

United States Nuclear Regulatory Commission Official Hearing Exhibit	
In the Matter of:	Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2)
	ASLBP #: 09-879-04-COL-BD01
	Docket #: 05200029 05200030
	Exhibit #: INT383-00-BD01
	Admitted: 12/3/2012
	Rejected:
Other:	Identified: 10/31/2012 Withdrawn: Stricken:

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE THE MANATEE CLUB, INC.,)	
and FRIENDS OF THE GREENWAY,)	
)	
Petitioners,)	
)	
vs.)	CASE NO. 96-1723
)	
CITRUS RECREATIONAL MARINA, INC.,)	
and FLORIDA DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

The final hearing in this case was held before Larry J. Sartin, Administrative Law Judge, on August 6-8, 1996, in Crystal River, Florida, and on August 15-16, 1996, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this case is whether a management and storage of surface waters permit and a wetland resource permit/water quality certification to construct a marina facility within an existing dolomite mine pit adjacent to the Cross Florida Barge Canal applied for by Citrus Recreational Marina, Inc., should be granted by the Florida Department of Environmental Protection.

PRELIMINARY STATEMENT

Respondent, Citrus Recreational Marina, Inc., applied to the Florida Department of Environmental Protection for a management and storage of surface waters permit and a wetland resource permit/water quality certification to construct a marina facility within an existing dolomite mine pit adjacent to the Cross Florida Barge Canal. On or about February 6, 1996, an Intent to Issue the permit was entered indicating the intent of the Florida Department of Environmental Protection to issue the requested permit.

Petitioners, Save The Manatee Club, Inc., and Friends of the Greenway, jointly challenged the Intent to Issue by filing a Petition for Formal Administrative Hearing with the Florida Department of Environmental Protection. On April 9, 1996, the Petition was filed with the Division of Administrative Hearings with a Request for Assignment of Hearing Officer and Notice of Preservation of Record. The Petition was designated case number 96-1723 and was assigned to the undersigned.

At the final hearing Respondent, Citrus Recreational Marina, Inc., presented the testimony of James Eyster, Richard Olsen, Lauren Milligan, Randall Armstrong, Ken Echternacht, Fred Ayer, Mary Duncan, Robert J. Moresi and Martin Roessler. The deposition testimony of Neal Wingo, Henry Lamb, Peter A. Quincy was also presented by Citrus Recreational Marina, Inc. Mr. Lamb and Mr. Quincy are accepted as experts as proffered in the depositions.

Respondent, the Florida Department of Environmental Protection, presented the testimony of Paul Lee and offered one exhibit.

Petitioners presented the testimony of Rodney DeHan, Mary Stewart, John Parker, Helmut Buquor, John Camillo, Ronald O'Connell, Charlie Miller, Patricia Thompson and Patrick Rose. The deposition of Joyce Kleen was also presented. Ms. Kleen is accepted as an expert as proffered in the deposition.

Official recognition of Chapter 40D-2, Florida Administrative Code, and a document titled "First Amendment to August 10, 1992, Operating Agreement Concerning Management and Storage of Surface Waters Regulation, and Wetland Resource Regulation Between Southwest Florida Water Management District and Department of Environmental Regulation" was requested and granted.

A transcript of the final hearing was filed on September 9, 1996. Volumes 1 and 2 of the transcript incorrectly indicate that the portion of the hearing reported in those volumes was held on "October 6, 1996." The actual date of the portion of the hearing reported in Volumes 1 and 2 was August 6, 1996.

Proposed recommended orders were filed by Petitioners, Citrus Recreational Marina, Inc., and the Florida Department of Environmental Protection. Those proposed orders have been fully considered.

FINDINGS OF FACT

A. The Parties.

1. Respondent, Citrus Recreational Marina, Inc. (hereinafter referred to as "Marina"), is a corporation. Marina is the applicant for the permit which is at issue in this proceeding.

2. Respondent, the Florida Department of Environmental Protection (hereinafter referred to as the "Department"), is an agency of the State of Florida with the responsibility for, among other things, wetland resource permitting. The Department also has responsibility, pursuant to an agreement with the Southwest Florida Water Management District (hereinafter referred to as the "Water Management District"), for Management and Storage of Surface Water permitting within the jurisdictional boundaries of the Water Management District.

3. Petitioner, Save the Manatee Club, Inc. (hereinafter referred to as "Save the Manatee"), is a non-profit, Florida corporation. The stated purpose of Save the Manatee includes protection of the manatee and its habitat through the promotion of public awareness, research and lobbying efforts.

4. Petitioner, Friends of the Greenway (hereinafter referred to as "Friends"), is an organization which promotes responsible environmental policy in Citrus County.

5. Save the Manatee and Friends are "citizens" of the State of Florida. They filed a verified petition for hearing in this matter. They alleged in the petition that the proposed facility will injure, harm, or otherwise pollute the state's natural resources. Members of Petitioners observe, study and enjoy manatee in Citrus County, including waters that would be impacted by the proposed facility.

B. Marina's Permit Applications, the Department's Notice of Intent to Issue and the Petitioners' Challenge.

6. On March 28, 1995, Marina applied to the Department for a permit for Management and Storage of Surface Water.

7. On March 10, 1993, Marina applied to the Department for a wetland resources (dredge and fill) permit.

8. The permits sought by Marina are associated with Marina's plan to construct a marina facility. The marina is to be constructed within an existing dolomite mine pit (hereinafter referred to as the "Mine Pit").

9. On or about February 6, 1996, the Department entered a notice of intent to issue the permit sought by Marina. A copy of the draft permit, permit number 092278259 and MS092681199, was attached to the notice of intent to issue.

10. On or about March 13, 1996, Petitioners filed a Petition for Formal Administrative Hearing challenging the Department's proposed decision to issue the draft permit.

C. Marina's Proposed Facility.

11. Marina's proposed facility is to be located in Citrus County, Florida. Citrus County is located on the west coast of Florida, north of Tampa, Florida, and south of the mouth of the Suwannee River on the Gulf of Mexico.

12. As part of the proposed facility, Marina proposed to construct 256 wet slips (122 of which may be covered) on six floating docks, a boat ramp, a boat lift bay, a 63-boat dry storage facility, a convenience store with fueling and sewage pump-out facilities, a clubhouse, a stormwater facility and a parking area.

13. The proposed facilities will also include a potable water system. The water system will provide drinking water to the clubhouse, bait stand, fueling facility, boat storage area and the marina docks.

14. The proposed facilities will also include an on-site wastewater treatment facility. The treatment facility will consist of an aerobic system with on-site effluent disposal through drainfield lines into the soil.

15. No sewage treatment percolation ponds will be included on the proposed site.

16. The stormwater system for the proposed site will be separate from the wastewater treatment facility. The stormwater system will include the collection and treatment of stormwater in on-site basins prior to discharge into the Mine Pit. The system will be designed to retain the entire rainfall from a 100-year storm combined with wet detention and on-line systems involving percolation. All these systems have been designed to meet the design standards required by Chapter 40D-4, Florida Administrative Code.

17. The post development runoff discharge rate for the proposed site is projected to be less than the current rate of runoff discharge on the proposed site.

18. The proposed facility will not cause any increased flood risks on-site or off-site.

19. No part of the surface water management system will be located within 100 feet of any public supply well.

20. The fish cleaning stations included for the proposed facility will be located over land. Waste associated with fish cleaning will be collected for disposal. Wastewater from the stations will be directed into the wastewater treatment system for the proposed facility.

