct and operate a public mooring field within 34.29 acres of the Aquatic Preserve just south of the Jensen Beach Causeway. The proposed site of the Mooring Field is an area that was dredged for the filling of submerged lands to create the nearby west island of the Causeway.

32. The general area of the Project is a busy waterway that has heavy boat traffic from the north, south, east and west. It is approximately 500 feet from the Intracoastal Waterway near the Intracoastal's intersection with the Okeechobee Waterway.

33. The Project area is close to established upland facilities such as boat ramps, fish cleaning stations, a fishing pier, restrooms, picnic shelters, and public parking for cars and boat trailers, all maintained by the County on the west island of the Jensen Beach Causeway. The Causeway on its eastern end connects the mainland to a large, populated barrier island. On the mainland shore, several hundred yards west of the Project area is SunDance Marina, a commercial facility that offers fuel, repair, docking and other services for boaters. The facilities operated by the County, the marina, the local population and the heavy boat traffic in the area contribute to the per capita boat ownership in Martin County, among the highest for counties in Florida.

34. Amenities in or near a county park at the west island of the Jensen Beach Causeway include 140-car parking spaces, 58 car/trailer parking spaces and a wooden viewing platform adjacent to the boat ramp on the south side of the Causeway. There is currently a small dock and a sandy beach along the causeway near the boat ramp along the south portion of the

Causeway enjoyed by boaters while they also use the park facilities. Boaters would lose the use of the existing dock and the beach if the Project is constructed but would gain the benefits provided by the Project.

35. The Causeway has a vertical concrete seawall parallel to the Project area. There is a section of the Causeway that connects to the shoreline, called a relief bridge that promotes flushing and circulation otherwise impeded by the Causeway.

36. Prevailing winds are out of the southeast. Since the Lagoon is a large, open, water body, the wind traveling across it contributes to wave height which increases turbidity.

37. At present, in the absence of a mooring field, approximately 20 vessels anchor in and around the Jensen Beach area at any one time. Many anchor in the shallow seagrass area and remain for extended periods of time. The anchoring is haphazard and poses a risk of scarring and otherwise damaging seagrass beds.

38. The Project area has been plagued by dilapidated and sunken vessels. The County has removed seven of them recently, plus another three from nearby waters of the Aquatic Preserve. Dilapidated vessels pose the potential to leak hazardous materials, be navigational hazards and prevent seagrass growth, all of which can damage the Aquatic Preserve.

39. The Project Area is not currently managed or maintained by the County. The Project is proposed as a management tool to encourage boaters to utilize mooring buoys located in an area where seagrass is either sparse or barren instead of anchoring in shallow seagrass areas where the boats may damage the seagrass.

40. Known as the Jensen Beach Managed Mooring Field, the Project is authorized for 51 buoys permanently attached to helical mooring anchors drilled into the submerged bottom lands of the Preserve and a new Dinghy Dock on the south shore of the nearby west Causeway Island.

41. The helical mooring anchor is approximately 12 inches in diameter and will be secured to the Lagoon bottom by hydraulic methods. The anchoring system contains a shock absorber designed to provide flexibility when a vessel is moored by allowing the vessel the ability to swing with wind and wave energy. This swinging mechanism reduces potential impacts to seagrass from shading. Vessels moored in a boat slip or at a marina do not have swinging capability. The anchors are designed to provide safe mooring withstanding winds up to 80 miles per hour. Removal of vessels is mandatory in the event of a Category One hurricane (74 miles per hour) or above.

42. The Mooring Field will accommodate vessels from 20 to 60 feet in length.



43. The Mooring Field will be open to the general public on a first-come, first-serve basis as defined in rule 18-21.003(27). Furthermore, as a mooring field of buoys rather than a dock or marina with fixed boat slips, the waters of the Aquatic Preserve within the Mooring Field will remain open and accessible to public use by any vessels especially in the open, buoy-free lanes (or "Fairways") 75 feet wide. The fairways will bisect the Mooring Field in north-south and east-west directions and thereby create four quadrants in which buoys will be present. Permanent markers will mark the perimeter of the Mooring Field to provide notice of its existence.

