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## **Enhanced Water Quality Protection in Florida: An Analysis of the Regulatory and Practical Significance of an Outstanding Florida Water Designation**

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**Thomas Ankersen, Richard Hamann, Rachel King, Megan Wegerif, John November<sup>1</sup>**

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### **I. Introduction**

The Outstanding Florida Water (OFW) designation is the highest protection offered to a body of water by the state of Florida and is available only to those waters whose “natural attributes” warrant it. An OFW designation provides that water body with an antidegradation standard for certain activities affecting its water quality. Ordinarily,

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waters in Florida must meet the criteria established by rule for their respective class of water (based on the Florida water body classification system), regardless of existing water quality. Once a water body is designated as an OFW, however, a baseline water quality standard is set based on the ambient water quality of that particular water body. Because the OFW water quality standard may be higher than the rule-based water quality classification criteria, regulated activities that may affect the OFW are subject to additional scrutiny by regulatory agencies. In addition, those activities not necessarily occurring within an OFW, but that may “significantly degrade” an OFW, are subject to heightened scrutiny.

The Florida OFW program is administered by the Florida Department of Environmental Protection (FDEP). Currently, more than 350 waters are designated as OFWs. These are divided into two categories, managed and special waters. Managed OFWs, referred to by FDEP as managed areas, are waters that lie within or adjacent to managed areas such as state parks and aquatic preserves. Special OFWs, or special waters, lie outside of managed areas and are adjacent to non-public lands. Special water designations have proved to be controversial and to date only 41 OFWs have been designated in this manner.

The various activities that are generally subject to OFW standards include those needing Environmental Resource Permits (ERPs), stormwater and wastewater discharge permits, and dock permits. When activities subject to these approvals are proposed in an OFW, the applicant must demonstrate that the activity is “clearly in the public interest,” as opposed to the more lenient test of “not contrary to the public interest” that is applicable to all other waters. For activities conducted outside OFWs that may affect OFWs, an applicant must demonstrate that the activity will not “significantly degrade” the OFW. For certain activities, the requirements are more explicit, such as reduced square footage for exempt docks in OFWs and a limitation on the amount of storage in stormwater basins. Buffers and other aspects of best management practices for silviculture are also subject to stricter criteria in OFWs.

The ability of current OFW regulation to fulfill the legislative intent behind the OFW designation remains uncertain. Judicial and administrative case law addressing OFWs provide little clear guidance in interpreting the statutory standards for the issuance of permits in or affecting OFWs, especially the “clearly in the public interest” standard. The effect of the designation on water quality parameters subject to a narrative standard (nutrients), and on water quality parameters that are not currently established by rule (e.g. emerging pathogens of concern) has not been established. The transboundary nature of some OFWs may implicate water quality standard setting in adjacent states, as a matter of federal law. The extent to which Best Management Practices (BMPs) for silviculture operations are sufficient to safeguard OFW water quality may require further research. In addition, the extent to which the OFW statute and rules recognize the ecological role of riparian zones remains in question.

## **II. The Designation Process**

States are authorized by the federal Clean Water Act to adopt their own water quality standards<sup>2</sup> and federal Environmental Protection Agency regulations direct the states to adopt antidegradation policies to prevent violations of those water quality standards.<sup>3</sup> Pursuant to this grant of power, the Florida Legislature enacted the OFW designation in 1982.<sup>4</sup> Section 403.061(27) of the Florida Statutes grants FDEP the power to: “Establish rules which provide for a special category of water bodies within the state, to be referred to as ‘Outstanding Florida Waters’, which shall be worthy of special protection because of their natural attributes.”<sup>5</sup> Moreover, the FDEP may establish stricter rules concerning OFW permits and enforcement.<sup>6</sup> The Florida Environmental Regulation Commission (ERC), a seven-member citizens body appointed by the Governor, has final decision-making authority over the state water quality standards and other environmental standards proposed by the FDEP.<sup>7</sup> Once a water body is designated as an OFW, the antidegradation policy operates to protect the OFW’s ambient water quality from being lowered as a result of proposed activities or discharges, with some exceptions.<sup>8</sup> However, only the area of the water that is within the legal boundary of the OFW is given this protection.<sup>9</sup>

There are two types of OFWs: “Managed Areas” and “Special Waters”. Most managed area OFWs are within areas that are managed by either the state or federal government.<sup>10</sup> These areas include wildlife refuges, parks, marine sanctuaries, some of the waters within the boundaries of state or national forests, and aquatic preserves.<sup>11</sup> Managed Areas become OFWs through regular rulemaking that involves public notice, a public hearing, and an ERC Hearing.<sup>12</sup> Some Managed Areas OFWs were designated by inclusion in the original legislation.<sup>13</sup> In many circumstances, the waters within these public areas gained this special level of protection because the particular managing agency requested the OFW designation.<sup>14</sup> Since Managed Areas OFWs are part of a larger preserved area, either state or federal, the legal boundaries of the OFW are subsumed within those of the park, preserve, protected area, etc.<sup>15</sup> In most cases, all of the waters within that area are classified as OFW, unless specific areas are exempted by its listing rule.<sup>16</sup> The FDEP is currently planning to update the list of Managed Areas OFWs for the first time in over ten

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<sup>2</sup> 33 U.S.C. §1313 (2008).

<sup>3</sup> 40 C.F.R. §131.12 (2008).

<sup>4</sup> 1982 FLA. LAWS volume I part I, s. 1, ch. 82-79, s. 2, ch. 82-80.

<sup>5</sup> FLA. STAT. §403.061(27) (2008).

<sup>6</sup> *Id.* §403.061(34).

<sup>7</sup> *Id.* §403.804.

<sup>8</sup> FLA. ADMIN. CODE r. 62-4.242(2) (2008).

<sup>9</sup> *Id.* r. 62-302.700.

<sup>10</sup> Personal Communication, Janet Klemm, Outstanding Florida Waters Program, Florida Department of Environmental Protection. *See also*, FLA. ADMIN. CODE r. 62-302.700(9)(a)-(h) (2008).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* r. 62-302.700(4).

<sup>13</sup> *Id.* r. 62-302.700(8).

<sup>14</sup> Personal Communication, Janet Klemm, *supra* note 10.

<sup>15</sup> *Id.* *See also*, FLA. ADMIN. CODE, r. 62-302.700(9)(a)-(h) (2008).

<sup>16</sup> Personal Communication, Janet Klemm, *supra* note 10.

years.<sup>17</sup> FDEP has requested comments and suggestions from other state and federal management agencies regarding the update of the rule.<sup>18</sup>

“Special Waters” are designated through the same rulemaking process as Managed Areas OFWs.<sup>19</sup> This process includes the submission of a petition by any person, public workshops, a staff investigation and report, and an ERC public hearing.<sup>20</sup> Specifically regarding Special Waters OFWs, however, the ERC must find that the waters have “exceptional recreational or ecological significance” and that the “environmental, social, and economic benefits of the designation outweigh the environmental, social, and economic costs.”<sup>21</sup> The petitions submitted to FDEP contain the legal boundary description of the specific area of water that the petitioner wishes to have designated as an OFW.<sup>22</sup> Unless these boundaries are changed through the petition process, this description serves as the legal boundary for these Special Waters OFWs.<sup>23</sup> Some descriptions are also found within the actual rule itself, as seen with the Florida Keys Special Water listing, in which the OFW boundary extends to Florida’s territorial limit.<sup>24</sup>

There are currently over 350 OFWs, most of which are Managed Areas OFWs.<sup>25</sup> The forty-one Special Waters OFWs include all or portions of Florida’s 1700 rivers, several lakes and lake chains, several estuarine areas, and the Florida Keys.<sup>26</sup> (See Table 1). Designation of Special Waters OFWs by petition has proved to be controversial in many cases. No data exists on the number of Special Waters petitions that have failed to reach regulatory fruition. The Weekiwachee Riverine and Spring System was the last Special Water designation, which occurred in 2003.<sup>27</sup>

**Table 1: The 41 Special Waters OFWs<sup>28</sup>**

Apalachicola River	Myakka River (lower part)
Aucilla River	Ochlocknee River
Blackwater River	Oklawaha River
Butler Chain of Lakes	Orange Lake, River Styx, and Cross Creek
Chassahowitzka River System	Perdido River
Chipola River	Rainbow River
Choctawhatchee River	St. Marks River

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> FLA. ADMIN. CODE, r. 62-302.700(4) (2008).

<sup>20</sup> *Id.* r. 62-302.700(4)-(5).

<sup>21</sup> *Id.* r. 62-302.700(5).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* r. 62-302.700(9)(a)-(h) (2008).

<sup>26</sup> Florida Department of Protection, *Fact Sheet about Outstanding Florida Waters*, <http://www.dep.state.fl.us/WATER/wqssp/ofwfs.htm#designation> (last visited Feb. 15, 2010).

<sup>27</sup> FLA. ADMIN. CODE, r. 62-302.700(9)(i)(38) (2008).

<sup>28</sup> Table copied from FDEP, *supra* note 26. The actual rule language designating these water bodies is more complete. For further information, refer to Fla. Admin. Code r. 62-302.700(9)(i).

Clermont Chain of Lakes	Santa Fe River System
Crooked Lake	Sarasota Bay Estuarine System
Crystal River	Shoal River
Econlockhatchee River System	Silver River
Estero Bay Tributaries	Spruce Creek
Florida Keys	Suwanee River
Hillsborough River	Tomoka River
Homosassa River System	Wacissa River
Kingsley Lake & Black Creek (North Fork)	Wakulla River
Lake Disston	Weekiwachee Riverine System
Lake Powell	Wekiva River
Lemon Bay Estuarine System	Wiggins Pass Estuarine System
Little Manatee River	Withlacoochee Riverine and Lake System
Lochloosa Lake	

To begin the OFW rulemaking process, an interested party must submit a petition to FDEP requesting the water be listed in r. 62-302.700(9), Florida Administrative Code.<sup>29</sup> Aside from the practical requirement for a boundary description, there are few guidelines or specific requirements as to what must be included in a petition. Petitions must, however, include information and facts to support a finding of “ecological significance” or “recreational significance” as defined by § 120.54(7), Florida Statutes. Moreover, because there are requirements for the FDEP to follow during the rulemaking process (such as an economic analysis and public workshop), it is in the best interest of the petition to include information that will be useful to FDEP in accomplishing these tasks.

The submission of the petition triggers the OFW rulemaking requirements listed in r. 62-302.700, Florida Administrative Code.<sup>30</sup> If FDEP chooses to go forward with the rulemaking, it must conduct at least one fact-finding workshop in the geographic area that would be most affected by the OFW designation.<sup>31</sup> Prior to this workshop, the FDEP Secretary must notify the local governments and legislators whose jurisdictions include the water body at issue in writing a minimum of 60 days prior to the workshop.<sup>32</sup> In addition, a prominent public notice must be placed in a general circulation newspaper of the affected area at least 60 days prior to the workshop.<sup>33</sup> The FDEP is required to keep a rulemaking record.<sup>34</sup> The record should include the initial petition for rulemaking, an economic impact analysis, and the material covered at the public fact-finding workshop conducted by FDEP.

The FDEP is required to complete an economic impact analysis regarding the likely effects of the OFW designation on growth and development in the surrounding area.<sup>35</sup> The economic impact analysis is drafted based on data gathered at the public workshops, by the

<sup>29</sup> FLA. STAT. §120.54(7) (2008).

<sup>30</sup> FLA. ADMIN. CODE r. 62-302.700(4) (2008). As an overall requirement, the rulemaking procedures listed in Chapter 120, Florida Statutes, must also be followed throughout the process.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> FLA. STAT. §120.54(8) (2008).

<sup>35</sup> *Id.*

FDEP's professional staff, and from the petitioner. The FDEP takes a multi-faceted approach when preparing an economic impact assessment. In addition to traditional economic indicators, the FDEP examines ecological values and a variety of sectors within the local economy including recreation and small businesses. The goal of the analysis is to provide the ERC with enough information to weigh the economic costs and benefits of the proposed designation.