21. Wastewater from boats at the proposed facility will be directed to the wastewater treatment facility through two pumpout stations located near the proposed fueling facility.

22. Solid waste from the proposed facility and boats utilizing it will be disposed of in trash receptacles located throughout the proposed site. They will ultimately be picked up by a solid waste hauler for disposal.

23. Erosion around the Mine Pit will be controlled through the placement of 2,200 feet of rip rap, vegetation planting and other erosion control techniques.

24. The Mine Pit where the proposed marina is to be constructed is located on the south side of the Cross Florida Greenway Waterway (hereinafter referred to as the "Greenway Waterway") (formerly known as the "Cross Florida Barge Canal"), approximately one half mile east of where U.S. Highway 19 crosses the Greenway Waterway.

25. The proposed site is approximately 4.75 miles from where the Greenway Waterway empties into the Gulf of Mexico.

26. The Mine Pit is U-shaped, approximately 31.4 acres in size, and has an average depth of -20 feet, with pockets of -33 feet in depth. Marina proposed to fill the Mine Pit to 13.0 feet NGVD, place 2,285 linear feet of rip rap, and dredge 4.75 acres of the Mine Pit to -13.0 feet NGVD.

27. The waters of the northwestern corner of the Mine Pit are separated from the waters of the Greenway Waterway by a plug of land approximately 100 to 150 feet wide. Marina proposed to remove the plug to create an entrance from the marina to the Greenway Waterway. The removal of the plug will result in a lowering of the level of water in the Mine Pit by approximately 3 to 5 feet to sea level, the level of the water in the Greenway Waterway.

28. Marina also proposed to excavate a flushing canal channel between the Greenway Waterway and the northeast corner of the Mine Pit.

29. The boundary of the property on which the Mine Pit is located is approximately 100 feet from the Mine Pit at its closest location.

30. The Mine Pit was excavated from lime rock and Ona fine sands; Pits and Udorthents (both manmade) soil types exist throughout the project site.

31. Weedy vegetation dominates the historically disturbed upland area surrounding the Mine Pit. Saltbush (*Baccharis halimifolia*), marsh elder (*Iva frutescens*), dog fennel (*Eupatorium* spp.), marsh fleabane (*Pluches* spp.), and waxmyrtle (*Myrica cerifera*) exist along the Greenway Waterway. Southern red cedars (*Juniperius silcicola*) are scattered throughout the area. Cattails (*Typha* spp.) have invaded the edges of the Mine Pit.

D. Ownership of the Proposed Site Property.

32. Marina has no ownership interest in the property where the Mine Pit is located. Nor has Marina ever held such an interest.

33. The proposed facility site is held in three undivided interests.

34. At the time the permit applications were filed by Marina, Marina had an option contract to purchase the proposed site. At the time of the final hearing of this matter, the option contract was no longer in force.

35. Marina had also been authorized in writing prior to filing the permit applications to act as agent for the owners of the site for purposes of seeking environmental permitting. It was stipulated at the time of the final hearing that two of the three undivided interest owners had authorized Marina to act as their agent for purposes of obtaining the permits at issue in this proceeding.

36. At the time of the final hearing, the third undivided interest owner did not authorize Marina to act as its agent for any purpose.

37. Marina is agreeable to a new condition being added to the draft permit by the Department requiring Marina to submit documentation to the Department before any development of the proposed facility is commenced proving that Marina has acquired interests in the proposed site necessary for it to carry out the permit conditions.

38. It is the Water Management District's policy in implementing Rule 40D-4.301(g), Florida Administrative Code, which requires applicants to provide reasonable assurances concerning their proposed projects, is to require the land owner to be the permittee.

E. The Greenway Waterway and the Surrounding Area.

39. The Greenway Waterway consists of natural and man-made waters formerly intended to be used as the Cross Florida Barge Canal. The waters of the Greenway Waterway are classified as "Class III" waters.

40. The Cross Florida Barge Canal was deauthorized on January 22, 1991. In its place was created the Cross Florida Greenways State Recreation and Conservation Area.

41. The State of Florida owns the majority of the lands within the Cross Florida Greenways State Recreation and Conservation Area. The state can, therefore, control development along the Greenway Waterway.

42. A portion of the Greenway Waterway was constructed as part of the Cross Florida Barge Canal by digging a canal from a spillway at Lake Rousseau, east-northeast of the proposed site, to the Gulf of Mexico. This portion of the canal (hereinafter referred to as the "Greenway Canal"), is straight and was designed for a depth of 12 feet. The actual depth of the Greenway Canal varies and, in some locations, is 18 feet deep. The Greenway Canal is also approximately 250 feet wide.

43. The Greenway Canal intersects the Withlacoochee River, which is located to the east of the proposed facility. Prior to the construction of the Greenway Canal, the Withlacoochee River ran from a spillway at Lake Rousseau to the Gulf of Mexico. After construction of the Greenway Canal, the portion of the Withlacoochee River which connects with the Gulf of Mexico was, and still is, separated from the Greenway Canal by an earthen berm. The western portion of the Withlacoochee River (hereinafter referred to as the "Upper Withlacoochee"), continues to run from Lake Rousseau for approximately 1.3 miles to the Greenway Canal and then runs to the Gulf of Mexico through the Greenway Canal.

44. The depth of the Upper Withlacoochee varies from river bottom which is exposed at low tide to areas of approximately 20 feet. The depth of water, the speed at which water flows and the amount of aquatic vegetation in the Upper Withlacoochee varies depending on the amount of water released from Lake

Rousseau through the spillway. For the past year, the rate of flow in the Upper Withlacoochee has been relatively high.

45. There are currently two public boat ramps, but no marinas, located on the Greenway Canal. One of those boat ramps is in disrepair and the evidence failed to prove that it is in use. There are no marinas on the Upper Withlacoochee or the Greenway Canal.

46. There is a Florida Marine Patrol station located on the Greenway Canal approximately one-half mile east of U.S. Highway 19. Whether the presence of the station will have any impact on the enforcement of speed limits in the Greenway Canal is purely speculative.

47. Approximately 2 miles west of the proposed facility is an existing active mining operation owned by Independent Aggregates. Barges transport mine product along the Greenway Canal from the mine to the Gulf of Mexico.

48. Another organization, known as "Holnam", has been permitted by the Department to construct a barge-loading facility opposite the Independent Aggregates' barge facility and mine. It is unlikely, however, that Holnam will actually begin operating barges on the Greenway Canal.

49. A speed limit of 25 miles per hour has been imposed by the Department throughout the Greenway Canal. The speed limit was imposed to protect West India Manatee that utilize the Greenway Canal.

50. The Upper Withlacoochee has been designated an idle-speed zone by local ordinance.

51. Crab traps are located along the banks of the Greenway Canal for approximately four miles into the Greenway Canal from the Gulf of Mexico. Traps are generally anchored to the bottom by lines and are spaced approximately 100 feet apart, 20 to 15 feet from the bank.

52. A channel extends for approximately 12 to 15 miles into the Gulf of Mexico from the mouth of the Greenway Canal. The channel is marked. There are obstructions and shallow water outside this channel. Prudent boaters will continue in the channel for approximately four to nine miles before turning north or south into the Gulf of Mexico. Operators of smaller boats and those with knowledge of the area are able, however, to navigate north or south closer to shore.