44. The Mooring Field will be operated by the County as a not-for-profit operation. A fee will be collected from users with the proceeds to pay for the County's management by a Harbormaster and for maintenance of the buoys, the Dinghy Dock and associated upland amenities available to the users of the Mooring Field.

45. The design of the Mooring Field was determined by bathymetric depths taking into consideration the draft of the vessels that would occupy the field to ensure that there will be at least one foot between the draft of the vessels and the submerged bottom land.

46. The depth inside the Mooring Field varies within a foot or so of 9 feet. The anticipated draft of the vessels

entering the field will be 2 to 4 1/2 feet. Vessels traversing the field should not disturb the submerged land.

47. In addition, 34.29 acres of sovereign submerged land in the Aquatic Preserve occupied by the Mooring Field, the Dinghy Dock will be 1,832 square feet and occupy .178 acres of the Preserve. It will L-shaped, with a 5' x 163.5' "access walkway" from shore out to a 5' x 203' "terminal platform" designed to allow temporary mooring of up to 18 small vessels.

48. The access walkway at the Dinghy Dock will be constructed from Fiberglass light-transmitting grates atop pilings and elevated as high as 6 feet above the water level. The terminal platform will float on the water in order to comply with requirements of the Americans with Disabilities Act for access by handicapped boaters.

49. The Dinghy Dock is designed to ensure that environmental resources will not suffer impacts. It will connect to the bulkhead and existing riprap on the uplands. The pilings of the dock will be constructed of concrete. The slips will be 13 feet wide and 20 feet long and will accommodate a vessel up to 20 feet in length. A 20-foot vessel has a maximum draft of 2 to 2 1/2 feet. The water depth below the proposed Dinghy Dock's slips ranges from 7 to 10 feet.

50. The Dinghy Dock's terminal platform will be located over an area with no seagrass or other submerged aquatic resources.

Publication of Consolidated NOI

51. On March 17, 2011, the County published the Department's Consolidated NOI in the Stuart News.

Resources Located at the Site

52. In the summer of 2010, Coastal Systems International, Inc. ("Coastal Systems") performed an inspection of the existing upland structures on the Jensen Beach Causeway west island and the submerged lands located southwest of the Causeway. "The surveyed area is the site of the proposed Jensen Beach Managed Mooring Field Project . . . ." MC Ex. 11.

53. Three prior surveys had been conducted by Coastal Systems in the general Project area. In each of the surveys, in 2005, 2008 and 2009, "seagrass was observed along the mainland shoreline of Jensen Beach, west of the proposed Project area, and in the nearshore shoreline region of Jensen Beach Causeway, just north of the proposed mooring field." Id. at 2.

54. Four species of seagrass were observed in the nearshore area: Manatee Grass, Shoal Grass, Paddle Grass and Johnson's Seagrass.

55. Seagrass beds serve several functions important to the Aquatic Preserve. They stabilize sediments; entrap silt;

recycle nutrients; provide shelter, habitat and substrate for animals and other plant life forms; are nursery grounds for fish and shellfish; and are important direct food sources for various species, including the endangered manatee. Many commercially important fishes spend at least part of their lives in seagrass beds.

56. Coastal Systems submitted its Field Observation Report (the "Report") to the Department on July 16, 2010. The Report describes its purpose as follows:

The purpose of this inspection was to verify the previous marine resource survey of the submerged lands conducted in 2009 by Coastal Systems and to confirm the location, composition and density of marine resources, including the federally listed species Johnson's Seagrass (Halophila johnsonii . . .) .

Id.