The Department's economic impact analysis for the Sarasota Bay and Lemon Bay OFW designations illustrates this multi-faceted approach.<sup>36</sup> While at the time of designation, Sarasota Bay had a high economic value because of recreational fishing<sup>37</sup> and other recreational activities,<sup>38</sup> Lemon Bay had a higher ecological value.<sup>39</sup> In both cases, the Department concluded that the additional protection that an OFW designation would offer to these areas would safeguard their value, which offset the potential costs of compliance to local business and/or industry.<sup>40</sup> The Department did note, however, that the water quality of Sarasota Bay and Lemon Bay prior to designation was relatively high, and that they were unaware of any dischargers who would be adversely affected.<sup>41</sup>

Upon the completion of the workshop and the economic impact statement, the decision as to OFW designation is directed to the Environmental Regulation Commission, as discussed above.<sup>42</sup> To designate a water body as an OFW, the ERC must make two determinations at a public hearing after reviewing the relevant facts from the record.<sup>43</sup> First, the ERC must determine that the water body has exceptional recreational *or* ecological significance.<sup>44</sup> Second, the ERC must determine that the environmental, social, and economic benefits of the designation outweigh the environmental, social, and economic costs.<sup>45</sup> Once the ERC makes an affirmative determination as to both of these requirements, the petition for rulemaking is approved and the water body becomes listed under r. 62-302.700(9), Florida Administrative Code.

### III. Regulatory Significance of OFW Designation

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<sup>36</sup> DEPARTMENT OF ENVIRONMENTAL REGULATION, REPORT TO THE ENVIRONMENTAL REGULATION COMMISSION, PROPOSED DESIGNATION OF SARASOTA BAY AND LEMON BAY AS OUTSTANDING FLORIDA WATERS, Appendix L: Economic Impact Statement (1986).

<sup>37</sup> *Id.* The total annual economic value of recreational fishing in the Sarasota Bay area was estimated at \$38,001,471 in 1983, at the time of the OFW designation.

<sup>38</sup> *Id.* The total annual economic value of all other recreational activities in the Sarasota Bay was estimated to be \$9,949,223 (in 1983 dollars).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Regulated industries that participate in the rulemaking process often provide detailed testimonial evidence on the economic impact of OFW designation from their perspective, which the Department must take into account. This can lead to negotiated solutions where shoreline segments are removed from OFW consideration.

<sup>42</sup> FLA. ADMIN. CODE, r. 62-302.700(5) (2008).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

The key regulatory feature of an OFW designation is its “antidegradation” standard. This stricter standard increases agency scrutiny of permits for activities within OFWs and increases the burden on applicants to demonstrate compliance. However, not all regulated activities are subject to OFW review and agency application of the standard of review for OFWs, especially the so-called “clearly in the public interest” test required for certain permitted activities, has been problematic. Moreover, the role of mitigation in meeting this standard for OFWs has not been adequately distinguished from non-OFW water bodies.

#### *A. Environmental Resource Permits*

The Environmental Resource Permit (ERP) Program was established in 1994 to regulate activities involving the alteration of surface water flows.<sup>46</sup> Section 373.103(1), Florida Statutes, authorizes FDEP to administer and enforce the permitting systems established in the Water Resources Chapter of the Florida Statutes. According to FDEP:

[The ERP Program] regulates the construction, alteration, maintenance, removal, modification, and operation of all activities in uplands, wetlands and other surface waters (whether publicly or privately-owned) that will alter, divert, impede, or otherwise change the flow of surface waters. That includes dredging and filling in most surface waters and wetlands (whether isolated or connected to other waters). Example activities that the program covers are the construction of new buildings, roadways, and parking areas that increase impervious surfaces and stormwater runoff. The program is designed to ensure that such activities do not degrade water quality (from the discharge of untreated stormwater runoff) or cause flooding (from a change in off-site runoff characteristics). In addition, the ERP program regulates the type of dredging and filling activities reviewed under the former wetland resource (dredge and fill) permitting program, such as the dredging of navigation channels, filling of wetlands, and the construction of docks and seawalls. This ensures that water quality is not degraded, and that wetlands and other surface waters continue to provide a productive habitat for fish and wildlife.<sup>47</sup>

ERP applications are processed by either FDEP or one of the five state water management districts (WMD), in accordance with the division of responsibilities specified in the operating agreements between these entities.<sup>48</sup> Within most WMDs, the FDEP is responsible for reviewing permit applications for the following activities:

- Solid waste, hazardous waste, domestic waste, and industrial waste facilities;
- Mining (except borrow pits that do not involve on-site material grading or sorting);
- Power plants, transmission and communication cables and lines, and natural gas and petroleum exploration, production, and distribution lines and facilities;

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<sup>46</sup> 1994 FLA. LAWS volume I part II, s. 4, ch. 94-122.

<sup>47</sup> Fact Sheet, Florida Department of Environmental Protection, *Environmental Resource Permit Program Fact Sheet: Purpose and History* (updated Oct. 1, 2007), available at [http://www.dep.state.fl.us/water/wetlands/docs/erp/ERP\\_Fact\\_Sheet.pdf](http://www.dep.state.fl.us/water/wetlands/docs/erp/ERP_Fact_Sheet.pdf). Statutory authority for ERPs is found in Fla. Stat. §373.4144 (2008).

<sup>48</sup> *Id.* See also, FLA. STAT. §373.4141 (2008).



- Docking facilities and attendant structures and dredging that are not part of a larger plan of residential or commercial development;
- Navigational dredging conducted by governmental entities, except when part of a larger project that a WMD has the responsibility to permit;
- Systems serving only one single-family dwelling unit or residential unit not part of a larger common plan of development;
- Systems located in whole or in part seaward of the coastal construction control line;
- Seaports; and
- Smaller, separate water-related activities not part of a larger plan of development (such as boat ramps, mooring buoys, and artificial reefs).<sup>49</sup>

All other proposed activities are reviewed by the WMDs in which the activity would be located.<sup>50</sup>

The ERP program is in effect throughout the state except for the Florida panhandle, which is within the limits of the Northwest Florida Water Management District (NFWFMD). In the NFWFMD, the Wetland Resource Permitting (WRP) Program, which regulates dredged and fill activities only, is still in effect.<sup>51</sup> However, NFWFMD ERP rulemaking was authorized through amendments to § 373.4145, Florida Statutes, in the 2006 legislative session to develop rules addressing stormwater quality and quantity. Rules for the NFWFMD ERP stormwater program became effective October 1, 2007.<sup>52</sup> The remaining components of the comprehensive ERP program, referred to as “Phase 2,” manages surface waters including isolated wetlands.<sup>53</sup> These components have been proposed by FDEP for the NFWFMD and are currently awaiting approval.<sup>54</sup>

## 1. ERP Standards and Criteria for OFWs

The regulation of ERP activities is addressed by the Florida Statutes and the Florida Administrative Code. Chapter 373 Part IV, Florida Statutes, addresses the “Management and Storage of Surface Waters.” Upon review of a standard ERP permit application, seven criteria listed in § 373.414(1)(a), Florida Statutes, must be analyzed, and the proposed activity must be found to be “not contrary to the public interest” in order for a permit to be issued. However, if the regulated activity is proposed within an OFW or will significantly degrade an OFW, the applicant has to meet a heightened standard by providing a “reasonable assurance that the proposed activity will be clearly in the public interest.”<sup>55</sup>

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<sup>49</sup> Florida Department of Environmental Protection, Environmental Resource Permitting (ERP) and Sovereign Submerged Lands (SSL) Rules: Florida’s Water Management Districts, <http://www.dep.state.fl.us/water/wetlands/erp/wmd.htm> (last visited February 26, 2010).

<sup>50</sup> *Id.*

<sup>51</sup> FLA. STAT. §§ 373.4145 and 403.811 (2008).

<sup>52</sup> *See*, FLA. ADMIN. CODE, ch. 62-346 (2008).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Copies of the current draft rule and amendments are available at [http://www.dep.state.fl.us/water/wetlands/erp/rules/draft\\_nw.htm](http://www.dep.state.fl.us/water/wetlands/erp/rules/draft_nw.htm).

<sup>55</sup> FLA. STAT. § 373.414(1) (2008).

The Florida Legislature requires the DEP to consider a number of additional factors under both the OFW and non-OFW public interest test. The seven additional factors are:

- Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
- Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
- Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
- Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the activity will be of a temporary or permanent nature;
- Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of § 267.061; and
- The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>56</sup>

However, the statute does not offer further guidance in the application of these factors as between the two tests. It appears that regardless of which test is applied, the weight be accorded each of these factors remains a question of law for the agency or court to decide.<sup>57</sup>

As a general note, a “de minimus” exemption is available for all activities governed by chapter 62 of the Florida Administrative Code. Structural activities that will not change “the quality, nature or quantity of air and water contaminant emissions or discharges or which will not cause pollution” are allowed without a permit. Additionally, r. 62-4.040, Florida Administrative Code, exempts existing or proposed installations which FDEP determines “does not or will not cause the issuance of air or water contaminants in sufficient quantity.”<sup>58</sup>

If an applicant is unable to meet either public interest standard, the FDEP or the governing board of the WMD is to consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. These may include onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from permitted mitigation banks.<sup>59</sup> The nature or location of the mitigation to be considered appears to be the same whether the activity is proposed in a non-OFW or an OFW.

## **2. Antidegradation Policy**

As required by the federal Clean Water Act, Florida has adopted an antidegradation policy to prevent the further degradation of the state’s waters. In accordance with its regulations,

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<sup>56</sup> *Id.* § 373.414(a).

<sup>57</sup> *Florida Power Corporation v. Fla. Dept. Env. Prot.*, 638 So. 2d 545, 559-60 (Fla. Dist. Ct. App. 1994) (affirming agency final order where agency head rebalanced the findings of fact to determine whether a proposed activity satisfied the public interest test).

<sup>58</sup> FLA. ADMIN. CODE r. 62-4.040(1)(b) (2008).

<sup>59</sup> FLA. STAT. § 373.414(1)(b) (2008).

the DEP shall refused to permit any discharge that “will reduce the quality of the receiving waters below the classification established for them.”<sup>60</sup> If a proposed discharge will not reduce the quality of the receiving water below its classification, the DEP “shall permit the discharge if such degradation is necessary or desirable under federal standards and under circumstances which are clearly in the public interest, and if all other Department requirements are met.”<sup>61</sup>

The antidegradation standard does not apply to “any existing activity permitted, exempted, or for which a completed application for permit was filed, on or before the effective date of the [OFW] designation.”<sup>62</sup> It also does not apply “to any renewal of a Department permit where there is no modification of the activity which would necessitate a permit review. Furthermore, “any activity that is exempted from permit programs administered by the Department is not subject to the requirements” of OFW review.<sup>63</sup>

In determining whether a proposed discharge which results in water quality degradation “is necessary or desirable” or “clearly in the public interest,” the DEP must consider and balance the following factors:

- Whether the proposed project is important to and is beneficial to the public health, safety, or welfare;
- Whether the proposed discharge will adversely affect conservation of fish and wildlife, including endangered or threatened species, or their habitats; and
- Whether the proposed discharge will adversely affect the fishing or water-based recreational values or marine productivity in the vicinity of the proposed discharge; and
- Whether the proposed discharge is consistent with any applicable Surface Water Improvement and Management Plan that has been adopted by a Water Management District and approved by the Department.<sup>64</sup>

In addition, the Florida antidegradation policy provides that no permit or water quality certification may be issued for an activity in an OFW unless the proposed activity of discharge is clearly in the public interest and one of two additional factors are met.<sup>65</sup> Either (1) a permit was issued or application received on or before the date of OFW designation or (2) the existing ambient water quality within the OFW will not be lowered as a result of the proposed activity or discharge. With respect to the second factor, a lowering of water quality may be allowed on a temporary basis during construction within a restricted mixing zone approved for the FDEP, if water quality criteria would not be violated outside the restricted mixing zone.<sup>66</sup>

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<sup>60</sup> FLA. ADMIN. CODE r. 62-302.300(16) (2008).

