

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE F. KAINE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 93-0051
	)	
STATE OF FLORIDA DEPARTMENT	)	
OF ENVIRONMENTAL PROTECTION,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on July 27, 1995, in Miami, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Lawrence F. Kaine, Esquire  
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Miami, Florida 33128-1097

For Respondent: Christine C. Stretesky, Esquire  
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STATEMENT OF THE ISSUE

Whether Petitioner should be granted the permit he has requested from the Department of Environmental Protection authorizing him to construct a dock on his property on Saddlebunch Key in Monroe County, Florida, and if so, under what conditions, if any?

PRELIMINARY STATEMENT

On December 22, 1992, Petitioner filed with the Department of Environmental Protection (hereinafter referred to as the "Department") a petition for administrative review challenging the Department's determination, announced in its December 7, 1992, Notice of Permit Denial, to deny Petitioner's application for a permit to construct a dock on his property on Saddlebunch Key in Monroe County, Florida. The Department, on January 11, 1993, referred Petitioner's petition to the Division of Administrative Hearings (hereinafter referred to as the "Division") for the assignment of a Division Hearing Officer "to conduct all necessary proceedings required by law and to submit a recommended order to the

Department." On January 26, 1993, Petitioner filed an amended petition for administrative review with the Department. The Department transmitted Petitioner's amended petition to the Division three days later.

At the final hearing conducted by the Hearing Officer, the parties presented the testimony of a total of six witnesses: Lawrence Plummer; Petitioner; Philip Frank; Edward Barham; Ronald Walters; and Lucy Ann Blair. In addition to the testimony of these six witnesses, various exhibits were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the Hearing Officer advised the parties on the record that post-hearing submittals had to be filed no later than 20 days following the Hearing Officer's receipt of the transcript of the hearing. The Hearing Officer received the hearing transcript on November 16, 1995. The Department and Petitioner filed proposed recommended orders on December 4, 1995, and December 13, 1995, respectively. The parties' proposed recommended orders contain, what are labelled as, "findings of fact" and "conclusions of law." These proposed "findings of fact" and "conclusions of law" have been carefully considered by the Hearing Officer. The proposed "findings of fact" are specifically addressed in the Appendix to this Recommended Order.

#### FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Petitioner owns Lot 5 on Saddlebunch Key in Monroe County, Florida.
2. The lot is approximately 24 acres in size.
3. It is located in a pristine area devoid of any exotic species.
4. From west to east, Petitioner's property consists of: an approximately one acre low hammock, uplands area inhabited by buttonwood trees; a transition area slightly lower in elevation than the uplands area; a salt marsh area with key grass; a narrow mangrove area with mangroves between four and six feet tall; and an open water area. The first two hundred feet or so of the open water area has small coral sponges, sea grasses and algae on the bottom. Further out, the bottom is sandy with a minimal amount of vegetation.
5. Among the species of birds that inhabit Petitioner's property and the surrounding area are the Little Blue Heron, White Ibis and Reddish Egret.
6. The area is also the home of two endangered species, the Silver Rice Rat (which requires large expanses of undisturbed habitat such as that presently found in Saddlebunch Key) and the Lower Key Marsh Rabbit (which inhabits areas such as the transitional and marsh areas found on Petitioner's property). 1/
7. On April 20, 1992, Petitioner submitted to the Department an application for a permit to build a 1200 feet long/12 feet wide dock (hereinafter referred to as the "Proposed Dock") extending east from the uplands area of his property on Saddlebunch Key out into the open waters where the water depth is approximately four feet. The Proposed Dock will enable Petitioner (and his family, as well as visitors, both invited and uninvited) to more easily access the uplands area of his property, on which he plans to build a vacation home for his and his family's use. 2/ As a result of the closure and

barricading of Sugarloaf Boulevard, there is no longer a route over dry land that Petitioner can take to get to the uplands. To reach the uplands, he must either walk through wetlands or navigate a boat through the shallow waters adjoining the uplands. Regardless of which means of access he chooses, the bottom (the mud and muck in which he steps when he travels by foot and the coral sponges, sea grasses and algae against which his boat scrapes when he travels by boat) is disturbed. 3/

8. The Proposed Dock will be located in a Class III, Outstanding Florida Water.

9. On May 6, 1992, the Department, by letter, advised Petitioner that it had received his application and determined that it was incomplete. The letter specified the additional information and materials Petitioner needed to supply to make his application complete.