F. Impact on the Conservation of Fish and Wildlife,
Including Endangered or Threatened Species, or Their
Habitat.

53. The West India Manatee is an endangered species, which means that it is in danger of extinction.

54. Approximately 3000 manatees are found in Florida waters. Approximately half are located on the east coast and half on the west coast of Florida. There is little interchange between the two groups. The State of Florida is attempting to restore the manatee population to a size which will help to insure its survival as a species.

55. In order for the manatee population to survive, human development and interaction with manatees must be managed. Manatee habitat needs to be preserved from development.

56. Two of the most significant challenges to the survival of the manatee are the number of manatees killed by boats and the increasing number of boats in Florida waters. Collisions with boats is the greatest known cause of manatee deaths (approximately 25 percent).

57. Manatee change locations frequently searching for food, drinking water, resting areas, potential mates and birthing areas. They also return to preferred habitat features.

58. Manatee are attracted to areas that are calm and quiet for birthing areas. Shallow water, accessible from deeper water, is essential for birthing.

59. After giving birth, the mother and calf generally remain in the area for some period of time, sometimes as long as months, until the calf is able to survive elsewhere. They will leave an area, however, if disturbed.

60. Boat traffic, even at slow speeds, can cause disruption to mothers and young calves. Boat traffic can separate a mother and calf.

61. There are approximately 300 manatee in the waters of northwestern Florida (from Tampa Bay to the Suwannee River), which includes the area of the proposed facility and Citrus County. This population has been increasing in recent years.

62. Manatee in the waters of northwestern Florida require a stable source of warm water during the winter. During the winter ambient temperatures drop below the level at which the manatees' metabolism will sustain them. As a result of the need for warmer waters, most of the manatee in northwestern Florida spend the winter in Citrus County. Kings Bay, Crystal River and Homosassa all provide warm water locations for manatee. These sites are located to the south of the proposed facility. Kings Bay is the most important winter manatee habitat on the west coast of Florida.

63. During the rest of the year, when waters are warmer, manatee leave their warm water, winter habitats to forage and investigate other habitat.

64. Manatee that winter in the warm water sites in Citrus County generally migrate to the north. They travel to, and past, the mouth of the Greenway Canal, returning by the same general routes in the winter. Manatee also linger at the mouth of the Greenway Canal at the Gulf of Mexico because that area offers a combination of a relatively deep-water channel with adjacent shallow water and aquatic vegetation.

65. Manatee use the waters of the Greenway Canal and the Upper Withlacoochee. The Greenway Canal is not, however, considered particularly good habitat for manatee. It has relatively deep water, steep banks, little fresh water and little vegetation of interest to manatee.

66. In 1991 Citrus County adopted a Manatee Protection Plan as part of its comprehensive growth management plan. The Manatee Protection Plan does not identify the Greenway Canal as essential manatee habitat. The Manatee Protection Plan was adopted with the assistance of the Department. The Plan was

based upon a compilation of manatee studies, marina inventory studies, and a comprehensive view of the county's waterway systems at the time the Plan was adopted.

67. "Essential manatee habitat" is defined in the Manatee Protection Plan as "any land or water area constituting elements necessary to the survival and recovery of the manatee population from endangered status".

68. Whether an area is "essential manatee habitat" is to be considered under the Plan as "a criteria for determining areas where dock facilities should be limited."

69. The definition of "essential manatee habitat" for purposes of the Plan is different from the standard to be applied in by the Department in this case. The definition in the Plan is similar to the federal criteria considered and found to be different from that applicable to Department permitting cases in *Metropolitan Dade County v. Coscan Florida, Inc.*, 609 So.2d 644, 651 (Fla. 3d DCA 1992).

70. The Manatee Protection Plan contemplates that a master plan will be undertaken to establish the capacity of the Greenway Canal for boat and marina facilities. That master plan has not been developed. The fact that the master plan has not been formally undertaken, however, is of little consequence. The Department, due to the State's ownership of the land surrounding the Greenway Canal, has been able to consider possible uses of the Greenway Canal for boating and marinas without a formal master plan.

71. The Manatee Protection Plan does not support a finding that the proposed facility will not have an adverse impact on the manatee.

72. Although the waters of the Greenway Canal do not constitute good manatee habitat, the Upper Withlacoochee is considered good habitat, depending on the amount of water being released from the spillway at Lake Rousseau.

73. Manatee have used the Upper Withlacoochee for feeding, resting and birthing. The Upper Withlacoochee has limited human activity, light boat traffic, sources of fresh water, a warm-water spring and aquatic vegetation.

74. The Upper Withlacoochee has been used for birthing. Infant mortalities reported in the area suggest that the Upper Withlacoochee is used as a preferred birthing area. The rate of mortality suggests a higher rate of successful births.

75. Aerial survey and mortality data also suggests that the Upper Withlacoochee and the Greenway Canal are utilized throughout the year by manatee. Greatest use is seasonal.

76. Aerial survey data underestimates the number of manatee utilizing the Upper Withlacoochee and the Greenway Canal due to the lack of water clarity and due to the meandering course of, and vegetation along, the Upper Withlacoochee. Manatee mortality data concerning the Greenway Canal and the Upper Withlacoochee provides some indication of the fact that the number of manatee that travel through the Greenway Canal and the Upper Withlacoochee is not insignificant.

77. While there was considerable evidence presented concerning whether the number of manatee that utilize the Greenway Canal and the Upper Withlacoochee is

accurate or has been underestimated, based upon aerial survey data and manatee mortality comparisons, the critical fact proved by the evidence in this case is that a significant number of manatee do use the Upper Withlacoochee as habitat, including for birthing. The evidence also proved that, in order for manatee to use the Upper Withlacoochee, it is necessary that they travel the length of the Greenway Canal. Another critical fact proved by the evidence is to this matter is that manatee traveling to and from the Upper Withlacoochee must travel the Greenway Canal from the Gulf of Mexico past the proposed facility.

78. The evidence was also unrefuted that increased boat traffic from the proposed facility will have the potential to adversely impact the manatee. That adverse impact will take the form of physical injury due to collisions and stress on manatee from increased human activity. The activity could reduce the use of the Upper Withlacoochee as habitat.

79. What remains to be determined is whether the conditions of the draft permit will provide adequate assurances that the impact will not be contrary to the public interest.

80. The Department's Bureau of Protected Species Management determined that, without the conditions to be added to the draft permit it suggested, the following impacts could be expected as a result of approval of the proposed facility:

The probability of manatee/boat collisions increases with increasing boat traffic where boaters and manatees regularly inhabit the same waterways. While the current level of barge/vessel traffic does not appear to be a problem, increasing the amount of recreational and commercial vessel traffic to the proposed levels in this narrow waterway is expected to adversely impact the endangered manatee. Barge trips may become more frequent, and barges traveling down the center of the canal drives manatees toward the edges of the canal. This increases the risk of manatee/recreational boat collisions, and increases the risk of these recreational boats driving manatees underneath, ahead of or behind traveling barges. The probability of lethal and sublethal propeller strikes increases. Also, there is not sufficient space for manatees between the canal bottom and the bottom of a fully loaded barge, with only one foot clearance as typical for loaded barges. The probability of a manatee being crushed will increase, and this impact is difficult to offset with conservation measures other than not allowing the activity.

Page 2, Petitioners exhibit 7 and CRMI exhibit 10. The evidence in this case supports the foregoing conclusions.

