

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAST STAND, INC., AND GEORGE)
HALLORAN,)
)
Petitioners,)
)
vs.) Case No. 12-2574
)
FURY MANAGEMENT, INC., AND)
DEPARTMENT OF ENVIRONMENTAL)
PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

The final hearing in this matter was held on October 31 and November 1, 2012, by video teleconference at sites in Tallahassee and Marathon, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether Fury Management, Inc., is entitled to an environmental resource permit under chapter 373, Florida Statutes (2012),^{1/} and a sovereignty submerged land lease under chapter 253, Florida Statutes, for a proposed project in the waters off the coast of Key West, Florida.

PRELIMINARY STATEMENT

On June 13, 2012, the Department of Environmental Protection ("Department") issued a notice of its intent to issue a consolidated environmental resource permit and modified sovereignty submerged land lease to Fury Management, Inc. ("Fury"), for an "entertainment destination" consisting of permanently-moored platforms and large floating "water toys" where customers are brought to swim, ride jet skis, use kayaks, and play on the water toys. George Hallorhan and Last Stand, Inc. ("Last Stand"), filed a petition for administrative hearing with the Department to challenge the permit and lease, and the

petition was referred to DOAH to conduct an evidentiary hearing. Petitioners requested and were allowed to amend their petition twice.

At the final hearing, Petitioners presented the testimony of: Peter Frezza, an expert in marine biology; Leonard Nero, an expert in marine conservation, oceanography, and navigation; Arnaud Girard, a salvage boat operator; Mark Songer, president of Last Stand; and George Hallorhan. Petitioners' Exhibits 1 through 10 were admitted into evidence.

The Department presented the testimony of: Bruce Franck, environmental manager for the South District Branch Office, an expert in marine biology; and Timothy Rach, bureau chief of the Bureau of Submerged Lands and Environmental Resources, an expert in marine biology. Department's Exhibits 1, 8 through 11, 13, 15, 22, and 24 were admitted into evidence.

Fury presented the testimony of: Scott Saunders, president of Fury; Eric Denhart, Fury's operations manager; Marius Venter, who also identified himself as operations manager; John Goldasich, an expert in marine resources; and George Young, Jr., an expert marine surveyor. Fury's Exhibits 1 through 8 were admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders

that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner Last Stand is a corporation formed in 1987 to protect, promote, and preserve the quality of life in Key West and Monroe County "with an emphasis on the environment." Last Stand has 235 members.

2. The president of Last Stand, Mark Songer, said that members use the "back country" area off Key West, which includes the proposed lease area, for boating, fishing, swimming, and bird watching. He was not specific about the number of members that do so. Petitioner George Hallorhan, a member of Last Stand, named nine members of Last Stand that use the back country area for recreational activities.

3. Hallorhan is a natural person residing at 16B Hilton Haven Drive in Key West. Hallorhan has used the waters that include the proposed project site for sailing, fishing, boating, snorkeling, and nature observation.

4. The Department is the state agency charged by statute with the responsibility to regulate construction activities in waters of the state. The Department has also been delegated authority from the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to review applications for

submerged land leases for structures and activities that will preempt the use of sovereignty submerged lands.

5. Fury is a Florida corporation that is in the "water attraction" business and has been operating in Key West for 17 years. It currently operates a recreational site similar to the proposed project nearby.^{2/}

6. Fury owns no riparian uplands.

The Affected Waters and Water Bottom

7. The proposed lease area is approximately .6 miles offshore of Key West and is 17,206 square feet in size (0.39 acres).^{3/}

8. The site is within the Florida Keys National Marine Sanctuary, which is designated an Outstanding Florida Water. Outstanding Florida Waters are waters designated by the Environmental Regulation Commission as worthy of special protection because of their natural attributes. See § 403.061(27), Fla. Stat.

9. The proposed lease area is close to the Key West National Wildlife Refuge.

10. It lies between two shallow landforms known as Pearl Bank and Frankfurt Bank. The closest upland is Wisteria Island, which is undeveloped.

11. The water depth at the site is about ten feet.

12. The Department and Fury contend the bottom beneath the proposed floating structures is rocky and mostly denuded, with no seagrasses and only scattered sponges and octocorals (soft corals) that do not constitute a "benthic community." They found turtle grass growing between the denuded areas and beyond the project site.