10. On July 8, 1992, Petitioner provided the Department with additional information and materials in response to the request made by the Department in its May 6, 1992, letter.

11. By letters dated July 20 and 21, 1992, the Department advised Petitioner that it had received his July 8, 1992, submission, but that, notwithstanding this submission, his application remained incomplete. The letters specified the additional information and materials Petitioner still needed to supply to make his application complete.

12. On August 10, 1992, Petitioner provided the Department with additional information and materials in response to the request made by the Department in its July 20 and 21, 1992, letters.

13. By letter dated August 18, 1992, the Department advised Petitioner that it had received his August 10, 1992, submission, but that, notwithstanding this submission, his application remained incomplete. The letter specified the additional information and materials Petitioner still needed to supply to make his application complete.

14. On September 9, 1992, Petitioner provided the Department with additional information and materials in response to the request made by the Department in its August 18, 1992, letter. In his letter Petitioner requested that the Department "process [his] application."

15. Less than 90 days later, on December 7, 1992, the Department issued a Notice of Permit Denial.

16. Petitioner has not provided reasonable assurance that the Proposed Dock will not degrade the quality of the water in and around the project site, nor has he provided reasonable assurance that the Proposed Dock is clearly in the public interest.

17. Turbidity will occur during the construction of the Proposed Dock. When the holes into which the dock pilings will be placed are bored, the excavated material will become suspended and, if not contained, will flow with the current. The containment required will be substantial.

18. The use of turbidity curtains is an accepted means of limiting turbidity.

19. Although Petitioner has indicated that he will use turbidity curtains during the construction of the Proposed Dock, he has not indicated where they will be placed, how long they will remain in place and how they will be used.

20. Turbidity has an adverse impact on the transparency of water (that is, the degree to which sunlight is able to penetrate the water).

21. In and around the project site there is submerged vegetation that requires sunlight.

22. If turbidity is not properly contained during construction, there will be a decrease in the transparency of the water in and around the project site and a resultant adverse impact on the biological function of the submerged vegetation in that area.

23. Moreover, the Proposed Dock, when completed, will block sunlight and prevent this sunlight from reaching the submerged vegetation beneath the dock.

24. Such shading will occur even though Petitioner has agreed to have one inch separations between the boards that will comprise the Proposed Dock's walkway. These separations will allow only a limited amount of sunlight to come through the dock.

25. The amount of shading produced by the Proposed Dock will be substantial because the Proposed Dock will have an east/west alignment and therefore the sun will always be directly above it. 4/

26. Because the Proposed Dock will deprive the submerged vegetation beneath it of needed sunlight, the dock will have an adverse effect on such vegetation, as well as on the organisms that feed on such vegetation, and it will therefore reduce the diversity of life in the area. The reduction of the area's diversity of life will, in turn, adversely affect the biological integrity of the area.

27. The activity associated with the construction and presence of the Proposed Dock and the vacation home that Petitioner will build if he is permitted to construct the Proposed Dock 5/ will flush birds that now inhabit Petitioner's property and the surrounding area, including the Little Blue Herons, White Ibises and Reddish Egrets, from their present habitat.

28. This activity will also adversely affect other wildlife in the area, including, most significantly, the Silver Rice Rat and the Lower Key Marsh Rabbit, both of which are endangered species that will suffer from the invasion of the exotic species that will accompany the development of the area. In addition, the construction of the Proposed Dock will result in a loss of habitat for the Lower Key Marsh Rabbit. 6/

29. The Proposed Dock is intended to be a permanent structure and therefore its post-construction impacts will be of a long-lasting nature.