81. The increased boat traffic from the proposed facility, even if limited to sailboats and even if power boats are allowed at lower speed limits than currently in force in the Greenway Canal, may cause impacts with manatees due to

the increased traffic and the use of the Greenway Canal by barges and recreational boats. It is possible that manatees, confronted by oncoming recreational boats and barges, may be forced into the path of barges and be crushed. Barges used by Independent Aggregates are approximately 72 feet wide and 250 feet long and are pulled or pushed by tugboats. The probability of this conflict taking place will be greater if barge use of the Greenway Canal is increased as proposed by Independent Aggregates.

82. The greatest threat to the manatee of the proposed facility is the threat of death or injury as a result of cuts or blunt trauma from collisions of boats with manatees. This threat is primarily associated, however, with faster moving, power boats. Therefore, the extent of possible adverse impact on the manatee will be determined largely by the speed limit imposed in the Greenway Canal.

83. To mitigate against the possible adverse impact on manatee, the Department has included certain conditions in the draft permit. Those conditions are found in Condition 6 of the draft permit and were recommended by the Department's Bureau of Protected Species Management.

84. As a result of the Bureau of Protected Species Management's review of the proposed facility, it was recommended that the proposed facility not be approved if all of the conditions suggested by it were not included in the draft permit. All of the conditions recommended, except one, were included in the draft permit. The condition not included was one that provided that a violation of manatee speed zones would be grounds for revocation of the lease of any slip or dock space at the proposed facility.

85. The lease revocation condition recommended by the Bureau of Protected Species Management was not included in the permit due to concern by the Department as to whether the condition could be legally imposed.

86. The language of the memorandum of review of the proposed facility from the Bureau of Protected Species Management suggesting that the proposed project should not be approved unless all recommended conditions are accepted is standard language used by the Bureau and not intended to be strictly interpreted. The Bureau ultimately concluded that, despite its recommendation, it believes that the conditions of the draft permit are adequate to offset adverse impacts to the manatee. The Bureau's explanation is sufficient to eliminate any inference that otherwise may be drawn from its suggestion that the proposed facility should not be approved due to the exclusion of the permit condition concerning revocation of leases for speed zone violators.

87. Condition 6 requires, among other things, that signs warning of possible manatee activity be displayed during construction, that personnel associated with the project be educated about the manatee, and that other measures designed to protect manatee during construction be followed.

88. Due to the fact that most of the construction will take place in the enclosed Mine Pit, there should be little, if any adverse impact on manatee as as result of construction.

89. Condition 6 also provides that permanent manatee warning signs and information concerning manatee be posted by the marina, and that a manatee awareness education program be established at the proposed facility.

90. Condition 6 also limits the use of the boat ramp of the proposed facility to boats stored "on-site." The ramp will not be open to the general public.

91. Finally, condition 6.1. provides the most important limitation of the use of the proposed facility. Condition 6.1 limits use of the proposed facility to sailboats and, therefore, prohibits the use of power boats:

. . . until the applicant has provided documentation to the Department that manatee protection speed zones in the CFBC have been revised, approved by the Bureau of Protected Species Management, and posted in the CFBC. Occupancy of the facility by sailboats shall not be restricted.

92. The limitation of the use of a marina to sailboats should adequately mitigate the adverse impacts to the manatee from the proposed facility. See Coscan, at 651.

93. The effect of condition 6.1. is to allow Marina to obtain a modification of the draft permit after it is issued to allow power boats based upon events which may take place in the future. There are no guarantees that those events will result in reasonable assurances that the adverse impact to the manatee from power boat use at the proposed facility will not be contrary to the public interest.

94. The speed zones which must be established and approved by the Bureau of Protected Species Management will be established, if at all, through rule-making procedures. See Rule 62N-22.011, Florida Administrative Code. The process would allow public input. Additionally, the outcome of the process would be subject to challenge under Chapter 120, Florida Statutes. Because of possible challenges to the efforts to impose speed zones, it is possible that speed zones adequate to reduce the adverse impacts to the manatee which would satisfy the public interest test applicable in this matter will not be adopted.

95. The standards which the Department must adhere to in establishing speed zones are not the same standards applicable in this matter. In this matter, reasonable assurances must be given that there will not be adverse impacts to the manatee, a threatened species, contrary to the public interest. Establishing speed zones pursuant to other provisions of law will not insure that the reasonable assurances required for the issuance of the permit at issue in this case will be given.

96. Although the resulting speed zones may be adequate to protect the manatee, there is no way to determine what kind of speed zones will be established. Without knowing the ultimate speed zones which may be established, or, more importantly, to know that the speed zones will meet the public interest test applicable in this matter, it is not possible to find the reasonable assurances Marina is required to provide at this time or at any time before the proposed facility is actually permitted.

97. If reasonable assurances can be given that the use of power boats in the proposed facility will not be contrary to the public interest once speed zones are established, Marina or the owner of the proposed facility may apply for a permit modification. At that time the requisite reasonable assurances concerning power boat use can be determined. The provision of condition 6.1.

allowing Marina to avoid seeking a permit modification at that time is, therefore, at a minimum, unnecessary, and at its worse, an effort to allow Marina to avoid having to provide the necessary reasonable assurances concerning the use of power boats.

98. If only the impact on the manatee were considered in establishing speed zones, it could be concluded slow or idle speed should be imposed throughout the Greenway Canal and for some distance into the Gulf of Mexico in order to adequately reduce the adverse impact from the proposed facility on the manatee. Establishing speed zones, however, requires a consideration of other factors. The evidence in this case failed to address those factors sufficiently to recommend a condition to the draft permit concerning speed zones.

99. Based upon the foregoing, it is concluded that reasonable assurances have not been given that there will not be unreasonable adverse impact to the manatee if the use of power boats at the proposed facility is allowed as provided in condition 6.1. of the draft permit.

G. Other Public Interest Criteria.

100. The evidence failed to prove that the proposed facility will adversely affect the public health, safety or welfare or the property of others.

101. The evidence also failed to prove that the proposed facility will adversely affect navigation or the flow of water or cause harmful erosion or shoaling. The docks and other marina facilities will all be restricted to the Mine Pit, which is not now open to navigation.

102. There is adequate width in the Greenway Canal to allow boats to exit the Mine Pit into the Greenway Canal and for boats and barges in the Greenway Canal to pass each other.

103. Rip-rap to be placed along the Mine Pit shore and other shoreline stabilization activities will be adequate to prevent erosion and shoaling.

104. Groundwater flow at the proposed site should not be adversely affected by the proposed facility, except as discussed, infra.

105. The proposed facility should not adversely affect fishing or recreational values or marine productivity in the vicinity of the proposed facility. Recreational values (boating and fishing) should be enhanced as a result of the proposed facility. If condition 6.1. is not eliminated and power boats are allowed in the Greenway Canal, there are no assurances that the recreational value provided by the manatee will not be adversely impacted.

106. The proposed facility is intended to be permanent.

107. The evidence failed to prove that the proposed facility will adversely affect or enhance significant historical or archaeological resources under the provisions of Section 267.061, Florida Statutes.

108. If condition 6.1. is not modified to eliminate the use of power boats automatically upon the establishment of speed zones, there are no reasonable assurances that the current condition and relative value of functions being performed by the Greenway Canal and the Upper Withlacoochee will not be adversely affected by the proposed facility. Otherwise, the proposed facility

should not have an adverse impact on current conditions and relative value of current functions of the area.

H. Groundwater Quality Standards.

109. The general geology in the area of the proposed facility and the Greenway Canal is known as karst terrain. Karst terrain is geology formed by the solution of limestone over millions of years. Sequential episodes of exposure of the Floridan aquifer, which underlies the area, occurs in karst terrain as the result of the natural formation of sink holes. These sink holes impact the movement of groundwater.