57. The Report concluded that consistent with the previous marine resource survey conducted in 2009, seagrasses were found in shallower portions of the survey area. The most extensive areas of seagrass "were observed in the immediate nearshore area along the southwest portion of the Causeway, the southwest quadrant of the survey area [different from the quadrants into which the Mooring Field is divided] and the southeast quadrant of the survey area (See sheet 5 in attachment 1)." MC Ex. 11, "Conclusion" at 3.

58. Sheet 5 in Attachment 1 to the Report is entitled "Resources and Proposed Work" for the "Jensen Beach Mooring Field." It shows seagrass patches consistent with the description in the Report's Conclusion.

59. Depicting the proposed Mooring Field divided by Fairways into four quadrants, Sheet 5 shows the two eastern quadrants to be barren of seagrass. Portions of the two western quadrants are shown to be sparsely inhabited by seagrass at a level of 1 percent or below.

60. The northwest quadrant and the southwest quadrant are inhabited by seagrass at the 1 percent or below level. The area of sparse seagrass is no more than 10 percent of the northwest quadrant. In contrast, most of the southwest quadrant, at least 75 percent of its area, is shown to be inhabited by seagrass.

61. The 2009 survey was confirmed in 2010 when the Report was prepared. Field work done both in 2009 and the next year in 2010 were done during the growing season when the seagrass, including federally-listed Johnson Seagrass, would be most prevalent and easily observed. The seagrass that was observed in the footprint of the Mooring Field was "paddle grass decipiens." Tr. 73. No Johnson Seagrass was observed within the footprint of the Mooring Field in either the 2009 survey or

the field work done in July of 2010 during the growing season in advance of the Report.

62. Fish and manatees feed in seagrass areas. They would likely feed in the areas of dense seagrass in the Project Area found outside the Mooring Field where the sediments consisted of shelly, sandy materials and where Paddle, Manatee and Johnson's Seagrass were identified.

63. Macroalgae was present throughout the Project area in varying densities. The types observed included Common Caulerpa, Graceful Red Weed, Green Feather Algae, Hooked Red Weed, Spiny Seaweed, and Y Branched Algae. Macroalgae is a leafy algae and important marine resource. It provides habitat, shelter and food for various species in the Aquatic Preserve including the manatee and different fish species.

64. Fish observed included Atlantic Spadefish, Gray Snapper, Gulf Pipefish, Leopard Sea Robin, Sheepshead, Southern Puffer and other unidentified juvenile fish.

65. Other marine fauna observed during one field inspection included Amber Penshell, Blue Crab, Caribbean Spiny Lobster, Feather Duster Worms, Hermit Crabs, Horseshoe Crab, Hydroids, Lightning Whelk, Spaghetti Worms, Spider Crab and Sponges.

66. The Project area is also habitat for various endangered and threatened species and species of special concern

such as birds, reptiles and mammals, including the wood stork, manatee, Atlantic green turtles, and the saltmarsh snake.

Wading birds such as the great blue heron and roseate spoonbill inhabit the area. The Florida Manatee uses the area and is known to feed on the types of seagrasses found there.

67. Fish and manatees are unlikely to feed within the footprint of the Mooring Field because seagrass is either not present or extremely sparse.

#### The Mooring Field's Footprint: Seagrass Opportunity

68. The sediments within the mooring field are silty and muddy. Dependent on sunlight for growth, seagrass grows best in shallow areas of good water clarity that allows for sunlight penetration. Silty bottoms interfere with sunlight penetration whenever there is turbidity in the area that kicks up the silt. Seagrass is also more prone to grow in sandy sediments as opposed to silty or muddy sediments. Seagrass root systems hold fast in sandy sediments; they do not adhere well in silty sediments. The Mooring Field's sediment explains why its footprint is either barren of seagrass or inhabited by seagrass at such a sparse level.

69. Nonetheless, the presence of seagrass within the Mooring Field indicates that seagrass has the opportunity to grow there, that is, at least in the parts of the two western

quadrants of the Mooring Field which constitute seagrass habitat. Mr. Egan elaborated at hearing:

[S]ince the footprint of the mooring area already contains sparse seagrass, that area which is within the footprint of the mooring field itself, though quite sparse now, could easily rebound in much thicker growth were water quality conditions to be good for it  
. . . .