<sup>61</sup> *Id.* r. 62-302.300(17).

<sup>62</sup> *Id.* r. 62-242(2)(d).

<sup>63</sup> *Id.* r. 62-4.242(2)(c).

<sup>64</sup> *Id.* r. 62-4.242(1)(a).

<sup>65</sup> *Id.* r. 62-4.242(2).

<sup>66</sup> *Id.* r. 62-4.242(2)(a)(ii)(1) – (2).

“Existing ambient water quality” is “the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application.”<sup>67</sup> The term “water quality” itself is not defined by Florida law. Water quality standards and water quality criteria are defined terms that suggest the presence of a rule-based list that limits what factors may be considered.<sup>68</sup> Pollution is defined in a general way,<sup>69</sup> but it appears to be operationalized in the context of violations of water quality standards.<sup>70</sup> As to the specific requirements for the establishment of data that are baseline water quality, the Department has indicated that any water quality documentation that will help characterize the water is helpful.<sup>71</sup> The absence of site-specific water quality data for rule-based standards and criteria may make enforcement of the OFW antidegradation standard problematic, and the extent to which unlisted contaminants compromise “existing ambient water quality” as a matter of law has not been addressed.

In limited circumstances, the FDEP may permit activities and discharges in OFWs which allow for or enhance public use, maintain facilities in existence prior to the OFW designation date, or maintain facilities permitted after adoption of the designation.<sup>72</sup> Such activities may be permitted only if the activity meets the “clearly in the public interest” test and it meets (1) one of the two additional factors outlined above or (2) management practices and suitable technology approved by the Department are implemented for all stationary installations including those created for drainage, flood control, or by dredging or filling and there is no alternative for the proposed project.<sup>73</sup>

### 3. Mixing Zones

An OFW designation also alters the FDEP’s authority with respect to mixing zones, which the agency is authorized to establish in certain circumstances.<sup>74</sup> Mixing zones are areas where discharges may be measured further away from the point source which allows some dilution (and hence water quality degradation) to take place in the receiving water before measurement.<sup>75</sup> In general, mixing zones are prohibited in OFWs.<sup>76</sup> Some exceptions apply, however. For example, mixing zones are permitted for sources receiving permits prior to either April 1, 1982 or the designation of the OFW (whichever is earlier), blowdown from new power plants that are certified pursuant to the Florida Electrical Power Plant Siting Act, and discharges of water that are necessary for water management purposes and have been approved by the governing board of a water management district (and the FDEP

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<sup>67</sup> *Id.* r. 62-4.242(2)(c).

<sup>68</sup> *Id.* r. 62-302.200(31) - (32).

<sup>69</sup> *Id.* r. 62-302.200(15) (defining pollution generally).

<sup>70</sup> *Id.* r. 62-302.300(13) (“Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed ...”).

<sup>71</sup> Personal Communication, Stacey Crowley, Office of General Counsel, Florida Department of Environmental Protection, and Janet Klemm, *supra* note 10.

<sup>72</sup> FLA. ADMIN. CODE r. 62-4.242(2)(b) (2008).

<sup>73</sup> *Id.*

<sup>74</sup> FLA. STAT. § 403.061(11) (2008).

<sup>75</sup> FLA. ADMIN. CODE, r. 62-302.200(39) (2008).

<sup>76</sup> FLA. STAT. § 403.061(11)(b) (2008).

Secretary if required by law).<sup>77</sup> In addition, mixing zones are allowed for the discharge of demineralization concentrate which is permissible under and meets the criteria of § 403.0882, Florida Statutes, if the proposed discharge is found to be clearly in the public interest.<sup>78</sup> The rationale for the adding the “clearly in the public interest” requirement for demineralization concentrate (discharge from desalinization treatment facilities) is unclear, since ERP permits for activities in OFWs must meet that requirement anyway.

## *B. Wastewater Permits*

### **1. Wastewater Discharges**

Under Florida law, no wastes are to be discharged to any waters of the state without first being given the degree of treatment necessary to protect the beneficial uses of such water.<sup>79</sup> A wastewater permit issued by the FDEP is required for certain construction activities and operations associated with wastewater facilities or activities.<sup>80</sup> These activities must further conform to a variety of requirements listed in r. 40B-4.2030(8)(d)-(m), Florida Administrative Code.

For purposes of permitting, wastewater facilities or activities are categorized as either industrial or domestic based on the type of wastewater the facility handles.<sup>81</sup> Domestic wastewater is wastewater from dwellings, business buildings, institutions, and the like, commonly referred to as sanitary wastewater or sewage.<sup>82</sup> A permit is required for the construction, modification, or operation of domestic wastewater treatment and effluent disposal or reuse facilities.<sup>83</sup> The requirements for the treatment and reuse or disposal of domestic wastewater are set forth in §§ 403.085 and 403.086, Florida Statutes. Minimally, treatment must comply with Technology-based Effluent Limitations<sup>84</sup> and in certain cases, Water Quality-based Effluent Limitations.<sup>85</sup> Activities excluded from domestic wastewater permitting requirements are enumerated in r. 62-600.120, Florida Administrative Code.

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<sup>77</sup> *Id.* at § 403.061(b)(1) – (3).

<sup>78</sup> *Id.* §403.061(11)(b)(1)(4). The blowdown exemption to r. 62-4.242(2), Florida Administrative Code, permit requirements addresses blowdown from a recirculated cooling water system of a steam electrical generating plant in an OFW or significantly degrades an OFW. The FDEP considers issuing a permit for such an activity if one of two standards are met. First, if at the point of discharge, the discharge follows the limitations of r. 62-302.520(4), which stipulate the monthly and maximum temperature limits. Second, a mixing zone is established which follows the requirements of r. 62-302.520(6)(b), ensuring protection of species relying on the OFW, as long as the establishment also considers the recreational and/or ecological significance of the OFW, and the discharge meets the requirements of r. 62-302.520(4) at the boundary of the mixing zone.

<sup>79</sup> FLA. STAT. § 403.021(2) (2008).

<sup>80</sup> FLA. ADMIN. CODE, r. 62-620.310(1) (2008). Section 403.051(2)(a), Florida Statutes, requires that any Department planning, design, construction, modification, or operating standards, criteria, and requirements for wastewater facilities be developed as a rule.

<sup>81</sup> FLA. STAT. §367.021(5) (2008).

<sup>82</sup> *Id.* §367.021(5); FLA. ADMIN. CODE, r. 62-600.200(25) (2008).

<sup>83</sup> *Id.* r. 62-600.700(1).

<sup>84</sup> *Id.* r. 62-600.420.

<sup>85</sup> *Id.* r. 62-600.430.

All wastewater that is not defined as domestic wastewater is considered industrial wastewater.<sup>86</sup> Sources of industrial wastewater include large and small facilities and activities such as manufacturing, commercial businesses, mining, agricultural production and processing, and wastewater discharge from cleanup of petroleum and chemical contaminated sites.<sup>87</sup> There is a general permit for the specific activities categorized as having industrial, as opposed to domestic, wastewater.<sup>88</sup> Effluent limitations for industrial wastewater discharges are addressed in rule 62-660.400.

For domestic and industrial wastewater discharges, the public interest test outlined above applies as well.<sup>89</sup> This means that in applying for a domestic or industrial wastewater permit, the applicant must show that the proposed activity is not contrary to the public interest, or in the case of an OFW, that the activity is clearly in the public interest.

## 2. General and Generic Permits in OFWs

The FDEP and WMDs also issue “noticed general permits” for certain types of facilities or activities that have minimal adverse environmental impact when performed in accordance with specific requirements and practices.<sup>90</sup> Noticed general permits are considered “permits by rule” which means that they are issued upon adoption as a rule pursuant to Chapter 120, Florida Statutes.<sup>91</sup> Rule 62-34.900, Florida Administrative Code, sets forth the general policies and procedures for the issuance of noticed general permits. Thirty-six activities are currently permitted under this rule.

“Generic permits” are issued by the Department as an alternative to individual permits to regulate a particular category of wastewater facilities or activities. They are also permits by rule.<sup>92</sup> Generic permits may only be issued if they all: (a) involve the same or substantially similar types of operations; (b) discharge the same types of wastes or engage in the same types of residuals or industrial sludge use or disposal practices; (c) require the same effluent limitations, operating conditions, or standards for residuals or industrial sludge use or disposal; and (d) require the same or similar monitoring.<sup>93</sup>

With respect to general and generic permits, neither the statutes nor implementing rules categorically treat OFWs differently. All anti-degradation standards must be followed, including those concerning OFWs.<sup>94</sup> Some noticed general permits, however, do give special treatment to OFWs.<sup>95</sup> More than thirty noticed general permits are listed for FDEP in the

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<sup>86</sup> FLA. STAT. §367.021(8) (2008).

<sup>87</sup> Florida Department of Environmental Protection, Wastewater Permitting, <http://www.dep.state.fl.us/water/wastewater/permitting.htm> (last visited Feb. 15, 2010).

<sup>88</sup> FLA. ADMIN. CODE rules 62-660.801 - .806, 62-660.820 - .821 (2008).

<sup>89</sup> *Id.* r. 62-4.242(1)(c)-(d).

<sup>90</sup> FLA. STAT. §403.814(1) (2008).

<sup>91</sup> *Id.* §403.814; FLA. ADMIN. CODE, r. 62-620.705(1) (2008).

<sup>92</sup> *Id.* r. 62-620.710(1).

<sup>93</sup> *Id.* r. 62-620.710(2).

<sup>94</sup> *Id.* r. 62-341.215.

<sup>95</sup> See e.g., *id.* r. 62-341.447(2)(e), General Permit to the Florida Department of Transportation, Counties, and Municipalities for Minor Activities Within Existing Rights-of-Way or Easements: “This general permit shall not apply to ditch construction in Class I or Class II surface waters,

Florida Administrative Code.<sup>96</sup> Fifteen of those specifically mention OFWs,<sup>97</sup> although ten simply state that the particular permitted activity is prohibited in OFWs.<sup>98</sup> Some Water Management Districts also have general permit rules that specifically mention OFWs.<sup>99</sup> Also, certain permits under FDEP and the Southwest Florida Water Management District require that permit applications specify if the activity will take place in an OFW.<sup>100</sup>

### C. Stormwater Management

Stormwater management is regulated by a number of programs within the FDEP, including Florida's National Pollutant Discharge Elimination System (NPDES) program (as authorized by the Federal Clean Water Act),<sup>101</sup> and the ERP program.<sup>102</sup> Stormwater management activities require ERP permits.<sup>103</sup> Rule 62-25.025, Florida Administrative Code, regulates stormwater management in OFWs.

A construction permit for a new stormwater discharge facility may only be issued by the FDEP if the application provides reasonable assurance that "the construction, expansion, modification, operation, or activity of the stormwater discharge facility will not discharge, emit, or cause pollution in contravention of Department standards, rules or regulations."<sup>104</sup> Reasonable assurance is presumed if the facility design will provide treatment equivalent to retention (or detention with filtration) of the runoff from the first one inch of rainfall, or first one-half inch if the drainage areas are less than 100 acres.<sup>105</sup> Facilities discharging directly into OFWs need to provide an additional level of stormwater treatment "equal to fifty percent of the treatment criteria."<sup>106</sup>

Anyone who owns or has authorization to use a wetland for stormwater treatment must obtain a wetlands stormwater discharge facility permit from the FDEP.<sup>107</sup> Wetlands stormwater discharge facilities must also provide treatment of runoff from the first one inch of rainfall (or the first one-half inch of runoff for drainage areas less than 100 acres).<sup>108</sup> As with the other stormwater regulations, wetland stormwater facilities directly discharging into OFWs are required to comply with r. 62-25.025(9), Florida Administrative Code.

