

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SUNCOAST WATERKEEPER, INC.;  
FLORIDA INSTITUTE FOR SALTWATER  
HERITAGE, INC.; AND JOSEPH  
MCCLASH,

Petitioners,

vs.

Case Nos. 17-0795  
17-0796

LONG BAR POINTE, LLLP, AND  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Respondents.

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RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in these cases on December 5 and 6, 2017, in Sarasota, Florida.

APPEARANCES

For Petitioners: Ralf Gunars Brookes, Esquire  
(Suncoast and Ralf Brookes Attorney  
FISH) 1217 East Cape Coral Parkway  
Suite 107  
Cape Coral, Florida 33904-9604

For Petitioner: Joseph McClash, pro se  
(McClash) 711 89th Street Northwest  
Bradenton, Florida 34209-9692

For Respondent: Chris R. Tanner, Esquire  
(Long Bar) Amy Wells Brennan, Esquire  
Manson Bolves Donaldson Varn, P.A.  
Suite 300  
109 North Brush Street  
Tampa, Florida 33602-4167

For Respondent: Marianna Sarkisyan, Esquire  
(Department) Department of Environmental Protection  
Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The issue is whether Long Bar Pointe, LLLP's (Long Bar), application for a Mitigation Bank/Environmental Resource Permit (ERP) to establish a mitigation bank on a 260.80-acre coastal site located in western Manatee County should be approved.

PRELIMINARY STATEMENT

By letter dated December 16, 2017, the Department of Environmental Protection (Department) issued its Notice of Intent to Issue Mitigation Bank Permit No. 0338349-002 (Notice) authorizing Long Bar to establish the Long Bar Pointe Mitigation Bank on a 260.80-acre site in Manatee County. The Notice indicates that a total of 18.01 potential mitigation bank credits will be awarded.

Petitioners, Suncoast Waterkeeper, Inc. (Suncoast), and Florida Institute for Saltwater Heritage, Inc. (FISH), timely filed a Verified Petition challenging the agency action. After the initial pleading was dismissed by the Department, an Amended Verified Petition was filed. The matter was referred to the Division of Administrative Hearings (DOAH) and assigned Case No. 17-0795. Petitioner, Joseph McClash (McClash), also timely filed a Verified Petition challenging the same action. After

his initial pleading was dismissed by the Department, a First Amended Verified Petition for Formal Administrative Hearing was filed. This filing was referred to DOAH and assigned Case No. 17-0796. The two cases were then consolidated.

At the hearing, Petitioners jointly presented the testimony of seven witnesses, including Mr. McClash. Also, Petitioners' Exhibits 1 through 47, 55 (treated as hearsay only), 63, 67 (Land Use Map only), 78, and 81 (except the Key West photograph) were accepted in evidence. The remainder of Exhibit 67 and Exhibits 68, 69, and 75 were accepted on a proffer basis only. Long Bar presented the testimony of two witnesses. Long Bar Exhibits 1 through 12 were accepted in evidence. The Department presented no witnesses; however, Department Exhibit 1 was accepted in evidence. Finally, Joint Exhibit 1 was accepted in evidence.

A two-volume Transcript of the hearing was prepared. Proposed findings of fact and conclusions of law were filed by the parties on February 16 and 19, 2018, and they have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. The Department is the state agency having concurrent jurisdiction with the water management districts for permitting mitigation banks pursuant to chapter 373, Florida Statutes.

Pursuant to an operating agreement executed by the Department and the water management districts, the Department is responsible for reviewing and taking final agency action on this activity.

2. Long Bar is a Florida limited liability limited partnership registered to do business in the state. Its address is 1651 Whitfield Avenue, Sarasota, Florida.

3. Suncoast has been registered as a nonprofit corporation in Florida since 2012. Its mission is to "protect and restore the Suncoast's waterways through enforcement, fieldwork, advocacy, and environmental education for the benefit of the communities that rely upon these precious coastal resources." Respondents have stipulated that at least 25 members reside within Manatee County.

