

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFFREY RAY SUNDWALL,

Petitioner,

vs.

Case Nos. 18-0296
18-1207

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

_____ /

RECOMMENDED ORDER

On May 31, 2018, a final hearing was conducted by Robert L. Kilbride, Administrative Law Judge at the Division of Administrative Hearings, in Key West, Florida.

APPEARANCES

For Petitioner: Jeffrey Ray Sundwall, pro se
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5501 College Road
Key West, Florida 33040

For Respondent: Brandy Elaine Elliott, Esquire
Florida Fish and Wildlife
Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399-1600

STATEMENT OF THE ISSUE

Whether the Florida Fish and Wildlife Conservation Commission ("FWC," "Respondent," or "Commission") properly determined that two (2) vessels owned by Jeffrey Sundwall ("Petitioner" or "Sundwall") were derelict or abandoned upon the

waters of the state of Florida ("State") in violation of section 823.11, Florida Statutes (2018),^{1/} and, therefore, subject to the provisions of sections 823.11, 705.101(3), and 705.103, Florida Statutes.

PRELIMINARY STATEMENT

FWC provided notices to Sundwall that it had determined that two (2) vessels owned by him were derelict upon the waters of the State in violation of section 823.11, and therefore subject to the provisions of sections 823.11, 705.101(3), and 705.103.

Taking exception to those determinations, Petitioner challenged the notices and findings by FWC and timely filed two (2) separate petitions for administrative hearing relating to the vessels.

The two (2) cases were consolidated by the undersigned for all purposes, including a final hearing.

After addressing several pre-hearing motions filed by the parties, the cases were set for final hearing and heard on May 31, 2018, in Key West, Florida.

FWC called numerous witnesses, all of whom were sworn law enforcement officers including: Kelsey Grenz, Harry Balgo, Bob Wehner, David Bellville, Noel Garcia, and Robert Rowe. FWC offered Exhibits 1 through 12, which were all admitted by the undersigned.

Sundwall testified on his own behalf. He offered, and the undersigned admitted without objection, Exhibits A through E, I, J, and L through S. Over FWC's objection, the undersigned also admitted Petitioner's Exhibits F through H, T, V, W, and Y.

In an Evidentiary Order, entered on June 6, 2018, the undersigned reconsidered sua sponte a ruling made at the hearing, and admitted Petitioner's Exhibit X, a large color photograph of the vessel, "Cuki," taken in September or October 2017.^{2/}

In the same Order, the undersigned instructed the parties to brief Petitioner's claim that: (1) FWC had a duty to maintain or protect the vessel after it grounded, and (2) whether Petitioner's incarcerated status relieved him of his responsibility to retrieve or make arrangements to retrieve his vessels.

The Transcript was filed June 18, 2018. The parties timely filed their proposed recommended orders, which were reviewed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The undersigned makes the following findings of material and relevant fact:

1. Following the aftermath of Hurricane Irma in September 2017, law enforcement officers from FWC investigated what were categorized as "displaced vessels" found around the State that had been impacted and dislocated by the hurricane.

Many had been ripped from their moorings, slips, or docks and floated away, driven by the winds and tides.

2. Vessels displaced by Hurricane Irma included those that were either wrecked or sunken in waters of the State.

3. Vessels that were left on the waters of the State in a wrecked or sunken state by Hurricane Irma were considered "derelict vessels" by FWC under section 823.11(1)(b).

4. Following Hurricane Irma, derelict and displaced vessels were dealt with differently by FWC than derelict vessels would ordinarily be handled.

5. For instance, ordinarily, derelict vessels would be left on the waters of the State while the owner was determined, located, and notified and the investigation process was completed.

6. In the wake of Hurricane Irma, however, since there were so many derelict vessels that littered the waters of the State, particularly in South Florida and the Florida Keys, the State authorities chose to be more proactive and remove the derelict vessels from the State waters and store them for 30 days.

7. After the hurricane in September 2017, FWC attempted to locate and notify owners that their derelict vessel had been located, removed from the waters of the State, and stored. The owner could either (1) retrieve the vessel during a 30-day window following notification, (2) waive their interests in the vessel

and allow the State to destroy the vessel sooner than 30 days, or (3) do nothing.

8. If the owner had not recovered the vessel or challenged the derelict determination after 30 days, Respondent would proceed with destruction of the derelict vessel.

9. Ordinarily, the private owner of a derelict vessel is responsible for all costs associated with its removal and destruction. Despite this, after Hurricane Irma, the State assumed those costs.