110. Information exists to reasonably describe the hydrogeology of the area in "regional" terms. There is insufficient information generally available about the specific hydrogeology of the proposed site or the immediately surrounding area.

111. Underlying the entire area and the proposed site in particular is the Floridan aquifer.

112. The properties of the Floridan aquifer in coastal Citrus County, including the proposed site, can vary enormously over relatively short vertical distances. This variability impacts the movement of groundwater.

113. The groundwater under the proposed site is classified as G-II.

114. The terms "potentiometric surface" are used to describe the level to which groundwater will rise above sea level. The higher groundwater rises above sea level, the thicker the layer of underlying drinkable water should be before reaching an interface between drinkable and undrinkable water. In central Citrus County, the potentiometric surface is relatively low and flat at approximately 5 or 6 feet above sea level. The resulting interface between drinkable and nondrinkable water is found at 200 or more feet.

115. Due to natural geological conditions, moving to the northwest of Citrus County, including the Greenway Canal area, potentiometric levels are higher. Therefore, thicker layers of drinkable water should be found around the proposed facility site and the Greenway Canal than in central Citrus County.

116. Because of higher potentiometric surface in the area of the Greenway Canal, the layer of drinkable water would be expected to continue beyond 120 feet below the surface.

117. Construction of the Greenway Canal has resulted in the intrusion of saltwater from the Greenway Canal into the groundwater. It has also resulted in the upconing of mineralized (sulfate) waters from deeper to less deep levels within the Floridan aquifer. These impacts have been significant with regard to the chloride levels (from the saltwater) and sulfate upconing.

118. The impact of the construction of the Greenway Canal on saltwater intrusion and sulfate upconing is the result of the lowering of the surface waters to sea level in the Greenway Canal. The lowering of the level of water in the Greenway Canal has had the effect of decreasing the potentiometric surface and, consequently, reducing the thickness of the layer of drinkable groundwater.

119. Saltwater has intruded along and beneath the Greenway Canal. The extent of this intrusion is represented graphically on Petitioner's exhibits 13 and 14. Saltwater intrusion has occurred primarily as a result of downward leakage of saltwater traveling up the Greenway Canal.

120. The saltwater intrusion has been localized around the Greenway Canal. The wedge of saltwater intrusion has reached to approximately where U.S. Highway 19 crosses the Greenway Canal, approximately one-half mile east of the proposed site.

121. Although it is "theoretically" possible that the saltwater wedge could continue to move along the entire length of the Greenway Canal, the evidence fails to support such a conclusion. Due to freshwater discharges from Lake Rousseau, the evidence supports a conclusion that the saltwater wedge will not move further eastward to any significant extent.

122. The lowering of the waters of the Greenway Canal to sea level has had the effect of bringing sea level elevations to the Floridan aquifer several miles further inland than had been the case before construction of the Greenway Canal. Groundwater adjacent to the Greenway Canal, which is at levels higher than sea level, has discharged into the Greenway Canal. This has caused a lower groundwater level and the movement upward of groundwater. Similar effects have occurred naturally along the Withlacoochee River.

123. As groundwater rises it comes into contact with a geologic unit which contains calcium sulfate. The sulfate mixes with the groundwater causing the "mineralized" groundwater.

124. While the change in surface waters in the Greenway Canal was quick, the change in groundwater quality from saltwater intrusion and sulfate upconing has taken place only as fast as groundwater in the area flows. Generally, groundwaters flow very slowly.

125. The impact of the Greenway Canal on upconing of sulfates will continue over time. Mineralized waters will continue to move upward and, perhaps, laterally away from the Greenway Canal.

126. Pockets of mineralized waters (containing sulfates) can be found naturally occurring around the proposed site.

127. Sulfate enriched groundwater in coastal areas naturally move toward, and discharge into, the surface waters along the coastal boundary. This process occurs along the Gulf of Mexico and the shoreline of Citrus County. The construction of the Greenway Canal has disrupted this natural process.

128. The Mine Pit, when it was in use, was dewatered to different levels at various times. The dewatering took place for varying periods of time. Usually, the Mine Pit would be completely dewatered for a period of approximately three months. On one occasion, the Mine Pit was dewatered for a period of two years (1989 to 1991). It was dewatered to allow the removal of dolomite. The Mine Pit was allowed to fill back up with water after each dewatering.

129. The dewatering of the Mine Pit was regulated by the Water Management District. The permit allowing dewatering of the Mine Pit required that the permit holder mitigate for adverse impacts of dewatering, including the inducement of natural contaminants into the aquifer. The evidence failed to

prove, however, the extent of adverse impacts of the dewatering or whether the permit holder actually mitigated against any such adverse impacts.

130. The lowering of the water level in the Mine Pit caused some upconing of sulfates for the same reason that the digging of the Greenway Canal did. Lowering the water level in the Mine Pit lowered the potentiometric level. The evidence, however, failed to prove the extent of the impact or how long the impact lasted.

131. The lowering of the water level of the Mine Pit to sea level by connecting the Mine Pit to the Greenway Canal as proposed by Marina will have the same general impact as the digging of the Greenway Canal on the upconing of sulfates. Unlike the impact of the dewatering of the Mine Pit, the proposed modification will be permanent. Lowering the water level will have the same type impact for the same reasons that the digging of the Greenway Canal caused upconing. The potentiometric level will be permanently lowered; the layer of drinkable water will be permanently decreased.

132. The evidence failed to prove that the lowering of the water level of the Mine Pit to sea level as a result of the proposed project will have the same impact on saltwater intrusion. This impact is less likely because the Mine Pit is four and a half miles inland from the Gulf of Mexico.

133. The upconing of sulfates as a result of the construction of the proposed facility will cause the levels of sulfates found in some portion of the currently drinkable layer of groundwater to exceed water quality standards. The area impacted will consist of groundwater which would otherwise have been expected to be potable.

134. Comments concerning the proposed facility were provided to the Department by the Water Management District. By letter dated August 16, 1995, the Water Management District informed the Department that it was anticipated that the proposed facility would result in saltwater intrusion and upconing of mineralized water and that the area's groundwater could be expected to be degraded inconsistent with Water Management District rules.

135. In response to the Water Management District's comments, Marina agreed to undertake a hydrogeologic study to gather site specific information to address those concerns. As a part of Marina's study, one monitoring well was drilled on the proposed site. The well was drilled to a depth of 450 feet in order to gather data concerning water quality at various depths.

136. In early 1996, the Water Management District concluded that the results of the study undertaken by Marina had resolved its concerns.

137. The test well was drilled to the south of the Mine Pit, approximately 2500 feet from the Greenway Canal.

138. The water quality tests run on water taken from the test well reflected a sharp change in water quality at a depth of approximately 120 feet. The water below that level contained high levels of sulfates: 552 milligrams per liter of sulfate. Immediately above the high sulfate waters, low sulfate levels (12 milligrams per liter) were found. This result is contrary to what would be expected to be found based upon the higher potentiometric surface in this area of Citrus County. Because the potentiometric surface is higher in the area, it would be expected that the layer of drinkable groundwater would be considerably higher than 120 feet.

139. The findings concerning the thickness of the drinkable groundwater found at the test well are consistent with the conclusions concerning the impacts of the digging of the Greenway Canal. As a result of the digging of the Greenway Canal and the lowering of the water level to sea level, the resulting decrease in the potentiometric surface has caused the upconing of mineralized waters and a decrease in the layer of drinkable groundwater.