4. Suncoast's geographical area of interest is the coastal waters of Manatee and Sarasota Counties, including the waterways and coastline in the immediate area of the project site and within the proposed Mitigation Service Area (MSA) of the bank.

5. Suncoast's representative, Mr. Merriam, testified that the organization has more than 800 members residing within Manatee County. However, he does not know the exact number of members who actually use the site or MSA and might reasonably be expected to be affected by the proposed activities. Moreover, he was unaware of what activities the proposed permit actually

authorizes that would adversely affect the interests of the members. After learning what activities are authorized by the permit, he admitted they have a beneficial purpose.

6. FISH is an active not-for-profit corporation in good standing since 1991 and has an address at 4515 124th Street West, Cortez, Florida. FISH owns and maintains real property, including coastal land within the village of Cortez. FISH also owns and maintains a wetland restoration/mitigation project known as the "FISH Preserve" property located in Cortez.

7. The mission and goal of FISH includes the protection of the nature and natural resources within Manatee County, including Anna Maria Sound and Perico Island located within the MSA. Respondents have stipulated that FISH has at least 25 members who reside in Manatee County.

8. According to a representative of FISH, Mr. Stevely, there are more than 150 members who reside or own property in Manatee County. The number who actually use and enjoy the natural resources located in the bank site and MSA is not known. Mr. Stevely could not explain how the activities authorized by the proposed permit would adversely affect its members. He also admitted that the removal of exotics, planting of native plants, and recording of a conservation easement (the only activities authorized by the permit) may actually benefit his environmental interests. Mr. Stevely asserted that the trimming of mangroves

would adversely affect his interests, but the permit, as proposed, does not authorize mangrove impacts. He speculated that the proposed placement of buoys along the shoreline might attract inexperienced boaters to the area, but admitted that good channel marking is one of the best ways to protect seagrasses. Moreover, the installation of buoys requires a separate permit from the Florida Fish and Wildlife Conservation Commission (FFWCC). Presumably, a point of entry to contest that action will be provided by the agency.

9. Mr. McClash is a resident of Bradenton who uses the waters in the vicinity of the project site for fishing, crabbing, boating, and wildlife observation. He contends the informational buoys will attract inexperienced boaters to the area, who will harm the seagrasses. He is also concerned that if the application is approved, other ERPs may be issued in the future and their impacts could potentially be offset by the purchase of credits from the Project.

#### The Project Site

10. The property designated to become the mitigation bank is a 260.80-acre site located in western Manatee County, west of El Conquistador Parkway and 75th Street West, and an adjacent unsurveyed portion of Sarasota Bay, an Outstanding Florida Water (OFW), Class II Waters. Around half of the site is adjacent to agricultural lands that may be developed with a mixed use

residential/commercial project. The other half is contiguous with Sarasota Bay and/or existing conservation lands. The project site has more than two miles of shoreline making it the largest continuous mangrove shoreline along Sarasota Bay. The site is near other properties with high ecological value, such as Emerson Point, Robinson Preserve, Neal Preserve, Tidy Island, Sister Keys, and Legends Bay. All of these properties are conservation lands. Long Bar has a sufficient real property interest to conduct the proposed activities.

11. Based on historical aerial photography, the area encompassing the Project site has remained essentially undeveloped since 1944, with the exception of mosquito ditching that was conducted in the northwestern portion of the property from the 1940s to the 1970s, and agricultural ditching that has occurred adjacent to and within some portions of the site.

12. The site is dissected by four, approximately 30-foot-wide strips of land owned by Manatee Fruit Company (MFC), which are excluded from the credit assessment. However, Long Bar has sufficient ownership interest in the MFC strips of land and will be required to maintain the area free of debris and nuisance and exotic vegetation.

13. The Town of Longboat Key also has a 30-foot-wide easement in the southeastern portion of the site, which will be preserved, enhanced, and maintained similar to the adjacent area

of the project site , but is excluded from the credit assessment.

14. The project site consists of privately-owned submerged Sarasota Bay bottomlands that are dominated by seagrasses; mangrove swamps; mangrove hedges; areas of salt marsh/saltern; coastal freshwater herbaceous wetlands; and areas of coastal uplands (maritime hammock).

