STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SIESTA KEY ASSOCIATION OF SARASOTA, INC., AND MICHAEL S. HOLDERNESS,

Petitioners,

vs.

Case No. 17-1449

CITY OF SARASOTA; U.S. ARMY CORPS OF ENGINEERS; DEPARTMENT OF ENVIRONMENTAL PROTECTION; AND BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Respondents,

and

LIDO KEY RESIDENTS ASSOCIATION, INC.,

Intervenor.
_____/

SAVE OUR SIESTA SANDS 2, INC.; PETER VAN ROEKENS; AND DIANE ERNE,

Petitioners,

Case No. 17-1456

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

and

LIDO KEY RESIDENTS ASSOCIATION, INC.,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in these consolidated cases was held on December 12 through 15, 2017, in Sarasota, Florida, and on December 18, 2017, by video teleconference in Sarasota and Tallahassee, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners Siesta Key Association of Sarasota, Inc., and Michael S. Holderness:

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For Respondent City of Sarasota:

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For Respondent U.S. Army Corps of Engineers:

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For Intervenors Lido Key Residents Association:

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STATEMENT OF THE ISSUE

The issue to be determined in these consolidated cases is whether the U.S. Army Corps of Engineers ("Corps") and the City of Sarasota ("City") (sometimes referred to as "the Applicants") are entitled to the proposed joint coastal permit, public easement, and sovereign submerged lands use authorization (referred to collectively as "the Permit") from the Department of Environmental Protection ("DEP") and the Trustees of the Internal Improvement Trust Fund to dredge sand from Big Sarasota Pass and its ebb shoal and place the sand on the shoreline of Lido Key.

PRELIMINARY STATEMENT

On December 22, 2016, DEP gave notice of its intent to issue the Permit to the City and Corps. The Permit would

authorize a 15-year joint coastal permit for beach nourishment, grant a Letter of Consent to use sovereign submerged lands for the proposed beach fill placement area, and grant a public easement to use sovereign submerged lands for three proposed borrow areas and for two groins.

Siesta Key Association of Sarasota, Inc., Michael S. Holderness, William A. Bortz, and David N. Patton ("SKA"); and Save Our Siesta Sands 2, Inc., Peter Van Roekens, Diane Erne, and Jeanne Ezcurra ("SOSS2") filed petitions challenging the Permit. The two cases were consolidated. Lido Key Residents Association, Inc. ("LKRA") was granted leave to intervene in support of the Permit.

Florida Wildlife Federation filed a petition for hearing to challenge the Permit, but later filed a notice of voluntary dismissal of the petition and it was dismissed before the final hearing.

At the final hearing, Petitioners presented the testimony of Catherine Luckner; Michael Holderness; Peter van Roekens; Diane Erne; Jennifer Peterson, Ph.D.; Ellen Edwards, Ph.D.; Todd Walton, Jr., Ph.D., accepted as an expert in coastal engineering; Mark Luther, Ph.D., accepted as an expert in coastal marine science; R. Grant Gilmore, Ph.D., accepted as an expert in marine ecology and marine fisheries; and Robert Young, Ph.D., accepted as an expert in coastal geology. SKA

Exhibits 7, 11, 12, 27, 33, 35, 36, 37-1 through 37-7, and 48 through 51 were admitted into evidence. SOSS2 Exhibits 69, 71, 77, 79, and 83 were admitted into evidence.

The City presented the testimony of Alexandrea Davis-Shaw, P.E., and Michelle Pfeiffer, P.E. City Exhibits 3, 5, and 6 were admitted into evidence.

The Corps presented the testimony of Aubree Hershorin, Ph.D., accepted as an expert in biology; and Jason A. Engle, P.E., accepted as an expert in coastal engineering. Corps Exhibits 76, 79E and 79H were admitted into evidence.

DEP presented the testimony of Robert Brantly, P.E., accepted as an expert in coastal engineering; and Ellen Edwards, Ph.D. DEP Exhibits 1 and 17A were admitted into evidence.

LKRA presented the testimony of Mark S. Fonseca, Ph.D., accepted as an expert in marine ecology and seagrass restoration. LKRA Exhibit 20 was admitted into evidence.

The Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders, which were considered in preparing this Recommended Order. All references to the Florida Statutes are to the 2017 codification.

FINDINGS OF FACT

The Parties

1. Petitioner Siesta Key Association, Inc. is a Florida Not for Profit Corporation, with its principal place of business

in Sarasota. The organization has approximately 1,425 members and represents the interests of those who use and enjoy Siesta Key's beach and waters. A substantial number of its members have substantial interests in the use of the beach and adjacent waters.