140. The Department and Marina have not disputed the fact that drinkable groundwater will be impacted by the upconing of mineralized waters (sulfates) as a result of connecting the Mine Pit with the Greenway Canal and lowering the level of water in the Mine Pit to sea level. The Department and Marina, however, have suggested that the extent of the impact of the lowering of the water level in the Mine Pit will not extend more than 100 feet from the Mine Pit and will be limited to the proposed site. The evidence failed to support this position.

141. The unplugging of the Mine Pit will have the effect of increasing the area of water below sea level in the area by 12 percent of the size of the area of the Greenway Canal. Data from test wells around the Greenway Canal and other data has indicated that the upconing of mineralized water as a result of the lowering of the water level in the Greenway Canal has extended considerably more than 100 feet from the Greenway Canal. In light of the fact that the Mine Pit is equal in surface area to 12 percent of the surface area of the Greenway Canal, there is reason to be concerned that the area of impact from the lowering of the water level in the Mine Pit will also be significant.

142. In light of the foregoing, and due to the variability of the geology of the area, the data from a single well on the site is of questionable value. Data from a single well simply does not provide the information necessary for Marina to provide reasonable assurances that the impact on groundwater from its proposed facility will be limited to an area of 100 feet from the Mine Pit.

143. There is simply not enough data concerning the Mine Pit to conclude with any reasonable assurance that the upconing of mineralized waters (containing sulfates) will be limited to an area of 100 feet around the Mine Pit. Because of the size of the Mine Pit in relation to the Greenway Canal and the impact on upconing from the Greenway Canal, it is more likely that the impact of upconing will exceed 100 feet.

144. A log of geologic characteristics of the test well was maintained. A confining unit or layer was found between the high-sulfate and low-sulfate waters at between 110 and 120 feet below the surface. The evidence failed to prove, however, the extent to which the layer may extend horizontally from the well location. In light of the general geology of Citrus County and the region around the proposed site, insufficient data exists to reach any conclusion about the extent of the confining layer. Establishing the extent of the confining layer would require more extensive (and costly) study of the site.

145. The existence of a confining layer would also have no significant impact on the degree of upconing as a result of lowering the water level in the Mine Pit.

I. Surface Water Quality Standards.

146. Petitioners stipulated that the proposed facility would not violate surface water quality standards except with regard to the standard for chloride.

147. Because of the flow of fresh water from Lake Rousseau and the flushing canal to be constructed at the proposed site, reasonable assurances have been given by Marina that there will be sufficient flushing of the Mine Pit to preclude a violation of chloride standards for surface waters.

148. The evidence presented by Petitioners concerning the possibility that the salt water wedge resulting from the construction of the Greenway Canal may extend landward and eventually into the Mine Pit was too speculative and "theoretical".

CONCLUSIONS OF LAW

A. Jurisdiction.

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

B. Burden of Proof.

150. The burden of proof, absent a statutory directive to the contrary, is on the party asserting the affirmative of the issue in this proceeding. *Antel v. Department of Professional Regulation*, 522 So.2d 1056 (Fla. 5th DCA 1988); and *Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981).

151. In this proceeding, it is Marina that is asserting the affirmative: that the Department should issue the permit Marina has sought. Marina, therefore, had the burden of proof. Marina was required to meet its burden by the preponderance of the evidence. *J.W.C. Co., supra*. See also Rules 62-4.070 and 40D-4.301, Florida Administrative Code.

152. In order for Marina to meet its burden of proof, it was required to present a prima facie showing of entitlement to the permit at issue, taking into account the objections raised by Petitioners. The Petitioners were then required to prove the allegations of their petition. The evidence presented by Petitioners was required to be of at least equivalent quality to the evidence presented by Marina. See *Hoffert v. St. Joe Paper Company*, 12 FALR 4972 (DER 1990).

C. Standing.

153. Petitioners established that they are citizens of the State of Florida and that they filed a verified petition challenging the proposed action of the Department in this matter. Petitioners have standing to maintain this proceeding. Section 403.412(5), Florida Statutes. See also, *Manasota-88, Inc. v. Department of Environmental Regulation*, 441 So.2d 1109 (Fla. 1st DCA 1983.)

154. Marina also has standing to participate in this proceeding. Although Marina did not prove that it has ownership of the property where the proposed facility is to be located and does not have authority to act as agent for all of the owners of the property, it did prove that it was the applicant for the permit at issue and that it was authorized to act as agent for the majority of the owners. The rules which govern applications for the type of permits at issue in this matter authorize agents to act on behalf of owners of property. Rules 63-312.220(6) and 40D-4.101(2), Florida Administrative Code.

155. Having proved that it is acting as agent for a majority of the ownership interest in the property, Marina is the permit applicant. As such, it has standing to defend the Department's decision to issue the draft permit. See *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981).

156. At the commencement of the final hearing, Petitioners filed a Motion to Dismiss these proceedings for lack of standing. The cases cited by Petitioners in support of its motion are distinguishable from this case. The parties determined to lack standing in those case did not include an applicant for the permit at issue as in this case. Based upon the foregoing, the motion is hereby denied.

D. Permit Sought by Marina.

157. The permit sought by Marina in this matter involves two permitting actions. One action is for a wetlands resource permit (dredge and fill permit). The other action is for a Management and Storage of Surface Water permit.

158. Permit applications submitted and completed prior to the effective date of the environmental resource permit rules adopted pursuant to Section 373.414(9), Florida Statutes (1995), are subject to review in accordance with the rules in effect under the law in existence at the time the permit application was submitted unless the applicant elects otherwise. See Section 373.414(14), Florida Statutes (1995). Marina did not make such an election in this case.

159. Having been filed in 1993, the application for wetlands resource permit (dredge and fill permit) is subject to review under Sections 403.91 through 403.929, Florida Statutes (1992 Supp.). The application for Management and Storage of Surface Water permit, having been filed in 1995, is subject to review under Part IV, Chapter 373, Florida Statutes (1995), and Rule 40D-4, Florida Administrative Code.

E. Marina's Ability to Provide "Reasonable Assurances".

160. In order for Marina to obtain the permit at issue in this matter, it must provide the Department with "reasonable assurances" that it can carry out the conditions of the permit. See Section 373.414(1), Florida Statutes (1995).

161. Marina will have to obtain a sufficient interest in the subject property in order for it to provide the necessary reasonable assurances to the Department that it can carry out the following permit conditions:

a. Establish and assure survival of littoral area (shoreline vegetation) for stormwater treatment by proper and perpetual maintenance.

b. Reserve rights-of-way and easement location necessary for a surface water management system.

c. Provide quarterly monitoring reports for certain water quality parameters from monitoring wells located on site.

d. Maintain stormwater discharge systems in compliance with water quality standards.

e. Enter into a binding long-term agreement with the Department wherein the permittee agrees to comply with all of the permit conditions for the life of the facility (beyond the 5 year term of the permit). The agreement is to run with the land and be binding on the permittee and its successors and assigns.

162. Marina has agreed to the addition of a condition to the permit providing that no construction on the proposed facility will be started until Marina obtains ownership of the project area and the mitigation area necessary for it to carry out the permit conditions. With the addition of such a condition, Marina will be required to provide the requisite reasonable assurances before the project is finally approved. See Metropolitan Dade County, supra.

F. The Wetlands Resource Permit.

163. In order to be entitled to a wetlands resource permit, an applicant must provide "reasonable assurances" that (a) Class III surface water quality standards will not be violated by the proposed project; and (b) the proposed project is not contrary to the "public interest". Section 403.918(1) and (2), Florida Statutes (1992 Supp.), provide, in part:

(1) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurances that water quality standards will not be violated. . . .