10. The law enforcement officers who testified at the hearing received training at the law enforcement academy to identify derelict vessels as defined by State law.

Facts Relating to the Vessel, Cuki

11. Following Hurricane Irma, FWC personnel determined that a vessel named Cuki was displaced following Hurricane Irma. It was found grounded and partially imbedded on the beach just south of Spessard Holland Beach Park in the unincorporated area of Melbourne Beach in Brevard County. The Cuki, is a 1974 Columbia 45-foot, two-masted sailboat.

12. Depending on the level of the ocean tide, this area of the beach was rather wide and flat, and frequented by members of the public and other beachgoers.^{3/}

13. An Incident Summary Report was prepared by Kelsey Grenz on November 21, 2017. The Cuki was first reported to FWC as

grounded on the beach in Brevard County on September 19, 2017.
Resp. Ex. 1.

14. The facts, and reasonable inferences from the facts, indicate that when it was first reported to FWC on September 19, 2017, the Cuki was in reasonably decent condition.^{4/} See Pet. Exs. N and X.

15. Respondent investigated ownership of the Cuki and identified Petitioner as the last documented owner of the Cuki.^{5/} Resp. Ex. 2, pp. 1-2.

16. On November 15, 2017, Grenz and her supervisor provided written notice to Petitioner that his vessel, the Cuki (documented vessel D0564929), was wrecked and grounded off the coast of Brevard County, Florida, following Hurricane Irma. Resp. Exs. 1 and 2.

17. The notice was hand-delivered to Petitioner by Grenz while he was in custody and incarcerated at the Monroe County Detention Center on several unrelated criminal charges.^{6/} Resp. Ex. 1, pp. 1-2.

18. In addition to the written notice informing Petitioner that the Cuki had been displaced following Hurricane Irma, Grenz also provided Petitioner with a waiver document that would have allowed Petitioner to waive his interests in the Cuki, and allowed the State to remove and destroy the vessel at no cost to

him. Resp. Ex. 1, p. 2. Petitioner was unwilling to sign the waiver.^{7/}

19. By November 15, 2017, the vessel, although derelict and grounded on the beach in Brevard County, was still considered physically in the waters of the State. Resp. Exs. 5a and 5b. More specifically, it was below the high-tide watermark on the beach, and, at times, the normal tidal flows of the Atlantic Ocean washed up against and around it. Resp. Ex. 5.

20. On January 16, 2018, Respondent, Law Enforcement Officer Bob Wehner, went to the location of the Cuki and recorded the vessel's condition as he personally observed it then.

21. In a short report, Wehner described the Cuki as follows:

Vessel "CUKI" is a 1974 45' Columbia Fiberglass sailboat that is beached on the Atlantic coast in the unincorporated area of Brevard County (N28.0454 W80.5462). The portside of the vessel is partially imbedded in the sand below the high-water tidemark on the beach. The vessel is equipped with an inboard motor, however, there is no shaft or propeller present. The vessel has no rudder, or steering wheel at the helm and no other means of steerage. The vessel is equipped with two masts. The mast at the stern of the vessel is broken at the base and suspended only by a single cable. There are no sails and the sail rigging is either missing or in disarray. The hatches at the topside of the cabin and windows on the portside have no covers leaving the interior open to the rain and wave activity.

Resp. Ex. 3, p. 2.

22. A detailed series of daylight pictures of the Cuki were taken by Wehner on January 16, 2018. The pictures generally reveal and show that the vessel:

a. Was grounded on the beach in waters of the State. Resp. Ex. 4(a).

b. The Cuki had cables attached to the sail that were tangled up, or in disarray. Resp. Exs. 4(a) and 4(h). Some of these cables and other riggings were supposed to be attached to the masts and were broken off. Resp. Ex. 4(d).

c. The Cuki had seven (7) or eight (8) open hatches or doors on the top side of the vessel that were subject to wind, rain, ocean spray, and other natural elements. Resp. Exs. 4(c), 4(d), and 4(g).

d. The Cuki was lying on its port side, pointing generally north with the bottom/keel area facing out towards the Atlantic Ocean. It was partially imbedded in the beach sand all the way up to the gunwale on the port side of the vessel. Resp. Exs. 4(d) and 4(e).

e. Its rear mast was broken at the base, making the mast unusable. Resp. Exs. 4(f) and 4(g).

f. It had no rudder or steering wheel to navigate the vessel when it was under power.

g. The drive shaft and propeller were missing and were not connected to the inboard motor used to power the vessel when it was not under sail. Resp. Exs. 4(i), 4(j), and 4(k).

h. The Cuki's keel, necessary for stabilizing the vessel, was imbedded in the sand and was cracking and rusting where it was affixed to the hull. Resp. Exs. 4(l), 4(m), and 4(n).

i. The vessel had no skeg to protect the rudder. Resp. Exs. 4(i) and 4(j).