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Outstanding National Resource Waters or waters designated as Outstanding Florida Waters."

<sup>96</sup> See, *id.*, ch. 62-341.

<sup>97</sup> See, *id.*

<sup>98</sup> *Id.*

<sup>99</sup> The South Florida Water Management District: FLA. ADMIN. CODE r. 40E-4.301; the Suwannee River Water Management District: FLA. ADMIN. CODE, r. 40B-400.051 and r. 40B-400.215; the Southwest Florida Water Management District: FLA. ADMIN. CODE, r. 40D-1.603 and r. 40D-400.500.

<sup>100</sup> FLA. ADMIN. CODE, r. 40D-1.603(11) and ch. 62-341 (2008).

<sup>101</sup> FLA. STAT. §403.0885 (2008), FLA. ADMIN. CODE r. 62-620.100 (2008), 33 U.S.C. §1342 (2008).

<sup>102</sup> FLA. ADMIN. CODE, r. 62-40.431(3) (2008).

<sup>103</sup> FLA. STAT. §§ 373.413(2), 373.416, 403.812 (2008).

<sup>104</sup> FLA. ADMIN. CODE 62-25.040(4) (2008).

<sup>105</sup> *Id.* r. 62-25.040(5).

<sup>106</sup> *Id.* r. 62-25.025(9).

<sup>107</sup> *Id.* r. 62-25.042(3).

<sup>108</sup> *Id.* r. 62-25.042(6)(b).

#### *D. Docks, Piers, Docking Facilities and Marinas*

Permit applicants seeking to construct a dock generally apply for an ERP permit. However, certain types of dock and docking facilities are exempt from FDEP permitting. For non-OFW waters, permits are only required for docks over 1000 square feet. In an OFW, the exemption is reduced to 500 square feet.<sup>109</sup> Four separate requirements need to be met to qualify for these exemptions. First, the dock should be used for recreational or noncommercial activities – no commercial activities should take place there.<sup>110</sup> Second, it should use pilings as support, including floating docks, so that the facility's installation does not involve unnecessary filling or dredging.<sup>111</sup> Third, the facility should not substantially impede the flow of water, create a navigational hazard, or cause water quality violations (which include OFW standards).<sup>112</sup> Finally, the dock should be the sole dock along the shoreline for a minimum distance of 65 feet.<sup>113</sup> If the individual parcel of land is less than 65 feet in length along the shoreline, then one dock per parcel will be allowed. In the case of multi-family developments, complexes, or other facilities using the proposed private dock, those structures are treated as one parcel of land, regardless of legal ownership divisions or control of that property.

In Florida, “any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county” must undergo “development-of-regional-impact” review by the Florida Department of Community Affairs.<sup>114</sup> Development of regional impact review is required for waterport or marina construction, unless the facility is designed for (1) the wet storage or mooring for less than 150 watercraft used exclusively for sport, pleasure, or commercial fishing; (2) the dry storage of less than 200 watercraft used exclusively for sport, pleasure, or commercial fishing; or (3) the wet or dry storage or mooring of less than 400 watercraft used exclusively for sport, pleasure, or commercial fishing with all necessary approvals and located outside OFW and Class II waters.<sup>115</sup> In addition, the FDEP must determine “that the marina is located so that it will not adversely impact Outstanding Florida Waters or Class II waters and will not contribute boat traffic in a manner that will have an adverse impact on an area known to be, or likely to be, frequented by manatees.”<sup>116</sup>

#### *E. Other Activities*

Although an ERP permit is not required for “the installation, removal, and replacement of utility poles that support telephone or communication cable lines, or electric distribution lines of 35 kilovolts or less,”<sup>117</sup> this exemption does not apply to forested wetlands located within 550 feet of the mean high water line of an OFW.<sup>118</sup> In addition, permit exemptions

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<sup>109</sup> *Id.* r. 40B-400.051(2)(g).

<sup>110</sup> *Id.* r. 40B-400.051(2)(g)(1).

<sup>111</sup> *Id.* r. 40B-400.051(2)(g)(2).

<sup>112</sup> *Id.* r. 40B-400.051(2)(g)(3).

<sup>113</sup> *Id.* r. 40B-400.051(2)(g)(4).

<sup>114</sup> FLA. STAT. § 380.06(1) (2008).

<sup>115</sup> FLA. ADMIN. CODE r. 28-24.034(1) (2008).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* r. 40B-400.051(2)(v).

<sup>118</sup> *Id.* r. 40B-400.051(2)(v)(4).



for treatment or disposal systems do not affect application of state water quality standards, including those for OFWs.<sup>119</sup>

#### *F. Best Management Practices for Silviculture Operations*

The maintenance of Florida's water quality standards are required during all silviculture operations in the state.<sup>120</sup> In order to ensure that this goal is reached, the State of Florida has developed and adopted a Best Management Practices (BMPs) manual for silviculture operations and management in order to address these impacts.<sup>121</sup> Silviculture operations are required to utilize the "Silvicultural Best Management Practices Manual," last revised in 2008.<sup>122</sup> These BMPs were developed specifically for silviculture and are intended to be applied on all such operations in the state regardless of whether or not the operation is subject to other regulatory standards or permits.<sup>123</sup> However, these BMPs are not intended for use during tree removal or land clearing operations associated with development or other activities that have non-forestry objectives.<sup>124</sup>

Silviculture operations in Florida are presumed to comply with state water quality standards as long as they provide a notice of intent to implement BMPs on their property and follow the other requirements. These requirements include the maintenance of documentation that verifies the implementation and maintenance of BMPs on the subject property.<sup>125</sup>

Silviculture activities in Florida that are not exempted due to this presumption of compliance must seek and obtain a permit from the appropriate local, state, and/or federal government agency prior to conducting the operation.<sup>126</sup> Rule 40C-400.500, Florida Administrative Code, dictates when the acquisition of a permit is required for construction, operation, maintenance, alteration, abandonment, or removal of minor silviculture surface water management systems.<sup>127</sup> For instance, certain activities, such as culvert placement during normal forestry operations, require the landowner to apply for a permit from the appropriate water management district.<sup>128</sup>

The FDEP may establish Special Management Zones (SMZ), specific areas associated with a stream, lake, or other waterbody which are designated for more stringent protection during silviculture operations.<sup>129</sup> The purpose of an SMZ is to protect water quality by

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<sup>119</sup> *Id.* r. 40B-400.051(3)(f).

<sup>120</sup> FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, SILVICULTURE BEST MANAGEMENT PRACTICES MANUAL, 2 (2003).

<sup>121</sup> *Id.* at 1.

<sup>122</sup> FLA. ADMIN. CODE, r. 40C-400 (5)(g) (2008).

<sup>123</sup> Silviculture BMP Manual, *supra* note 125.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> FLA. ADMIN. CODE, r. 40C-400 (2008).

<sup>128</sup> *See*, THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, APPLICANT'S HANDBOOK FOR THE MANAGEMENT AND STORAGE OF SURFACE WATERS, *available at* <http://www.sjrwm.com/handbooks/msswhandbook.html> (last visited Feb. 26, 2010).

<sup>129</sup> Silviculture BMP Manual, *supra* note 120, at 3.

minimizing the amount of sediment, nutrients, debris, chemicals, and water temperature changes that can have a negative affect on water quality.<sup>130</sup> Within the SMZ, there are two sub-zones: a Primary Zone with timber-harvesting restrictions and a Secondary Zone which only imposes operational restrictions.<sup>131</sup>

The Primary Zone is meant to afford water quality protection to the contiguous water bodies by maintaining shade along the banks, minimizing the disturbance to ground cover vegetation, and reducing leaf litter impacts.<sup>132</sup> The Primary Zone also provides essential wildlife habitat values, particularly for species that need snags, cavities, tall trees, and other characteristics that are often associated with minimally impacted forest conditions.<sup>133</sup> The width of the Primary Zone is dictated by the width of the water body and the water body's type/classification.<sup>134</sup> Water bodies less than 20 feet wide have a Primary Zone that is 35 feet wide on each side.<sup>135</sup> Water bodies whose width is between 20 and 40 feet wide have a Primary Zone that is 75 feet on each side.<sup>136</sup> Water bodies whose width is 40 ft or wider have a Primary Zone that is 200 feet wide per side.<sup>137</sup>

An OFW designation has the effect of expanding the Primary Zone to 200 feet from the shoreline, even if the width of the waterbody is less than 40 feet.<sup>138</sup> This expansion of the primary zone can have a more significant effect on silviculture activities on small tributaries, braided streams, and headwaters where Primary Zones may overlap, substantially increasing the area subject to the Zone's restrictions.

Within the Primary Zone clearcut harvesting is prohibited, except under special conditions. These special conditions are:

- No individual tract or tracts-in-contiguous-ownership may be required to designate more than 10% of the total tract area as Primary Zone;
- No Primary Zone may be required beyond 35 feet from a perennial water body or 50 feet from any OFW, Outstanding Natural Resource Water (ONRW), or Class I Water, where the trees have been traditionally managed for the purpose of pine timber production and where there is an existing predominance of pine trees with no significant component of large sized or merchantable hardwood trees;
- Where the above do not apply, clearcut harvesting in the Primary Zone is permissible provided that no clearcutting takes place within 35 feet of any perennial water body or within 50 feet of any OFW, ONRW, or Class I Water, and where:

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 5.

<sup>132</sup> *Id.* at 4.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 56.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 7.

- The total acreage clearcut does not exceed 25% of the area designated as Primary Zone, and the number of acres clearcut are added-on to the Primary Zone acre for acre. These additional acres added-on to the Primary Zone must be directly connected to the Primary Zone boundary within the harvest unit, may not extend out beyond that boundary more than 200 feet, and must be managed in accordance with the Primary Zone Management Criteria;
- The basal area of overstory trees within the SMZ is 30 square feet per acre or less, and other hardwood species present are of such low quality (physiologically or biologically) that total stand removal would provide a greater long-term wildlife and/or forestry benefit. However, the total area clearcut under this exception may not equal more than 10% of the Primary Zone, and any given clearcut parcel must not be greater than 500 feet in length, as measured along the stream.<sup>139</sup>

In certain circumstances, the second exemption cited above may have significant effects on the primary zone delineation. As stated, this provision exempts tracts of land that have traditionally been managed for the purpose of pine timber from being required to expand their primary zone beyond 35 feet. However, this exception also requires that “there is an existing predominance of pine trees with no significant component of large sized or merchantable hardwood trees.”<sup>140</sup> In Florida, a significant percentage of water bodies are lined with large sized or merchantable hardwoods, such as cypress that may extend beyond 35 feet. The presence of these hardwoods may therefore limit the application of OFW BMPs for silviculture adjacent of such water bodies.

The following management criteria apply in Primary Zones:

- Clearcut harvesting is always prohibited within 35 feet of all perennial waters and within 50 feet of all water bodies designated as OFW, ONRW, or Class I Waters.
- Selective harvesting may be conducted to the extent that 50% of a fully stocked stand is maintained. The residual stand should conform to the following:
  - Trees are left to maintain the approximate proportion of diameter classes and species present prior to harvesting, except oaks (other than water oaks) may be favored;
  - Repeated entry into harvested Primary Zone in short time intervals for additional harvesting is prohibited;
  - No trees are harvested in stream channels or on the immediate stream bank.
- Special emphasis should be given to the following within the Primary Zone:
  - Protection of very large and/or old trees
  - Protection of snags (dead trees) and cavity trees
  - Protection of trees where any part of the canopy overhangs the water

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<sup>139</sup> *Id.* at 105.

