

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., AND
ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC.,

Petitioners,

vs.

Case No. 12-3427

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER

The final hearing in this case was held on March 4, 6-8, 11, 12, 14, 19 and 20, 2013, in Tallahassee, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida, Inc.:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Florida Fish and Wildlife Conservation Commission ("Commission") is entitled to the requested minor modification of its existing Environmental Resource Permit and Sovereign Submerged Lands Authorization, which would authorize the backfilling of a portion of Fisheating Creek as part of a restoration project.

PRELIMINARY STATEMENT

In May 2011, the Department of Environmental Protection ("Department") issued to the Commission an Environmental Resource Permit and a Sovereign Submerged Lands Authorization ("permits"). The permits authorized the installation of six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which Fisheating Creek runs. The work was completed later that year.

On September 10, 2012, the Department approved the Commission's application to modify the initial permits. The modification would allow the Commission to backfill approximately two miles of Fisheating Creek.

Petitioners timely filed a petition for administrative hearing. The Department referred the petition to DOAH to conduct an evidentiary hearing and issue a recommended order. Petitioners were granted leave to file an amended petition.

The Department filed a motion in limine to exclude evidence and argument concerning a 1998 circuit court judgment which determined that Fisheating Creek is navigable, and a related 1999 settlement agreement. The motion was denied. Petitioners filed a motion in limine to bar the Department or Commission from presenting evidence inconsistent with evidence presented by the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") in the 1998 circuit court case. No evidence was excluded by the ALJ, but a final ruling on whether any evidence should not be considered was deferred.

At the final hearing, Petitioners presented the testimony of: William Giles, accepted as an expert in aquatic plant removal; Darina Palacio, accepted as an expert in hydrology and stream restoration as it relates to hydrology; Robert Miller, P.E., accepted as an expert in surface water hydrology and stream flow analysis; Peter Barile, Ph.D., accepted as an expert

in aquatic ecology; Greg Sawka, accepted as an expert in wetlands delineation and soil sciences; Walt Wheeler, accepted as an expert in wetland ecology and wetland determinations in Florida; Ron Edenfield, P.E., accepted as an expert in water resource management; Jeff Cooner, accepted as an expert in surveying and aerial interpretation; Thomas Conboy, P.E., accepted as an expert in hydrologic restoration; Jeri Curley, accepted as an expert in biology; Bob Ballard; Nicole Williams; Dale Williams; Karen Putnal; Becky Aych; Rhonda Roff; Bobbie Lee; Patty Whitehead; Paula House; Leonard Bryant Jr.; Dale Gillis; and Erica Lynne. Petitioners' Exhibits 3, 4, 7, 14, 18, 20-23, 25, 38, 43, 45, 47, 55, 56, 61-63, 65, 80, 87, 90-96, 98-100, 103, 106-108, 111, 113, 114, 116, 120, 125, 127, 130, 132-136, 142, 146, 148, 155, 156, 158, 161a, 162a-162d, 171, 173, 176, 178a, 179-183, 193-196, 198, and 199 were admitted into evidence. Petitioners' Exhibit 72, which is a composite of aerial photographs of Cowbone Marsh, was admitted except as to the dates noted on the photographs. Petitioners' Exhibit 200 was placed in the record as a proffer.

The Commission presented the testimony of:

Mahmoud Madkour, accepted as an expert in engineering, hydrology, civil engineering, and lake, stream and aquatic restoration; Jessica Griffith, accepted as an expert in wetlands

delineation; and Stephen M. Shea. Commission Exhibits 1-13 were admitted into evidence.

The Department presented the testimony of: Jon Iglehart, accepted as an expert in environmental assessment and restoration; Paul Gray, Ph.D., accepted as an expert in environmental assessment and restoration; and Lawrence Glenn. Department Exhibits 2-8 were admitted into evidence.

Commission and Department Joint Exhibits 1-10 were admitted into evidence. Joint Exhibits 6 and 7, which are compliance orders issued by the Environmental Protection Agency ("EPA"), and Joint Exhibit 10, which is an emergency final order issued by the Department, were not admitted to prove the truth of the statements contained in the orders.