[T]o put a source of water quality impacts in close proximity to . . . the sparse seagrass fields . . . [eliminates] the opportunity for these seagrass beds to expand in an area where we have evidence to see that seagrass beds have been expanding.

Tr. 859-60 (emphasis added).

70. The impacts referred to by Mr. Egan are from shading caused by vessels moored in the four quadrants of the Mooring Field and the bioaccumulation in plants of toxic substances and biocides, like copper and zinc, that typically leach from the bottom paint of vessels. While Mr. Egan did not predict with certainty the impact of substances leaching from the bottoms of vessels in the Mooring Field, he was able to opine that in areas where circulation is reduced like the Project area because of the nearby Causeway, the levels of the toxic substances will increase and the plants and animals in the area can be expected to accumulate the substances to a degree that produces "a certain level of concern." Tr. 850.



71. That seagrass beds are expanding in the Project area is evident from a comparison of images provided by the South Florida Water Management District between 2006 and 2009. They show a doubling of the seagrass beds on the side of the channel opposite the Mooring Field site. Whether such expansion will, in fact, occur in the Mooring Field footprint, however, were the footprint free of shading and toxic substances leached from boat bottoms, is speculative. The sediment would still remain silty and unlikely to provide a good basis for seagrass root structure.

#### The Dinghy Dock

72. The types of vessels that will most likely use the Dinghy Dock include johnboats, dinghies, and sailboats. The Project allows sufficient distance for boats to traverse the Mooring Field and gain access to the Dinghy Dock without encroaching on seagrass beds.

73. The edge of the Dinghy Dock slip closest to the seagrass beds is approximately 25 feet away from the beds. Boater can avoid traversing marine resources whether seeking ingress or egress from their slips. Seagrass, moreover, is not likely to suffer impacts from vessels at the Dinghy Dock because there is a 7 to 10-foot depth under the slips. There is sufficient room between the Dinghy Dock and the Johnson's Seagrass.

74. A small portion of the Dinghy Dock's walkway from the Causeway Island traverses a narrow band of nearshore seagrass. The access walkway is constructed of fiberglass grated decking material and is elevated 6 feet above high water to minimize the impact of shading. The grated decking allows sunlight to reach the seagrass when the sun is directly overhead. Keeping the walkway at a 6-foot elevation above high water allows light to penetrate under the walkway as the sun moves from east to west. The potential for impacts to seagrass from shading by the walkway is not significant.

#### FWC and Archaeological/Historical Resources

75. Florida Fish and Wildlife Conservation Commission ("FWC") recommended approval of the Project if two manatee conditions are added to the permit. The Department relies on FWC for its expertise related to impacts to endangered or threatened species and their habitats, including impacts to manatees or seagrass habitat.

76. There are no archaeological or historical resources in the area.

#### Resource Protection Areas

77. Resource Protection Areas ("RPAs") are divided into three categories. The three categories are defined in rule 18-20.003 as follows:

(54) "Resource Protection Area (RPA) 1" - areas within the aquatic preserves which have resources of the highest quality and condition for that area. These resources may include, but are not limited to, corals; marine grassbeds; mangrove swamps; salt-water marsh; oyster bars; archaeological and historical sites; endangered or threatened species habitat; and, colonial water bird nesting sites.

(55) "Resource Protection Area 2" - Area within the aquatic preserves which are in transition with either declining resource protection are 1 resources or new pioneering resources within resource protection area 3.

(56) "Resource Protection Area 3" - Areas within the aquatic preserve that are characterized by the absence of any significant natural resource attributes.

78. The existence of sparse seagrass in the footprint of the Mooring Field, the Johnson's Seagrass, and the dense seagrass beds nearby are indicia that the Project area is within a Resource Protection Area 2.