(2) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurances that the project is not contrary to public interest. . . .

164. Although filed in 1993, the wetlands resource permit (dredge and fill permit) was still pending on June 15, 1995. Therefore, the wetlands resource permit (dredge and fill permit) must also meet the provisions of Rule 62-312, Florida Administrative Code. See Section 373.414(14), Florida Statutes, and Rule 62-312.010, Florida Administrative Code.

165. The waters of the Greenway Canal are Class III surface waters. Marina has given reasonable assurances that the proposed facility will not violate Class III surface water quality standards.

166. Petitioners stipulated that all applicable surface water quality standards other than those relating to chloride would be met by the proposed facility.

167. Marina provided reasonable assurances that fresh water from Lake Rousseau and the flushing canal to be constructed at the proposed site would be sufficient to flush the Mine Pit and preclude a violation of chloride standards.

168. Petitioners were unable to refute Marina's assurances. The evidence presented by Petitioners concerning the movement of a saltwater wedge up the Greenway Canal was too speculative.

169. The determination of whether the project is contrary to the "public interest" is governed by Section 403.918(2)(a), Florida Statutes (1992 Supp.), which establishes the following criteria which must be considered by the Department:

(a) In determining whether a project is not contrary to the public interest, or is clearly

in the public interest, the department shall consider and balance the following criteria:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;
5. Whether the project will be a temporary or permanent nature;
6. Whether the project 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.

170. The determination of whether Marina has provided reasonable assurances that the project is not contrary to the public interest requires a balancing of the public interest criteria. *Higgins v. Roberts*, 9 FALR 5045, 5047-48 (DER 1987).

171. The applicant's burden with regard to the public interest test is "one of reasonable assurances, not absolute guarantees." *Manasota-88, Inc. v. Agrico Chemical*, 12 FALR 1319, 1325 (DER 1990). The reasonable assurances must deal with reasonably foreseeable contingencies.

172. If an applicant presents a prima facie case, an objecting petitioner then has the burden of proving the truth of facts asserted in the petitioner's petition sufficient to raise a genuine issue regarding reasonable assurances. Simply raising "concerns" or speculation about what "might" occur is not enough to carry a petitioner's burden. See *Chipola Basin Protective Group, Inc. v. Florida Department of Environmental Protection*, 11 FALR 467, 480-81 (DER 1988).

173. Ultimately, the Secretary of the Department has the final responsibility and authority to determine whether reasonable assurances have been provided that a proposed project is not contrary to the public interest. *1800 Atlantic Developers v. Department of Environmental Regulation*, 552 So.2d 946 (Fla. 1st DCA 1989), rev. den., 562 So.2d 345 (1990).

174. In this case the conflict over whether reasonable assurances have been given that the proposed facility will not be contrary to the public interest centers around the impact of the proposed facility on the manatee. At issue is whether there will be an adverse impact from the proposed facility on the manatee and, if so, whether sufficient actions can be taken to mitigate those impacts. See *Barringer v. E. Speer and Associates*, 14 FALR 3660 (DER 1992); *Coscan Florida, Inc. v. Department of Environmental Regulation*, 12 FALR 1359 (DER Final 1990), rev. on other grounds, *Metropolitan Dade County v. Coscan*

Florida, Inc., 609 So.2d 644 (Fla. 3d DCA 1992); and Sheriden v. Deep Lagoon Marina, 11 FALR 4710 (DER 1989).

175. The evidence in this case proved that there would be an adverse impact to the manatee from the use of recreational boats in the Greenway Canal as a result of the proposed facility. Those negative impacts are, however, mitigated by the limitation of the permit to sailboats. With this limitation, and the other conditions of the permit concerning operation of the marina for only sailboats, it is concluded that reasonable assurances that the marina will not be contrary to the public interest have been given by Marina.

176. The foregoing conclusion does not, however, resolve this issue. The permit at issue in this case, although limiting the use of the proposed facility to sailboats, also specifically provides that the proposed facility may be used by power boats in the future.

177. The use of the proposed facility by power boats will have an adverse impact on the manatee. That adverse impact will be, without doubt, contrary to the public interest.

178. In an effort to mitigate against the adverse impact to the manatee from the use of the proposed facility by power boats, the Department has imposed a number of conditions on the proposed facility. Of particular importance is the condition of the draft permit that requires that Marina provide documentation to the Department "that manatee protection speed zones in the [Greenway Canal] have been revised, approved by the Bureau of Protected Species Management, and posted in the [Greenway Canal]".

179. The difficulty with the condition concerning the use of power boats is that the speed zones which may ultimately be established are unknown. There is no assurance that the establishment of the speed zones and approval by the Bureau of Protected Species Management will in fact eliminate, or sufficiently reduce, adverse impacts to the manatee. The condition is vague and ambiguous in that it fails to require that any speed zones which may ultimately be considered adequate by the Department to allow power boats must not be contrary to the public interest criteria of Section 403.918(2), Florida Statutes. The condition is, therefore, inadequate. See *Town of Windermere v. Orange County Parks Department*, 13 FALR 3897, 3900-3901 (DEP 1991).

180. The condition concerning speed zones is deficient in that it allows the Department to "proceed without an analysis, in advance, of (1) the likely effects of the project" *Metropolitan Dade County* at 648. See also *Cahill Pines & Palms Property Owners Ass'n v. Department of Environmental Protection*, 16 FALR 2569, 2584 (DEP 1994).

181. While the evidence proved that the establishment of speed zones MAY be sufficient to mitigate the adverse impact on manatees from power boats, the condition fails to require that any speed zones established in the future will in fact eliminate the adverse impact of power boats on the manatee sufficiently to conclude that the use of the proposed facility, as modified, will not be contrary to the public interest. While it is true that the establishment of speed zones will be pursuant to the administrative procedures of Chapter 120, Florida Statutes, the evidence failed to prove that the speed zones that will be established will result in little or no adverse impact to the manatee.

182. The permit, without the condition concerning the establishment of speed zones, allows Marina to establish its facility and use it for sailboats.

If, in the future, Marina can provide reasonable assurances that the use of the proposed facility for power boats will not cause an adverse impact on the manatee because adequate speed zones have been established or some other manatee protection plan has been instituted, it may apply to the Department for a permit allowing power boats in the marina. It would then be required to provide reasonable assurances that the project, as modified, is not contrary to the public interest, i.e., that established speed zones will sufficiently reduce the potential for adverse impact on the manatee. No permit condition is required in order for Marina to pursue such a modification. More importantly, without a permit condition concerning the establishment of speed zones, the Department would be able to insure that the use of power boats would not be contrary to the public interest.

183. In light of the foregoing, it is concluded that the condition of the permit providing that power boats may be allowed at the proposed facility if documentation that speed zones have been established is, at a minimum, unnecessary, and at worse, a condition that could allow Marina to use the proposed facility in a manner that will be contrary to the public interest.

184. Marina has provided reasonable assurances that the use of the marina for sailboats only, without the condition establishing a prospective right to use the facility for power boats if speed zones are established, is not contrary to the public interest. Marina has failed to provide reasonable assurances, however, that the condition of the permit allowing the use of power boats in the future if documented that speed zones have been established is not contrary to the public interest.