Official recognition was taken of the Judgment on Title and Right to Immediate Possession, issued in Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Lykes Bros., Inc., Case No. CA93-136 (Fla. 20th Cir. Ct. 1998).

On April 15, 2013, the ten-volume Transcript of the hearing was filed with DOAH. Two requests to extend the time for filing proposed findings of fact and conclusions of law were granted. A third request was denied. On June 12, 2013, all parties filed proposed recommended orders, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state agency responsible for regulating construction activities in waters of the State. The Department has also been delegated authority to process and act on applications for authorization from the Board of Trustees for activities on sovereignty submerged lands.

2. The Commission is the state wildlife management agency. The Commission is the applicant for the minor modification at issue in this proceeding.

3. Petitioner, Save Our Creeks, Inc., is a non-profit Florida corporation with its offices in Lake Place, Florida. Save Our Creeks' members are interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways. Save Our Creeks owns property on Fisheating Creek in Glades County, approximately nine miles upstream of Cowbone Marsh.

4. Petitioner, Environmental Confederation of Southwest Florida, Inc. (ECOSWF), is a non-profit Florida corporation with its offices in Sarasota, Florida.

5. A substantial number of the members of Save Our Creeks and ECOSWF use and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and

wildlife observation. Their interests would be affected by the proposed project.

Fisheating Creek and Cowbone Marsh

6. Fisheating Creek flows from Highlands and Desoto Counties south and east through Glades County. The Creek runs in a northeastern direction through Cowbone Marsh before draining into Lake Okeechobee. The Creek contributes approximately nine percent of the flow into Lake Okeechobee. Fisheating Creek is designated as Class III waters.

7. Cowbone Marsh is located about eight miles west of Lake Okeechobee. It is a mile and a half long and two miles wide, covering about 2,500 acres.

8. Fisheating Creek and Cowbone Marsh are within the Fisheating Creek Wildlife Management Area.

9. In 1929, the United States Army Corps of Engineers ("USACOE") prepared a survey map which shows Fisheating Creek as an open water route from Lake Okeechobee through Cowbone Marsh and continuing beyond. The accuracy of the course of the Creek as it is depicted in the 1929 map is not disputed by the parties.

10. The 1929 map does not describe the depth or width of the Creek. Some evidence about historical widths and depths was presented, but it was incomplete. There was credible evidence showing that some segments of Fisheating Creek were four to five

feet deep and 20 to 30 feet wide. There was also credible evidence that other segments of the Creek were shallower and narrower.

11. The record shows only that canoes, kayaks, and other vessels drawing twelve inches of water or less have been used on the Creek.

12. For a number of years, much of Fisheating Creek has been choked by vegetation and "tussocks." Tussocks are floating mats of vegetation. Carolina willow now dominates Cowbone Marsh, having replaced areas that were previously open water or covered with herbaceous marsh communities.

13. The vegetation in the Creek made navigation difficult or impossible through Cowbone Marsh.

The 1998 Judgment and 1999 Settlement Agreement

14. In 1989, Lykes Bros., Inc., asserted ownership of Fisheating Creek and tried to prevent public access to the Creek. The Board of Trustees responded with a civil action against Lykes Bros., seeking a determination that Fisheating Creek throughout Glades County is navigable and, consequently, the title to its bottom is held by the Board of Trustees as sovereignty submerged lands. Petitioners in this administrative proceeding intervened in the circuit court case on the side of the Board of Trustees.

15. The jury found Fisheating Creek navigable throughout Glades County and the court entered a judgment in 1998 determining that the Creek is sovereignty land held in trust by the Board of Trustees. The judgment did not include any findings about the widths and depths of Fisheating Creek. The court retained jurisdiction to determine the boundaries of the Creek, but the boundaries were never determined.

16. The circuit court case was appealed, but in May 1999, the parties entered into a settlement agreement pursuant to which Lykes Bros. agreed to sell to the Board of Trustees a conservation easement on upland areas adjacent to Fisheating Creek, to be held and managed for the benefit of the public. The conservation area is known as the Fisheating Creek Expanded Corridor.