#### Water Quality and the Management Plan

79. Adverse impacts to water quality caused by haphazard anchoring will be eliminated when boaters instead use the Mooring Field. The Mooring Field will enable boaters to secure their vessels to mooring buoys instead of dropping anchors into the substrate. Anchors hitting bottom cause turbidity. Vessels anchored to the substrate are a continual source of turbidity because the anchor can move back and forth with the wind or water current. Impacts of turbidity from prop dredging when

boats anchor in shallow areas would also be reduced because the Mooring Field is in deeper water.

80. The Project will enhance water quality in the Jensen Beach area through the implementation of the Jensen Beach Management Plan (the "Management Plan").

81. The Management Plan is a list of best management practices. The provisions most significant to water quality enhancement include: 1) all vessels must pump out their septic tank waste within 24 hours of entering the Mooring Field and every three days thereafter; 2) all major repairs are prohibited; 3) the scraping of a vessel's hull is prohibited; 4) throwing trash overboard is prohibited; 5) cleaning a vessel is prohibited; 6) throwing anchor in the leased area is prohibited; and 7) all vessels are required to be operational.

82. The Mooring Field and the Dinghy Dock will be regulated and managed by a harbor master under the plan. The harbor master is responsible for the day-to-day operations of the Mooring Field under the Management Plan. For example, if there is an illegal discharge, the harbor master is charged with notifying FWC so that it can conduct enforcement.

83. The Board of Trustees proposed a lease condition that requires vessels to contain their graywater in onboard holding tanks so that it will not be discharged into the Aquatic

Preserve. (Graywater is not potable and not contaminated with sewage but has been used, for example, dishwashing water.)

84. Tierra Consulting Group, Inc. performed the water quality analysis at the Project site. Its findings indicate that water quality in the area meets water quality standards.

85. Flushing in the area is adequate due to strong currents and the relief bridge which assist in offsetting the effects of the Causeway's presence.

86. The Permit addresses water quality during the construction phase by implementing a turbidity management plan. The turbidity plan requires a curtain to be deployed during construction. The curtain will prevent water quality violations from occurring outside the curtained area during construction. The curtain will protect seagrass and microalgae outside the curtain from the effects of turbidity. The County has also agreed to conduct post-construction water quality monitoring to confirm that water quality in the Project area has not been impaired by construction.

#### Navigation

87. The Project is located a safe distance from the Intracoastal, existing boat ramps, and the Sundance Marina.

88. The Mooring Field design provides adequate distance between buoys to ensure that vessels will be properly spaced.

The Fairways provide safe corridors for two vessels to pass each other in the Fairways.

Board of Trustees Authorization

89. The Project requires a lease because it involves placing mooring buoys over sovereignty submerged lands. The lease is required to be approved by the Board of Trustees and could not be delegated to the Department for two reasons: 1) it was deemed to be a matter of "heightened public concern"; and 2) it would result in the addition of 50 slips. The Board's approval was unanimous.

90. The upland portion adjacent to the Project is owned by the Board of Trustees.

91. The public interest benefits from the Project include enhancement to water quality in the Aquatic Preserve; the first-come, first-serve basis on which it is open to the public; accessibility to the upland public amenities for patrons; protection of seagrass beds; and removal of dilapidated vessels in the area.

92. The Board of Trustees agreed to waive lease fees because all of the revenue the County collects associated with the Project will be used to operate and maintain the facility.

93. There are approximately 19 mooring fields currently in operation on lands owned by the Board of Trustees. None is

located in an aquatic preserve. Two are located in the National Marine Sanctuary in the Florida Keys.

94. The Aquatic Preserve Management Plan that applies to the Project area is the 1985 Indian River Lagoon Management Plan.

95. The Conceptual State Lands Management Plan also applies to the Project area. The Conceptual State Lands Management Plan emphasizes balancing the resources of aquatic preserves with public use and benefit of the preserves.