30. It is reasonable to expect that other property owners in the vicinity of the Proposed Dock will seek a permit to construct a dock like Petitioner's if Petitioner is permitted to construct the Proposed Dock. These other projects, if they too are permitted, will have environmental consequences similar to those produced by the Proposed Dock.

31. Although the Proposed Dock will enable Petitioner and his family to reach the uplands area of Petitioner's property without creating a disturbance on the bottom of the adjoining shallow waters, on balance, the Proposed Dock will have an adverse environmental impact on the uplands and surrounding area. The Proposed Dock's environmental disadvantages outweigh its environmental benefits.

32. Petitioner has expressed a general willingness to make those modifications to his proposed project that will make the project permittable, but he has yet to make the modifications that will minimize the project's adverse environmental consequences.

33. Mitigation of these consequences is a possibility. In the past, the Department has accepted both on-site and off-site mitigative measures. 7/

#### CONCLUSIONS OF LAW

34. Before determining whether, and under what conditions, if any, it should grant an application for a dredge and fill permit, such as the one at issue in the instant case, the Department must evaluate the application in light of the provisions of Section 373.414, Florida Statutes, which provides in pertinent part as follows:

(1) [T]he department shall require the applicant to provide reasonable assurance that water quality standards applicable to waters as defined in s. 403.031(13) 8/ will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1) is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, 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 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 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.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, . . . the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity. . . .

(8) The . . . department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:

(a) The activity for which the permit is sought.

(b) Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.

(c) Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

35. The term "reasonable assurance," as used in the statute, "contemplates . . . a substantial likelihood that the project will be successfully implemented." *Metropolitan Dade County v. Coscan Florida, Inc.*, 609 So.2d 644, 648 (Fla. 3d DCA 1992). The "reasonable assurances" that the statute requires must be given "before the project is started" and it is not within the Department's "province to allow a[n applicant] to proceed with a project . . . with no idea as to what the effect on water quality [and the public interest] will be." *Id.*

36. Where an application for a dredge and fill permit is contested, the burden is on the applicant to prove by a preponderance of the evidence at the administrative hearing on the matter that it is entitled to the requested permit pursuant to the foregoing statutory criteria. See *Metropolitan Dade County v. Coscan Florida, Inc.*, 609 So.2d at 646; Rule 62-103.130(1)(a), Fla. Admin. Code. In determining whether the applicant has met its burden, the Department should take into consideration not only the direct impacts of the activity, but also the "'secondary' impacts caused or enabled by the [activity]." The *Conservancy, Inc. v. A. Vernon Allen Builder*, 580 So.2d 772, 779 (Fla. 1st DCA 1991).

37. In the instant case, the activity for which Petitioner is seeking a permit is the construction of a dock in what the Department has designated by rule as Outstanding Florida Waters. The construction of the Proposed Dock will require both "dredging," as that term is defined in Section 373.403(13), Florida Statutes, 9/ and Rule 62-312.020(7), Florida Administrative Code, 10/ and "filling," as that term is defined in Section 373.403(14), Florida Statutes, 11/ and Rule 62-312.020(11), Florida Administrative Code, 12/ inasmuch as it will involve the boring of holes into which pilings will be placed in the waters of the state. As Petitioner acknowledges, in order to engage in such "dredging" and "filling," he needs a permit from the Department. Section 373.413, Fla. Stat.; Rule 62-312.030(1), Fla. Admin. Code.

38. Petitioner, however, has failed to provide reasonable assurance that state water quality standards will not be violated as a result of the construction of the Proposed Dock.

39. Petitioner has also failed to provide reasonable assurance that the construction of the Proposed Dock is not contrary to the public interest, much less shown that such activity is clearly in the public interest. Viewing the facts of the instant case in light of criteria set forth in Section 373.414, Florida Statutes, it appears that, on balance, the construction of the Proposed Dock will have a negative impact on the public interest.

40. Furthermore, Petitioner has not proposed, nor has he agreed to, any specific mitigative measure or measures that would offset the adverse effects of the Proposed Dock to such an extent as to justify the Department's issuance of a permit authorizing its construction.