17. The settlement agreement also called for the Board of Trustees to lease the Fisheating Creek Expanded Corridor to the Commission, who the Board of Trustees designated as the managing agency.

18. The settlement agreement acknowledges the public's "right to boat and canoe on Fisheating Creek throughout the entire Expanded Corridor." With respect to navigation, the settlement agreement provides:

Protection of Navigation. The navigability of Fisheating Creek throughout the entire Expanded Corridor shall be maintained and

enhanced through a navigation maintenance program which includes aquatic weed control and removal of fallen logs and similar obstructions. This section does not authorize dredging.

The Cookie-Cutter Project

19. In January 2009, the Commission aerially applied an herbicide to kill the vegetation along the course of the Creek.

20. In April 2010, the Commission contracted with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks." The Commission directed A & L to perform the project by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh."

21. The Commission instructed A & L to re-open a channel "approximately 2.2 miles long and 18-20 feet wide," and to clear some areas of the Creek "as wide as 35-feet wide occasionally as necessary to turn shredding equipment during the shredding process."

22. The Commission did not direct A & L to dredge a deeper channel.

23. The vessel used by A & L to perform the work is known as a "cookie-cutter." The cookie-cutter has two cutting wheels at the front of the vessel to shred and side-cast vegetation. The cutting wheels also act as propellers to propel the cookie-cutter forward.

24. The cookie-cutter can clear woody vegetation up to four inches in diameter.

25. The two cutting wheels can be lowered or raised in order to cut vegetation at various depths in the water. Evidence was presented to show how the cutting wheels could be lowered two to three feet, but it was not made clear whether the cutting wheels could be lowered even more.

26. No evidence was presented to establish how deep the cookie-cutter blades were lowered into Fisheating Creek during the work performed by A & L.

27. No evidence was presented to establish what depth of soil the cookie-cutter was capable of dredging through if the cutting wheels cut into the Creek bottom.

28. The cookie-cutter began on the eastern side of Cowbone Marsh and moved upstream. The parties disputed the point of beginning. Petitioners contend it was farther upstream, but the more persuasive evidence for the point of beginning was presented by the Commission.

29. The cookie-cutter generally followed the course of Fisheating Creek as depicted on the 1929 USACOE map. However, there are three areas where the cookie-cutter deviated from the 1929 map. One deviation is about 100 feet off-line. The other two deviations are 25 to 30 feet off-line. No explanation was given for the deviations, but the cookie-cutter operator

generally followed the path of dead vegetation killed by the aerial spraying of herbicide and the line may have deviated from the true course of the Creek in these three areas.

30. During the cookie-cutter project, water levels within the Creek and Marsh fluctuated. At some point, the project was postponed due to low water conditions. A sandbag dam was placed in the channel to artificially raise the water level so the cookie-cutter could continue.

31. In July 2010, the Department and USACOE ordered the Commission to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. Before the cookie-cutter stopped, it had cleared about two miles of Fisheating Creek.

32. Where the cookie-cutter stopped there is a discernible channel continuing west, but it is shallower and narrower than the channel created by the cookie-cutter. At this terminus, the cookie-cutter was dredging a deeper and wider channel than existed naturally.

33. Additional evidence of dredging along the Creek channel is the soil cast up on the banks, and the removal of peat soils in the bottom of the Creek and exposure of underlying mineralized soil.

34. The cookie-cutter altered the natural conditions of the Fisheating Creek in some areas by dredging the sides and bottom of the Creek.

35. The dredging by the cookie-cutter altered the hydrology of the Creek and Marsh. The Marsh drained rapidly to Lake Okeechobee. In addition, large quantities of soil, muck, silt, and debris disturbed by the cookie-cutter were carried downstream toward Lake Okeechobee. Some of the soil and debris settled out at the mouth of the Creek, causing shoaling.