23. FWC hand-delivered a supplementary written notice to Petitioner on January 17, 2018. The notice provided Petitioner with additional details of the specific condition of the Cuki, as detailed above on January 17, 2018. Resp. Ex. 6.

24. At present, the Cuki is still located on the beach in Brevard County, Florida.

25. At some point in time when Respondent was prepared to remove the Cuki from the Brevard County beach as a derelict vessel, it determined that an order had been entered by the Monroe County Court for the Sixteenth Judicial Circuit of Florida. It ordered FWC, and other state entities, not to destroy, remove, alter, move, or otherwise dispose of the Cuki until certain that misdemeanor criminal charges filed against Petitioner were resolved.^{8/} Resp. Ex. 10.

26. Apparently, this July 24, 2017, order was lifted when an Amended Order Granting State's Motion to Reconsider was entered on January 8, 2018. Resp. Ex. 12.

27. This second order specifically stated that FWC "may remove the [vessel] or the vessel may be removed by the post-Irma federal grant program." Resp. Ex. 12. It further stated that Petitioner, as the defendant in that criminal case, could "make arrangements, prior to the local, State, and/or Federal government removing the vessel, to have the vessel removed and stored on private property with the consent of the property owner." Resp. Ex. 12. Neither party did so.^{9/}

28. Petitioner does not contest that the Cuki is "destroyed" or "abandoned." Sundwall also characterized the Cuki as a "carcass at this point."

29. Rather he argues, in part, that FWC had a duty to maintain or protect the Cuki after it grounded in Brevard County.

Facts Relating to the Vessel, Sea Myst

30. Following Hurricane Irma, FWC personnel determined that another vessel, named the Sea Myst (documented vessel FL6220JX), registered to Petitioner, was displaced following Hurricane Irma. The Sea Myst is a 15-foot, fiber-glassed open motorboat.

31. The Sea Myst was wrecked and substantially dismantled in the waters of the State in Monroe County. Resp. Ex. 8.

32. When it was found, a visible water line stain and barnacle growth on the outside of the hull indicated that the vessel had been partially submerged or sunken in the sea water. The barnacles attached to the hull indicated to the officers that it had been submerged in sea water for an extended period of time.^{10/} Resp. Exs. 9(a), 9(b), 9(c), and 9(d).

33. When it was first discovered, it appeared that approximately 75 percent of the Sea Myst vessel was underwater at the bow. Resp. Ex. 9(a). There was no outboard motor or other means of propulsion on the vessel. There was also no steering linkage with which to steer the vessel. Resp. Ex. 9(d).

34. When it was first found, the Sea Myst was lodged alongside other derelict vessels, which were lying "stacked up" against the shore. Pet. Ex. W.

35. To determine if a vessel is substantially dismantled, FWC commonly looks to three categories: propulsion, steerage, and hull integrity. Since the Sea Myst was missing both propulsion and steerage, it was substantially dismantled, given the conditions under which it was recovered following Hurricane Irma.^{11/}

Post-Hurricane Irma Investigation and Collection of
Derelict Vessels

36. Following Hurricane Irma, the U.S. Coast Guard removed displaced and derelict vessels from the waters of the State that

were not able to be retrieved by their owners, including the Sea Myst.

37. Neither FWC nor the U.S. Coast Guard removed any vessels from the waters of the State following Hurricane Irma, unless they were left on the waters of the State in a wrecked or derelict condition. This included vessels that were submerged, partially submerged, beached, or grounded in a position where they could not be moved under their own power without mechanical assistance.

38. All the vessels removed by the U.S. Coast Guard or the Commission were on waters of the State. Removal of these vessels was also necessary to prevent hazards to navigation.

39. Following removal from the waters of the State, the Sea Myst, like other vessels, was put in a storage location that was monitored by FWC. This was to allow Sundwall, identified as the registered owner, an opportunity to receive notice of the vessel's condition and to retrieve the vessel from the storage location, without incurring the costs of removal from the waters of the State. Resp. Ex. 8, pp. 1-2.

