

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL CASALE,)
)
Petitioner,)
)
vs.) Case No. 12-1227
)
OCULINA BANK AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
)

CAROLYN L. STUTT, ROBERT)
PROSSER, ORIN R. SMITH, AND)
STEPHANIE SMITH,)
)
Petitioners,)
)
vs.) Case No. 12-1228
)
OCULINA BANK AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
)

E. GARRETT BEWKES,)
)
Petitioner,)
)
Vs.) Case No. 12-1229
)
OCULINA BANK AND DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

The final hearing in this case was held on November 27-28,
2012, in Vero Beach, Florida, before Bram D.E. Canter,

Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners: Marcy I. LaHart, Esquire
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For Respondent Oculina Bank:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Respondent Oculina Bank is entitled to a Consolidated Environmental Resource Permit and Sovereignty Submerged Lands Authorization to construct three single-family homes, an access drive, surface water management systems, and three single-family docks in Vero Beach, Indian River County, Florida.

PRELIMINARY STATEMENT

On February 10, 2012, the Department of Environmental Protection ("Department") issued a Consolidated Environmental

Resource Permit and Sovereign Submerged Lands Authorization to Oculina Bank for the project described above. On March 28, 2012, Michael Casale filed a petition for hearing with the Department challenging the permit and authorization. On April 4, 2012, Carolyn Stutt, Robert Prosser, Orin Smith, and Stephanie Smith filed a petition for hearing with the Department. Also on April 4, 2012, E. Garrett Bewkes filed a petition for hearing with the Department. The Department referred the petitions to DOAH to conduct an evidentiary hearing and submit a recommended order. The three petitions were consolidated for hearing.

The Department thereafter amended its Notice of Intent to Issue three times to incorporate revisions to the proposed project. The evidence presented by the parties at the final hearing addressed the proposed project, as revised.

Oculina Bank presented the testimony of: Chris Russell; Morris Crady, who was accepted as an expert in land planning; and George Kulczycki, who as accepted as an expert in estuarine wetland ecology. Oculina Bank Exhibits 1-5, 8, and 11-13 were admitted into evidence.

The Department presented the testimony of Nicole Martin, a marine biologist. Department Exhibits 5-11 and 13 were admitted into evidence.

Respondents' Joint Exhibits 1-75 were admitted into evidence. Following the final hearing, the Administrative Law Judge ordered Oculina Bank to file a larger copy of the project drawings that were a part of Respondents' Joint Exhibit 74 because the exhibit in the record had details that were too small to see and read. Oculina Bank filed a larger copy that was admitted into the record as Respondents' Joint Exhibit 74A.

Petitioners presented the testimony of: Robert Prosser; Garrett Bewkes; Carolyn Stutt; Leonard Nero, who was accepted as an expert in piloting, marine conservation, and oceanography; David Cox, who was admitted as an expert in ecology, conservation planning, and wildlife habitat evaluation; Grant Gilmore, who was accepted as an expert in ichthyology, and marine and estuarine fish ecology; and Karen Garrett-Krauss, who was accepted as an expert in wetlands ecology and wetlands evaluation. Petitioners Exhibits 1-4, 6-9, 22, 23, 25, 29, and 30 were admitted into evidence.

The three-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders that were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Parties

1. Petitioners Carolyn Stutt, Robert Prosser, and Garrett Bewkes live approximately one mile north of the proposed project site, on John's Island. John's Island is on the opposite side of the Indian River Lagoon from the proposed project site.

2. Petitioner Carolyn Stutt uses the Lagoon for boating, nature observation, nature photography, and sketching. Petitioner Robert Prosser uses the Lagoon for boating, kayaking, and fishing. Petitioner Garrett Bewkes uses the Lagoon for boating and fishing.

3. Petitioners Michael Casale, Orin Smith, and Stephanie Smith did not testify at the final hearing nor present other evidence to show they have substantial interests that would be affected by the proposed project.

4. Respondent/Applicant Oculina Bank owns the project site, which it acquired through foreclosure, and is named in the agency action that is the subject of this proceeding.

5. The Department is the state agency responsible for regulating construction activities in waters of the State. The Department also has authority to process applications for authorization from the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to use sovereignty

submerged lands for structures and activities that will preempt their use by the general public.

The Project Site

6. The project site is 15.47 acres and located along 45th Street/Gifford Dock Road in Vero Beach. It is on the western shoreline of the Indian River Lagoon.

7. The Lagoon in this area is part of the Indian River-Malabar to Vero Beach Aquatic Preserve. It is also an Outstanding Florida Water.