15. The seagrass areas are dominated by shoal grass with patches of turtle grass in deeper pockets. The mangrove areas are predominately black mangroves, mixed with red mangroves closer to the shoreline and with white mangroves in the more landward mangrove areas. Red mangroves increase in dominance in the vicinity of the mosquito ditches in the northwestern portion of the site, and white mangroves increase in dominance in the formerly disturbed portions of the site. The salt marsh/saltern area is generally open and sandy, but supports some herbaceous vegetation, such as buttonwood, glasswort, and saltwort. The coastal freshwater herbaceous wetlands and much of the coastal uplands are currently dominated by a near monoculture of invasive exotic Brazilian Pepper, though areas of intact maritime hammock remain. Brazilian Pepper is present in the ecotone areas (the transition area between two communities) between the freshwater herbaceous and mangrove swamp assessment



areas. There are also spoil mounds within the mangrove swamp assessment areas.

#### Mitigation Bank Permits

16. Section 373.403(19), Florida Statutes, defines a mitigation bank as "a project permitted under Section 373.4136, F.S. undertaken to provide for the withdrawal of mitigation credits to offset adverse impacts authorized" by an ERP issued under Part IV, chapter 373. A mitigation bank permit is a type of ERP. See Fla. Admin. Code R. 62-330.301(3).

17. Section 373.4136(1) authorizes the Department and water management districts to require an ERP to establish, implement, and operate a mitigation bank. A bank acts as a repository for wetland mitigation credits that can be used to offset adverse impacts to wetlands that occur as the result of future ERP projects. A bank is designed to "enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management," often within larger, contiguous, and intact ecosystems.

18. Mitigation banks are intended to "emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems." Id. Therefore, the Department and the water management districts are

directed to participate in and encourage the establishment of mitigation banks. Id.

19. A mitigation bank is to be awarded a number of mitigation credits by the permitting agency. § 373.4136(4), Fla. Stat. A mitigation credit is a "standard unit of measure which represents the increase in ecological value resulting from restoration, enhancement, preservation, or creation activities." Fla. Admin. Code R. 62-345.200(8). The number of credits must be "based upon the degree of improvement in ecological value expected to result from the establishment and operation of the mitigation bank as determined using a functional assessment methodology." § 373.4136(4), Fla. Stat. In this case, the Department is proposing to issue 18.01 credits.

Mitigation Service Area (MSA)

20. Rule 62-342.600 requires the establishment of a MSA for a mitigation bank. An MSA is a geographical area within which adverse impacts may be offset by the bank credits. A single MSA is proposed for the Project, covering both freshwater and saltwater credits. The MSA includes portions of Charlotte, Manatee, and Sarasota Counties within the South Coastal Drainage Basin and portions of the Manatee River Basin west of Interstate 75 and the portion of the Tampa Bay Drainage Basin located west of Interstate 75 and south and west of Interstate 275. Credits

are not allowed for use outside the MSA, except as provided for by section 373.4136(6) (d) .

Criteria for a Mitigation Bank

21. Besides statutory criteria in section 373.4136(1), a maze of Department rules applies to the creation of a mitigation bank. Pertinent to this case, rule 62-342.400 sets forth criteria specifically applicable to a mitigation bank. Rule 62-330.301 sets forth criteria for the issuance of an ERP, while rule 62-330.302 establishes additional ERP criteria that form the basis for the public interest test. In the Joint Pre-hearing Stipulation, Petitioners agree that only the criteria in rule 62-330.301(1) (d) and (f), rule 62-330.302(1) (a)2., 4., and 5., and rule 62-342.400(1) (a)-(f) are at issue. Petitioners also agree that Long Bar has provided reasonable assurance in regards to all requirements of financial responsibility.

The Project

22. Long Bar submitted to the Department its application for a permit on September 12, 2016. After additional information was submitted, the application was deemed complete on December 16, 2016. See Fla. Admin. Code R. 62-342.450.