<sup>140</sup> *Id.*

- The following forestry activities are prohibited within the Primary Zone:
  - Mechanical site preparation;
  - Fertilization;
  - Aerial application or mist blowing of pesticides (herbicide, fungicide, insecticide);
  - Loading decks or landings and log bunching points;
  - Road construction except when crossing a water body;
  - Site preparation burning on slopes greater than 18% perennial.<sup>141</sup>

The Secondary Zone may apply as an “add-on” to the SMZ depending on certain characteristics of the site including the soil erodibility, K-factor (index representing the potential erodibility of a soil by water based on soil texture), and the slope of the site.<sup>142</sup> Depending on soil and site characteristics, the Secondary Zone may be extended up to an additional one hundred feet.<sup>143</sup>

The Secondary Zone has no timber harvesting restrictions. However, the following operational restrictions apply:

- No mechanical site preparation;
- No loading decks or landings;
- No site prep burning on slopes exceeding 18%;
- No roads except for crossings<sup>144</sup>

### *G. Submerged Lands Authorizations*

The State of Florida typically owns the lands beneath surface waters.<sup>145</sup> When this is the case, additional authorizations are required to conduct activities that are subject to permitting. This ordinarily comes in the form of a lease or “consent of use.”<sup>146</sup> ERPs and submerged lands authorizations (SLAs) are ordinarily consolidated into a single application. Activities that are to be conducted over sovereign submerged lands are subject to their own public interest standard.<sup>147</sup> For most submerged lands, this standard is the same as for non-OFW waters; the proposed activity must be “not contrary to the public

<sup>141</sup> *Id.* at 4-5.

<sup>142</sup> *Id.* at 5.

<sup>143</sup> *Id.* at 43.

<sup>144</sup> *Id.* at 5.

<sup>145</sup> FLA. STAT. §§253.001, 253.002 (2009).

<sup>146</sup> *See generally, id.* ch. 253.

<sup>147</sup> When used in the context of submerged lands authorizations, “Public interest’ means demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the Board shall consider the ultimate project and purpose to be served by said use, sale, lease, or transfer of lands or materials.” FLA. ADMIN. CODE r. 18-21.003(51)(submerged lands generally), r. 18-20.003(46) (aquatic preserves).

interest.”<sup>148</sup> However, when the proposed activity falls within one of Florida’s forty-one aquatic preserves, the standard becomes “in the public interest.”<sup>149</sup>

Rules governing submerged lands and aquatic preserves address the public interest standard differently from the rules governing OFWs. To be considered “in the public interest” for the purposes of SLAs, a balancing test is employed to determine whether the benefits of the proposed activity outweigh its costs.<sup>150</sup> The benefits and costs to be considered relate to improvements to the social, economic, and/or environmental condition of the aquatic preserve. What appears to be critical here, is that for SLAs, mitigation that merely offsets impacts may be insufficient. Whereas, if the proposed activity lies within an aquatic preserve the applicant must do more than merely offset the impacts of the activity to demonstrate the project is “in the public interest.”<sup>151</sup>

All aquatic preserves in Florida are also managed-waters OFWs.<sup>152</sup> Thus in addition to meeting the public interest test of the SLA for aquatic preserves, such activities must also meet the heightened standard of “clearly in the public interest” for permitting in OFWs. However, the OFW rules do not offer the same sort of detailed guidance through a public benefits balancing test. As a result, greater attention is paid to the role of mitigation in demonstrating that an activity is “clearly in the public interest,” but there remains little clarity as to the distinction between mitigation that satisfies the “not contrary to the public interest” test and mitigation that rises to the level of “clearly in the public interest.” Florida judicial and administrative case law has not been particularly helpful in parsing this distinction.

#### IV. Florida Case Law Addressing OFWs

Only one appellate case squarely addresses OFWs. The preponderance of judicial treatment comes from administrative decisions where administrative law judges (ALJs) review an agency action on a permit application for an activity that affects an OFW. These cases tend to be fact specific and do little to clarify the legal standards governing review of permits for activities in OFWs, particularly the crucial determination as to what constitutes “significant degradation,” and when an activity is “clearly in the public interest.”

The leading case involving an OFW remains *1800 Atlantic Developers v. Department of Environmental Regulation*, 552 So. 2d 946 (Fla. Dist. Ct. App. 1989).<sup>153</sup> In *1800 Atlantic*, the Department of Environmental Regulation (DER) (DEP’s predecessor agency) had adopted a final order to deny a dredge and fill permit on land in Key West owned by 1800

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<sup>148</sup> *Id.* r. 18-21.004(a) (“... all activities on sovereignty lands must be not contrary to the public interest, except for sales which must be in the public interest.”).

<sup>149</sup> *Id.* 18-20.004(1)(b) (“There shall be no further sale, lease or transfer of sovereignty lands except when such sale, lease or transfer is in the public interest ...”).

<sup>150</sup> FLA. STAT. §373.414 (2008), FLA. ADMIN. CODE, r. 62-302.700(1) and r. 62-4.242(2)(a)(ii) (2008).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* r. 62-302.700(2)(f) (2008).

<sup>153</sup> *1800 Atlantic Developers v. Department of Environmental Regulation*, 552 So. 2d 946 (Fla. Dist. Ct. App. 1989).

Atlantic Developers.<sup>154</sup> The permit denial was based upon the fact that the DER had recently designated the waters in that area of Key West to be an OFW.<sup>155</sup> Therefore, the heightened “clearly in the public interest” test was applied and the DER found the proposed activity not clearly in the public interest.<sup>156</sup>

The appellate court reversed the DER’s final order, finding that the DER should have afforded 1800 Atlantic Developers an opportunity to explain which changes to the permit application could warrant DER’s approval of the proposed project, as instructed by § 403.92, Florida Statutes.<sup>157</sup> The court opined:

Absolute prohibition of dredge and filling activity, therefore, should be the rare exception in cases of extreme damage to the environment that cannot be avoided or mitigated under any circumstances. It must be remembered that this act was not intended to serve as a means for the state to acquire private land for public purposes, or to compel the owner of private land to make it available for the public use and benefit, without the state’s having to pay just compensation to the owners.<sup>158</sup>

Further, the court found that the DER erred in adopting the hearing officer’s recommendation to deny the permit based on “vague and ill defined” additional conditions in the mitigation agreement.<sup>159</sup> While the DER believed the hearing officer’s conclusions were findings of fact and therefore binding on the department, the court explained that the DER itself, not the hearing officer, was responsible for considering and determining the appropriateness of mitigation measures.<sup>160</sup> The second sentence in the quoted language above is significant because it appears to undercut reliance on the sorts of public benefits that serve as the basis for the conclusion that an aquatic preserve submerged lands authorization is “in the public interest.” It also makes it difficult to utilize the nature and form of mitigation to distinguish between activities in OFWs and non-OFWs and their respective public interest tests, e.g. mitigation that does more than merely offset impacts.

### **V. Florida Administrative Case Law Addressing OFWs**

113 administrative cases involving OFW permitting were reviewed for this article, including ERPs, wastewater, and stormwater permits. (See Appendix A). Of these, 59 permits were approved and 54 denied. Within the various categories of permitted activities subject to OFW review, the proportions were roughly equivalent. A wide variety of activities under ERPs were reviewed, including dredge and fill permits for docks, marinas, boat slips; developments of regional impact; and seawalls. In reviewing the administrative decisions as a whole, no single permitted activity was approved or denied more often than others. Appendix A provides a thorough review of each of these cases in terms of the activity

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<sup>154</sup> *Id.* at 950.

<sup>155</sup> *Id.* at 948.

<sup>156</sup> *Id.* at 950.

<sup>157</sup> *Id.* at 955.

<sup>158</sup> *Id.* at 954-955.

<sup>159</sup> *Id.* at 955.

<sup>160</sup> *Id.*

permitted, the issue, holding and, where evident, the reasoning. In addition, the nature of any mitigation proposed is described.

The particular type of permit did not seem to be an important factor. The driving force behind whether any activity was allowed or prohibited really depended on the specific facts of the case. In reviewing the 113 cases, several facts seem particularly important. First, a highly pristine or unique OFW tended to weigh against the applicant, often ending in a denial of the permit. Whereas, permits that sought activities similar to those already allowed within the same (or similar) OFWs, such as the construction of a standard dock in an OFW where all adjacent landowners also had docks, tended to lead to permit approval. As will be discussed below, the type of activity itself is often very persuasive in the issuance or denial of a permit. Sometimes whether the project would have cumulative and/or secondary impacts was weighed heavily by the Administrative Law Judge (ALJ) and other times it was seemingly ignored.

Another factor that is hard to quantify was the impact of an applicant's willingness to amend their initial permit/project/activity when forced or faced with opposition by the FDEP or WMD. Often, the FDEP issuance of a "noticed intent to deny" was enough motivation for applicants to completely overhaul their project to better comply with the "clearly in the public interest test." Similarly, another not unappreciated factor, was individual applicants willingness, ability, and preparation to make their project not only comply but go above and beyond the minimum requirements. Finally, the "human factor" and individual biases of ALJs undoubtedly played a role in whether, at least in a few cases, permits were granted or denied. The following sections will explore the dynamics of these various facts in more detail.

#### *A. Reasonable Assurance and the Clearly in the Public Interest Test*

As mentioned above, ERP applicants must provide "reasonable assurance" that the proposed activity will meet the applicable public interest test. For an OFW, this standard is "clearly in the public interest."<sup>161</sup> *Florida Audubon Society, Inc. v. South Florida Water Management District and Lennar Homes, Inc.* (2002) addressed this "reasonable assurance" standard for an OFW application. The ALJ stated that courts have extended considerable deference to the FDEP and that the decision of whether or not the applicant has provided reasonable assurance that an activity is "clearly in the public interest" is a conclusion of law.<sup>162</sup> The ALJ in *Florida Audubon Society* also held that courts should give the same deference to the adequacy of proposed mitigation as they do for the "reasonable assurance" standard.<sup>163</sup>

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<sup>161</sup> FLA. STAT. §373.414 (2008).

<sup>162</sup> See, 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946 (Fla. Dist. Ct. App. 1989) and Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. Dist. Ct. App. 2001), as cited in *Florida Audubon Society, Inc.*, Fla. Div. of Admin. Hearings Case No. 02-1629 (2002).

<sup>163</sup> *Florida Audubon Society, Inc.*, Case No. 02-1629. See also, *Anna Maria, Inc. v. Department of Transportation*, 700 So. 2d 113, 116 (Fla. Dist. Ct. App. 1997); 1800 Atlantic Developers, 552 So. 2d 946).

### B. The Role of Mitigation

*Pond, Inc. v. Department of Environmental Protection* (1994) examined the role of mitigation in meeting the “clearly in the public interest” test.<sup>164</sup> This case involved a dredge and fill permit to build a bridge in a Class II OFW, and provides an example of a case where “reasonable assurance” was not provided due to inadequate mitigation.<sup>165</sup> In the order, the ALJ noted that “Because there will be adverse impacts to an OFW, the project can be permitted only if it is determined that the mitigation plan offsets the adverse impacts and makes the project clearly in the public interest.”<sup>166</sup> Despite the applicant’s previous belief that the revised project, including a mitigation plan, would be “clearly permissible,” the ALJ found the mitigation plan was not adequate, and therefore the applicant did not provide the essential reasonable assurance for the permit to be approved.<sup>167</sup> The ALJ did not provide a specific reason as to why the plan was inadequate, other than to point out the numerous adverse impacts that the project would have on area wetlands and wildlife.<sup>168</sup>

In the majority of cases in which the permit was approved, however, the applicant showed with reasonable assurance that the activity would meet the clearly in the public interest standard. This finding of reasonable assurance was generally attributed to the adequacy of the mitigation plans, as interpreted by a WMD Governing Board or the FDEP.