13. "Benthic communities" are defined in Florida Administrative Code Rule 18-21.003(12) as areas where "associations of indigenous interdependent plants and animals occur," such as grass beds, algal beds, sponge beds, and octocoral patches.

14. Petitioners' experts said there are seagrasses, octocorals, sponges, and algal species beneath the proposed structures that compose a benthic community.

15. The marine biologists employed by the Department and Fury spent more time investigating the resources at the site than did Petitioners' biologists. In addition, Fury's consultants determined with greater precision the location of the benthic resources in relationship to the proposed floating structures than did Petitioners' consultants. The more persuasive evidence regarding the benthic resources and their locations was the evidence presented by the Department and Fury.

The Proposed Activities

16. Fury proposes to permanently moor a registered vessel consisting of two connected, floating platforms. It was sometimes referred to as a "barge." One floating platform would support up to ten jet skis, and the other would support up to ten kayaks. The structure would be used to moor the catamaran that brings customers to and from the site.

17. There would also be three floating, inflatable water toys moored at the site: a trampoline, a climbing wall, and a slide.

18. The area between the floating platforms and water toys would be roped-off to create a central swimming area.

19. The platforms and the water toys would be secured to the water bottom with permanent anchors.

20. The floating platforms would remain moored at the site (except when a hurricane is approaching), but the water toys, jet skis, and kayaks would be brought back to an upland location each night.

21. The proposed project would be part of the "Fury Ultimate Adventure," a six-hour tour in which customers are taken to a reef for three hours in the morning to snorkel and, then, to the floating platforms for three hours in the afternoon to swim, ride jet skis and kayaks, and play on the water toys.

22. Fury would provide an educational program for its customers to inform them about the importance of the marine environment, including seagrasses, mangroves, marine turtles, manatees, corals, whales, and fishes. Educational documents would also be made available to Fury's customers.

Impact Assessment in General

23. In assessing the potential impacts of the proposed project, consideration must be given to the fact that Fury currently operates the same activities only 500 feet away. The proposal is to move the activities to the new site where they will be subject to regulation for the first time.

24. Fury's existing operations do not require an environment resource permit from the Department because Fury uses a structure that has been registered as a vessel and uses conventional anchors. Generally, vessel operation and mooring are not subject to Department regulation because they do not involve construction in waters of the state.

25. Fury's existing operations do not require a lease from the Board of Trustees because the activities are being conducted over private water bottom, not sovereignty submerged land.

26. There are two similar, competing operators near Wisteria Island. The competing operators do not have leases from the Board of Trustees or permits from the Department because they

are operating as vessels, using conventional anchors, and moving every day.

27. Fury's existing operations and the operations of its competitors are not subject to the conditions that can be imposed in a sovereignty submerged lands lease and environmental resource permit to protect the environment.

Environmental Impacts

28. The floating platforms and water toys would be secured to helical screw anchors installed into the bottom at locations where there are no seagrasses, sponges, or octocorals.

29. The proposed anchors and anchor lines are designed to avoid the damage to seagrasses and other benthic resources often caused by conventional vessel anchors and chains that can drag across the bottom.

30. The ten-foot water depth at the project site ensures that activities on the surface, such as boating and swimming, will not impact the bottom.

31. The proposed project would cause some shading to submerged resources, but the shading would be minimal and would not cause the loss of seagrasses or other benthic resources.

32. There would be no pollutant discharges associated with the proposed project. The catamaran that transports customers to the site has two Coast Guard-approved restrooms. The jet skis would not be fueled at the site.

33. Fury is required to monitor water quality at two sampling sites, one within the lease area and a second 300 feet away to represent background conditions.

34. Fury's operations would be subject to a sewage handling plan, a waste management plan, a fueling plan, and an emergency spill response plan that address these potential sources of environmental pollution.

35. The Florida Fish and Wildlife Conservation Commission was informed of the proposed project, but made no objection to the Department.

Navigational Impacts

36. The proposed site lies between Pearl Bank and Frankfurt Bank, which are about 1,500 feet apart. The proposed project is 107 feet wide at its widest point, leaving adequate space for navigation around the anchored platforms and water toys.

37. The water depth in the remaining space between the banks varies from six to 12 feet, which is sufficient water depth for the vessels that use the area.

38. There are no marked channels in the area. Arnaud Girard, a salvage boat operator, said there is an unmarked "nine-foot" channel between the banks that is used by commercial and recreational boaters. Girard's testimony about boats using the nine-foot channel and why he opposes Fury's proposed project was confusing. Girard seemed to indicate, for example, that Fury's

existing operation is a greater impediment to the use of the nine-foot channel than Fury's proposed project.