8. The Lagoon is an estuary, but it is almost non-tidal in this area. There is a seasonal rise in sea level that occurs from August to November and it is during this season that waters of the Lagoon flood into adjacent wetlands. The wetlands may be inundated at other times as a result of large storms.

9. The wetlands along the western shore of the Lagoon play a major role in regional tarpon and snook fisheries. Wetlands provide essential refuges for early-stage tarpon and snook. When the wetlands are inundated, larval tarpon and snook move into the wetlands and seek out shallow areas to avoid predation by larger fish. When the waters of the Lagoon recede, the juvenile tarpon and snook remain in the wetlands where the predators cannot go.

10. The project site is dominated by salt marsh wetlands. In order to control salt marsh mosquitoes, the site was

impounded by the Indian River Mosquito Control District sometime in the 1950s by excavating ditches and building earthen berms or dikes along the boundaries of the site. During the dry season, the Mosquito Control District pumped water into the impounded wetlands to keep them wet. It discontinued the seasonal pumping many years ago.

11. There was a dispute about whether the wetlands on the project are isolated or are connected to the Lagoon. The mean high water line of the Lagoon in this area is 0.78 feet. The berms were constructed to an elevation of about five feet, but there are now lower elevations in some places, as low as 2.5 feet in spots on the north and south berms and 3.8 feet on the shore-parallel berm. Therefore, the wetlands can be described as isolated for much of the year because the waters of the Lagoon cannot enter the wetlands unless the waters rise above these lowest berm elevations. On the other hand, the Lagoon and the wetlands are connected whenever the water rises above the lowest berm elevations.

12. Petitioners' experts said the project site is still inundated seasonally by waters of the Lagoon, but they did not address the frequency and duration of the inundation. The more persuasive evidence is that the frequency and duration of inundation has been reduced by the impoundment berms.

13. There are almost 14 acres of wetlands impounded by the berms. The impoundment berms and fill along the road comprise 1.71 acres.

14. The impounded wetlands are dominated by salt grass. There are also mangroves, mostly white mangroves, along the side slopes of the berms. Most of the upland areas are dominated by Brazilian pepper trees and Australian pine trees, which are non-native, invasive vegetation.

15. Within the wetlands are three ponds.

16. Before the project site was impounded for mosquito control, it had "high marsh" vegetation such as saltwort and glasswort, as well as black and red mangroves. The impoundment resulted in the loss of these species.

17. There is now reduced nutrient export from the impounded wetlands to the Lagoon.

18. Nevertheless, Petitioners' experts believe the wetlands still have high functional value. Dr. Gilmore believes this site is "one of the critical habitats maintaining regional tarpon fisheries."

19. Dr. Gilmore found juvenile tarpon, among other species, in the wetlands on the site.

20. The project site provides nesting, denning, and foraging habitat for numerous birds and other wildlife.

21. Petitioners presented evidence that there might be a small fish, rivulus marmoratus, that uses the site, which is a listed "species of special concern."

22. To the north and south of the project site are salt marsh wetlands that have been restored. North of the project site is a portion of the mitigation area for a development called Grand Harbor. To the south is the CGW Mitigation Bank. Both adjacent wetland areas were restored by improving their connection to the Lagoon and removing exotic vegetation.

23. The restored wetlands to the north and south now contain a dominance of saltwort and glasswort. They also have more black and red mangroves. These environmental improvements, as well as an increase in species diversity, are typical for former mosquito control impoundments that have been restored.

24. In the offshore area where the three proposed docks would be constructed, there are scattered seagrasses which are found as close as 25 feet offshore and far as 100 feet offshore. They include Manatee grass, Cuban shoal grass, and Johnson's seagrass.

25. Oyster shells were also observed from 50 feet to 400 feet (the limit of the survey) offshore. There was a dispute whether a significant number of live oysters are present. Oculina Bank's and the Department's experts found no live

oysters, but Petitioners' expert found some live oysters and believes they represent an important resource.

26. The rules of the Board of Trustees require greater protection for areas with submerged resources. Rule 18-20.003(54) defines a Resource Protection Area 1 ("RPA1") as an area within an aquatic preserve which has "resources of the highest quality," which may include marine grassbeds and "oyster bars." A Resource Protection Area 2 ("RPA2") is defined as an area which is "in transition" with declining RPA1 resources.