41. In light of the foregoing, the Department should not issue Petitioner such a permit.

42. Petitioner's argument that he is entitled to a permit by default under the provisions of Section 120.60(2), Florida Statutes, is without merit.

43. Section 120.60(2), Florida Statutes, provides, in pertinent part, as follows:

When an application for a license is made as required by law, the agency shall conduct the proceedings required by law with reasonable dispatch and with due regard to the rights and privileges of all affected parties and aggrieved persons. Within 30 days after receipt of an application for a license, the agency shall examine the application, notify the applicant of any apparent errors or

omissions, and request any additional information the agency is permitted by law to require. Failure to correct an error or omission or to supply additional information shall not be grounds for denial of the license unless the agency timely notified the applicant within this 30-day period. . . . Every application for license shall be approved or denied within 90 days after receipt of the original application or receipt of the timely requested information or correction of errors or omissions unless a shorter period of time for agency action is provided by law. The 90-day or shorter time period will be tolled by the initiation of a proceeding under s. 120.57 and will resume 10 days after the recommended order is submitted to the agency and the parties. Any application for a license which is not approved or denied within the 90-day or shorter time period . . . , shall be deemed approved; and . . . the license shall be issued. . . .

44. The provisions of Section 120.60(2), Florida Statutes, must be read together with those of Section 403.0876, Florida Statutes, which governed the processing of applications for dredge and fill permits at the time the Department had before it Petitioner's permit application. See *Doheny v. Grove Isle, LTD.*, 442 So.2d 966, 974 (Fla. 1st DCA 1983).

45. At all times material to the instant case, Section 403.0876, Florida Statutes, has provided, in pertinent part, as follows:

(1) Within 30 days after receipt of an application for a permit under this chapter, the department shall review the application and shall request submittal of all additional information the department is permitted by law to require. If the applicant believes any departmental request for additional information is not authorized by law or departmental rule, the applicant may request a hearing pursuant to s. 120.57. Within 30 days after receipt of such additional information, the department shall review and may request only that information needed to clarify such additional information or answer new questions raised by or directly related to such additional information. If the applicant believes the request of the department for such additional information is not authorized by law or departmental rule, the department, at the applicant's request, shall proceed to process the permit application.

(2)(a) A permit shall be approved or denied within 90 days after receipt of the original application, the last item of timely requested additional material, or the applicant's request to begin processing the permit application.



See also Rule 62-4.055(5), Fla. Admin. Code. ("Permits shall be approved or denied within 90 days after receipt of the original application, the last item of timely requested additional material, or the applicant's request to begin processing the permit application, whichever occurs last").

46. In the instant case, the Department received "the last item of timely requested information" from Petitioner, as well his "request to begin processing the application," on September 9, 1992. Less than 90 days later, on December 7, 1992, it issued a Notice of Permit Denial denying Petitioner's permit application.

47. Accordingly, the Department did not violate the 90-day time requirement imposed by Sections 120.60(2) and 403.0876, Florida Statutes, and thus Petitioner is not entitled to a default permit pursuant to the "deemer" provision of Section 120.60(2), Florida Statutes.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order denying Petitioner's application for a dredge and fill permit to construct the Proposed Dock.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 29th day of December, 1995.

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STUART M. LERNER, Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of December, 1995.

#### ENDNOTES

1/ The Lower Key Marsh Rabbit is endangered due primarily to loss of habitat.

2/ In the past, uninvited persons have come on Petitioner's and the surrounding property and left behind trash and other unwanted items, which, during his visits to Saddlebunch Key, Petitioner has made every effort to remove. Petitioner's building a home on his property and he and his family spending more time there would deter such trespassing, littering and dumping.

3/ It appears that, because of the difficulty and inconvenience involved in reaching the uplands in the absence of a dock, Petitioner does not frequently make the trip.

4/ A dock with an east/west alignment blocks more sunlight than a north/south aligned dock, which does not always have the sun directly above it.

