

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PELICAN ISLAND AUDUBON SOCIETY,
GARRETT BEWKES, NED SHERWOOD,
ORIN R. SMITH, STEPHANIE SMITH,
AND CAROLYN STUTT,

Petitioners,

vs.

Case No. 15-0576

OCULINA BANK CORPORATION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

_____ /

RECOMMENDED ORDER

The final hearing in this case was held on March 15 and 16,
2016, 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
Marcy I. LaHart, P.A.
4804 Southwest 45th Street
Gainesville, Florida 32608-4922

For Respondent Oculina Bank Corporation:

Nicholas M. Gieseler, Esquire
Steven Gieseler, Esquire
Gieseler & Gieseler P.A.
789 South Federal Highway, Suite 301
Stuart, Florida 34994

For Respondent Department of Environmental Protection:

Glenn Rininger, Esquire
Jeffrey Brown, Esquire
Department of Environmental Protection
Douglas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

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 Sovereign Submerged Lands Authorization to construct three single-family homes, an access drive, surface water management system, and three single-family docks in Indian River County.

PRELIMINARY STATEMENT

In February 2012, the Florida Department of Environmental Protection ("DEP") gave notice of its intent to issue to Oculina Bank an Environmental Resource Permit and Sovereign Submerged Lands Authorization. Orin R. Smith, Stephanie Smith, Carolyn Stutt, and Robert Prosser jointly filed a petition challenging the permit. Michael Casale and E. Garrett Bewkes filed separate petitions. These petitions were transferred to DOAH where they were assigned DOAH Case Nos. 12-1227, 12-1228, and 12-1229 and consolidated (referred to hereafter as "Oculina I"). Following an administrative hearing held in November 2012, the Administrative Law Judge recommended denial of the authorization

because potential adverse impacts to the refuge and nursery functions of the wetlands, specifically related to tarpon and snook, and potential impacts to the rivulus marmoratus, another species of fish, were not adequately addressed by Oculina. In August 2013, DEP issued a Consolidated Final Order adopting the Recommended Order with a few exceptions.

In March 2014, Oculina Bank re-applied for an Environmental Resource Permit and Sovereign Submerged Lands Authorization (hereafter referred to as "the Permit"). The Department gave notice of its intent to issue the Permit on January 7, 2015. Pelican Island Audubon Society, Garrett Bewkes, Ned Sherwood, Orin R. Smith, Stephanie Smith, and Carolyn L. Stutt filed a petition challenging the permit.

Oculina Bank filed a motion in limine to limit the issues that could be heard in this new proceeding. The Administrative Law Judge entered an order ruling that the doctrines of res judicata and collateral estoppel were applicable and required that argument and evidence be limited to new facts, changed conditions, or additional submissions by Oculina Bank.

At the final hearing, a number of findings from the earlier proceeding were stipulated to for this new proceeding. Oculina Bank presented the testimony of: George Kulczycki, accepted an expert in estuarine wetlands ecology, through a deposition transcript and video (Oculina Bank Exhibits 55 and 56); and

Dr. W. Michael Dennis, accepted as an expert in biology, wetlands ecology, and wetlands hydrology. Joint Exhibits 1-63 and Oculina Bank Exhibits 1-57 and 59 were admitted into evidence. Official recognition was taken of section 607.0501, Florida Statutes, and a Quitclaim Deed from Oculina Bank dated January 4, 2012.

Petitioners presented the testimony of: David Cox; Grant Gilmore, accepted as an expert in ichthyology and marine and estuarine fish ecology; Scott Taylor, accepted as an expert in the Mangrove Rivulus; and Tony Miller, accepted as an expert in wetlands ecology. Petitioners Exhibits 1-9, 11, 13-15, 23-25, 28-29, 46-47, 53-56, 58, and 64 were admitted into evidence.