2. Petitioner Michael S. Holderness is a resident and property owner on Siesta Key. Mr. Holderness has substantial interests in the protection of his property and the use of the beach at Siesta Key and adjacent waters.

3. Petitioner Save Our Siesta Sands 2, Inc. is a Florida Not For Profit Corporation, with its principal place of business in Sarasota. The organization has over 700 members and was formed in opposition to the current dredging proposal. A substantial number of its members have substantial interests in the use of the beach at Siesta Key and adjacent waters.

4. Petitioners Peter van Roekens and Diane Erne are residents and property owners on Siesta Key. They have substantial interests in the protection of their properties and the use of the beach at Siesta Key and adjacent waters.

5. Respondent City of Sarasota is an incorporated municipality in Sarasota County. It is a co-applicant for the Permit.

6. Respondent Corps is the federal agency responsible for the Lido Key Hurricane and Storm Damage Reduction Project first

authorized by Congress in 1970. Under this Project, the Corps has conducted periodic maintenance, inlet dredging, surveys, and bypassing to protect Lido Key's shoreline. The Corps is a co-applicant for the Permit.

7. Respondent DEP is the Florida agency having the power and duty to protect Florida's air and water resources and to administer and enforce the provisions of chapters 161, 373, and 403, Florida Statutes, and rules promulgated thereunder in Titles 62 and 62B of the Florida Administrative Code, which pertain to the permitting of construction activities in the coastal zone and in surface waters of the state. DEP acts as staff to the Board of Trustees of the Internal Improvement Trust Fund.

8. Intervenor Lido Key Residents Association is a Florida Not for Profit Corporation incorporated in 1980 and with its principal place of business in Sarasota. The organization represents the interests of regular users of Lido Key Beach. A substantial number of its members have substantial interests in the use of the beach at Lido Key and adjacent waters.

The Project Area

9. Lido Key is a 2.6-mile-long, manmade barrier island constructed in the 1920s, located on the Gulf of Mexico and within the City of Sarasota.

10. North of Lido Key is New Pass, a navigation channel that separates Lido Key from Longboat Key.

11. South of Lido Key is Big Sarasota Pass and the ebb shoal of the pass. Further south is Siesta Key, a natural barrier island.

Sediment Transport

12. In the project area, sand generally drifts along the various shorelines from north to south. There can be sand drift to the north during some storm events, currents, and tides, but the net sand drift is to the south. It is sometimes called "downdrift."

13. Whatever downdrift conditions existed 100 years ago, they were substantially modified by the creation of Lido Key.

14. For decades, the shoreline of Lido Key has been eroding. Since 1964, the Corps has periodically dredged New Pass to renourish the shoreline of Lido Key. The City has also used offshore sand to renourish Lido Key. These renourishment projects have not prevented relatively rapid erosion of the shoreline.

15. A 2.4-mile-long segment of the shoreline of Lido Key has been designated by DEP as "critically eroded."

16. The Big Sarasota Pass ebb shoal has been growing and now has a volume of about 23 million cubic yards ("cy") of sand. The growth of the ebb shoal is attributable to the renourishment

projects that have placed over a million cy of sand on Lido Key and Longboat Key.

17. The growth of the ebb shoal has likely been a factor in the southward migration of the main ebb channel of Big Sarasota Pass, closer to the northern shoreline of Siesta Key.

18. Most of the west-facing shoreline at Siesta Key has experienced significant accretion. It is unusually wide for a Florida beach. It was named the best ("#1") beach in the United States by "Dr. Beach," Dr. Steven Leatherman, for 2011 and 2017.

The Project

19. The federally-authorized Lido Key Hurricane and Storm Damage Reduction Project includes the use of New Pass as a supplemental sand source for renourishing Lido Key. However, the use of New Pass is the subject of separate DEP permitting. The project at issue in this proceeding only involves the renourishment of Lido Key and is named "Lido Key Beach Renourishment and Groins."

20. The Applicants conducted a study of the ebb shoal to determine whether it could be used as a permanent sand source to renourish Lido Key. The study consisted of an environmental feasibility study and an inlet management program for Big Sarasota Pass and New Pass with alternative solutions. The application for the Permit was a response to this study.

21. The proposed sand source or borrow areas are three dredge "cuts." Cuts B and D are within the ebb shoal. Cut C extends through the ebb shoal and partly into Big Sarasota Pass. Cut C generally follows an existing "flood marginal channel."