*Crouthers v. J.B.’s Fish Camp and the Environmental Protection Department* (1997) reveals the effect of an applicant’s willingness to mitigate on the issuance of the permit.<sup>169</sup> *Crouthers* involved a permit for the construction of a sixteen-slip dock, linking to the applicant’s existing fish camp, which had two existing docks.<sup>170</sup> The previously denied application was re-evaluated when the applicant took extensive mitigation efforts and established a conservation easement over a portion of the property.<sup>171</sup> After adequate mitigation measures were provided, the permit was approved for the dock, even though the docks were proposed within a manatee zone.<sup>172</sup>

### C. Nature of the Activity

Another important issue addressed in various OFW administrative cases is the nature of activities which meet the “clearly in the public interest” test. Projects that serve a public purpose such as transportation projects and public boat ramps or marinas, may be more likely to meet this threshold since they begin with a presumption that the activity is in the public interest. Even here, however, there may be competing public interests. In *Lineberger v. Prospect Marathon Coquina* (2008), the FDEP found that even after offsetting the direct impacts of a sixty slip marina project with mitigation, an offer to contribute to the construction of a public boat ramp did not shift the activity to one that is “clearly in the

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<sup>164</sup> Alden Pond, Inc., Fla. Div. of Admin. Hearings Case No. 93-6982 (1994).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> William and Jill Crouthers, Fla. Div. of Admin. Hearings Case No. 97-0994 (1997).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*



public interest,” due to the secondary adverse impacts the additional boat traffic from the new ramp would cause.<sup>173</sup> In *State D.O.T. v. St. John’s River Water Management District* (1996), the District reversed a hearing officer’s finding that a proposed transportation project was clearly in the public interest “on the ground that even though replacing a causeway with a permanent bridge may improve existing water quality, the permanence would preclude future restoration of the water body at issue.”<sup>174</sup> Additionally, a permit for a proposed bridge was denied in *Vanwagoner v. Department of Transportation and Department of Environmental Protection* (1995), based on the evidence failing to show that the project would not degrade an OFW.<sup>175</sup>

Several cases have approved the issuance of a permit to applicants proposing relatively minor activities on OFWs, such as public boat ramps,<sup>176</sup> boat slips,<sup>177</sup> or the maintenance of mangrove trees<sup>178</sup>. However, permits for such minor activities have also been denied.<sup>179</sup> For instance, in *Town of Windermere v. Orange County Parks and Recreation Department and South Florida Water Management District* (1990), the ALJ found that the dredge and fill permit for the floating dock inadequately addressed the water quality issues because of dredging within the OFW.

*Suto v. Celebrity Resorts, Inc. and DER* (1991) addressed the issue of OFW designation and wastewater permits.<sup>180</sup> Celebrity Resorts had applied for a permit to construct a wastewater treatment and reuse/disposal facility on Orange Lake, an OFW.<sup>181</sup> The treatment facility would serve a proposed recreational vehicle (RV) park.<sup>182</sup> Various constituents who use the lake for professional and recreational activities, as well as for drinking water, opposed the issuance of the permit to Celebrity.<sup>183</sup> The ALJ, however, recommended that the permit for the proposed sewage treatment plant and effluent disposal system, or spray irrigation system, be granted to Celebrity.<sup>184</sup> The ALJ explained that Celebrity had provided reasonable assurance that both the sewage treatment plant and the spray irrigation system would not violate any state water quality standards, including the requirement for OFWs that existing ambient water quality not be lowered.<sup>185</sup>

#### D. “Significantly Degrades” and Geographic Proximity

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<sup>173</sup> *Linberger v. Prospect Marathon Coquina*, Fla. Div. Admin. Hearings Case no. 07-3757, FDEP Consolidated Final Order (2008).

<sup>174</sup> *Fla. Dept. of Transportation v. St. John’s River Water Management District*, Fla. Div. of Admin. Hearings Case no. 94-5261, Recommended Order (1996).

<sup>175</sup> *Robert E. Vanwagoner*, Fla. Div. of Admin. Hearings Case No. 95-3621 (1995).

<sup>176</sup> *James E. Slater, as Trustee, and Alicia O’Meara*, Fla. Div. of Admin. Hearings Case No. 97-0437 (1998).

<sup>177</sup> *Harold and Charlottee Toms*, Fla. Div. of Admin. Hearings Case No. 93-5724 (1994).

<sup>178</sup> *Leland D. Eglund*, Fla. Div. of Admin. Hearings Case No. 88-3530 (1988).

<sup>179</sup> *Town of Windermere*, Fla. Div. of Admin. Hearings 90-1782 (1990).

<sup>180</sup> *Suto*, Fla. Div. of Admin. Hearings Case No. 91-2722 (1991).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

A few cases have addressed the “significant degradation” standard for activities outside of OFWs.<sup>186</sup> Such activities are subject to the “not contrary to the public interest” test for non-OFWs, but still must demonstrate that they will not “significantly degrade the OFW.”<sup>187</sup> For example, in *Florida Audubon Society, Inc. v. South Florida Water Management District and Lennar Homes, Inc.* (2002), Lennar Homes filed an ERP application for a 516-acre residential development, in close vicinity to the Biscayne Bay Coast Wetlands project in Miami-Dade County.<sup>188</sup> While Biscayne Bay is an OFW, Lennar Homes was able to show that their project was neither directly in an OFW (Biscayne Bay), nor would result in direct discharge of surface water into an OFW.<sup>189</sup> Therefore, the ALJ did not find reason to deny the permit based on impacts to an OFW.<sup>190</sup>

In *Guttmann v. Department of Environmental Protection and ADR of Pensacola* (2000), Guttmann objected to a proposed 30-slip docking facility by the applicant, ADR of Pensacola.<sup>191</sup> Among other things, Guttmann claimed that the activity’s discharge, although not directly in the OFW, would significantly degrade it.<sup>192</sup> The ALJ concluded that since the FDEP had already found the activity would not degrade the Class III waters on which it was located, it also would not significantly degrade the OFW into which the Class III water discharged.<sup>193</sup> On the other hand, in *Sunset Acres Property Owners Association v. Department of Environmental Protection* (1996), a dredge and fill permit was requested to connect a canal network in the Sunset Acres subdivision to Florida Bay, an OFW.<sup>194</sup> According to the ALJ, the applicant Sunset Acres did not provide reasonable assurance that the activity on the non-OFW water would not degrade the OFW.<sup>195</sup> Therefore, the permit was denied.<sup>196</sup>

Various other administrative cases involve the denial or approval of a permit in an OFW based either solely or partially on the fact that the activity significantly degraded the water quality.<sup>197</sup> In many of these cases, the ALJ simply made a determination based on the facts that the applicant had or had not provided reasonable assurances that the water quality would not be degraded. However, none of these cases illuminate a specific standard or definition for the phrase “significantly degrades.” The Office of General Counsel for the

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<sup>186</sup> See, Charles H. Griffin, Fla. Div. of Admin. Hearings Case No. 98-0818 (1998) and Florida Audubon Society, Inc., Fla. Div. of Admin. Hearings Case No. 02-1629 (2002).

<sup>187</sup> FLA. ADMIN. CODE, r. 62-4.242(2)(a) (2008).

<sup>188</sup> Florida Audubon Society, Inc., Fla. Div. of Admin. Hearings Case No. 02-1629 (2002).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Michael L. Guttmann, Fla. Div. of Admin. Hearings Case No. 00-2524 (2000).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> Sunset Acres Property Owners Association, Fla. Div. of Admin. Hearings Case No. 91-7958 (1996).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> See, Manasota-88, Inc. and Manatee County Save Our Bays Association, Inc., Fla. Div. of Admin. Hearings Case no. 90-2350 (1990), Jeffrey Jay Frankel, Fla. Div. of Admin. Hearings, Case No. 98-1326 (1998), Pine Island Properties, Ltd., Fla. Div. of Admin. Hearings, Case No. 93-2713 (1994), Bay Oaks Circle Association, Inc., Fla. Div. of Admin. Hearings Case No. 99-0851 (1999), Robert E. Vanwagoner, Fla. Div. of Admin. Hearings Case No. 95-3621 (1995), Ocean Reef Club, Inc., Fla. Div. of Admin. Hearings Case No. 87-4660 (1988).

FDEP has indicated that some permit programs, i.e. industrial wastewater, use the term “measurable” to interpret the meaning of the term “significant.”<sup>198</sup> Presumably, this means that the effect on ambient water quality can be quantified in some way.

## VI. Impact of OFW Designation on Transboundary Waters

Florida shares a number of water bodies with its neighboring states, several of which are OFWs. These waters are commonly referred to as successive and contiguous, depending on their relationship as an interstate boundary.<sup>199</sup> Successive water bodies such as the Apalachicola and Suwannee Rivers (both OFWs) flow across a state border as they progress downstream. Contiguous water bodies, like the Perdido River (an OFW), flow along a state border as they progress downstream, typically with the centerline of the stream serving as the political boundary.<sup>200</sup> The presence of these types of rivers in Florida creates unique circumstances when that river is designated as an OFW.

The transboundary nature of the Apalachicola River, shared between Florida, Alabama and Georgia has generated controversy concerning its use and regulation.<sup>201</sup> This controversy stems from Georgia and Alabama’s interest in the river as a source of drinking water and hydropower, and Florida’s interest in the river’s environmental characteristics, especially its estuary, renowned for its oysters which are a very profitable industry in the area.<sup>202</sup> The controversy entered the courtroom years ago and has not yet been resolved. In 2009, a federal district court ordered the U.S. Army Corps of Engineers (Corps) to seek authorization from Congress before changing the project purposes for Lake Lanier, at Apalachicola’s headwaters. Georgia seeks to divert water from the lake for potable water use for the metropolitan Atlanta region.<sup>203</sup>

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<sup>198</sup> Personal Communication, Stacey Cowley, Office of General Counsel, Florida Department of Environmental Protection

<sup>199</sup> STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES: NON-NAVIGATIONAL USES*, 41 (Oxford University Press, 2001).

<sup>200</sup> *Id.*

<sup>201</sup> Florida Department of Environmental Protection, Apalachicola-Chattahoochee-Flint River System (ACF) Timeline of Action As of July 27, 2009, <http://www.dep.state.fl.us/mainpage/acf/timeline.htm> (last visited Feb. 26, 2010).

<sup>202</sup> Kevin Spear, *Atlanta’s Thirst Risks Florida Way of Life*, ORLANDO SENTINEL (Florida), Oct. 28, 2007, at A1.

<sup>203</sup> The states brought a Joint Motion for Partial Summary Judgment, challenging “the Corps’ operation of Lake Lanier for the benefit of municipal and industrial ... water supply rather than the three authorized purposes for which Congress approved the reservoir’s construction – power generation, downstream navigation support, and flood control.” On May 11, 2009, Florida and the other parties from the seven consolidated cases presented oral arguments on the motions filed in January before Senior U.S. District Judge Paul Magnuson. On July 27, 2009, Judge Magnuson charged Congress with the responsibility of approving the water use of Lake Lanier for water supply purposes. Additionally, Judge Magnuson ordered that all water withdrawals be frozen at current levels for the next three years until Congressional authorization is given or if some other resolution is reached. If Congress does not approve a reallocation within that period, then water withdrawals from Lake Lanier will revert to “baseline” operation of the mid-1970s. FDEP Timeline, *supra* note 201. *See also*, *In re Tri-State Water Rights Litigation*, 639 F.Supp.2d 1308 (M.D. Fla. 2009).

Florida, among other things, argues that the Corps has not adequately provided a “required consistency determination” on their actions in relation to the “enforceable policies of the federally approved Florida Coastal Management Plan.”<sup>204</sup> In listing the exact enforceable policies that they are referring to, Florida cites to the Florida Statutes and Administrative Code that apply to OFWs, pointing out that the Apalachicola River and Bay are both OFWs.<sup>205</sup>

Contiguous water bodies invoke similar issues for OFWs, which can persist along the entire length of the river. This geographical orientation occurs with the Perdido River, an OFW<sup>206</sup> and the St. Marys River, a non-OFW. The Perdido River serves as the border between Florida and Alabama in northwest Florida. Similarly, Florida shares the St. Marys River with Georgia in northeast Florida. Although the two states share the rivers, they may have significantly different management goals and water quality standards. This differential regulation may undermine the purpose of one state’s regulatory regime, and hence implicate federal law.