DEP presented the testimony of: Dr. Jeffrey Wilcox of the Florida Fish and Wildlife Conservation Commission ("FWC"), accepted as an expert in the Mangrove Rivulus, through his deposition transcript (DEP Exhibit 1); Dr. Kathy Guindon, accepted an expert in fisheries biology and Tarpon; and Monica Sovacool, accepted as an expert in wetlands ecology. DEP Exhibits numbered 1-39 were admitted into evidence.

The four-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders, which were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

Parties

1. Petitioner Pelican Island Audubon Society has more than 25 members residing in Indian River County, was in existence for more than a year before Oculina Bank filed its application for the Permit, and was formed for the purpose of protecting the environment, fish, and wildlife resources.

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

3. Petitioner Carolyn Stutt uses the Lagoon for boating, nature observation, nature photography, and sketching. Petitioner Garrett Bewkes uses the Lagoon for boating and fishing.

4. Petitioners Orin Smith and Stephanie Smith did not testify at the final hearing nor present other evidence to show they have substantial interests that could be affected by the proposed project. Respondents did not stipulate to any facts that would establish the Smiths' substantial interests.

5. Respondent Oculina Bank has an undivided ownership interest in the project site and is the applicant for the Permit that is the subject of this proceeding.

6. DEP is the state agency responsible for regulating construction activities in waters of the State. DEP 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

7. 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.

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

9. 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.

10. The wetlands along the western shore of the Lagoon play a 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 can move into the wetlands and seek out shallow areas to avoid predation by larger fish.

11. 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.

12. 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. The wetlands on the site are isolated for much of the year because the waters of the Lagoon cannot enter the wetlands unless the waters rise above the lowest berm elevations. This connection only occurs in unusually high water conditions.

13. The impoundment berms have decreased the frequency and duration of the project site's inundation by waters from the Lagoon.

14. There are almost 14 acres of wetlands impounded by the berms.

15. 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.

16. Within the wetlands are three ponds.

17. 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 reduction of these species.

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

19. The project site still provides nesting, denning, and foraging habitat for birds and other wildlife. However, the environmental health and productivity of the wetlands on the site have been reduced by the impoundment berms.

20. The adverse effects of impounding wetlands for mosquito control are widely understood by environmental scientists. Therefore, reconnecting impounded wetlands along the Indian River Lagoon has been a local and state governmental objective.

21. North and south of the project site are salt marsh wetlands that have been restored. To the north 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 reconnecting them to the Lagoon and removing exotic vegetation.

22. 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.

23. 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.

The Proposed Project

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

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

26. 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.

27. 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.

28. 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. One of the onsite ponds would be eliminated by the construction.

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

30. 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.

31. 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.

32. Because the docks meet the length limit specified in Florida Administrative Code Chapter 18-21, they are presumed not to create a navigation hazard.

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

34. 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.

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

36. In *Oculina I*, the Administrative Law Judge determined that the condition for vessels moored at the proposed docks should be stated as a maximum permissible draft. The Permit imposes a maximum draft for boats using the docks.

Fish Survey

37. Oculina Bank conducted a fish sampling survey in 2014 to obtain additional information about the presence of tarpon, snook, rivulus, and other fish on the project site. Twenty-three sampling stations were established and sampled from January 16, 2014 to February 16, 2014. The survey was conducted during a period of seasonal high water in order to catalog the highest number of fish that might migrate in and out of the site during high water.

38. Oculina Bank collected five species of fish that are typically found in impounded areas. No tarpon or snook were found.

39. Oculina Bank did not find Florida Gar or Least Killifish during the fish survey, but Dr. Taylor observed these

two species on his site inspection in 2015. He also saw three to five juvenile tarpon.

40. No testimony about snook was presented at the final hearing nor was this fish mentioned in Petitioners' Proposed Recommended Order.

Mangrove Rivulus

41. *Rivulus marmoratus*, or mangrove rivulus, is designated a species of special concern by the FWC. See Fla. Admin. Code R. 68A-27.005(2)(b). Species of special concern are those species for which there are concerns regarding status and threats, but for which insufficient information is available to list the species as endangered or threatened.