22. The sand from the cuts would be placed along the central and southern 1.6 miles of Lido Key to fill a beach "template." The design width of the renourished beach would be 80 feet. The initial placement would be wider than 80 feet to account for erosion.

23. The Permit would have a duration of 15 years. The Applicants' intent is to initially place 950,000 cy of sand on Lido Key. After the initial renourishment, sand would be dredged from one or more of the three designated cuts about every five years to replace the sand that eroded away, and would probably be on the scale of about 500,000 cy.

24. The numerical modeling of the proposed project assumed the removal of up to 1.3 million cy of sand from the three cuts.

25. One of DEP's witnesses testified that the Permit authorizes the removal of up to 1.732 million cy of sand. The record does not support that testimony. The Applicants did not model the effects of dredging 1.732 million cy of sand from the ebb shoal and pass. There is insufficient evidence in the record to support an authorization to remove more than 1.3 million cy of sand.

26. Although the total volume of sand in the three cuts is 1.732 million cy, it is reasonable for the dimensions of the cuts and the proposed easement that is based on these dimensions to contain more material than is authorized to be removed, so as to provide a margin to account for less-than-perfect dredging operations.

27. Therefore, it is found that the Permit authorizes up to 1.3 million cy of sand to be removed from the designated borrow areas. The findings of fact and conclusions of law in this Recommended Order that address the expected impacts of the proposed project are based on this finding.

28. The Permit also authorizes the construction of two rubble mound groins at the southern end of Lido Key to stabilize the beach and lengthen the time between renourishment events. The groins are designed to be semi-permeable so that they "leak" sand.

29. There are no seagrasses in the renourishment area and mostly scattered and thin patches of seagrass near the dredge cuts. The Permit requires mitigation for the potential direct impacts to 1.68 acres of seagrasses. To offset these impacts, the Applicants propose to create 2.9 acres of seagrass habitat. The seagrass habitat would be established at the Rookery at Perico Seagrass Mitigation Basin in Manatee County, about 16 miles north of Big Sarasota Pass.

30. The Permit incorporates the recommendations of the Florida Fish and Wildlife Conservation Commission regarding protections for turtles, nesting shorebirds, and manatees.

31. The Permit requires regular monitoring to assess the effects of the project, and requires appropriate modifications if the project does not meet performance expectations.

Project Engineering

32. The Corps' engineering analysis involved three elements: evaluating the historical context and the human influences on the regional system, developing a sediment budget, and using numerical modeling to analyze erosion and accretion trends near the project site.

33. A principal objective of the engineering design for the borrow areas, sand placement, and groins was to avoid adverse effects on downdrift, especially downdrift to Siesta Key.

34. The Corps developed a sediment budget for the "no action" and post-project scenarios. A sediment budget is a tool used to account for the sediment entering and leaving a geographic study area.

35. The sediment budgets developed by the Corps are based on sound science and they are reliable for the purposes for which they were used.

36. The post-project sediment budget shows there would be minimal or no loss of sediment transport to Siesta Key.

37. Petitioners did not prepare a sediment budget to support their theory of adverse impact to Siesta Key.

38. Petitioners object to the engineering materials in the Permit application because they were not certified by a Florida registered professional engineer. DEP does not require a Florida professional engineer's certification for engineering work submitted by the Corps. As explained in the Conclusions of Law, Florida cannot impose licensing conditions on federal engineers.

Ebb Shoal Equilibrium

39. Petitioners' witness, Dr. Walton, developed a formula to estimate ebb shoal volume equilibrium, or the size that an ebb shoal will tend to reach and maintain, taking into account bathymetry, wave energy, tides, adjacent shorelines, and related factors.

40. In an article entitled "Use of Outer Bars of Inlets as Sources of Beach Nourishment Material," Dr. Walton calculated the ebb shoal equilibrium volume for the Big Sarasota Pass ebb shoal as between 6 and 10 million cy of sand.

41. The ebb shoal has been growing and is now about 23 million cy of sand, which is well in excess of its probable equilibrium volume. The volume of sand proposed to be removed

from the ebb shoal is only about six percent of the overall ebb shoal volume.

42. Dr. Walton's study of the use of ebb shoals as sand sources for renourishment projects supports the efficacy of the proposed project.

Modeling Morphological Trends

43. The Corps used a combined hydrodynamic and sediment transport computer model called the Coastal Modeling System, Version 4 ("CMS") to analyze the probable effects of the proposed project. The CMS model was specifically developed to represent tidal inlet processes. It has been used by the Corps to analyze a number of coastal projects.