Most Current Permit Drawing and Management Plan

96. The Department's Consolidated NOI does not contain the most current permit drawings or the most current management plan. Changes to the drawings and the plan occurred after the Department deemed the application complete. The changes were submitted by County with the intention that they be included.

97. The most current drawings were attached to a Response to an Army Corps RAI. These drawings should have been included in the Department's Consolidated NOI but were overlooked. The changes clarify the dimensions of the Mooring Field boundary and elevated the dinghy dock from 5 feet to 6 feet to allow for more light penetration for the benefit of the seagrass.

98. The most current management plan (also attached to the Response to the Army Corp RAI and submitted by the County to the Department in a timely fashion) includes two revisions.

99. First, it revises section 2.5.1 to require the harbor master to fill Mooring Field Quadrants 1, 2 or 3 ahead of quadrant 4. Quadrant 4 is the quadrant with the seagrass. The order of filling was prescribed to protect the sparse seagrass observed by Coastal Systems in Quadrant 4.

100. Second, the Management Plan was revised to address waste management and marine pollution by adding section 2.7. It provides a schedule for Martin County's waste management vessel to pump out the septic tanks of vessels that use the facility. It specifies how often vessels should be pumped out and requires that information be provided to each patron on arrival.

101. If authorized, the changes to the drawings and the Management Plan not included in the Consolidated NOI will not have to be reviewed by the Board of Trustees because the Department regards them to be "minor modifications." See Fla. Admin. Code. R. 62-343.100(1)(a).

The County's Aspiration and Past Department Action

102. The County seeks authorization for the Project in hopes for less adverse impacts from boaters anchoring in seagrass, traversing seagrass, and discharging wastewater, graywater and waste materials into the Aquatic Preserve.

103. Prior to this case, the Department has not authorized a Mooring Field within an Aquatic Preserve.



## CONCLUSIONS OF LAW

104. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57.

### Timeliness

105. The Consolidated NOI's publication on March 17, 2011, gave petitioners fourteen days or until March 31, 2011, to file a petition challenging the permit and the lease. See Fla. Admin. Code. R. 62-110.106(3). See also City of St. Cloud v. Dep't of Env't'l. Reg., 490 So. 2d 1356 (Fla. 5th DCA 1986).

106. Petitioner Burgess obtained a valid extension of time to file the petition that initiated this case and the petition was filed within the time allowed by the order granting the extension. Petitioner Fullman, however, did not seek an extension of time to file the petition in writing and the order granting the extension of time to Mr. Burgess did not extend the time for filing a petition to Mr. Fullman.

107. The petition that initiated this case was untimely as to Petitioner Fullman. Petitioner Fullman should be dismissed as a petitioner. See Fla. Admin. Code R. 110.106(4); Somero v. Hendry Gen. Hosp., 467 So. 2d 1103 (Fla. 4th DCA 1985).

### Mr. Burgess' Standing

108. Mr. Burgess contends that he has standing as a party because he is a person "whose substantial interests will be

affected by proposed agency action." § 120.52(13)(b), Fla. Stat.

109. In order for a Mr. Burgess to demonstrate that he meets the definition of a "party" and therefore has standing to initiate an administrative proceeding, he must meet the two-pronged test of Agrico Chemical Corp. v. Dep't of Env'tl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981), as clarified by St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011), that is, that he has a substantial interest that reasonably could be affected by the agency action in question and that the injury is of the type that the proceeding is designed to protect.

110. The proof offered by Mr. Burgess meets the test for standing. Mr. Burgess has standing to initiate this proceeding pursuant to sections 120.569 and 120.57.

#### Burden

111. At the outset of this proceeding, Martin County had the burden of ultimate persuasion to show by a preponderance of the evidence that its permit application should be approved and the sovereignty submerged lands lease be authorized. See Fla. Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

112. The County made a prima facie case that it is entitled to the authorizations sought. The burden, therefore,

shifted to Mr. Burgess and Mr. Fullman (if the petition is ultimately accepted as timely as to Mr. Fullman) to rebut the prima facie case and support the allegations in their petition. For the Petitioners to prevail, their evidence must be of equivalent or greater quality than the evidence presented by the County and the Department. Otherwise, the authorizations sought should be issued. Id.