27. The grassbeds in the area of the proposed dock constitute RPA1s. The oysters in the area constitute an RPA2.

The Proposed Home Sites, Access Drive, and Surface Water Management Systems

28. The proposed home sites are on separate, recorded lots ranging in size from 4.5 acres to 6.5 acres.

29. The home sites would have 6,000 square feet of "footprint." The houses would be constructed on stilts.

30. There would be a single access driveway to the home sites, ending in a cul-de-sac. The displacement of wetlands that would have been required for the side slopes of the access drive and cul-de-sac was reduced by proposing a vertical retaining wall on the western or interior side of the drive.

31. Each home site has a dry retention pond to store and treat stormwater runoff. The ability of these retention ponds to protect water quality is not disputed by Petitioners.

32. The home sites and access drive would be constructed on the frontal berm that runs parallel to the shoreline. However, these project elements would require a broader and higher base than the existing berm. The total developed area would be about three acres, 1.85 acres of which is now mangrove swamp and salt marsh and 0.87 acres is ditches.

33. The houses would be connected to public water and sewer lines.

34. The existing impoundment berm along the north boundary of the site and the south end of the frontal berm would be "scraped down" to an elevation of one foot. The re-graded area would be planted with salt cordgrass.

35. If there are rivulus marmoratus using the site, scraping down the berms could destroy some of the crab holes they use for habitat.

36. A culvert will be installed beneath the drive at the north side of the proposed project. The culvert at the north and the removal of a portion of the impoundment berm on the south would allow more frequent and prolonged exchange of water between the Lagoon and the interior of the site.

37. Despite the proposed culvert and removal of a portion of the frontal impoundment berm, Dr. Cox and Dr. Gilmore said the elevated (about seven feet above mean high water) home sites would act as a barrier to water. However, Ms. Garrett-Krauss said the pre- and post-construction condition would be the same. Petitioners failed to prove that the elevated home sites would prevent the interior wetlands from being inundated.

38. Two of the ponds on the site would have to be filled to create the home sites. There is no proposal to establish new ponds. Dr. Gilmore believes the ponds are important for the nursery function of the wetlands.

39. Oculina Bank would grant a perpetual conservation easement over 11.69 acres of onsite salt marsh wetlands. It would remove Brazilian Pepper trees, a non-native plant, from the site.

40. At the hearing, Petitioners claimed that a portion of the proposed conservation area was subject to a DOT easement, but they were wrong.

41. Using the Uniform Mitigation Assessment Method ("UMAM") in Florida Administrative Code Chapter 62-345, the parties analyzed the functional values of the site in its pre- and post-project condition. The UMAM analyses conducted by the Department and Oculina Bank showed the project resulted in a

gain in functional value for fish and wildlife. Petitioners' UMAM analysis showed a net loss of functional value.

42. The UMAM analyses conducted by Oculina Bank and the Department did not adequately address the loss of the ponds or the impact on rivulus marmoratus.

43. Petitioners contend that the project would have less impact if it were constructed on the most western portion of the site, but Petitioners failed to prove this allegation.

44. Petitioners contend that the impacts of the project have not been minimized because the houses could be smaller. Petitioners do not say how small a "minimized" house should be. Of course, meeting the requirement to minimize impacts does not mean only teepees are allowed. The Department has some discretion in determining, under the circumstances of each permit application, whether reasonable reductions in impacts have been made by a permit applicant.

45. Oculina Bank proposes to build on the most disturbed area of the site and it made costly^{1/} design changes to reduce impacts to wetlands. These factors, if combined with a demonstration that Oculina Bank would restore the site to create a net improvement for fish and other wildlife, would provide a reasonable basis for the Department to determine that the project impacts were minimized. However, Respondents' evidence that the project would result in a net environmental improvement

was contradicted by Petitioners' evidence regarding the refuge and nursery functions of the wetlands and the project's adverse impacts to those functions. Petitioners' evidence on this point was not completely rebutted by Respondents.

46. Oculina Bank did not provide reasonable assurance that the proposed project will not adversely impact the value of the refuge and nursery functions provided by the wetlands. This failure of proof was due mainly to insufficient evidence regarding (1) the interrelationship of existing channels and open water features on the site, (2) which features are natural and which are man-made, (3) how those features are used by fish, (4) how they will be altered by the project, and (5) how the nursery and refuge functions of the wetlands would be affected.^{2/} Under the circumstances of this case, it was not sufficient to merely show that the wetlands would be "re-connected" to the Lagoon.

47. The finding made above should not be confused with Petitioners' argument that the non-natural conditions should be maintained on the site. No such finding is made.