44. Dr. Walton opined that the CMS model was inappropriate for analyzing this project because it is a two-dimensional model that is incapable of accounting for all types of currents and waves. However, a two-dimensional model is appropriate for a shallow and well-mixed system like Big Sarasota Pass. Dr. Walton's lack of experience with the CMS model and with any three-dimensional sediment transport model reduced the weight of his testimony on this point.

45. Petitioners contend that the CMS model was not properly calibrated or verified. Calibration involves adjustments to a model so that its predictions are in line with

known conditions. Verification is the test of a model's ability to predict a different set of known conditions.

46. For calibrating the hydrodynamic portion of the model, the Corps used measurements of water levels and currents collected in 2006. The model showed a 90-percent correlation with water surface elevation and 87-percent correlation to velocity.

47. Dr. Walton believes a model should exhibit a 95-percent correlation for calibration. However, that opinion is not generally accepted in the modeling community.

48. Model verification, as described by Dr. Walton, is generally desirable for all types of modeling, but not always practical for some types of modeling. A second set of field data is not always available or practical to produce for a verification step. In this case, there was only one set of sea floor elevations available for verification of the CMS model.

49. It is the practice of DEP in the permitting process to accept and consider sediment transport modeling results that have not been verified in the manner described by Dr. Walton.

50. The Corps described a second calibration of the CMS model, or "test of model skill," as an evaluation of how well the CMS model's sediment transport predictions (morphological changes) compared to Light Detection and Ranging ("LIDAR") data collected in 2004. The CMS model successfully reproduced the

patterns of erosion and sediment deposition within the area of focus.

51. Petitioners' expert, Dr. Luther, testified that, over the model domain, the CMS model predictions differed substantially from LIDAR data and believes the discrepancies between the model's predictions and the LIDAR data make the model's predictions unreliable.

52. Modeling sediment transport is a relatively new tool for evaluating the potential impacts of a beach renourishment project. Renourishment projects have been planned, permitted, and carried out for decades without the use of sediment transport models. Now, modeling is being used to add information to the decision-making process. The modeling does not replace other information, such as historical data, surveys, and sediment budgets, which were heretofore used without modeling to make permit decisions.

53. Sediment transport is a complex process involving many highly variable influences. It is difficult to predict where all the grains of sand will go. Sediment transport modeling has not advanced to the point which allows it to predict with precision the topography of the sea floor at thousands of LIDAR points.

54. However, the CMS model is still useful to coastal engineers for describing expected trends of accretion and

erosion in areas of interest. This was demonstrated by the model's accurate replication of known features of the Big Sarasota Pass and ebb shoal, such as the flood marginal channels and the bypassing bars.

55. The CMS model's ability to predict morphological trends assisted the Applicants and DEP to compare the expected impacts associated with alternative borrow locations on the ebb shoal and pass, wave characteristics, and sediment transport pathways. Together with other data and analyses, the results of the CMS model support a finding that the proposed dredging and renourishment would not cause significant adverse impacts.

56. The Applicants extensively analyzed sediment transport pathways and the effects of alternative borrow areas on sediment transport to Siesta Key. Petitioners' hypothesis is not supported by engineering studies of equivalent weight. The more persuasive evidence indicates that sediment transport to downdrift beaches would not be reduced and might even be increased because sediment now locked in the ebb shoal would reenter the sediment transport pathways.

57. In addition, the proposed dredging may halt the southward migration of the main ebb channel of Big Sarasota Pass, and thereby reduce erosive forces on the interior shoreline of north Siesta Key.

Wave Energy

58. Petitioners assert that the proposed dredging would result in increased wave energy on Siesta Key because the diminished ebb shoal would no longer serve as a natural buffer against wave energy from storms. They conducted no studies or calculations to support this assertion.

59. Because the proposed dredging would remove a small percentage of the total ebb shoal volume, the ebb shoal would remain a protective barrier for Siesta Key.

60. Wave energy reaching the shorelines along Big Sarasota Pass or within Sarasota Bay would continue to be substantially reduced by the ebb shoal. The predicted increase in wave energy that would occur as a result of the project could increase the choppiness of waters, but would not materially increase the potential for wave-related erosion.

61. Petitioners conducted no studies and made no calculations of their own to support their allegation that the project would significantly increase the potential for damage to property or structures on Siesta Key due to increased wave energy. To the extent that Petitioners' expert coastal engineer opined otherwise, it was an educated guess and insufficient to rebut the Applicants' prima facie case on the subject of wave energy.