#### Permitting and Leasing Criteria

113. Chapter 18-20 governs Florida Aquatic Preserves. Rule 18-20.004 establishes "Management Policies, Standards and Criteria" for requests for activities on sovereignty submerged lands in aquatic preserves.

114. Rule 18-20.004 requires all activities in aquatic preserves with an adopted management plan to demonstrate consistency with the plan. See rule 18-20.004(7).

115. The County and the Department presented evidence that a Mooring Field in the proposed location is consistent with the applicable management plan. The applicable management plan is the Indian River Lagoon Aquatic Preserves Management Plan adopted on January 22, 1985. The County also presented evidence that the Mooring Field is consistent with the Conceptual State Management Plan. The Petitioners did not present contrary evidence of equivalent quality to rebut a determination that the Project is consistent with the management plans.

116. Rule 18-20.004(5)(d) provides "Standards and Criteria for Docking Facilities" that apply only to "commercial" or "other revenue generating/income related" docks such as the Mooring Field. Among those criteria are:

1. Docking facilities shall be authorized only in locations having adequate circulation and existing water depths in the boat mooring, turning basin, access channels, and other such area which will accommodate the proposed boat use to ensure that a minimum of one foot clearance is provided between the deepest draft of a vessel and the bottom of the waterbody at mean or ordinary low water.

2. Docking facilities and access channels shall be prohibited in a Resource Protection Area 1 or 2, except as allowed pursuant to Section 258.42(3), Florida Statutes, while dredging in Resource Protection Area 3 shall be strongly discouraged.

117. Section 258.42(3)(e)3 provides:

Commercial docking facilities shown to be consistent with the use or management criteria of the preserve may be approved if the facilities are located within a reasonable distance of a publicly maintained navigation channel . . . . The distance shall be determined in accordance with criteria established by the trustees by rule, based on the depth of the water, nature and condition of bottom, and presence of manatees.

118. The Project complies with the requirements of the rule except that it is in a Resource Protection Area 2. It is located, however, approximately 500 feet from the Intracoastal Waterway. It is within a reasonable distance of a publicly-

maintained navigation channel. The Project, therefore, is eligible for approval under the statute.

119. Rule 18-20.003(19) defines the term "dock" as "a fixed or floating structure, including moorings, used for the purpose of berthing buoyant vessels either temporarily or permanently." Rule 18-20.003(16) defines the term "Commercial, industrial, and other revenue generating/income related docks" as "docking facilities for an activity which produces income, through rental or any other means . . . ." The Project is a "revenue generating/income related dock."

120. Rule 18-20.004(5) (a) provides "Standards and Criteria for Docking Facilities" to which all docking facilities are subject. Among the criteria are the following:

2. Certain docks fall within areas of significant biological, scientific, historical, or aesthetic value and require special management considerations. The Board [of Trustees] shall require design modification based on site specific conditions to minimize adverse impacts to these resources, such as relocating docks to avoid vegetation or altering configurations to minimize shading.

3. Docking facilities shall be designed to ensure that vessel use will not cause harm to site specific resources. The design shall consider the number, lengths, drafts and types of vessels allowed to use the facility.

121. The County and the Department demonstrated compliance with the rule. The evidence in support of compliance was not rebutted.

122. The Project qualifies under rule 18-20.004(1)(e)4. The County, therefore, does not have to meet the requirements contained in rule 18-20.004(1)(g) because it applies only to projects that qualify under rule 18-20.004(1)(e)7-10.

123. Rule 18-20.004(2), entitled "Public Interest Assessment Criteria," provides that "[i]n evaluating requests for the sale, lease, or transfer of interest, a balancing test will be utilized to determine whether the social, economic and/or environmental benefits clearly exceed the costs."