40. On January 19, 2018, David Bellville hand-delivered written notice to Petitioner that his vessel, the Sea Myst, was damaged and displaced by Hurricane Irma. Resp. Ex. 7.

41. In addition to this notice, Bellville also provided Petitioner with a waiver document that would have allowed

Petitioner to waive his interests in the Sea Myst, and allowed the State to remove and destroy the vessel at no cost to him. Petitioner did not agree to sign the vessel over to the State.

42. Petitioner testified that he is not the owner of the Sea Myst and that the Sea Myst had been bought and paid for by an un-named person and never collected. Petitioner further stated that he filed a Petition for an Administrative Hearing regarding the Sea Myst in error and that he felt the vessel should be destroyed with federal disaster/FEMA funds.

43. Nonetheless, the more credible evidence indicates that Petitioner is still the titled owner of the Sea Myst, which is a derelict vessel.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of these proceedings. § 120.569 and 120.57(1), Fla. Stat.

45. Both sections 823.11 and 376.15, Florida Statutes, designate Respondent as the State agency empowered to remove or cause to be removed any derelict vessel from the public waters of the State under appropriate circumstances.

46. It is undisputed that the Cuki and the Sea Myst both meet the definition of "vessel" provided in section 327.02(46), Florida Statutes.

47. Section 823.11(1)(b) is the primary law at issue in these cases and provides two (2) principal definitions of a "derelict vessel" summarized as follows.

48. First, a "derelict vessel" includes "a vessel, as defined in s. 327.02, that is left, stored, or abandoned . . . [i]n a wrecked, junked, or substantially dismantled condition upon any public waters of this state."

49. Secondly, the statute defines a "derelict vessel" as one that is "left, stored, or abandoned" and is "docked, grounded, or beached upon the property of another without the consent of the owner of the property."

50. The statute provides that it is unlawful for a person to store, leave, or abandon any derelict vessel in this State. § 823.11(2), Fla. Stat.

51. Finally, the enforcement mechanism of the statute permits FWC to remove a derelict vessel from the public waters if the derelict vessel obstructs or threatens to obstruct navigation, or in any way constitutes a danger to the environment, property, or persons. § 823.11(3), Fla. Stat. The undersigned concludes that the Cuki meets these principal definitions in its present condition and location on Melbourne Beach. See also § 376.15(3)(a), Fla. Stat.

52. Any costs incurred to remove or relocate the vessel may be recovered against the owner. § 823.11(3)(b), Fla. Stat.

53. Navigable "waters of the State" include "the shores between ordinary high and low water marks." See, e.g., Walton Cnty. v. Stop the Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008); Brickell v. Trammel, 77 Fla. 544 (Fla. 1919); State v. Gerbing, 56 Fla. 603 (Fla. 1908). This definition is met based on the Cuki's present location.

54. Furthermore, the more persuasive evidence in this case reveals that the Cuki was and is currently located in or on the public waters of the State.

55. Thus, the Cuki meets the definition of a "derelict vessel" provided in section 823.11(1)(b).

56. Section 705.101(3) defines "abandoned property" as "all tangible personal property that does not have an identifiable owner and that has been disposed on public property in a wrecked, inoperative, or partially dismantled condition or has no apparent intrinsic value to the rightful owner." The term "abandoned property" now expressly includes a "derelict vessel" as defined in section 823.11.^{12/}

57. Because the Cuki meets the definition of "derelict vessel" provided in section 823.11(1)(b), the vessel is also "abandoned property" for purposes of chapter 705 (the State's lost and abandoned property law).

58. The testimony and evidence in these cases show that prior to being removed for storage after Hurricane Irma, the Sea

Myst was located on the public waters of the State. The testimony and evidence further show that the vessel was left, stored, and abandoned in a wrecked, junked, and substantially dismantled condition upon the waters of the State. The Sea Myst, therefore, meets the definition of a "derelict vessel" provided in section 823.11(1)(b).

59. Because the Sea Myst meets the definition of "derelict vessel" provided in section 823.11(1)(b), the vessel was also "abandoned property" for purposes of chapter 705 (the State's lost and abandoned property law).

Discussion Regarding Defenses Raised by Petitioner

Did FWC have any duty to maintain the Cuki after it grounded in Brevard County, Florida?

60. The short legal conclusion is "No."

61. Sundwall argues that FWC had an obligation to protect or maintain the Cuki after it grounded and was reported to the agency. There is no basis in law, or the facts of these cases, to support this proposition.