39. Fury's customers would be using watercraft around the project site for only three hours each day. Only seven jet skis would be out at any one time, six ridden by customers and one ridden by a Fury safety guide.

40. Fury would not be adding more jet skis into the area because jet skis are already using the area as part of Fury's existing operations.

41. The jet ski-riding area would be marked off with four red buoys permanently anchored to the bottom. The guide would accompany the customers to the ride area to monitor the jet ski use and keep the customers inside the riding area.

42. The riding area (about 19 acres) is not a part of the area to be leased. Other vessels are not excluded from the riding area.

43. The floating platforms and water toys will have Coast Guard-approved lighting. The Coast Guard does not believe the structures would cause hazards to public safety or navigation if they are adequately lighted.

44. It is in Fury's financial interest to provide safe navigation for its customers.

45. Numerous live-aboard vessels anchor in these waters. Navigation in this area already requires a careful lookout for anchored obstacles.

46. The preponderance of the evidence shows that the proposed activities would not create greater challenges for vessels attempting to navigate through the area or greater potential for collisions than exist currently. The proposed activities do not create a navigational hazard.

Impacts to Public Use

47. The proposed project would exclude the public from 17,206 square feet of sovereignty land, which takes into account the overlying floating platforms, moored catamaran, and floating water toys as well as the central swimming area. This exclusion would be offset in part by the public's access to the waters where Fury currently anchors its vessel and water toys.

48. The United States Fish and Wildlife Service reviewed the application and is satisfied that Fury's use of buoys to mark the jet ski-riding area will prevent jet skis from entering the wildlife refuge, where jet skis are prohibited.

Aesthetic Impacts

49. Petitioners contend that the aesthetic values of the proposed lease area would be significantly diminished. The assessment of aesthetic values is often subjective and, to avoid subjectivity, requires consideration of all vistas, human

activities, and structures that make up the current aesthetics of the area. It is noted, for example, that Hallorhan testified that he does not visit the area anymore because of existing "jet skis and noise." See also Fury Exhibit 1.

50. On this record, the evidence is insufficient to show that the existing aesthetic values in the area would be diminished by the proposed project.

Secondary Impacts

51. The proposed project would have minimal impact. There are few places in the general area with a hard bottom and no seagrasses or benthic communities that would be adversely affected, making it difficult for any future applicant to demonstrate minimal impact.

52. Petitioners failed to prove that there would be significant secondary impacts associated with the proposed project that require denial of the environmental resource permit.

Public Interest/Environmental Resource Permit

53. To obtain a permit for construction activities in an Outstanding Florida Water, it is necessary to show that a proposed project would be "clearly in the public interest." Section 373.414(1)(a) directs the Department to consider and balance the following criteria as part of this determination:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

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

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

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

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

54. Fury's proposed activities would not adversely affect the public health, safety, or welfare or the property of others.

55. The proposed activities would not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.

56. The proposed activities would not adversely affect navigation or the flow of water or cause harmful erosion or shoaling.

57. The proposed activities would not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.

58. The proposed activities would be of a permanent nature.

59. The proposed activities would not adversely affect significant historical and archaeological resources.

60. The current condition and relative value of functions being performed by areas affected by the proposed activities would not be diminished.

61. It is in the public interest to regulate Fury's activities, which are now unregulated.

62. Fury's proposed project is clearly in the public interest.

Mitigation

63. Under section 373.414(1) (b), if an applicant cannot eliminate potential adverse impacts, the Department must consider measures proposed by or acceptable to the applicant to mitigate the adverse effects. Initially, the Department determined that all of the potential adverse impacts of Fury's proposed project would be remedied through avoidance and minimization, and, therefore, mitigation was not required.

64. Later, "in an abundance of caution," the Department decided to require mitigation "to offset the minimal adverse impacts" which were identified as being associated with the screw anchors installed in the substrate and the permanent nature of the project. However, at the final hearing, Tim Rach, chief of

the Bureau of Submerged Lands and Environmental Resources, said he did not think mitigation was needed.

65. Fury proposes to pay \$4,000 to the Florida Keys National Marine Sanctuary Foundation ("Foundation"), a 501(c)(3) corporation, for the Foundation's Key West mooring buoy program. Similar donations to benefit the buoy program have been accepted in the past by the Department as mitigation.