23. The majority of the site is mangrove swamp and privately owned submerged seagrass bottomlands that are proposed for preservation only. The site also contains areas of coastal freshwater marsh and coastal uplands that are currently degraded

by invasive exotic vegetation which will be enhanced through removal of invasive exotic vegetation, planting of desirable vegetation, and implementation of a perpetual management plan. No wetland creation or dredging or filling activities are proposed for the Project.

24. The Project has the potential to generate several credit types, including seagrass, mangrove swamp, mangrove hedge, salt marsh/saltern, and freshwater herbaceous credits. The credit release schedule provides for an initial credit release upon recordation of a conservation easement and establishment of financial assurance mechanisms, followed by a series of potential credit releases based on satisfactory completion of specified mitigation activities, and a final credit release once all success criteria are met.

25. Prior to the release of credits, the site will be preserved by a conservation easement in favor of the Department and Southwest Florida Water Management District. Long Bar will establish financial assurance performance bonds for construction and implementation and perpetual management. Financial assurance is required to ensure the Project reaches success, it remains in compliance, and the perpetual management activities have a dedicated funding source.

26. In addition to protection provided by the conservation easement, Long Bar proposes implementation of a Seagrass

Informational Buoy Placement Plan (Plan) in an effort to provide additional protection to the submerged seagrass beds within and in the vicinity of the Project. The Plan contemplates the installation of non-regulatory seagrass information buoys at approximately the three-foot bathymetric contour along the Project site, and which follows the path of the traditional unmarked navigational channel where they can be readily seen. The buoys will inform boaters of the presence of seagrasses surrounding the Project site, which support significant estuarine habitats and can be harmed or destroyed from vessel groundings or prop scarring. Installation of the buoys will provide a significant public benefit in that it should significantly reduce or eliminate prop scars within the seagrass beds along the project site. Good channel marking is one of the best ways to protect seagrasses from prop scarring. There is no credible evidence that signage will attract inexperienced boaters who will damage the seagrasses in the area.

27. The permit does not authorize the installation of the buoys. In order to implement the Plan, Long Bar must apply to the FFWCC for a Uniform Waterways Markers in Florida Waters permit. The Plan must be implemented prior to credit release.

28. No mangrove trimming is authorized by the permit. Pursuant to a Conceptual Mangrove Trimming Plan, attached to the permit as Attachment A, Long Bar has reserved the right to trim

approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. No trimming will be allowed within the Project's mangrove swamps that are greater than 500 feet in width from the shoreline, and no trimming can result in fragmentation of the remaining intact mangrove forest into more than four individual fragments. Prior to the initial release of credits, Long Bar must develop and submit a Final Mangrove Trimming Plan and modify the permit to substitute the final plan for the conceptual plan, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits.

29. Any mangrove trimming must be conducted by a licensed professional mangrove trimmer and take place under a mangrove trimming permit issued pursuant to section 373.327 that may be issued at some time in the future by the Department if applicable criteria are met. Long Bar's reserved right to conduct limited mangrove trimming was accounted for in the credit scores.

30. Many of the current communities on the site are generally similar to the types of communities that would have been present historically, but have been adversely affected by invasion of nuisance and exotic vegetation, including Brazilian Pepper and Australian Pine. As such, the Project also involves a number of enhancement activities on the site. Approximately

17.35 acres of degraded coastal freshwater marsh will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 13.13 acres of degraded coastal uplands will be enhanced by removing invasive exotic vegetation and replanting with appropriate native vegetation. Approximately 6.44 acres of relatively intact coastal uplands will be enhanced by removing nuisance vines and exotic vegetation. All areas of preserved mangroves and salt marsh/saltern will be treated to remove existing low levels of nuisance and invasive exotic vegetation. Upon implementation and planting, the permit requires Long Bar to conduct "time zero" monitoring to establish a baseline for use in future monitoring events to determine whether success criteria have been achieved.

31. Although the proposed activities are expected to maintain and enhance site conditions in perpetuity, Long Bar will employ other strategies, based on continual evaluation of environmental data collected from the site, to ensure the goals of the Project continue to be met in perpetuity.