124. The cost/benefits balancing test is to be made in light of "the quality and nature of the specific aquatic preserve." Fla. Admin. Code R. 18-20.004(2)(a)2. Projects in less developed, more pristine aquatic preserves (such as Apalachicola Bay) are subject to a higher standard than a more developed preserve, id., such as the Jensen Beach to Jupiter Inlet Aquatic Preserve.

125. The Project's environmental benefits of enhancing water quality and preventing damage to existing seagrass beds outweighs the environmental cost of diminishing the opportunity for seagrass to grow in the Mooring Field. The social, economic and environmental benefits of the Project outweigh the cost of

the loss of whatever environmental benefit might be gained if the opportunity remained for the seagrass within the footprint of the Mooring Field to expand.

126. Rule 18-20.004(5)(a)2 requires an applicant to minimize adverse impacts to resources by locating the Dinghy Dock to avoid vegetation and minimize shading. Both the Mooring Field and the Dinghy Dock were downsized and relocated to avoid impacts to vegetation. The impacts from shading caused by the Dinghy Dock will be minor.

127. Section 373.414(1) directs the Department to not issue a permit unless the applicant provides reasonable assurance that state water quality standards will not be violated.

128. The Project will not violate water quality standards but poses the potential for enhancement of water quality in the Aquatic Preserve.

129. Mr. Egan's opinion that the concentration of boats in the Mooring Field creates concern because of toxic substances that will leach from boat bottoms is outweighed by the Tierra Consulting Group's water quality analysis, the current conditions in the Project area that include adequate flushing and heavy vessel traffic, the number of boats typically moored in the area at any one time, and the dilapidated vessels sunken in the substrate.

130. Reasonable assurance must be provided that proposed activity in, on, or over surface waters designated as OFW "will be clearly in the public interest." § 373.414(1). The public interest test involves a balancing of the seven enumerated criteria listed in section 373.414(1) (a).

131. The County has provided reasonable assurance that the Project is clearly in the public interest through the testimony at hearing, the conditions in the proposed permit, the supporting documentation in the application, and the County's removal of the dilapidated vessels from the Lagoon.

132. The Project will positively affect the public health, safety, welfare, and property of others. Boaters will be able to safely secure their vessels to a mooring buoy instead of anchoring in well-developed seagrass beds; the project provides boaters safe navigation within the Mooring Field, to and from the Dinghy Dock, and to and from the Intracoastal Waterway; and the ecological and aesthetic value in the Lagoon will be enhanced through implementation of the Management Plan and removal of the dilapidated vessels.

133. The Project will positively affect the conservation of fish and wildlife, including threatened or endangered species and their habitat.



134. The Project will positively affect navigation and not adversely affect the flow of water or cause harmful erosion or shoaling.

135. The Project will positively affect the fishing or recreational values or marine productivity in the vicinity of the Project.

136. The permanent nature of the Project will have a positive effect in the Lagoon.

137. The Project will not adversely affect historical or archaeological resources in the area since there are none.

138. The Project will have a positive effect on the current condition and relative value of functions being performed by areas affected by the proposed activity.


139. Rule 40E-4.301(1)(f) requires the County to provide reasonable assurance that the construction and operation of the surface water management system will not cause adverse secondary impacts to the water resources.

140. The evidence at hearing established that the Project will not result in secondary impacts to water resources in the Lagoon but rather will improve water resources in the area. The improvement will be accomplished through observance of the requirements in the Management Plan.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a Final Order issuing Consolidated Environmental Resource Permit and Sovereign Submerged Lands Lease, Department File No. 43-0298844-001 and Lease No. 430345996, to the County. It is also recommended that the Consolidated Environmental Resource Permit and Submerged Lands Lease incorporate the current drawings and revised management plan submitted by the County after the application was deemed complete.

DONE AND ENTERED this 7th day of November, 2011, in Tallahassee, Leon County, Florida.



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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.