66. The purpose of the mooring buoy program is to provide a place to moor vessels so that conventional vessel anchors do not have to be used. The buoys are permanently located near or above areas of coral reef or other sensitive benthic communities within the Florida Keys National Marine Sanctuary to prevent damage by vessel anchors.

67. Petitioners contend that Fury's proposed donation to the Foundation is unacceptable because it was not made for an "environmental creation, preservation, enhancement or restoration project" as required by section 373.414(1)(b)1. The Department considers the buoy program to be a preservation project because it preserves environmentally-sensitive benthic communities.

68. Petitioners contend that the monetary donation is also improper because the buoy program is not an environmental project formally "endorsed" by the Department. The Department has accepted donations to the mooring buoy program several times in

the past and states that it endorses the program as a preservation project.

Public Interest/Sovereignty Submerged Lands Lease

69. Rule 18-21.004(1)(a) requires that activities on sovereignty submerged lands not be contrary to the public interest. Rule 18-21.003(51) 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.

Therefore, to obtain authorization to use sovereignty submerged lands lease, an applicant must create a net public benefit.

70. Regulating Fury's proposed activities by issuing the permit and lease creates a net public benefit because such regulation allows the Department to ensure that the currently-unregulated activities do not adversely affect environmental resources.

71. Fury's proposed project would not affect any riparian rights.

Traditional Recreational Uses

72. Petitioners contend that the proposed project would conflict with rule 18-21.004(2)(a), which requires that all sovereignty lands "shall be managed in essentially their natural

conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming."

Petitioners assert that the proposed water toys are not traditional recreational uses that are allowed under this rule.

73. Swimming is a traditional recreational use, as is the use of personal watercraft. Floating "waterparks" and inflatable water toys are recent and uncommon uses. Such uses, far from shore, are not traditional uses.^{4/}

74. However, the rule also allows "[c]ompatible secondary purposes and uses which do not detract from or interfere with the primary purpose." The Department views Fury's primary uses as swimming and boating and the other uses as compatible secondary uses.

Water-Dependent Activities

75. Rule 18-21.004(1)(g) limits activities on sovereignty lands to "water dependent activities" unless the Board of Trustees determines that it is in the public interest to allow an exception as determined by a case-by-case evaluation.

76. A water-dependent activity is defined in rule 18-21.003(71) to mean an activity that can only be conducted on, in or over water because it requires direct access to the water body.

77. Inflatable water toys like the ones proposed by Fury are relatively new products, and the question whether they are

water dependent has only recently been considered by the Department. The Department determined they are water dependent and has authorized two similar operations in other parts of the state.

78. Petitioners claim that rock climbing, jumping on a trampoline, and sliding are not activities that require direct access to the water, and, therefore, the water toys are not water-dependant activities. It is an erroneous analysis to consider whether jumping, climbing, and sliding can also be done on land. These activities are transformed when the medium into which a person jumps, slides, or falls is water. Many people enjoy jumping, sliding, and falling into water. To experience this kind of recreation, one needs water.

Past Violations

79. Under Florida Administrative Code Rule 40E-4.302(2), the Department must consider a permit applicant's past violation of any Department rules adopted pursuant to sections 403.91 through 403.929 or any District rules adopted pursuant to part IV, chapter 373. Petitioners contend that a 2009 Department enforcement case against Fury shows Fury is incapable of providing reasonable assurance that it will comply with all applicable permit requirements.

80. The Department issued a Notice of Violation ("NOV") to Fury on July 14, 2009, for "Unauthorized structures and

activities on or over Sovereignty Lands," which was identified as a violation of section 253.77 and rule 18-21.004(1)(g). The NOV did not involve a violation of a rule adopted pursuant to chapters 403 or 373. Therefore, rule 40E-4.302(2) is inapplicable.

81. There is no similar rule of the Board of Trustees that requires it to consider past violations of rules adopted pursuant to chapter 253 when reviewing an application to use sovereignty submerged lands.

82. The enforcement case against Fury was satisfactorily resolved. The violation does not indicate that Fury should be refused a sovereignty submerged lands lease.

CONCLUSIONS OF LAW

Standing

83. Standing to participate in a section 120.57(1) proceeding is afforded to persons "whose substantial interests will be affected by proposed agency action." See § 120.52(13)(b), Fla. Stat.