32. Long Bar will implement a Security Plan to take all measures necessary to ensure the integrity of the Project is upheld in perpetuity. Large hole 50-inch high hog fencing will be installed at the Project boundary where it interfaces with offsite areas to ensure separation and protection from any

future development on adjacent lands. Fencing will act as a barrier to deter trespassing, but will still allow wildlife to move across and into the Project site. Conservation easement signage will also be installed at a minimum of every 300 feet, and at every bank boundary turn along the fence line. The buoy plan is also part of the Security Plan. Long Bar will conduct quarterly inspections of the fencing and signage, as well as Project site lands, and will repair or replace fencing as soon as the need is discovered. Any trash and other debris will be removed during site inspections either by hand or by a method that minimizes disturbances to Project lands. If habitat impacts are discovered during an inspection, adaptive management actions will be implemented.

33. After the Project's final success criteria are met, the Perpetual Management Plan will ensure that the Project is managed by Long Bar in a manner that ensures all permit conditions are maintained. The Perpetual Management Plan includes quarterly inspections of the Project site, including security measures.

#### The Calculation of Credits

34. In 2004, the Department adopted chapter 62-345, the Uniform Mitigation Assessment Method (UMAM) rule, which provides a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount those functions



are decreased by a proposed project, and the amount of mitigation necessary to offset that loss. UMAM is the sole means for determining the amount of mitigation credits to be awarded to mitigation banks and applied to Long Bar.

35. When applying UMAM, reasonable scientific judgment must be used. Therefore, even though UMAM is a standardized procedure, UMAM is not a precise assessment, and in the exercise of reasonable scientific judgment, two scientists can arrive at different results.

36. In general terms, the UMAM analysis consists of two parts. Part I is a qualitative characterization of the property, which divides the property into assessment areas. Part II assigns mitigation bank credits to those areas based on scoring criteria established in UMAM.

37. The mitigation proposal was assessed by the Department using UMAM. The Department determined that the Project had the potential to generate a total of 18.01 credits. These credits are differentiated as 7.38 for seagrass-dominated submerged bottomlands, 0.23 for salt marsh/saltern, 7.07 for mangrove swamps, 0.68 for trimmed mangrove hedge, and 2.65 for coastal freshwater marsh.

38. The environmental communities present at the site are subdivided into 47 different assessment areas. The assessment areas were established by Long Bar's expert, Mr. Hoffner, who

has worked on the Project since 2014 and has spent hundreds of hours evaluating the site. The assessment areas were generally grouped into seagrass, mangrove, saltwater, salt marsh, freshwater marsh, and uplands, and then sub-assessed based on their proximity to different habitats and different activities within the bank.

39. Assessment area boundaries were based upon aerial photography interpretation, the Florida Land Use, Cover and Forms Classification System, habitat map, Natural Resources Conservation Service soil maps, site inspections, formal wetlands jurisdiction determination, surveys performed by professional land surveyors, field verification, and reasonable scientific judgment. The record shows that ecotone community boundaries in the environment do not often have distinct lines of demarcation and two adjacent communities can be identified as unique assessment areas and yet have ecotone areas that share characteristics of both communities. For example, Brazilian Pepper is present within the ecotone areas between the mangrove and freshwater marsh assessment areas.

40. The Department's expert, Mr. Rach, verified the boundaries of the bank and assessment areas both in the field and through aerial photographs and descriptions provided by the applicant. Mr. Rach reiterated that the determination of assessment areas is not an exact science and requires the use of

scientific judgment. He determined that Long Bar provided sufficient information for each assessment area to be evaluated under the second part of the UMAM analysis and that they provide an appropriate frame of reference to use in the Part II evaluation.

41. While Petitioners' expert, Mr. Hull, disagreed with the assessment area boundaries, he agreed that UMAM is not an exact science. He conceded that he was not sure whether he visited every assessment area on the site, and he was unable to provide an explanation of where he believed each specific boundary should be located.

42. Petitioners did not establish by a preponderance of the evidence that the assessment areas are in contravention of Department rules.