48. The Department did not consider the secondary impacts of the home sites, access drive, and surface water management systems because it had determined that there would be a net improvement in environmental value. However, the loss of refuge and nursery functions would prevent a net improvement in

environmental value and it would cause secondary impacts to the tarpon and snook fisheries.

49. Petitioners identified other secondary impacts, such as the impacts of human disturbance, which it said should have been considered. The other impacts discussed by Petitioners were considered by the Administrative Law Judge and it is found that those impacts are insignificant.

The Proposed Docks

50. Petitioners' original objection to the proposed project and their decision to file a petition for hearing appears to have been caused by Oculina Bank's proposal to build docks over 500 feet in length. The dock lengths in the final revision to the project vary in length from 212 to 286 feet. The docks do not extend out more than 20 percent of the width of the waterbody. The docks do not extend into the publicly maintained navigation channel of the Lagoon.

51. Petitioners claim the docks would cause a navigation hazard. However, because the docks meet the length limit specified in rule chapter 18-21, they are presumed not to create a navigation hazard. Petitioners' evidence was not sufficient to rebut this presumption.

52. To reduce shading of sea grasses, the decking material for the docks would be grated to allow sunlight to pass through the decking.

53. There are no seagrasses at the waterward end of the docks where the terminal platforms would be located and where boats would usually be moored.

54. The dock pilings will be wrapped with an impervious membrane to prevent the treatment chemicals from leaching into the water.

55. The consolidated permit and authorization limits the vessels that can be moored at the docks to vessels with a draft that would allow at least 12 inches of clearance above the submerged lands at mean low water so no harm would be caused to submerged resources. Signs would be posted at each dock providing notice of this restriction.

56. A dock owner is unlikely to know what size boat he or she is limited to, based on a permit condition which is worded this way. To provide reasonable assurance that submerged resources in the area are protected, the permit condition should be stated as a maximum permissible draft.

57. The Department determined that the impacts of the docks, such as the installation of the pilings and shading of seagrasses would be de minimis. That determination is supported by a preponderance of the evidence.

58. Petitioners claim the Department failed to consider shading, prop wash, and scarring to seagrasses and oyster beds, and increased turbidity. Considering the use of grated decking,

restricting vessels to a maximum draft, and other related factors, the more persuasive record evidence establishes that these potential impacts would be reduced to insignificance.

59. Oculina Bank made alternative offers to satisfy the public interest requirement of the Department and Board of Trustees rules; the first was to contribute \$25,000 to the Marine Resource Council to remove five acres of non-native, invasive vegetation and plant mangroves on Pelican Island National Wildlife Refuge, which is located in the Indian River Lagoon; the second was to purchase one tenth (0.1) of a credit from the CGW Mitigation Bank. Petitioners objected to the offers as inadequate for various reasons, but as explained in the Conclusions of Law, neither offer is necessary.

CONCLUSIONS OF LAW

Standing

60. In order to have standing, a petitioner must have a substantial interest that would be affected by proposed agency action. See § 120.52(13)(b), Fla. Stat.^{3/} Standing requires a petitioner to show he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing, and the injury is of a type or nature which the proceeding is designed to protect. Agrico Chem. Co. v. Dep't of Env'tl Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

61. The uses of the waters of the Indian River Lagoon by Petitioners Carolyn Stutt, Robert Prosser, and Garrett Bewkes are substantial interests that would be affected by the proposed project and they are interests which this proceeding was designed to protect. Therefore, they have standing.

62. The Department contends that these Petitioners did not have standing because they would not suffer a substantial injury. The Department's argument confuses the proof necessary to prove a claim and the proof necessary for standing. Proof on the merits of a claim is unnecessary to prove standing, otherwise every losing party would lack standing. See Palm Beach Cnty. Emtl. Coalition v. Dep't of Emtl.Prot., 14 So. 3d 1076 (Fla. 4th DCA 2009).

63. The uses made of the Lagoon by Petitioners are substantial interests. Petitioners proved their interests are affected by the proposed project because it would be located partially within the Lagoon and would have both direct and indirect impacts to the Lagoon. That proof is sufficient for standing. Petitioners claim the effects would be large and contrary to applicable law; Respondents claim the effects would be small (or even an improvement) and permissible under the law. The resolution of this latter dispute determines who wins on the merits, but not whether Petitioners have standing.

64. Petitioners Michael Casale, Orin Smith, and Stephanie Smith presented no evidence to establish their substantial interests and, therefore, did not make the necessary showing for standing.