42. Some research indicates rivulus are more common than originally believed. Certain populations of rivulus in Florida are healthy and thriving. A team of scientists who participated in a biological status review of the rivulus for the FWC recommended that the rivulus be delisted. The team included Dr. Taylor and Dr. Wilcox.

43. In Oculina I, Dr. Gilmore did not find any rivulus on the project site, but he expressed the opinion that the site had rivulus habitat and they were probably on the site. In his more recent visits to the project site in conjunction with the current proceeding, Dr. Gilmore did not observe any rivulus. Oculina Bank did not find any rivulus during its fish survey.

44. Dr. Taylor sampled for rivulus on the site on five different days in 2015 and found five rivulus in a ditch outside (waterward) of the impoundment berm. Dr. Taylor sampled "extensively" for rivulus in the interior of the project site, but found none there. Still, he believes there are probably some in the interior.

45. The area where the rivulus were found outside the impoundment berm would not be changed by the proposed project. However, Oculina Bank's proposal to scrape down the impoundment berm would eliminate many crab burrows, which are habitat for the rivulus.

46. Dr. Taylor and Dr. Wilcox agreed that rivulus are more likely to be found in areas that are tidally connected.

47. The preponderance of the evidence does not support Petitioners' claim that the proposed project would, on balance, adversely affect the mangrove rivulus. However, the recommended permit modifications should benefit the species.

Tarpon

48. In Oculina I, Dr. Gilmore testified that the project site was "one of the critical habitats maintaining regional tarpon fisheries." However, he only observed one "post larval" tarpon in 2012 and none in 2014. Dr. Gilmore stated that a small mesh seine is the best method to sample for these nursery phase

tarpon, but he never used such a seine to sample for them on the project site, nor did anyone else.

49. Extensive evidence regarding on-site investigations and literature related to tarpon was presented at the final hearing. Sometimes the testimony failed to distinguish between early stage (larval) tarpon and later stage (juvenile) tarpon, whose habitat needs are not the same. The nursery and refuge functions of the wetlands on the project site relate primarily to larval tarpon, not juvenile tarpon.

50. The shallow ponds on the project site are an important habitat type that can be used by larval tarpon when related hydrologic conditions are compatible.

51. The preponderance of the evidence does not support the characterization of the wetlands on the project site as "critical habitat" for tarpon in the region. The current hydrologic conditions diminish the value of the nursery and refuge functions provided by the wetlands. Improving the connection between the wetlands and the Lagoon can enhance the tarpon nursery function if the improved connection is made without giving predators of larval tarpon access to the interior ponds.

52. Dr. Gilmore stated, "you don't have to take down the entire dike, you can create low spots." By low spots, he means areas like the one that currently exists in the southern impoundment berm that is at about elevation 2.0 feet.

53. The preponderance of the evidence shows the proposed project would not adversely affect the nursery function of the wetlands for tarpon if the recommended modifications are made to the Permit to improve the connection to the Lagoon while keeping the interior ponds isolated from the Lagoon for most of the year.

Mitigation

54. DEP conducted a Uniform Mitigation Assessment Methodology ("UMAM") analysis for the proposed project that assumed direct impacts to 2.72 acres of mangrove swamp. It did not account for secondary impacts that could be caused by the proposed project.

55. DEP's UMAM analysis determined there would be a functional loss of 1.269 units. It further determined that these losses would be offset by the creation of 0.88 acres of salt marsh and the enhancement of 10.81 acres of mangrove swamp, resulting in a net functional gain of 2.342 units.

56. DEP concluded that, if functional losses caused by secondary impacts were included, there would be a functional loss of 2.350 units, which still results in a net gain of 3.056 units.

57. Because DEP determined there would be a net gain in functional value, it did not require Oculina Bank to provide additional on-site mitigation or to purchase mitigation credits from an off-site mitigation bank.