84. Hallorhan has standing to initiate this legal proceeding because his interests in using the waters in the vicinity of the project for recreational purposes and for nature observation are substantial interests which this proceeding was designed to protect, and those interests could be affected by the proposed project.

85. For an association to meet the requirements of standing, it must demonstrate that a substantial number of its members would have standing as individuals. Fla. Home Builders Ass'n v. Dep't of Labor & Emp. Sec., 412 So. 2d 351 (Fla. 1982). Accordingly, Last Stand must demonstrate that a substantial number of its members will suffer injury if the proposed permit and lease are issued.

86. The record contains no quantification of the number of members of Last Stand that use the waters in the area of Fury's proposed project, except for the nine members identified by Hallorhan. Nine is not a substantial number in the context of an association with a total membership of 235.

87. The associational standing of Last Stand was not established because it was not shown that a substantial number of its members would be affected by the proposed project.

Burden of Proof

88. Because Petitioners challenge an environmental resource permit issued under chapter 373, the procedure described in section 120.569(2)(p) is applicable:

For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval,

followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence. (emphasis added).

89. The underlined wording, above, clearly contemplates an abbreviated presentation of the applicant's prima facie case. Such a presentation could be made by the parties' stipulation into evidence of the application and relevant material submitted to the agency, or the documents could be offered through a witness who can identify the documents as the application and relevant material submitted to the agency.

90. When an agency's intent to issue a permit has been challenged, the procedure and burden of proof established in section 120.569(2) (p) provides for a logical and efficient proceeding. The permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory when it is admitted into evidence at the final

hearing, and it does not lose that status unless the challenger proves that specific aspects of the application are unsatisfactory.

91. It follows that the permit application and supporting material submitted to the agency may be received into evidence for the truth of the matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.

92. Section 120.569(2) (p) changed a fundamental principle of administrative law established in Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981), that the applicant for a permit has the ultimate burden of persuasion to prove entitlement to the permit. Now, when the agency intends to issue a permit, the burden of ultimate persuasion is on the challenger to prove the case in opposition to the permit.

93. When the ultimate burden of persuasion was on the applicant, the J.W.C. court stated that "common sense dictates" the applicant's proof for uncontroverted aspects of a permit application should not require the same formalities as the proof for contested aspects. The court indicated that the prima facie

case as to the uncontroverted aspects of the application could be made by entering into evidence the permit application and supporting material:

[W]hen agency employees or officials having special knowledge or expertise in the field accept data and information supplied by the applicant, the same data and information, when properly identified and authenticated as accurate and reliable by agency or other witnesses, will be readily accepted by the hearing officer, in the absence of evidence showing its inaccuracy or unreliability.

Id. at 789.

94. When the applicant had the burden of persuasion, it made sense to require the applicant to prove with normal formalities the contested aspects of the permit application. Now that section 120.569(2)(p) places the burden on the challenger in cases where the agency intends to issue the permit, there is no longer a reason to differentiate between the quality of proof required for the uncontroverted and the contested aspects of the permit application. It is consistent with the reasoning in J.W.C. that all aspects of the applicant's prima facie case of entitlement to the permit should now be subject to less formal proof through the admission into evidence of the permit application and supporting material.

95. Fury presented a prima facie case of its entitlement to the environmental resource permit, and, therefore, the burden of

ultimate persuasion was on Petitioners to prove their case in opposition to the permit by a preponderance of the evidence.

96. Section 120.569(2)(p) does not apply to Petitioners' challenge to the sovereignty submerged land lease, which would be issued under chapter 253. The burden was on Fury to prove its entitlement to the lease by a preponderance of the evidence.

Environmental Resource Permit

97. Fury must provide reasonable assurance that it complies with all applicable permitting criteria in rules 40E-4.301 and 40E-4.302 and in the South Florida Water Management District's Basis of Review for Environmental Resource Permit Applications, which the Department adopted by reference in rule 62-330.200(4). Fury provided this reasonable assurance.

98. The Department must consider measures proposed by or acceptable to the applicant to mitigate the adverse effects that may be caused. See § 373.414(1)(b), Fla. Stat. Monetary donations for purposes of mitigation are allowed "only where the donation is specified for use in a duly noticed environmental creation, preservation, enhancement or restoration project endorsed by the Department or the governing board of the water management district." See § 373.414(1)(b)1., Fla. Stat. The Foundation's mooring buoy program is an environmental preservation project that is endorsed by the Department.