Burden and Standard of Proof

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

66. The Sovereignty Submerged Lands Authorization was issued under chapter 253. It is not subject to section 120.569(2) (p). 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).

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

68. This is a de novo proceeding designed to formulate final agency action, not to review action taken preliminarily. J.W.C. at 785. Therefore, modifications to a project can be made when they are supported by record evidence and the due process rights of the parties are preserved.

The Environmental Resource Permit

69. The determination whether Oculina Bank is entitled to the Environmental Resource Permit is governed by chapter 373, rule 40C-4.301, and the Applicant's Handbook: Management and Storage of Surface Waters of the St. John's River Water Management District ("Applicant's Handbook").

70. Rule 40C-4.301(1) requires, in relevant part, that an applicant provide reasonable assurances that the proposed activity:

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;

(f) Will not cause adverse secondary impacts to the water resources;

71. The term "reasonable assurance" means a demonstration that there is a substantial likelihood of compliance with standards. See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So.

2d 644, 648 (Fla. 3d DCA 1992). It does not mean absolute guarantees.

72. Oculina Bank did not provide reasonable assurance that the proposed project will not adversely impact the value of the refuge and nursery functions provided to fish and wildlife and listed species.

73. Section 12.2.1 of the Applicant's Handbook requires the Department to consider whether the applicant has implemented all practicable design modifications to reduce or eliminate the proposed projects adverse impacts to wetland and surface water functions. Petitioners contend that Oculina Bank should have done more to eliminate impacts.

74. The Department and Board of Trustees would not achieve the legislative intent reflected in chapters 253 and 373, nor the environmental goals reflected in their rules, by applying the requirement to minimize impacts in a manner that discouraged environmental restoration. If Oculina demonstrated net improvements in environmental values to go along with its design changes to reduce adverse impacts, it would have satisfied Section 12.2.1. However, because a net improvement was not demonstrated, Oculina Bank's evidence is insufficient to show that all practical modifications to reduce adverse impacts have been implemented.

75. Rule 40C-4.301(1)(e) requires an applicant for an Environmental Resource Permit to provide reasonable assurance that a proposed project "will not cause adverse secondary impacts to the water resources." Oculina Bank failed to demonstrate compliance with this rule because the loss of refuge and nursery functions would cause secondary impacts to the tarpon and snook fishery.

76. Section 373.414(1)(a) requires consideration and balancing of the following criteria when determining whether a proposed project is not contrary to the public interest or, in the case of projects in an Outstanding Florida Water, whether it is clearly in 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 historical 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.

77. Oculina Bank failed to demonstrate that construction of the proposed home sites, access road, and surface water management systems would not be not contrary to the public interest because Oculina Bank failed to rebut Petitioners evidence that the refuge and nursery functions of the wetlands would be adversely impacted by the project.

78. The proposed docks are in an Outstanding Florida Water and, therefore, must be shown to be clearly in the public interest. This showing does not require demonstration that the proposed project would create a net public benefit. It is sufficient to show that the project would have no material negative impacts or that any such impacts are clearly offset by public benefits. See 1800 Atlantic Developers v. Dep't of Env'tl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989).

79. Oculina Bank proved by a preponderance of the evidence that construction of the proposed docks would have no material negative impacts and, therefore, that the construction would be clearly in the public interest.

80. If an applicant is unable to meet the criteria set forth in section 373.414(1), the Department "shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity."

81. The proposed mitigation to offset impacts to the wetlands was not shown to be adequate because the potential adverse impacts to the refuge and nursery functions of the wetlands were not adequately addressed by Oculina Bank.

The Sovereignty Submerged Lands Authorization

82. Section 258.42(3)(e) prohibits the erection of structures within an aquatic preserve except for certain described projects, including private residential docks. See § 258.42(3)(e)1., Fla. Stat. The term "private residential single-family dock" is defined in rule 18-20.003(44) as a dock used for a single-family residence.

83. Petitioners contend that the proposed docks do not qualify as single-family docks because all three docks are being developed by Oculina Bank in a single project and they will generate income to Oculina Bank. However, there is nothing in the definition of "private residential single-family dock" that disqualifies the proposed docks as single-family docks. Furthermore, the definition of "income" in rule 18-21.003(31) does not mention income from the sale of property that includes

a dock, but, instead, refers to money paid specifically for use of a dock. These would not be income-generating docks.