43. The Department's scoring of the Project was determined by review of the UMAM scores provided by Long Bar, review of available information provided, numerous discussions with Long Bar, and field work. The Department's summary of the credit evaluation for each of the 47 assessment areas is contained in Condition 11 of the permit and is accepted as being the most persuasive on this issue. The actual scores for each assessment area are contained in Exhibit H of the draft permit.

44. While Mr. Hull disagreed with the scoring of the project, the difference between his and Long Bar's numbers are a

reflection in the difference in the application of reasonable scientific judgment.

45. Petitioners failed to prove by a preponderance of the evidence that the Department's determination that the project could generate 18.01 credits was incorrect.

#### Petitioners' Objections

46. In their PROs, Petitioners raise three broad objections. First, they contend that no credits should be awarded to Long Bar for seagrasses, or that a much smaller number is appropriate. Second, they contend fewer credits should be awarded for areas where mature mangroves that are 40 to 50 feet in height could be trimmed to 12 feet simply to provide a view for future residents of the adjacent upland residential development conceptually proposed by Long Bar. Finally, they contend the site is bisected by a 100-foot gap that is excluded from the bank because Long Bar intends to allow future access from the planned adjacent upland residential development to the shoreline. They argue that by creating this gap, Long Bar fails to maintain an intact ecosystem. Given these considerations, Suncoast and FISH contend that no more than 4.18 mitigation credits should be awarded, while Mr. McClash argues that the application should be denied.

47. As to the first issue, Petitioners generally contend that in the seagrass areas, the bank is focused on preservation

only, and not restoration, and therefore no additional protection or functional lift will be provided for any seagrass assessment areas. To begin with, preservation is a goal expressly included in the UMAM rule, which emphasizes preservation of undegraded areas and restoration of degraded systems over alteration of existing landscapes to create artificial wetlands. The proposed conservation easement increases protection to the wetlands and other surface waters in the site by preventing structures (such as docks or piers) within the seagrass assessment areas. If the site is not preserved, it is likely to be used to access Sarasota Bay from the uplands. As previously found, there will also be enhancement activities in adjacent assessment areas. In short, the steps being proposed by Long Bar provide additional protection to the seagrasses. The UMAM seagrass score is appropriate.

48. As to the second issue, no mangrove trimming is authorized by the permit. Long Bar has, however, reserved the right to modify the permit to trim approximately 30 percent of the onsite mangrove acreage to a minimum height of 12 feet, as measured from the substrate. The potential trimming was properly accounted for in the UMAM scores. If Long Bar chooses not to implement the proposed trimming, it would likely receive more credits. Notably, no trimming can result in fragmentation

of the remaining intact mangrove forest into more than four individual fragments. And prior to the release of credits, Long Bar must develop and submit a final mangrove trimming plan and modify the permit, adjust the assessment area configuration and acreages, and recalculate the total potential mitigation credits. Petitioners did not prove by a preponderance of the evidence that mangrove trimming affects the Department's assessment of the number of credits to be awarded.

49. Finally, the exclusion of a 100-foot gap from the conservation easement does not diminish the value of the bank as an intact system as a whole. While this area will not be included in the recorded plans, this will not fragment an intact ecosystem. No construction is proposed in the gap, and current Manatee County regulations do not allow for dredging in this area. Therefore, wildlife utilizing the site will be able to continue to utilize the excluded area and traverse the gap, regardless of the lines drawn on a set of plans. The net effect of the Project is to preserve approximately two miles of intact shoreline. The more persuasive evidence supports a finding that the 100-foot wide strip does not affect the overall suitability of the site as a mitigation bank. Petitioners did not prove by a preponderance of the evidence that the so-called "gap" impacts the number of credits to be awarded.

### Compliance with Applicable Criteria

50. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria in rule 62-330.301 for the issuance of an ERP.

51. The preponderance of the evidence supports a finding that Long Bar has established that the Project is clearly in the public interest, as required by rule 62-330.302(1).

52. The preponderance of the evidence supports a finding that Long Bar has satisfied all criteria for establishing a mitigation bank, as required by rule 62-342.400.