Groins

62. Petitioners contend that the two proposed groins would adversely impact the beaches of Siesta Key because the groins would capture sand that would otherwise drift south and benefit Siesta Key. However, the preponderance of the evidence shows the groins would not extend into or obstruct the sand "stream" waterward of the renourished beach.

63. The historic use of groins to capture downdrift resulted in adverse impacts to adjacent beaches. However, the use of groins in conjunction with beach renourishment to stabilize a renourished beach and without obstructing downdrift is an accepted practice in coastal engineering.

64. The proposed groins would not obstruct longshore sediment transport and, therefore, would not interfere with downdrift to Siesta Key.

Public Interest - General

65. Section 373.414(1) requires an applicant to provide reasonable assurance that state water quality standards will not be violated, and reasonable assurance that a proposed activity is not contrary to the public interest. However, if the proposed activity significantly degrades or is within an Outstanding Florida Water ("OFW"), the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

66. Sarasota Bay, including Big Sarasota Pass and portions of Lido Key, have been designated as an OFW. Therefore, the Applicants must demonstrate that the proposed project is clearly in the public interest.

67. In determining whether an activity is clearly in the public interest, section 373.414(1)(a) requires DEP to consider and balance seven factors:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

68. DEP determined that the project is clearly in the public interest because it would improve public safety by

providing protection to Lido Key upland structures from storm damage and flooding, protect and enhance wildlife habitat, and provide beach-related recreational opportunities; and it would create these public benefits without causing adverse impacts.

Public Interest - Safety

69. Petitioners contend that the proposed project would adversely affect public health, safety, welfare, or the property of others because it would interrupt downdrift and substantially reduce the storm protection provided by the ebb shoal. As found above, the preponderance of the evidence does not support this contention.

Public Interest - Conservation of Fish and Wildlife

70. Petitioners contend that the proposed project would adversely affect the conservation of fish and wildlife, including endangered or threatened species. The Permit application materials provided evidence that the proposed project would have no effects, or only minimal temporary effects, on water quality, temperature, salinity, nutrients, turbidity, habitat, and other environmental factors. That was sufficient as a prima facie showing that the project would not adversely affect the conservation of fish and wildlife because, if environmental factors are not changed, it logically follows that there should be no adverse impacts to fish and wildlife.

71. Therefore, as explained in the Conclusions of Law, the burden shifted to Petitioners to present evidence to show that adverse effects to fish and wildlife would occur. It was not enough for Petitioners to simply contend that certain fish species were not adequately addressed in the application materials.

72. With the exception of Dr. Gilmore's field investigation related to the spotted seatrout, Petitioners conducted no studies or field work of their own to support their allegations of adverse impacts to fish and wildlife.

73. Dr. Gilmore discovered that spotted seatrout were spawning in Big Sarasota Pass. Such spawning sites are not common, are used repeatedly, and are important to the conservation of the species. Spotted seatrout spawn from April through September.

74. The record does not show that the Florida Fish and Wildlife Conservation Commission, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service were aware that Big Sarasota Pass was a spawning area for spotted seatrout, or considered this fact when commenting on the project.

75. The spotted seatrout is not a threatened or endangered species, but DEP is required to consider and prevent adverse impacts to non-listed fish species, as well as recreational fishing and marine productivity. If the proposed project would

destroy a spotted seatrout spawning area, that is a strong negative in the balancing of public interest factors.

76. The Applicants do not propose mitigation for adverse impacts to spotted seatrout spawning.

77. Seagrass sites close to the spawning area are used by post-larval spotted seatrout for refuge. The likely seagrass nursery sites for seatrout spawning in Big Sarasota Pass are depicted in SOSS2 Exhibit 77. The proposed seagrass mitigation at the Perico Rookery Seagrass Mitigation Basin, over 16 miles away, would not offset a loss of this refuge function because it is not suitable as a refuge for post-larval spotted seatrout.

78. The spawning season for spotted seatrout occurs during the same months as turtle nesting season, and DEP argued that the turtle protection conditions in the Permit to limit lighting and prohibit nighttime work, would also prevent adverse impacts to the spotted seatrout. However, spotted seatrout spawning is also threatened by turbidity and sedimentation in the spawning area and adjacent seagrasses.