58. The UMAM analysis performed by DEP did not adequately account for the lost tarpon nursery function and the proposed mitigation could further diminish the nursery function. The purchase of mitigation bank credits would not offset the lost nursery function because the mitigation bank was not shown to provide a nursery function.

CONCLUSIONS OF LAW

Standing

59. 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. 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).

60. Respondents did not contest the standing of Petitioners. Carolyn Stutt and Garrett Bewkes were determined to have standing in Oculina I and they have standing in this proceeding.

61. Petitioners Orin Smith and Stephanie Smith presented no evidence to establish their substantial interests in Oculina I or in this current proceeding, and, therefore, did not make the necessary showing for standing.

62. Petitioner Pelican Island Audubon Society made the showing required under section 403.412(5), Florida Statutes, and, therefore, has standing.

Burden and Standard of Proof

63. The Environmental Resource Permit was issued under chapter 373, Florida Statutes. A petitioner challenging a permit issued under chapter 373 has the burden of ultimate persuasion following the applicant's presentation of its prima facie case. See § 120.569(2)(p), Fla. Stat. Oculina Bank presented a prima facie case of its entitlement to the environmental resource permit. Therefore, the burden of ultimate persuasion was on Petitioners to prove their case in opposition to the permit.

64. The Sovereignty Submerged Lands Authorization was issued under chapter 253, Florida Statutes. 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).

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

66. 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 permit can be made

when they are supported by record evidence and the due process rights of the parties are preserved.

67. The doctrines of *res judicata* and collateral estoppel apply to administrative proceedings. Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So. 2d 35, 40 (Fla. 3d DCA 1972) cert. denied, 267 So. 2d 833 (Fla. 1972).

68. In Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987), the Supreme Court of Florida held that, in a case where a previous permit was denied, *res judicata* will apply "unless the second application is supported by new facts, changed conditions, or additional submissions by the applicant." Changed conditions would present a clear basis for not applying *res judicata*. New facts would also present a clear basis for not applying *res judicata*, if "new facts" means facts that could not have been presented in the original litigation. However, the Court's reference to "additional submissions" is unclear, because the Court does not explain how the allowance for additional submissions would avoid the scenario where a losing party could re-litigate factual disputes in an effort to win with better evidence. Furthermore, the Court's reference to "additional submissions" is *dicta*, because Thomson involved changed conditions; the new permit application was changed to eliminate the impacts to seagrasses which were the reason for the denial of the first application.

69. A number of disputed issues were determined in *Oculina I* and, therefore, Petitioners are barred by the doctrine of *res judicata* from re-litigating those issues in this new proceeding.

70. In *Oculina I*, competent evidence was presented to show that the wetlands on the project site are probably used by the mangrove rivulus and by larval tarpon and *Oculina Bank* did not rebut that evidence. In this proceeding, new evidence was presented about the habitat needs of these fish and the site features and hydrologic conditions that affect the quality of the habitat. The recommended modifications to the project will mitigate for the loss of habitat for rivulus and tarpon because there will be a net gain in the functional value of the habitat for these fish.

Environmental Resource Permit

71. The determination whether *Oculina Bank* is entitled to the Environmental Resource Permit is governed by chapter 373, Florida Administrative Code 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").

72. 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;

73. 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.

74. If the proposed Permit is modified as recommended below, it provides reasonable assurance that the proposed project will not adversely affect the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. If the proposed modifications are not made, reasonable assurance has not been provided.

75. Section 12.2.1 of the Applicant's Handbook requires the DEP 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. If the proposed Permit is modified as recommended below, it will result in net improvements in environmental values to go along with Oculina Bank's design features to reduce adverse impacts, and will satisfy Section 12.2.1. If the proposed modifications are not made, then Oculina Bank did not make all practicable design modifications to reduce adverse impacts.

76. If the proposed Permit is modified as recommended below, the proposed project will not cause secondary impacts to water resources. If the proposed modifications are not made, reasonable assurance has not been provided.