### CONCLUSIONS OF LAW

53. Suncoast and FISH allege standing to initiate this proceeding under chapter 120 and section 413.412(6). Respondents have stipulated that the facts established by the two organizations provide standing under section 403.412(6).

54. For an association to establish standing under section 120.57(1) when acting solely as a representative of its members, it must demonstrate that a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged action, that the subject matter of the challenged action is within the association's general scope of interest and activity, and that the relief requested is of a type appropriate for an association to receive on behalf of its members. See, e.g., St. John's Riverkeeper, Inc. v. St. Johns

River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011); Fla. League of Cities, Inc. v. Dep't of Env'tl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992). Suncoast and FISH have failed to quantify the number of members that reside in the area of the Project that might reasonably be expected to be affected by the proposed activities. Therefore, they have no standing under chapter 120.

55. Mr. McClash alleges he has standing under chapter 120 as a person whose substantial interests are affected by the proposed issuance of the permit. Here, the evidence shows that Mr. McClash is concerned with activities contemplated, but not authorized, by the permit, and future ERPs that may have impacts that could potentially be offset through the purchase of credits from the Project. These concerns will not result in a direct injury or place Mr. McClash in an immediate danger of sustaining a direct injury as a result of the agency action. His concern is with future permit impacts, which are too speculative and remote to give rise to standing under chapter 120.

56. Petitioners have challenged the issuance of a mitigation bank permit issued under chapter 373. Therefore, section 120.569(2)(p) is applicable. Under this provision, the permit applicant must present a prima facie case demonstrating entitlement to the permit. Thereafter, a third party challenging the issuance of the permit has the burden "of



ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case.

57. Issuance of the permit is dependent upon there being reasonable assurance that the mitigation bank will meet applicable statutory and regulatory standards. § 373.4136(1), Fla. Stat.

58. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied.

59. Long Bar made its prima facie case of entitlement to the permit. Therefore, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the permit by a preponderance of the competent and substantial evidence. Having failed to do so, Long Bar must prevail.

60. In summary, Long Bar has provided reasonable assurance that all relevant criteria for the issuance of an ERP and establishment of a mitigation bank have been satisfied.

RECOMMENDATION

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

RECOMMENDED that the Department of Environmental Protection enter a final order approving the issuance of Mitigation Bank Permit No. 0338349-002 to Long Bar.

DONE AND ENTERED this 6th day of March, 2018, in Tallahassee, Leon County, Florida.



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D. R. ALEXANDER  
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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of March, 2018.

COPIES FURNISHED:

Joseph McClash  
711 89th Street Northwest  
Bradenton, Florida 34209-9692  
(eServed)

Ralf Gunars Brookes, Esquire  
Ralf Brookes Attorney  
Suite 107  
1217 East Cape Coral Parkway  
Cape Coral, Florida 33904  
(eServed)

Douglas P. Manson, Esquire  
Manson Bolves Donaldson, Varn P.A.  
Suite 300  
109 North Brush Street  
Tampa, Florida 33602  
(eServed)

Marianna Sarkisyan, Esquire  
Department of Environmental Protection  
Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Chris R. Tanner, Esquire  
Manson Bolves Donaldson, Varn P.A.  
Suite 300  
109 North Brush Street  
Tampa, Florida 33602  
(eServed)

Edward Vogler, II, Esquire  
Vogler Ashton, PLLC  
2411-A Manatee Avenue West  
Bradenton, Florida 34205-4948  
(eServed)

Noah Valenstein, Secretary  
Department of Environmental Protection  
Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Lea Crandall, Agency Clerk  
Department of Environmental Protection  
Mail Station 35  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000  
(eServed)

Robert A. Williams, General Counsel  
Department of Environmental Protection  
Legal Department, Suite 1051-J  
Douglas Building, Mail Station 35  
Tallahassee, Florida 32399-3000  
(eServed)

Amy Wells Brennan, Esquire  
Manson Bolves Donaldson Varn, P.A.  
Suite 300  
109 North Brush Avenue  
Tampa, Florida 33602-2637

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.