36. The sides of the channel in many areas is continuing to erode.

The Department's Emergency Final Order

37. In July 2010, the Department issued an Emergency Final Order, which directed the Commission to: (a) remove the cookie-cutter and immediately stop all activities associated with the cookie-cutter; (b) place temporary emergency flow restrictors in the channel to reduce flow velocities and minimize downstream sediment transport, as well as raise the water level to minimize surface and groundwater flow from the adjacent marsh into the channel; and (c) develop a long-term remedial plan to return water levels within the Marsh to pre-impact conditions and apply to the Department for an Environmental Resource Permit to implement the plan.

38. In August 2010, pursuant to the Emergency Final Order, the Commission constructed an aluminum weir in the Creek to decrease flow velocities, reduce erosion, and maintain the hydration of the Marsh. The weir was placed approximately half a mile downstream from where the cookie-cutter stopped.

39. During the wet season of 2010, the aluminum weir was completely submerged. Erosion and shoaling occurred immediately downstream. The Commission determined that the weir was ineffective and removed it.

The EPA Compliance Orders

40. In March 2011, the EPA issued an Administrative Compliance Order in which it alleged the Commission had engaged in "unauthorized activities associated with the excavation and construction of a channel within Cowbone Marsh." The Commission was ordered to construct an initial check dam in the upper reaches of the Marsh to minimize the loss of groundwater and prevent further adverse impacts.

41. In April 2011, EPA issued a second Administrative Compliance Order, directing the Commission to construct five additional check dams. The order describes the check dams as "initial corrective measures" and states that the "final restoration plan will include measures for backfilling the unauthorized cut through Cowbone Marsh."

The Initial Permits

42. In May 2011, the Department issued to the Commission an Environmental Resource Permit and Sovereign Submerged Lands Authorization, which authorized the construction of six earthen check-dams within the portion of Fisheating Creek where the cookie-cutter had operated. The purpose of the check dams was to improve the hydrology of Cowbone Marsh and promote the accumulation of sediments within the channel to restore the natural depth and width of Fisheating Creek.

43. The check dams were constructed using sand bags, marine plywood, coconut matting, and pressure-treated posts.

44. The check dams have ten-foot wing walls which extend into the surrounding marsh. The wing walls are to prevent erosion around the dams and to direct water into the marsh.

45. The installation of the check dams was completed in July 2011. Since that time, some repair efforts have been required to replace lost sandbags and to address erosion that has occurred around the check dams.

46. The check dams have been somewhat successful in maintaining higher water levels in the Marsh. However, they have not restored natural hydrologic conditions, or prevented erosion along the channel.

The Proposed Modification

47. In June 2012, the Commission applied for a "minor modification" to the existing permits, which the Department granted. The modified permits authorize the Commission to backfill the channel cleared by the cookie-cutter with approximately 27,000 cubic yards of sand. The check dams would not be removed.

48. The sand for the backfilling would be excavated from a "borrow" area located about a mile away. Petitioners contend that the borrow area is in wetlands, but the more persuasive evidence is that it is uplands.

49. A 1.164-mile temporary access road would be constructed from the borrow area through uplands and wetlands to a 100-square-foot staging area adjacent to Fisheating Creek where the backfilling would begin. Wetland impacts would be minimized by constructing the temporary access road and staging area with interlocking mats.

50. Petitioners did not show that the route or manner in which the temporary road would be constructed and used would have unacceptable adverse impacts to the environment or otherwise fail to comply with applicable criteria.

51. The sand would be dumped into the Creek and then compacted. As the Creek was filled, the compacted sand would be used as a roadway for the trucks to transport sand to the end of

the filled area to dump more sand, until the backfilling was completed.

52. The proposed backfilling would not restore a typical stream profile, deepest in the middle and becoming more and more shallow moving toward the banks. That kind of profile can be seen in the photographs of Fisheating Creek taken before the cookie-cutter project. The proposed modification calls for filling the cut channel from "bank to bank":

Final Grade: Fill must be compacted and ground surface elevations must be the same as the adjacent marsh ground surface elevations (within a tolerance of +6/-6 inches)

53. The filled channel would be seeded and fertilized to grow native vegetation. The proposed seed mixture is mostly water grasses, but has some willow included.