79. The spotted seatrout spawning area is in the area where dredge Cut B is located. If Cut B were dredged during the spawning season, it would likely disrupt or destroy the spawning site. Reasonable assurance that the proposed project would not disrupt or destroy the spawning site requires that Cut B not be dredged during the spawning season.

80. Seagrasses that are likely to provide refuge to post-larval seatrout are near the most eastern 1,200 feet of Cut C. Reasonable assurance that the proposed project would not disrupt or destroy the refuge function requires that the most eastern 1,200 feet of cut C not be dredged during the spawning season.

81. In summary, the proposed project would adversely affect the conservation of fish and wildlife unless dredging was restricted during the spotted seatrout spawning season, as described above.

Public Interest - Navigation, Flow of Water, and Erosion

82. Petitioners contend that the proposed project would adversely affect navigation, the flow of water, and would cause harmful erosion to Siesta Key, but Petitioners conducted no studies or calculations to support this assertion. The preponderance of the evidence shows that no such adverse impacts would occur.

Public Interest - Recreational Values

83. Petitioners contend that the proposed project would adversely affect fisheries and associated recreation because of harm to spotted seatrout and other fish species. As found above, the preponderance of the evidence shows the project would adversely affect the spotted seatrout, an important recreational fish species, unless dredging was restricted during the spawning season.

Public Interest - Value of Functions

84. Petitioners contend that the proposed project would adversely affect the current condition and relative value of functions being performed by areas affected by the proposed project because dynamic inlet system would be disrupted. As found above, the preponderance of the evidence shows the project would not adversely affect the coastal system. However, it would adversely affect the spotted seatrout spawning and refuge functions provided by Big Sarasota Pass unless dredging was restricted during the spawning season.

Mitigation

85. If a balancing of the public interest factors in section 373.414(1)(a) results in a determination that a proposed project is not in the public interest, section 373.414(1)(b) provides that DEP must consider mitigation offered to offset the adverse impacts.

86. Although the Perico Rookery at Seagrass Mitigation Basin is within the OFW and the same drainage basin, it does not fully offset the adverse impacts likely to be caused by the proposed project. The mitigation would not offset the loss of spotted seatrout spawning and refuge functions.

87. The mitigation for the loss of spotted seatrout spawning and refuge functions is unnecessary if the impacts are

avoided by restricting dredging during the spawning season as described above.

Design Modifications

88. Petitioners contend that the Applicants did not evaluate the alternative of taking sand from offshore borrow areas for the renourishment. The record shows otherwise. Furthermore, as explained in the Conclusions of Law, the Applicants were not required to address design modifications other than alternative locations for taking sand from the ebb shoal and Big Sarasota Pass.

Consistency with the Coastal Zone Management Program

89. Petitioners contend that DEP failed to properly review the Permit for consistency with the Florida Coastal Zone Management Program ("FCZMP"), because DEP failed to obtain an affirmative statement from Sarasota County that the proposed project is consistent with the Sarasota County Comprehensive Plan.

90. The State Clearinghouse is an office within DEP that coordinates the review of coastal permit applications by numerous agencies for consistency with the FCZMP. It is the practice of the State Clearinghouse to treat a lack of comment by an agency as a determination of consistency by the agency.

91. With respect to this particular project, the State Clearinghouse provided a copy of the joint coastal permit

application to the Southwest Florida Regional Planning Council ("SWFRPC") for comments regarding consistency with local government comprehensive plans. SWFRPC submitted no comments.

92. In a letter dated June 26, 2015, the State Clearinghouse reported to the Corps that "at this stage, the proposed federal action is consistent with the [FCZMP]."

93. In a written "peer review" of the proposed project produced by the Sarasota Environmental Planning Department in October 2015, some concerns were expressed, but no mention was made of inconsistency with the Sarasota County Comprehensive Plan.

94. Sarasota County sent a letter to DEP, dated August 24, 2016, in which it requested that the Corps prepare an Environmental Impact Statement ("EIS") for the project. Sarasota County did not indicate in its letter to DEP that the proposed project is inconsistent with any policy of the Sarasota County Comprehensive Plan.

95. Petitioners assert that the proposed project would be inconsistent with an environmental policy of the Sarasota County Comprehensive Plan that Petitioners interpret as prohibiting the proposed dredging. The record contains no evidence that Sarasota County believes the proposed project is inconsistent with this particular policy or any other policy of its comprehensive plan.

CONCLUSIONS OF LAW

Jurisdiction

96. DOAH has jurisdiction over the parties and the subject matter of this proceeding. See §§ 120.569, 120.57(1), Fla. Stat.