84. Rule 18-21.004(2)(b) prohibits activities on submerged lands within an aquatic preserve which result in significant adverse impacts to sovereignty lands and associated resources unless there is no reasonable alternative and adequate mitigation is proposed. A preponderance of the evidence shows the proposed docks would not result in significant adverse impacts to sovereignty lands and associated resources, so no alternative project or mitigation is required. However, it is acknowledged that the Board of Trustees has exclusive final authority to determine whether mitigation measures are sufficient to offset the expected adverse impacts of a proposed project. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997); 1800 Atlantic at 951.

85. Rule 18-20.004(5)(a) provides the following standards and criteria for all docking facilities in aquatic preserves relevant to the issues raised by Petitioners:

1. No dock shall extend waterward of the mean or ordinary high water line more than 500 feet or 20 percent of the width of the waterbody at that particular location, whichever is less.
2. Certain docks fall within areas of significant biological, scientific, historic or aesthetic value and require special management considerations. The Board shall require design modifications based on site

specific conditions to minimize adverse impacts to these resources, such as relocating docks to avoid vegetation or altering configurations to minimize shading.

3. Docking facilities shall be designed to ensure that vessel use will not cause harm to site specific resources. The design shall consider the number, lengths, drafts and types of vessels allowed to use the facility.

4. In a Resource Protection Area 1 or 2, any wood planking used to construct the walkway surface of a facility shall be no more than eight inches wide and spaced no less than one-half inch apart after shrinkage. Walkway surfaces constructed of material other than wood shall be designed to provide light penetration which meets or exceeds the light penetration provide by wood construction.

5. In a Resource Protection Area 1 or 2, the main access deck shall be elevated a minimum of five (5) feet above mean or ordinary high water.

86. Rule 18-20.004(5)(b) provides the following standards and criteria for private single-family docks located in aquatic preserves relevant to the issues raised by Petitioners:

1. Any main access dock shall be limited to a maximum width of four (4) feet.

2. The dock decking design and construction will ensure maximum light penetration, with full consideration of safety and practicality.

3. The dock will extend out from the shoreline no further than to a maximum depth of minus four (- 4) feet (mean low water).

4. When the water depth is minus four (- 4) feet (mean low water) at an existing bulkhead the maximum dock length from the bulkhead shall be 25 feet, subject to modifications accommodating shoreline vegetation overhang.

* * *

6. Terminal platform size shall be no more than 160 square feet.

7. If a terminal platform terminates in a Resource Protection Area 1 or 2, the platform shall be elevated to a minimum height of five (5) feet above mean or ordinary high water. Up to 25 percent of the surface area of the terminal platform shall be authorized at a lower elevation to facilitate access between the terminal platform and the waters of the preserve or a vessel.

8. Docking facilities in a Resource Protection Area 1 or 2 shall only be authorized in locations having adequate existing water depths in the boat mooring, turning basin, access channels, and other such areas which will accommodate the proposed boat use in order to ensure that a minimum of one foot clearance is provided between the deepest draft of a vessel and the top of any submerged resources at mean or ordinary low water;

87. Oculina Bank proved by a preponderance of the evidence that the proposed docks would comply with these criteria.

88. Rule 18-20.004(4)(c) states that, for "a private residential, single-family docking facility," compliance with the standards and criteria in rule 18-20.004(5) shall be deemed to meet the public interest requirements of rule

18-20.004(1)(b). Petitioners argue that rule 18-20.004(4)(c) is inapplicable in this case because that rule refers to "a" dock, but here we have three docks. The Department's interpretation of this rule as applicable to a project which involves more than one dock when the docks will serve recorded single-family lots, is more reasonable.

89. Petitioners attempted to prove that the Department and Board of Trustees did not treat such projects as single-family docks in the past, but Petitioners' evidence was unpersuasive.

90. Therefore, the offer made by Oculina Bank to either make a contribution to the Marine Resource Council or to purchase a mitigation bank credit was unnecessary to satisfy the public interest requirement of rule 18-20.004(1)(b).

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection issue a Final Order that denies the Consolidated Environmental Resource Permit and Sovereignty Submerged Land Authorization to Oculina Bank.

DONE AND ENTERED this 19th day of April, 2013, 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
Division of Administrative Hearings
this 19th day of April, 2013.

ENDNOTES

^{1/} For example, official recognition is taken of the fact that constructing a retaining wall for a driveway is more costly than leaving a sloped bank, and building a house on stilts is more costly than building the same house on a concrete slab.

^{2/} In this regard, it would be useful to know, as a comparison, whether the adjacent restored wetlands are functioning well as a refuge and nursery for larval and juvenile tarpon and snook.

^{3/} All references to the Florida Statutes are to the 2012 codification.

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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.