5/ The impacts associated with the construction and presence of the vacation home are secondary impacts of the Proposed Dock inasmuch as the Proposed Dock is, as the Department's witness Philip Frank pointed out at hearing, a "stepping stone to the house."

6/ That Petitioner will use the home only for vacations and not as a permanent residence does not necessarily mean that there will be a lesser adverse effect on wildlife than would otherwise be the case. For those species which are capable of eventually becoming acclimated to human activity, intermittent use of their habitat by humans can be more detrimental than daily use.

7/ Petitioner and the Department have engaged in discussions regarding mitigation, but have not come to any agreement on the matter.

8/ "Waters," as defined in Section 403.031(13), Florida Statutes, "include, but are not limited to, rivers, lakes, streams, springs, impoundments, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water."

9/ Section 373.403(13), Florida Statutes, defines "dredging" as "excavation, by any means, in surface waters or wetlands, as delineated in s. 373.421(1)."

10/ Rule 62-312.020(7), Florida Administrative Code, defines "dredging" as "the excavation, by any means, in waters of the state."

11/ Section 373.403(14), Florida Statutes, defines "filling" as the "deposition, by any means, of materials in surface waters or wetlands, as delineated in s. 373.421(1)."

12/ Rule 62-312.020(11), Florida Administrative Code, defines "filling" as "the deposition, by any means, of materials in waters of the state."

#### APPENDIX TO RECOMMENDED ORDER IN CASE NO. 93-0051

The following are the Hearing Officer's specific rulings on what are labelled as "findings of facts" in the parties' proposed recommended orders:

##### Petitioner's Proposed Findings

1. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

2. First sentence: Accepted and incorporated in substance; Second sentence: Rejected as a finding of fact because it is more in the nature of a statement of law than a finding of fact.

3-4. Accepted and incorporated in substance.

5. First sentence: Accepted and incorporated in substance; Second sentence: Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact. See *T.S. v. Department of Health and Rehabilitative Services*, 654 So.2d 1028, 1030 (Fla. 1st DCA 1995) ("Hearing Officer's "factual findings" which "merely summarize[d] the testimony of witnesses" were "insufficient").

6. Rejected as a finding of fact because it is more in the nature of legal argument than a finding of fact.

7. Accepted and incorporated in substance.

8. Rejected as a finding of fact because it is more in the nature of a statement of what transpired at hearing than a finding of fact.

9. To the extent that this proposed finding states that Petitioner has expressed a general willingness to make those modifications to his proposed project that will make the project permittable, it has been accepted and incorporated in substance. To the extent that it states that Petitioner has actually made the modifications that will minimize the project's adverse environmental consequences, it has been rejected because it lacks sufficient evidentiary/record support.

10. Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact.

#### The Department's Proposed Findings

1-2. Accepted and incorporated in substance.

3. To the extent that this proposed finding reads "starting to the east," instead of "starting to the west," it has been rejected because it is contrary to the greater weight of the record evidence. Otherwise, it has been accepted and incorporated in substance.

4-5. Accepted and incorporated in substance.

6. Rejected as a finding of fact because it is more in the nature of a statement of law than a finding of fact.

7-13. Accepted and incorporated in substance.

14. Rejected as a finding of fact because it is more in the nature of a statement of law than a finding of fact.

15. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

16. Accepted and incorporated in substance.

17. First and second sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer; Third sentence: Accepted and incorporated in substance.

18. First, second and third sentences: Accepted and incorporated in substance; Remaining sentences: Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

19-25. Accepted and incorporated in substance.

26. First sentence: Rejected as a finding of fact because it is more in the nature of a statement of law than a finding of fact; Second sentence: Accepted and incorporated in substance.

27. Accepted and incorporated in substance.

28. To the extent that this proposed finding states that the Department's requests for additional information were "timely," that the Department's Notice of Permit Denial was issued within the time period "required by law," and that Petitioner "is not entitled to a default permit," it has been rejected as a finding of fact because it is more in the nature of legal argument than a finding of fact. Otherwise, it has been accepted and incorporated in substance.

#### COPIES FURNISHED:

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#### NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period of time within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.