Compliance with Criteria

54. Florida Administrative Code Rule 62-343.100 provides that a modification is treated as either minor or major depending on the magnitude of the changes and the potential for environmental impacts that differ from those addressed in the original permit:

- [A] modification shall be considered to be minor only where the modification does not:
1. Require a new site inspection by the Department in order to evaluate the request;
 - or
 2. Substantially:
 - a. Alter permit conditions;

- b. Increase the authorized discharge;
- c. Have substantially different or increased impacts on wetlands and other surface waters. . . ;
- d. Decrease the retention/detention specified by the original permit;
- e. Decrease any flood control elevations for roads or buildings specified by the original permit; or
- f. Increase the project area.

55. At the final hearing, it was not shown how the modification meets the criteria for a minor modification. The proposed modification does not meet the criteria because it required new site visits, substantially alters the original permit conditions, and has a substantially different impact on wetlands.

56. The criteria applicable to an application for a major modification were not identified, nor was it shown how the evidence presented at the final hearing satisfies the requirements for such an application.

57. The proposed backfilling plan would not restore the natural conditions that existed in Fisheating Creek. The Commission did not show that it made a reasonable effort to determine the pre-disturbance conditions throughout the disturbed area.

58. The proposed modification would not restore the natural depths in the Creek. The backfilling plan calls for a finished grade of plus or minus six inches above the level of

the adjacent marsh. A final grade of zero to plus six inches would essentially eliminate Fisheating Creek. The maximum allowed depth of minus six inches below the level of the adjacent marsh would be shallower than the natural depths in portions of the Creek. Even the Department described the Creek was "one to two feet deep" before the cookie-cutter project. Adequate measures are not included in the permits to ensure that after backfilling and planting, the Creek would have the ordinary attributes of a creek.

59. The proposed modification would not restore the pre-existing hydrologic conditions of the Creek.

60. The modified Environmental Resource Permit requires strict compliance with the terms of the 1999 settlement agreement. The modification would not be consistent with the 1999 settlement agreement because the backfilling and planting would destroy the navigability of the Creek.

61. Petitioners want to preserve the current depths of Fisheating Creek, but some of those depths are unnatural, being the result of dredging by the cookie-cutter. However, the proposed backfilling would not restore the natural depths in some parts of the Creek and would not maintain the navigability of the Creek, even for shallow draft vessels such as canoes and kayaks.

CONCLUSIONS OF LAW

62. This is a de novo proceeding designed to formulate final agency action, not to review action taken preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

Standing

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

64. In order to have standing to participate as a party, a person must have substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

65. For organizational standing, Petitioners must prove that a substantial number of their members, but not necessarily a majority, have a substantial interest that would be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec., 412 So. 2d 351 (Fla. 1982); Fla. League of Cities,

Inc. v. Dep't of Env'tl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992).

66. The standing of Petitioners is not disputed. The evidence establishes their standing to participate as parties.

Burden and Standard of Proof

67. The Environmental Resource Permit was issued under chapter 373, Florida Statutes. A petitioner who challenges a permit issued under chapter 373 has the burden of ultimate persuasion. See § 120.569(2) (p), Fla. Stat.

68. The Sovereign Submerged Lands Authorization was issued under chapter 253. The applicant for such an authorization has the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See Fla. Dep't of Transp. V. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

69. The standard of proof is preponderance of the evidence. See § 120.57(1), Fla. Stat.

Navigability

70. Navigability in Florida can be established even if only boats with shallow drafts of "three to six inches" can navigate on the waterbody. See Broward v. Mabry, 58 Fla. 398, 405-406 (Fla. 1909).

71. Although the determination that a waterbody is navigable means the public has a right to navigate on the waterbody, Petitioners have not shown that Florida law

recognizes a right to navigation that is greater than the natural, physical limits of the waterbody will allow. If a stream is only deep enough to float canoes or similar shallow draft vessels, the public's right of navigation is limited to such vessels. If a stream can only be navigated during the high water season of the year, the public's right of navigation can only be exercised during the high water season.

Judicial Estoppel

72. Petitioners contend that the doctrine of judicial estoppel is applicable in this proceeding and prevents the Department or the Commission from presenting evidence contradicting the Board of Trustees' testimony and evidence presented in the 1998 circuit court case.