62. Likewise, the parties have cited to no civil or maritime law that obligated FWC to maintain the integrity or value of Petitioner's vessel, the Cuki, once it grounded, following Hurricane Irma. The Cuki was, and is, Petitioner's personal property. Such protection is not the State's obligation.

63. Also, Respondent did not seize, gather, or take possession of the Cuki. As a result, any decisional law in the criminal context obligating the State to preserve such evidence would not be applicable.^{13/}

64. Likewise, even if FWC had decided to move the vessel, it would only be liable for damage caused by its gross negligence or willful misconduct. § 823.11(3), Fla. Stat.

65. To be clear, neither of these two scenarios is present in this case. FWC did not seize, gather, or collect the vessel, nor has any present damage to the vessel occurred because they moved or relocated it after it was reported to the agency in September 2017.^{14/}

66. Absent a specific civil or criminal law that placed a distinct burden upon Respondent to protect or maintain the Cuki once it grounded following Hurricane Irma, none existed.

67. Since the language of the county court order was clear, it is not necessary to try to ascertain whether the intent or spirit behind the order was different. See Ortiz v. State, 2 So. 3d 318 (Fla. 4th DCA 2008).

68. To conclude, FWC followed and honored the plain language and the directive of the Monroe County Court for the Sixteenth Judicial Circuit of Florida Order on Motion to Preserve Evidence, and did not move, remove, or alter the Cuki in any way.

No other law placed an obligation on Respondent to handle the vessel differently.

Did Sundwall's Incarceration Relieve Him of His Responsibility to Retrieve or Make Arrangements to Retrieve His Vessel, Cuki?

69. The short legal conclusion is again "No."

70. The parties have cited to no civil or maritime law relieving Petitioner of his obligation to comply with the law while incarcerated in Monroe County.

71. In fact, courts have held that an inmate's general legal obligations do not end, nor are they suspended, while incarcerated. A survey of nationwide cases reveals several relevant cases. An incarcerated parent's obligation to pay child support while incarcerated may be altered or held in abeyance, but the obligation still exists, accumulates, and must be paid (Dep't of Rev. v. Jackson, 846 So. 2d 486 (Fla. 2003), and McCall v. Martin, 34 So. 3d 121 (Fla. 4th DCA 2010)); an incarcerated person may file bankruptcy but is still obligated, despite his or her imprisonment, to properly abide by all bankruptcy filing rules and requirements and file all required schedules (Davis v. Hedlund, 573 B.R. 777 (Bankr. N.D. Cal. 2017)), and an incarcerated debtor is not relieved of the responsibility to complete required credit counseling (Bristol v. Ackerman, 2009 U.S. Dist. LEXIS 7107 (E.D.N.Y. Feb. 2, 2009)).

72. More to the point in this case, no law has been cited or identified by either party relieving Petitioner from his responsibility to promptly retrieve, or make arrangements for someone else to retrieve, his derelict vessel. And this conclusion does not change merely because he was incarcerated in the Monroe County Detention Center.

73. It is undisputed that Petitioner was given written notice by FWC of his option to collect and remove the Cuki and the Sea Myst.

74. Likewise, the county court's Amended Order Granting State's Motion to Reconsider, dated January 8, 2018 (Resp. Ex. 12), specifically authorized Sundwall to "make arrangements, prior to the local, State, and/or Federal government removing the vessel, to have the vessel removed and stored on private property with consent of the property owner." Petitioner might, even now, make arrangements to have the Cuki removed from the beach in Brevard County and stored on private property or sold. He has chosen not to do so and cannot now complain.

75. FWC also offered to Petitioner the option of waiving his interest in the vessels so that FWC could remove them and destroy them consistent with the State's derelict vessel and abandoned property laws. Sundwall refused.

76. To conclude, no law relieves an inmate of his or her obligation to continue to properly maintain, store, retrieve, or

manage a vessel (or other property) he or she owned prior to, or while incarcerated. Petitioner had an obligation to promptly remove the derelict vessel, the Cuki, from its location on the public waters of the State and to retrieve the Sea Myst from storage, when he was notified by FWC.