99. Petitioners contend that the proposed mitigation violates section 373.4135(1)(b), which states that a governmental entity may not create or provide mitigation for a project other than its own except under limited conditions. However, the proposed donation by Fury does not involve mitigation created or provided by a governmental entity.

100. The requirement for construction activities in an Outstanding Florida Water to be clearly in the public interest does not mean that the applicant for an environmental resource permit must show the project would have no negative impacts or that it would create a net public benefit. See 1800 Atl. Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989).

101. In considering the factors set forth in section 373.414(1), it is concluded that Fury's proposed project is clearly in the public interest.

102. Petitioners did not meet their burden of ultimate persuasion that Fury is not entitled to issuance of the environmental resource permit.

Sovereignty Submerged Lands Lease

103. Petitioners contend that Fury cannot obtain a lease because it failed to show sufficient upland interest, citing rule 18-21.004(3)(b). However, that rule does not require an upland interest for activities on sovereignty submerged lands

when the submerged lands are not riparian to uplands. The proposed lease area is not riparian to uplands.

104. The Department's interpretation of rule 18-21.004(2) (a) to allow Fury's proposed primary and secondary uses within the lease area is a reasonable interpretation.

105. Rule 18-21.004(2) (b) states that activities which would result in significant adverse impacts to sovereignty lands and associated resources shall not be approved unless there is no reasonable alternative and adequate mitigation is proposed. The proposed project would not result in significant adverse impacts to sovereignty lands.

106. Petitioners contend that the Department interpreted rule 18-21.003(71), which defines "water dependent activity," differently for Fury's proposed project than in Department of Environmental Protection v. Fort, Case No. 10-0521EF, 2010 Fla. ENV LEXIS 188 (Fla. DOAH Sept. 29, 2010; Fla. DEP Dec. 27, 2010). In the Fort case, the Department required the removal of a tank for bait fish and a closet for storing fishing rods from a dock and boathouse because the tank and closet were not water-dependent activities. The Department emphasized in its Final Order that rule 18-21.003(71) requires a water-dependant activity to be one that can only be conducted on, in, or over water.

107. Petitioners misconstrue the precedent of the Fort case. A fish tank and a tackle closet do not have to be in or

over water, but water toys do have to be in or over water. Water is an integral part of these activities. The Department's decision in the Fort case does not require a finding that Fury's water toys are not water dependent.

108. Petitioners argue that the water toys can be used in swimming pools and over private water bottoms. However, rule 18-21.003(71) does not define water-dependant uses as uses that can only be conducted in waters overlying sovereignty submerged lands.

109. Preliminarily, one or more Department employees expressed the opinion that these kinds of water toys are not water dependant, but, when the Department took final agency action in the three applications involving water toys, the Department determined they were water dependant. The Department's final actions have been consistent in this regard.

110. Fury met its burden to prove that the proposed project is not contrary to the public interest and that it meets all applicable criteria for authorization to lease sovereignty submerged lands.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that:

1. The Consolidated Environmental Resource Permit and Lease to Use Sovereignty Submerged Lands be issued by the Department;

2. The permit should direct that Fury's monetary donation for mitigation shall be paid to the Florida Keys National Marine Sanctuary Foundation for use in the Florida Keys Mooring Buoy Account 30.4.4.6.; and

3. The lease should be modified to show the area to be leased is 17,206 square feet.

DONE AND ENTERED this 31st day of December, 2012, 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 31st day of December, 2012.

ENDNOTES

^{1/} All references to Florida Statutes are to the 2012 codification.

^{2/} There was ambiguous testimony about the distance between Fury's existing area of operations and the proposed lease area, but the best evidence for this distance is Fury's Exhibit 7, which shows both sites (Fury's existing area of operations is indicated by a circle, drawn in pen.).

^{3/} The Department's notice of intent states that "the registered vessel, vessel platforms and inflatable water toys will be moored

in an 11,436 square foot area," but, at the final hearing, the Department stated that the correct figure is 17,206 square feet.

^{4/} When these activities are contiguous to or within a few feet of a recreational beach, as they are in the "Tradewinds" water park in St. Pete Beach, a similar operation authorized by the Department in 2011, an argument could be made that they are within the scope of traditional uses associated with recreational beaches, where people commonly swim and play with numerous water toys in the waters just off the beach.

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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.