In *Arkansas v. Oklahoma*,<sup>207</sup> Arkansas sought a domestic wastewater discharge permit from the EPA. The discharge was to occur in the Illinois River, thirty-nine miles upstream from the Oklahoma state line. Oklahoma challenged the permit on grounds that the proposed discharge violated Oklahoma’s water quality standards. After an administrative hearing, the EPA overruled the administrative law judge and issued the permit. When it reached the U.S. Supreme Court, the Court held that while the Clean Water Act does not require compliance with the affected state’s water quality standards, it does not preclude EPA from requiring it. EPA rules provide that source states must meet the water quality standards of all affected states.<sup>208</sup>

## VI. Key Issues in OFW Regulation and Enforcement

### A. “Contaminants of Emerging Concern”

The presence of emerging water quality contaminants, such as pharmaceutical products, endocrine disruptors, and nano-materials, has garnered recent attention.<sup>209</sup> The continued practice of introducing pharmaceutical products into the waste stream through discharge of expired drugs as well as through treated human waste has introduced the term

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<sup>204</sup> *In Re Tri-State Water Rights Litigation*, Joint Motion and Memorandum in Support of Joint Motion for Partial Judgment on All Phase I Claims, Case no. 3:07-MD-1-PAM, at 72, 73, (M.D. Fla. Jan. 31, 2009), available at [http://www.dep.state.fl.us/mainpage/acf/files/012309\\_summary\\_judgment.pdf](http://www.dep.state.fl.us/mainpage/acf/files/012309_summary_judgment.pdf).

<sup>205</sup> *Id.* at 72.

<sup>206</sup> FLA. ADMIN. CODE, r. 62-302.700(9)(i) (2008). The Perdido River was designated as a special water OFW when the program began in 1978.

<sup>207</sup> *Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

<sup>208</sup> 40 CFR § 122.4(d) (2008)(No permit may be issued “when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.”).

<sup>209</sup> *Probe: Pharmaceuticals in Drinking Water*, CBS NEWS/ASSOCIATED PRESS, March 10, 2008, available at <http://www.cbsnews.com/stories/2008/03/10/health/main3920454.shtml>.

“contaminants of emerging concern” into the lexicon of water quality protection.<sup>210</sup> Trace amounts of these pharmaceuticals are too small for the various stages of required water treatment that prevent degradation and end up in the waters of the State of Florida.<sup>211</sup> These contaminants could lead to the degradation of not only water quality, but may also affect wildlife. While the effects of the introduction of trace amounts of these chemical and biological agents into the water supply is widely unknown, there is also increasing concern about their introduction into aquatic systems through point and non-point source discharges.<sup>212</sup>

An example of the presence of these contaminants in a Florida OFW can be seen in Biscayne Bay. A recent study compared the presence of twenty-four pharmaceutical compounds in Chesapeake Bay, Biscayne Bay, and the Gulf of Farallones.<sup>213</sup> Results showed that the most contaminants were found in the Chesapeake Bay test sites, which were in close proximity to (adjacent to and downstream of) wastewater treatment plants.<sup>214</sup> However, the test sites in Biscayne Bay were not near treatment plants; rather, they were “at the mouth of drainage canals and offshore areas that might be affected by inputs from the drainage canals or possibly groundwater discharges.”<sup>215</sup> This concern could be exacerbated if proposals to reduce salinity in the Bay by introducing treated “reuse” water are carried forward.<sup>216</sup>

Emerging contaminants of concern are not currently listed in the published list of water quality criteria to which water quality standards apply.<sup>217</sup> Even so, under the FDEP’s rule, discharges to OFWs may not reduce “existing ambient water quality,” except on a temporary basis within mixing zones. The phrase does not limit the determination of ambient water quality to only those parameters that are listed by rule.<sup>218</sup> Presumably,

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<sup>210</sup> Environmental Protection Agency, Contaminants of Emerging Concern, Aquatic Life, Water Quality Criteria (2008), available at <http://www.epa.gov/waterscience/criteria/aqlife/cec.html>.

<sup>211</sup> CBS News, *supra* note 209.

<sup>212</sup> Barbara S. Minsker, Drinking Water Contamination Transcript, March 10, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/discussion/2008/03/10/DI2008031002217.html>; See also, EPA, *supra* note 210.

<sup>213</sup> ANTHONY S. PAIT, ET AL., HUMAN USE PHARMACEUTICALS IN THE ESTUARINE ENVIRONMENT: A SURVEY OF THE CHESAPEAKE BAY, BISCAYNE BAY AND GULF OF THE FARALLONES, NOAA Technical Memorandum NOS NCCOS 7 (2006), available at <http://ccma.nos.noaa.gov/publications/humanusepharma.pdf>.

<sup>214</sup> *Id.* at 18.

<sup>215</sup> *Id.*

<sup>216</sup> See U.S. GEOLOGICAL SURVEY, SCIENCE PLAN IN SUPPORT OF ECOSYSTEM RESTORATION, PRESERVATION, AND PROTECTION IN SOUTH FLORIDA, available at <http://sofia.usgs.gov/publications/reports/doi-science-plan/waterparksbaykeys.html> (describing a pilot project under the Comprehensive Everglades Restoration Act (CERP) “to determine the ecological effects of using superior, advanced treated reuse water to replace and augment freshwater flows to Biscayne Bay and to determine the level of superior, advanced treatment required to prevent degradation of freshwater and estuarine wetlands and nearshore waters. The constituents of concern in wastewater will be identified, and the ability of superior, advanced treatment to remove those constituents will be determined.”)

<sup>217</sup> FLA. ADMIN. CODE r. 62-302.530.

<sup>218</sup> Ambient water quality is defined in the OFW Rule in a way that does not limit it to specific parameters.

then, the degradation of water quality by constituents not currently listed by rule could still result in a violation of the OFW antidegradation rule. This question has not been addressed under Florida law.

*B. Riparian Buffers – Are BMPs enough Protection for OFWs?*

Riparian buffers provide a transition between a water body and adjacent uplands. A buffer can have several distinct, yet related, purposes. A buffer protects the water quality through contaminant filtration and the trapping of sediments. A riparian buffer can also provide important habitat. Upland species may depend on riparian corridors for regional movement and other essential needs. Aquatic and wetland-dependent species may utilize riparian buffers for breeding, feeding and shelter during parts of their life cycle. Buffers may also shelter wildlife from disturbance by noise, lights or other consequences of human activities. Riparian buffers thus contribute to the maintenance of a fully functional ecosystem that encompasses the water body and its adjacent uplands. Finally, the recreational value of water bodies may be protected from aesthetic degradation by maintenance of undisturbed native vegetation in riparian buffers. The buffers required to protect water quality are ordinarily narrower than those required for habitat protection.

OFW rules do not consider riparian buffers, except where silvicultural activities are implicated. Silviculture BMPs for both OFWs and non-OFWs incorporate buffers that seem largely focused on protecting water quality, though with widths substantially less than some studies recommend.<sup>219</sup> To the extent that OFW designation is intended to protect water quality this seems appropriate. However, OFWs include a great diversity of waters in public ownership and “Special Waters” may be designated for their “outstanding ecological and recreational significance.”<sup>220</sup> The definition of “outstanding ecological significance in particular suggests that an OFW so designated is “part of an ecosystem of unusual value ...”<sup>221</sup> The basis for OFW designation is thus broader than protection of water quality and the qualities that may have lead to OFW designation cannot be maintained unless the watershed is managed with a more comprehensive set of goals. To the extent riparian uplands contribute to the ecological and recreational significance of an OFW, those values and functions should be protected.

The St. Marys River Watershed Report references a methodology for determining buffer widths, developed by the University of Florida’s Center for Wetlands.<sup>222</sup> This study, the “Wekiva River Basin Buffer Study,” suggests a science-based methodology focused on targeting significant species of animals and plants and then evaluating their buffer

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<sup>219</sup> For a comprehensive review of the scientific and management literature on riparian buffers, see SETH WEGNER, A REVIEW OF THE SCIENTIFIC LITERATURE ON RIPARIAN BUFFER WIDTH, EXTENT, AND VEGETATION (1999), available at

[http://www.rivercenter.uga.edu/service/tools/buffers/buffer\\_lit\\_review.pdf](http://www.rivercenter.uga.edu/service/tools/buffers/buffer_lit_review.pdf)

<sup>220</sup> FLA. ADMIN. CODE, r. 62-302.200(11 & 12) (2008).

<sup>221</sup> *Id.* r. 62-302.200(11) (2008).

<sup>222</sup> SUSANNA BLAIR, ET AL., ST. MARYS RIVER WATERSHED REPORT: AN ADAPTIVE MANAGEMENT ASSESSMENT, 42 (2009), available at <http://www.law.ufl.edu/conservation/resources/resources.shtml>. See also, M.T. BROWN, ET AL., AN EVALUATION OF THE APPLICABILITY OF UPLAND BUFFERS FOR THE WETLANDS OF THE WEKIVA BASIN, FINAL REPORT TO THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT (1987) available at <http://www.cfw.ufl.edu/publications.shtml#R>.

requirements to ensure their protection.<sup>223</sup> For example, studies indicate that buffers in wetlands should range from 322 feet to over 550 feet, while buffers in estuaries should be at least 322 feet with no maximum range indicated.<sup>224</sup> These suggested buffer ranges are typically wider than those afforded by silivcultural BMPs for both OFWs and non-OFW waters, and also exceed most riparian buffers required by local governments. The St. Johns River Water Management District has adopted rules protecting both wetland and upland habitat for aquatic and wetland-dependent species in Riparian Habitat Protection Zones in the Wekiva River, Econlockhatchee River, Tomoka River and Spruce Creek hydrologic basins.<sup>225</sup> These rules prohibit projects from adversely affecting the “abundance, food sources, or habitat” values for such species within areas, including uplands, that extend as far as 550 feet landward of a stream’s edge.<sup>226</sup>

### C. Impairment and OFWs

The federal Clean Water Act requires states to identify water bodies whose water quality does not meet the beneficial use classification that they have been given under the state program, based on the water quality standards and criteria assigned for that classification.<sup>227</sup> Water bodies that do not meet water quality standards must be designated as impaired and a “total maximum daily load” (TMDL) must be assigned for the violation of those standards that cause the impairment.<sup>228</sup> The assignment of a TMDL is designed to return the water body to the standards for the use for which it is classified. All water bodies in Florida are assigned to a class. OFWs serve as an overlay on the existing classification system. Hence, all OFWs also have an underlying beneficial use classification, but are not themselves considered a designated use by the state.

OFWs can also be impaired waters, either because they failed to meet water quality standards for their underlying classification when they were designated or because they have been subsequently degraded, notwithstanding the OFW non-degradation standard. However, because OFWs are not listed as designated uses it would appear that they could not be designated as impaired unless the underlying classification of the water body is itself impaired. This means that OFWs whose ambient water quality has been degraded below the quality established at or prior to the designation, but not to a point that the underlying use is impaired, do not trigger the establishment of TMDLs and the restoration planning that is accorded to impaired non-OFWs.

## VII. Conclusion

The ability of current OFW regulation to fulfill the legislative intent behind the OFW designation remains uncertain. Judicial and administrative case law addressing OFWs provide little clear guidance in interpreting the statutory standards for the issuance of permits in or affecting OFWs, especially the “clearly in the public interest” standard. The FDEP should consider adopting for the OFW Program the type of public interest

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See*, FLA. ADMIN. CODE. ch. 40C-41 (2008).

<sup>226</sup> *See, e.g., id.* r. 40C-41.063(3)(e).

<sup>227</sup> 33 U.S.C. § 1313(d)(1)(A) (2008).

<sup>228</sup> *Id.* § 1313(d)(1)(C).

benefits/costs balancing test currently provided for in Aquatic Preserves Program rules. This test creates a discernible distinction between the public interest standard for submerged lands activities that are within aquatic preserves as opposed to those occurring outside of the preserves.