185. It is allowable to recommend additional permit conditions based upon evidence of record so long as the rights of the parties to due process are not violated. See *Hopwood v. Department of Environmental Regulation*, 402 So.2d 1296 (Fla. 1st DCA 1981). The evidence in this case established that a restriction to idle or slow speed throughout the Greenway Canal and into the channel leading to deeper waters of the Gulf of Mexico would adequately protect the manatee. Such a condition cannot, however, be recommended. There are other factors in addition to the impact on the manatee that should be considered in establishing speed limits and the evidence presented in this matter did not adequately address those factors.

G. The Management and Storage of Surface Water Permit.

186. The Management and Storage of Surface Water permit sought by Marina is subject to the provisions of Section 373.413, Florida Statutes (1995), and Rule 40D-4.301, Florida Administrative Code, prior to amendment in October, 1995.

187. Section 373.413(1), Florida Statutes, provides the Department with authority to require that the proposed facility "not be harmful to the water resources of the district."

188. Rule 40D-4.301(1), Florida Administrative Code, requires that an applicant for a Management and Storage of Surface Water permit provide reasonable assurances that, among other things not relevant to this proceeding, the proposed facility:

-
- (d) will not cause adverse impacts on surface and ground water levels and flows,

. . . .
(h) will not adversely affect public health and safety,

. . . .
(j) will not otherwise be harmful to the water resource within the District,

. . . .

189. The evidence in this case failed to prove that the proposed facility will violate Section 373.413(1), Florida Statutes, or Rule 40D-301, Florida Administrative Code, with regard to saltwater intrusion.

190. The upconing of sulfates, however, creates a more difficult problem. The water quality standard for sulfates in class G-II groundwater is 250 mg/l. Rules 62-520.420 and 62-550.320 (Table 4), Florida Administrative Code. The upconing of sulfates as a result of the proposed facility will violate this standard. This standard is a "secondary drinking water" standard based upon the potential adverse affects on the odor and appearance of drinking water. See, Section 403.852(13), Florida Statutes. The sulfate violation from the proposed project will not cause a violation of primary drinking water standards, which are based upon public health concerns. See Section 403.851(12), Florida Statutes.

191. Despite the foregoing conclusions, Marina has failed to give reasonable assurances concerning the area of impact of the upconing of sulfates into the drinkable groundwater. It cannot, therefore, be concluded that the proposed facility will not "cause adverse impacts on . . . ground water levels and flows", will not "adversely affect public health and safety," and will not "otherwise be harmful to the water resource within the District".

192. Petitioners have argued that the assurances required to be given in order to be entitled to the Management and Storage of Surface Water permit cannot be given by Marina because of the policy of the Water Management District that the actual owner of the subject property be the applicant. This argument is rejected. The Department is responsible for the determination of policy with regard to its issuance of the Management and Storage of Surface Water permit in this proceeding.

H. Wetlands Resource Permit - Dredge and Fill Permit.

193. Because the wetlands resource permit is a dredge and fill permit, it is also subject to the provisions of Rule 62-312.080(1), Florida Administrative Code. Rule 62-312.080(1), Florida Administrative Code, provides:

(1) In accordance with Section 403.918(1), F.S., no permit shall be issued unless the applicant has provided the Department with reasonable assurance based on plans, test results or other information that the proposed dredging or filling will not violate water quality standards.

194. Rule 62-312.080(2), Florida Administrative Code, also requires that the proposed project meet the "public interest" test of Section 403.908(2), Florida Statutes. It has already been concluded, supra, that the public interest test has not been met by Marina.

195. The evidence in this case did not prove that the actual dredging and filling at the proposed site will have groundwater impacts. Secondary impacts, however, due to the lowering of the potentiometric surface and the resulting upwelling of sulfates will occur. The Department must consider these secondary impacts as part of its review of the dredge and fill permit. *The Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So.2d 772 (Fla. 1st DCA 1991).

196. The evidence also proved that the upconing of sulfates into class G-II groundwaters constitutes a violation of the secondary drinking water standard for sulfates. The assertion of the Department that the violation should be exempted is rejected. The position of the Department is based upon its conclusion that the upconing of sulfates will be limited to the area immediately below the Mine Pit. The evidence, however, failed to support this conclusion.

197. The Department has asserted that the violation should be exempt pursuant to Rule 62-4.050(1), Florida Administrative Code, by operation of Rule 62-4.040(1)(b), Florida Administrative Code. The evidence, however, failed to prove that the circumstances described in Rule 62-4.040(1)(b), Florida Administrative Code, necessary for the exemption to be applied exist in this case.

198. The Department has also asserted that the potential impact from upconing of sulfates is better addressed in determining whether the Management and Storage of Surface Water permit should be issued. The Department failed to cite any authority to support this argument. More importantly, the evidence failed to support a conclusion that the reasonable assurances required by an applicant for a Management and Storage of Surface Water permit have been given in this case.

199. The Department has also argued that an exemption should be granted because the upconing caused by the proposed facility will occur every time a well is installed. While this assertion is generally true, the problem with this assertion is the size of the Mine Pit compared to the size of a well. The lowering of the potentiometric surface caused by the digging of a well cannot be compared with the impact of the lowering of a water body which is as large as 12 percent of the area of the Greenway Canal.

200. Finally, it is concluded that the granting of an exemption in this matter, when no such exemption has been previously requested and ruled on by the Department, would be contrary to the requirement of Rule 62-4.040(1)(b), Florida Administrative Code. The rule requires that such determinations be made in writing, be filed by the Department as a public record and that the Department's determination is subject to challenge as agency action pursuant to Chapter 120, Florida Statutes. These requirements have not been fulfilled in this case.

I. Zone of Discharge.

201. Having failed to give the reasonable assurances required for the issuance of the permit due to the upconing of sulfates and the failure of Marina to be entitled to an exemption pursuant to Rule 62-312.080, Florida Administrative Code, it has been asserted that relief is available pursuant to Rule 62-522.410, Florida Administrative Code.

202. Rule 62-522.410, Florida Administrative Code, allows the establishment of a zone of discharge around a groundwater discharge site. The "zone of discharge" is the area underlying a site wherein there is opportunity

for treatment, mixture, or dispersion of wastes in to the aquifer. See also, Rule 62-520.200(23), Florida Administrative Code.

203. Within an approved zone of discharge groundwater quality standards for sulfates do not have to be met. An applicant must show, however, that the groundwater discharge will not violate standards outside of the zone. The zone can only extend to the property boundary or 100 feet from the discharge site boundary, whichever is less. See Rule 62-522.410(2), Florida Administrative Code.

204. Although this proposed facility does not involve an actual discharge of sulfates from the facility into the groundwater, the Department has suggested that the zone of discharge mechanism should be applied to this case. Although the Department has not cited any specific authority in support of this argument, it is concluded that application of the zone of discharge rules, if pertinent, is appropriate under the circumstances of this case.

205. The evidence in this case, however, failed to prove that the upconing of sulfates as a result of the proposed facility will be limited to a zone of discharge. Marina was not able to provide reasonable assurances that the upconing of sulfates will be limited to the boundaries of the proposed site or 100 feet from the Mine Pit, whichever is less. Marina is not, therefore, entitled to the relief provided by Rule 62-522.410, Florida Administrative Code.

RECOMMENDATION

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

RECOMMENDED that the Florida Department of Environmental Protection enter a Final Order denying Citrus Recreational Marina, Inc.'s application for wetland resource permit (dredge and fill) and the application for Management and Storage of Surface Waters Permit.

DONE and ENTERED this 18th day of November, 1996, in Tallahassee, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.