97. This is a de novo proceeding under section 120.57. It is intended to formulate final agency action, not to review action taken earlier and preliminarily. See § 120.57(1)(k), Fla. Stat.; McDonald v. Dep't of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Standing

98. Parties to a chapter 120 proceeding include persons whose substantial interests will be affected by the proposed agency action. § 120.52(13), Fla. Stat. The standing of Petitioners and Intervenor was not challenged. The record shows the substantial interests of Petitioners and Intervenor could be affected by the proposed Permit. Therefore, Petitioners and Intervenor have standing under chapter 120.

99. In addition, Petitioner and Intervenor associations have standing under section 403.412, Florida Statutes, as non-profit organizations formed for the purpose of environmental protection, with at least 25 members residing within Sarasota County.

Burden and Standard of Proof

100. The procedure outlined in section 120.569(2)(p) applies to proceedings arising under chapter 373, Florida Statutes. Section 120.569(2)(p) applies to this proceeding because it arises under section 373.427, which provides for concurrent review of activities that require an environmental resource permit, a coastal construction permit, and proprietary authorization from the Board of Trustees.

101. Under Section 120.569(2)(p), a permit applicant must present a prima facie case of its entitlement to the permit, which can be accomplished by submitting into evidence the permit application, agency staff report, and related materials. The City and the Corps satisfied their prima facie case for entitlement to the Permit.

102. After the prima facie case has been met, a petitioner challenging the issuance of a permit has the burden of ultimate persuasion to show that the applicant has not provided reasonable assurance that it will meet applicable permit requirements. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." Metro. Dade Cty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not mean absolute guarantees.

103. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

104. Petitioners demonstrated by a preponderance of the evidence that the City and Corps have not provided reasonable assurance that the project meets applicable criteria because the proposed project would cause avoidable adverse impacts to the conservation of the spotted seatrout. The Applicants can provide reasonable assurance if the proposed Permit is modified to restrict dredging during the spotted seatrout spawning season.

Project Engineering

105. Rule 62B-41.005(3) requires DEP to consider the following:

> (a) Adequate engineering data concerning the existing coastal system, including topography, bathymetry; wave and current data; coastal processes, conditions and morphological trends;
>
> (b) Design features of the proposed structures or activities; and
>
> (c) Such other specific information or calculations as are necessary for the evaluation of the application.

DEP had adequate data to make its initial decision to issue the Permit.

106. Rule 62B-41.007 requires that all coastal construction be sited and designed so as to minimize any expected adverse impact to the coastal system, marine turtles and adjacent property and structures. The term "coastal system"

is defined to exclude fish and wildlife. See Fla. Admin. Code R. 62B-41.002(9). The preponderance of the evidence shows the Applicants' compliance with rule 62B-41.007.

107. Rule 62B-41.005(5) prohibits structures that will interfere with natural/offshore movements of sediment unless a net positive benefit to the coastal system can reasonably be expected and mitigation is provided. The preponderance of the evidences shows the Applicants' compliance with this rule.

108. The application for the Permit and the additional evidence provided at the final hearing included sufficient technical information and analysis, including the modelling of morphological trends, to support the DEP's determination that the proposed project complies with all applicable criteria for approval except for the various criteria related to adverse impacts to fish and wildlife, because of the adverse impacts to spotted sea trout.

Cumulative Impacts

109. Section 10.2.8 of the Applicant's Handbook, Volume 1, requires consideration of whether this proposed project, in conjunction with past, present, and future activities, would amount to unacceptable cumulative impacts to surface water functions in the basin. The proposed projects' adverse impacts to the conservation of fish and wildlife, together with proposed future impacts, would be unacceptable. However, the cumulative

impacts would be acceptable if the Permit were modified to restrict dredging operations as recommended.

Licensed Florida Engineer

110. Petitioners contend that the Applicants failed to comply with rule 62B-41.007(4), which requires the design plans and specifications, studies, and other coastal process analyses submitted as part of the permit application to be certified by a professional engineer registered in the State of Florida.

111. DEP's practice not to impose this requirement on Corps engineers is consistent with an advisory legal opinion issued by the Florida Attorney General, which concluded that the Supremacy Clause of the United States Constitution prohibits Florida from requiring by statute or rule that a Corps engineer be licensed in Florida in order to secure a permit from DEP. See Op. Att'y Gen. Fla. 94-61 (1994).