73. Judicial estoppel bans litigants from asserting inconsistent positions in separate judicial proceedings. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001). A party is estopped from making an inconsistent claim or taking a conflicting position in a subsequent action, which was successfully relied upon by the party itself or a party with which it is in privity and the inconsistent position will prejudice the adverse party. Ramsey v. Jonassen, 737 So. 2d 1114, 1115-16 (Fla. 2d DCA 1999).

74. Under the terms of the 1999 settlement agreement, and as the Board of Trustees' designated manager of the Fisheating

Creek Expanded Corridor, the Commission is acting as the agent of the Board of Trustees in seeking to conduct the activities authorized by the permits. The Department is acting for the Board of Trustees in issuing the Sovereignty Submerged Lands Authorization. Therefore, judicial estoppel bars the Commission and Department from presenting evidence in this proceeding that contradicts the position taken by the Board of Trustees in the 1998 circuit court case and prejudices Petitioners.

75. However, the evidence presented by the Board of Trustees in the circuit court case was not credibly established in this administrative proceeding. This record does not contain the transcript or exhibits from the circuit court case, other than the 1929 USACOE map and some photographs. No findings of fact in this Recommended Order are inconsistent with the 1929 map and photographs.

76. Judicial estoppel must be based on clearly inconsistent positions. Id. It is not enough for Petitioners' counsel to make general statements in this proceeding about the contrary testimony that was offered in the circuit court case. Among other reasons, that is too self-serving to support a motion to exclude credible evidence about the natural conditions of Fisheating Creek. Neither the Commission nor the Department is claiming that Fisheating Creek is not navigable.

77. As stated previously, the circuit court retained jurisdiction to determine the boundaries of Fisheating Creek, but the boundaries were never determined.

78. It should also be noted that, without written findings of fact it is impossible to know whether any particular evidence was accepted as true by a court, except for facts that are necessary to a court's judgment. This is so even for evidence presented by the prevailing party. Because the determination that Fisheating Creek is navigable was possible even if it was believed the Creek was only several inches deep, there was no need to resolve the question "How much more than several inches?" The court (jury) only needed to conclude that the Creek is "deep enough." The court did not necessarily give much weight to the testimony of any particular Board of Trustees' witness about depths in the Creek when the court concluded the Creek was deep enough to be navigable.

Environmental Resource Permit

79. Section 373.414(1) requires an applicant for an Environmental Resource Permit to provide reasonable assurance that the proposed activity is not contrary to the public interest. Section 373.414(1)(a) sets forth the following criteria to be considered in determining whether a proposed project is contrary to the public interest:

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 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 cultural and archaeological resources under the provisions of s. 267.061, and
7. The current condition and relative value of the functions being performed by the areas affected by the proposed activity.

80. The proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. All the Department could offer on the subject of post-modification navigability in the Creek is that "[o]ver time a slight depression may form in the [backfilled] cut" due to "some minimal amount of settling in the level of the fill."

81. The proposed modification would adversely affect the conservation of fish and wildlife by eliminating the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced.

82. The proposed modification would adversely affect navigation and the flow of water in Fisheating Creek.

83. The proposed modification fails to restore the functions performed by the pre-disturbed Creek.

84. The proposed modification is contrary to the public interest.

85. The proposed modification fails to meet the criteria in rule 40E-4.301(1), to provide reasonable assurance that the proposed project will not adversely affect storage and conveyance capabilities, will not cause adverse secondary impacts, and will function as proposed.

Sovereignty Submerged Lands Authorization

86. The proposed modification fails to meet the requirements of rule 18-21.004(1) that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands."

87. The proposed modification fails to meet the requirement of rule 18-21.004(2) that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming."

RECOMMENDATION

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

RECOMMENDED that the Department deny the requested modification to the Commission's Environmental Resource Permit and Sovereignty Submerged Lands Authorization.

DONE AND ENTERED this 3rd day of July, 2013, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
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Filed with the Clerk of the
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this 3rd day of July, 2013.

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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.