77. Respondents contend that Oculina Bank must provide DEP with reasonable assurance that the project is not contrary to public interest. Petitioners contend the project must be shown to be clearly in the public interest because it affects the Indian River Lagoon, an Outstanding Florida Water. The same public interest criteria, contained in section 373.414(1)(a), are to be balanced in determining whether a project is not contrary to the public interest or 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 the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of the functions being performed by the areas affected by the proposed activity.

78. In Oculina I, it was determined that the project would not adversely affect the public health, safety, or welfare or the property of others. The proposed changes to the project do affect this determination.

79. If the proposed Permit is modified as recommended below, it will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. The project will create a net benefit to fish and wildlife, including endangered or threatened species or their habitats. If the proposed modifications are not made, the project will adversely affect fish and wildlife.

80. In Oculina I, it was determined that the proposed project will not adversely affect navigation or cause harmful erosion or shoaling. The proposed changes to the project do

affect this determination. The proposed project would improve the flow of water by reconnecting the wetlands to the Lagoon.

81. If the proposed Permit is modified as recommended below, the proposed project will not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity. It will result in a net improvement to local fisheries. If the proposed modifications are not made, the project will adversely affect fishing and marine productivity.

82. The project will be of a permanent nature.

83. In Oculina I, it was determined that the proposed project would not adversely affect historical or archaeological resources. The proposed changes to the project do not affect this determination.

84. If the proposed Permit is modified as recommended below, the current condition and relative value of the functions being performed by the areas affected by the proposed activity will be improved by the proposed project. The nursery functions of the site will be improved. Habitat for the rivulus will be improved. The wetlands on the site will be improved by reconnection to the Lagoon. If the proposed modifications are not made, the project will adversely affect the current condition and relative value of the functions being performed.

85. If the proposed Permit is modified as recommended below, the proposed project is not contrary to the public

interest, and is clearly in the public interest. If the proposed modifications are not made, the project is contrary to the public interest.

Mitigation

86. Section 10.3.1.2 provides:

Mitigation can be conducted on-site, off-site, or through the purchase of credits from a mitigation bank, or through a combination of approaches, as long as it offsets anticipated adverse impacts to wetlands and other surface waters and meets all other criteria for issuance.

87. If the proposed Permit is modified as recommended below, the proposed project includes adequate on-site mitigation to offset all direct impacts and secondary impacts.

Sovereignty Submerged Lands Authorization

88. It was determined in Oculina I that Oculina Bank met all applicable criteria to obtain authorization for use of sovereignty submerged lands for the proposed docks. The facts and law supporting that determination have not changed. Therefore, the determination is the same; Oculina Bank met all applicable criteria for the docks.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection issue Permit No. 31-0294393-003-EI, with the following modifications:

1. The impoundment berm will not be scraped down to mean sea level, but, instead, two new low spots will be created in the impoundment berm at an elevation of approximately 2.0 feet.

2. A new isolated pond will be created to replace the one that will be eliminated by the construction, similar in size to the one that will be eliminated.

3. Internal ditches and other channels will be filled as needed to eliminate predator access to the ponds.

If these modifications are not made, it is recommended that the Permit be denied.

DONE AND ENTERED this 1st day of June, 2016, in Tallahassee,
Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2016.

COPIES FURNISHED:

Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
4804 Southwest 45th Street
Gainesville, Florida 32608-4922
(eServed)

Glenn Wallace Rininger, Esquire
Department of Environmental Protection
Douglas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Nicholas M. Gieseler, Esquire
Steven Gieseler, Esquire
Gieseler and Gieseler, P.A.
789 South Federal Highway, Suite 301
Stuart, Florida 34994
(eServed)

Jonathan P. Steverson, Secretary
Department of Environmental Protection
Douglas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Craig Varn, General Counsel
Department of Environmental Protection
Douglas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Stop 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399
(eServed)

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.