77. Respondent may now deal with and dispose of the vessels as authorized by the State's derelict vessel and abandoned property law, chapters 823, 705, and 376.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Fish and Wildlife Conservation Commission enter a final order finding Petitioner's vessels, the Cuki and the Sea Myst, derelict vessels under section 823.11, Florida Statutes, and abandoned property pursuant to chapter 705, Florida Statutes; that Petitioner was obligated to remove his derelict vessels from the waters of the State and has not done so; that Respondent did not violate any responsibility or duty to protect, maintain, or preserve the vessels; that appropriate costs be recovered upon proper application and proof; and that Respondent may dispose of both vessels as authorized by law.

DONE AND ENTERED this 25th day of July, 2018, in
Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2018.

ENDNOTES

^{1/} All references to Florida Statutes are to the 2018 version.

^{2/} Another picture marked as Petitioner's Exhibit N, shows the Cuki at full length, but at a different angle. It was also taken much earlier than FWC photographs found in Respondent's Exhibit 4.

^{3/} Marine creatures and other wildlife, including nesting sea turtles, are frequently found in Florida east coast beach areas, such as this stretch of beach.

^{4/} Over time, however, as the Cuki lay grounded on the beach and exposed to the elements, there can be no doubt, and the undersigned finds, that its condition was compromised, and the general condition of the vessel, including its superstructure, deck, and hull, deteriorated. Some of the vessels equipment, riggings, and accessories were either removed or damaged over time as well.

^{5/} There is no dispute in these proceedings that Petitioner is the current registered owner of the Cuki.

^{6/} On November 15, 2017, when Petitioner was served with the "derelict vessel" notice, the Cuki was described in the notice as having "sustained major damage during Hurricane Irma." However, FWC's contention that the Cuki sustained major damage during the hurricane is seemingly contradicted and not necessarily supported by the original pictures taken earlier in September or October 2017. Pet. Exs. N and X. Regardless, as will be explained in more detail, the deterioration of the vessel and damage over time was not caused by FWC, nor was FWC under any legal obligation to maintain the vessel after it beached on Melbourne Beach in Brevard County in September 2017.

^{7/} The State had received funds from FEMA to destroy all vessels displaced by Hurricane Irma.

^{8/} Curiously, and although not necessarily dispositive of the issues in this case, the Order Granting Motion to Preserve Evidence was entered July 24, 2017, several months before the hurricane. Presumably, this order was already in place and being honored when Hurricane Irma struck the Keys in September 2017 and dislodged the Cuki from its mooring or dock somewhere in the Keys. It then drifted aimlessly for several days north along the eastern seaboard of Florida to Brevard County where it eventually wound up on the beach. Frankly, this gap in the evidence was not adequately explained by either party during the hearing. Nonetheless, it appears that when FWC initially determined that it wanted to remove the vessel, it was prevented from doing so by this July 2017 court order.

^{9/} Following the entry of the Amended Order Granting State's Motion to Reconsider, FWC did not remove the Cuki because the amended order did not require removal, and this administrative action was filed by Petitioner. Additionally, FWC was under the impression that Sundwall did not want the vessel removed. Regardless, neither party moved the vessel.

^{10/} Barnacles do not grow outside the water.

^{11/} The undersigned finds that this same test was met on the Cuki on November 15, 2017.

^{12/} Prior to 2002, vessels determined to be derelict by FWC under section 823.11 were excluded from the definition of abandoned property. The statute was amended in 2002 to include derelict vessels as "abandoned property" by definition. See Ch. 02-46, § 35, Laws of Fla.; See also Op. Att'y Gen. Fla. 06-17 (2006).

^{13/} Even if FWC had seized, gathered or taken the Cuki into its actual or constructive possession, which it did not, Sundwall would have to show damage to the vessel resulting from the bad faith of the agency. He did not. See Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988) (Unless defendant shows bad faith on the part of the law enforcement officers, failure to preserve potentially useful evidence does not constitute a denial of due process).

^{14/} These points are reinforced since the county court had entered its preservation order in July 2017, and there was no evidence presented to show that FWC did anything other than scrupulously honor that court order. Additionally, by its express terms, that order did not place any burden on FWC to seize, collect, maintain, or protect the Cuki. Rather, FWC and other agents of the State were only directed not to destroy, remove, alter, move, or otherwise dispose of the Cuki. This directive is limited, and does not impose any express or implied obligation on FWC to affirmatively protect or maintain the vessel. The undersigned concludes that no such duty existed. Indeed, if FWC had taken the Cuki into its possession or caused it to otherwise be removed or moved, then Respondent would have been in potential violation of the county court's order specifically prohibiting those actions. This was true both before and after Hurricane Irma while the court order was applicable.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.