Public Interest

112. The proposed project provides several public benefits. However, considering and balancing the seven public interest factors in section 373.414(1), the proposed project is not clearly in the public interest because it causes unreasonable and avoidable adverse impacts to the conservation of fish and wildlife, marine productivity, fishing recreation, and the relative value of functions being performed by areas affected. For the same reasons, the proposed project does not

comply with the public interest requirement of Florida Administrative Code chapter 18-21 for activities that require approval of the Trustees of the Internal Improvement Trust Fund.

113. The proposed project would satisfy the public interest requirements of section 373.414(1) and chapter 18-21 if the Permit were modified to restrict dredging operations during the spotted seatrout spawning season.

Mitigation

114. Section 373.414(1)(b) requires DEP to consider measures proposed by an applicant to mitigate the adverse impacts that may be caused by a proposed project. The mitigation measures proposed by the Applicants do not fully offset the impacts because the measures do not replace the loss of spotted seatrout spawning and refuge functions.

Consideration of Design Modifications

115. Section 10.2.1 of the Applicant's Handbook requires an applicant to consider the practicability of design modifications that could eliminate or reduce impacts to the area, but does not require consideration of projects significantly different in type of function. Because the objective of this project was to use the ebb shoal as a long-term sand source for renourishing Lido Key, the Applicants' analysis was properly confined to considering different parts of the ebb shoal for making dredge cuts.

Financial Assurances

116. Petitioners complain that the City and Corps have offered no financial assurance that the proposed project will perform as designed. However, there is no statute or rule requirement for federal entities or local governments to provide DEP with financial assurance to obtain a joint coastal permit.

Coastal Zone Consistency

117. The federal Coastal Zone Management Act ("CZMA") requires federal activities that are in or affect the coastal zone to be consistent to the maximum extent practicable with "the enforceable policies of approved State management programs." 16 U.S.C. § 1456(c)(1)(A).

118. In furtherance of the CZMA, Florida has adopted a CZM Program to be administered by DEP. See Part II, ch. 380, Fla. Stat. DEP is responsible for making consistency determinations pursuant to the CZMA.

119. Section 373.428 provides that "the final agency action on a permit application shall constitute the state's determination as to whether the activity is consistent with the federally approved Florida Coastal Zone Management Program." Through its Notice of Intent to issue the Permit, DEP signaled its determination that the Permit is consistent with the CZM Program. See § 373.428, Fla. Stat. However, like DEP's determination regarding any other regulatory criterion, DEP's

consistency determination is subject to de novo review in this proceeding.

120. The Florida State Clearinghouse coordinates the dissemination of coastal permit applications for comment regarding consistency with the enforceable policies of the FCZMP. An agency that submits a determination of inconsistency is an indispensable party to an administrative proceeding on the issue. Id.

121. Among the enforceable policies of the FCZMP is chapter 163, Florida Statutes, which requires all development undertaken by governmental agencies to be consistent with the local government's comprehensive plan. § 163.3194(1)(a), Fla. Stat. For comment on the consistency of this proposed project with chapter 163, the State Clearinghouse sent a copy of the permit application to the Southwest Florida Regional Planning Council ("SWFRPC"). Under Florida Administrative Code Rule 29I-5.003(1)(a), SWFRPC is responsible for reviewing a proposed project for "consistency with adopted regional and local goals, objectives and policies." SWFRPC coordinates its review with affected local governments. Fla. Admin. Code R. 29I-4.004(3).

122. SWFRPC provided no comments to DEP regarding the Permit, which DEP treated as a determination of consistency. Whether this consistency determination is sufficient or correct under chapter 163 is irrelevant. Even an affirmative

consistency comment from a local government to the State Clearinghouse does not settle the question of whether a project is consistent with the local government's comprehensive plan under chapter 163. A consistency comment is similar to a permit applicant's demonstration that it owns or controls land, which cannot open a permit proceeding to disputed issues regarding land title, nor result in a legally binding determination of land title. In this permit proceeding, the requirement for consistency with the FCZMP was satisfied when Respondents showed that the established commenting procedure was followed and no inconsistency comment was received by DEP.

RECOMMENDATION

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

1. DEP issue a final order approving the proposed agency actions, but only if the joint coastal permit is modified to prohibit dredging operations in Cut B and the most eastern 1,200 feet of Cut C during April through September. If this modification is not made, it is recommended that the proposed agency actions be DENIED; and

2. The joint coastal permit be modified to clarify that it authorizes the removal of up to 1.3 million cy of sand.

DONE AND ENTERED this 8th day of May, 2018, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
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.