The effect of the OFW designation on water quality parameters subject to a narrative standard (nutrients), and on water quality parameters that are not currently established by rule (e.g. emerging pathogens of concern) has not been established. In addition OFWs do not appear to enjoy any special consideration as designated uses subject to impaired waters restoration. The definitions of non-degradation and of ambient water quality for the purposes of OFW designation should be amended to ensure that they contemplate degradation by contaminants other than the current rule-based list of water quality standards and criteria. The extent to which BMPs for silviculture operations are sufficient to safeguard OFW water quality may require further research. In addition, the extent to which the OFW statute and rules recognize the ecological role and recreational value of riparian zones remains in question. This should be clarified by the FDEP.



## Appendix A

### Florida Administrative Law Cases Addressing OFW Rule

Name, Case Number, Date	Activity Permitted	OFW Involved	Legal Issues	Mitigation	Holding: Recommended Order and/or Final Order
<a href="#">Bay Oaks Circle Association, Inc. v. DEP and Richard Perkins, Case No. 99-0851 (1999)</a>	Environmental Resource Permit (ERP) to extend an existing multi-family residential docking facility that would exceed 500 square feet. Sovereign submerged land lease to permit the utilization of 2,219 square feet of submerged bottomland.	Lemon Bay – Class II OFW, aquatic preserve, and state-designated “Special Water.”	Whether permitting criteria set forth at § 373.414(1), Fla. Stat. have been met. (¶ 16). The proposed extension would have a negative impact on sea grass and navigation.	No mitigation options discussed; Petitioner simply proposed having relevant statutes and rules waived for his activity, without supporting evidence.	“The evidence fails to establish that the proposed extension of the dock is clearly in the public interest.” (¶ 33). The ERP and Land Lease denied.
<a href="#">Edmund Brennen (95-0494), Paul and Dorothy Marin (95-0495), D.L. Landreth (95-0496), David and Geri Wendt (95-0497), Julius and Stella Fielder (95-0498), and Jackie and Bright Johnson, Jr. (95-0943) v. Jupiter Hills Lighthouse Marina and DEP (1995)</a>	Dredge and Fill Permit under r. 62-312, Fla. Admin. Code, to place pilings and riprap in state water for a construction project to enlarge an existing marina and add new slips for use by sailboats.	Jensen Beach to Jupiter Inlet Aquatic Preserve, which is a part of the Indian River Preserve, a Class III OFW.	Whether Jupiter Hills Lighthouse Marina is entitled to a permit for its project application submitted July 29, 1992, and revised November 15, 1993, to enlarge an existing marina and add new slips.	Jupiter Hills has agreed to the following mitigation activities: (a) installation and maintenance of an ex-filtration trench to improve water quality by trapping grease coming from the uplands and intercepting up to three-fourths of an inch of stormwater from draining into the basin; (b) prohibition of live-aboards, so as to avoid fecal coliform violations; (c) refrain from use of construction materials treated by heavy metals; (d) prohibition on new powerboats docking at the facility; (e) installation of navigational and no wake signs, for manatee protection; (f) and the installation of riprap.	Respondent Jupiter Hills has provided reasonable assurance that the proposed project is clearly in the public interest and will not affect water quality standards. (¶ 15 and 41). Permit issued. “Respondent Jupiter Hills has demonstrated that it has provided reasonable assurance that the proposed project will not cause water quality violations.” (¶ 48).

<p><a href="#">Foster Burgess v. DEP, Case no. 93-2900 (1993)</a></p>	<p>Dredge and Fill Permit to construct a private boat dock, a platform for an “A” frame camping shelter, and a boardwalk all in jurisdictional wetlands along the water’s edge of a “small natural basin off of the Choctawhatchee River.”</p>	<p>Choctawhatchee River – Class III OFW. Adjacent to Class II shellfish waters.</p>	<p>“Whether Petitioner's application for a dredge and fill permit provides reasonable assurances that compliance will be had with applicable requirements of Section 403.918(2), Florida Statutes; specifically, that the project is in the public interest and that existing ambient water quality of an Outstanding Florida Water will not be lowered.” (¶ Statement of the Issues).</p>	<p>No mitigation measures proposed by Petitioner</p>	<p>Petitioner failed to present reasonable assurances that: prohibited cumulative impacts will not result (subdivision of property and proposal of numerous similar projects); Class II waters will not be degraded; the project is clearly in the public interest; ambient water quality standards will not be violated; and detrimental secondary impacts will not occur. Permit denied.</p>
<p><a href="#">Council of Civic Associations, Inc. (98-0999), Estero Conservancy, Inc. and Dorothy McNeill (98-1000), Ellen Peterson (98-1001), and Environmental and Peace Education Center (98-1002) v. Koreshan Unity Foundation, Inc. and DEP (1998)</a></p>	<p>ERP for the construction of a wooden footbridge for pedestrians over Estero River and to obtain a right to use sovereign submerged lands via easement</p>	<p>Estero River – Class III OFW</p>	<p>Whether DEP should issue permit and authorize the use of sovereign submerged lands when Koreshan has not provided reasonable assurance that the proposed footbridge would not adversely affect the water quality of the Estero River. The proposed footbridge would adversely affect the water quality in two respects: turbidity caused by the pilings and leaching from the chromated copper arsenate applied to the pilings. The pilings to be placed in the River “effectively divide the river into six segments of no more than 14 feet each,” thereby adversely affecting navigation and diminishing the recreational value of the River for canoeists and kayakers.</p>	<p>Koreshan proposed using impermeable plastic or PVC material to wrap the pilings on the proposed footbridge to reduce the leaching of deleterious substances from the pilings. The proposed permit requires that Koreshan grant a conservation easement for the entire riverbank running along both shorelines of Koreshan’s two parcels and also requires Koreshan to plant leather fern or other wetland species on three-foot centers along both banks of the River for a distance of 30 feet.</p>	<p>Koreshan has failed to provide reasonable assurance that the proposed footbridge will not affect water quality and is clearly in the public interest. The ERP is denied, and because of concurrency requirements of Sections 253.77(2) and 373. 427(3), Florida Statutes, the easement is also denied. The proposed footbridge would adversely affect the public health, safety, or welfare and the property of others.</p>

<p><a href="#">William and Jill Crouthers (97-0994) and Paul Tyre (97-1420) v. Captain J.B.'s Fish Camp and DEP (1997)</a></p>	<p>J.B Fish Camp (which includes a restaurant and aquaculture facility) applied for an ERP and variance from provisions of 40C-4.032(c), Fla. Admin. Code, for construction of a 16-slip docking facility.</p>	<p>Indian River North - Class II shellfish harvesting OFW and aquatic preserve.</p>	<p>J.B.'s wanted to replace its two existing docks with larger ones, as well as construct a concrete boat-launching ramp. They requested a variance from r. 40C-4.032(c), Fla. Admin. Code. DEP issued the permit and variance and Petitioners objected due to potential negative impacts to water quality from boat use and fish cleaning on the boat docks and ramp.</p>	<p>J.B.'s modified its original proposed project, reducing it to only one proposed dock, and no boat ramp. The FDEP also placed a number of conditions on the variance including: requirement of a wetland resource management permit; turbidity controls, if necessary; restricting the maximum boats allowed to dock at the facility; prohibiting discharges into the water; requiring that mooring areas be deep enough to prevent prop damage; requiring that any structure allow maximum sunlight penetration; and that the boat ramp be permanently closed. The FDEP also imposed conditions designed to protect manatees in the area. Finally, JB's agreed to establish a conservation easement over 224 linear feet of the shoreline that J.B.'s will plant with mangroves.</p>	<p>Proposed activities will not result in a worsening of the impacts to water quality. (§ 40). Rather, it should lessen them by improving the depth at which boats will dock (reducing turbidity) and through "the elimination of fish cleaning on the docks, the elimination of the existing Bait Shop Dock, and the elimination of the existing boat ramp." (§ 40). Impacts may also be lessened if J.B.'s adheres to the conditions imposed by FDEP on the docking of boats at the proposed Restaurant Dock. J.B.'s has made reasonable assurances to FDEP "that the proposed project is clearly in the public interest." (§ 92).</p>
<p><a href="#">Leland Eglund v. Largo Bayside, Inc. and DEP, Case no. 88-3530 (1998)</a></p>	<p>Permit to alter mangroves on property owned by Largo Bayside in Key Largo</p>	<p>Florida Bay, an OFW.</p>	<p>Largo Bayside owns a condominium development in Key Largo. Adjacent to the units is a water body bounded by a mangrove berm approximately 4 acres in size. Florida Bay is on the other side of the berm. The view of Florida Bay is, to some extent, obstructed by the mangroves. Largo Bayside proposes to trim the mangroves in the center of the berm (about two acres wide) to a height of 13 feet above grade to improve the view.</p>	<p>Largo Bayside could have trimmed a large amount of mangroves according to an exemption in r. 17-27.060, Fla. Admin. Code. (§ 5). However, Largo Bayside agreed to certain conditions by DEP to ensure no environmental damage would result from the trimming, as well as to ensure no impact on water quality or fish and wildlife would occur. (§ 4). Moreover, according to the conditions, Largo Bayside actually trimmed fewer mangroves as a condition of this permit.</p>	<p>Largo Bayside provided DEP with reasonable assurance that no impacts to water quality will occur as a result of the proposed trimming, and they have shown that it is clearly in the public interest. (§ 9).</p>

<p><a href="#">Florida Audubon Society, Inc., et al. v. South Florida Water Management District and Lennar Homes, Inc., Case no. 02-1629 (2002)</a></p>	<p>ERP for development of a 516-acre residential community.</p>	<p>The project is not located in an OFW nor would it result in direct discharge of surface water into an OFW. However, it is located about one mile from the southern part of the Biscayne Bay, an OFW, and much of its central and southern parts, including the area closest to the Project site, are within Biscayne National Park.</p>	<p>Lennar Homes wanted an ERP to build a 516-acre residential community in Miami-Dade County. The application, as revised, was for an ERP conceptually approving the construction of a surface water management system to serve the Project and authorizing the construction to clear the site, excavate the wet retention areas, and expand an existing lake.</p>	<p>The SFWMD imposed a flowage easement on the property, basically providing unlimited maintenance discretion to the SFWMD. Other conditions were also imposed in relation to the flowage easement. Lennar Homes proposed mitigation to offset the adverse impacts of the project.</p>	<p>“It was found that the Project will not cause adverse water quality impacts to receiving waters and adjacent lands.” (§ 6). “The Flowage Easement and new special conditions do not impose an inordinate burden upon Lennar Homes.” (§ 37). “The issuance of the ERP without the Flowage Easement and new special conditions would substantially impact the ability of the District to restore this part of Biscayne Bay.” (§ 47).</p>
<p><a href="#">Florida Keys Citizens Coalition and The City of Key West v. 1800 Atlantic Developers and DER (now DEP), Case no. 86-1216 (1986)</a></p>	<p>Fill permit and water quality certification for creation of a sand beach, about 500' long by 100' wide, requiring placement of 2,620 cubic yards of fill, 2,200 yards of which would be waterward of mean high water off Key West, Florida.</p>	<p>Project site waters are “part of the navigable open waters of Hawk Channel and the Straits of Florida (Atlantic Ocean)” - Class III OFW. The waters in the area of the project (within the boundaries of the Florida Keys Special Waters) were also an OFW.</p>	<p>1800 Atlantic was the developer of a 168-unit condominium property in Key West and wanted to build a beach. Petitioners objected due to potential negative impacts on fish, wildlife, and the environment.</p>	<p>1800 Atlantic’s original permit application included proposed construction of the beach, a jetty on the east end of the beach, a fishing pier on the west end of the beach, and an art display platform seaward. Due to DER’s concerns, they changed the application and agreed to conditions that may allow DER to issue the ERP.</p>	<p>It was ultimately found that the project would adversely impact fish and wildlife habitat, marine productivity, and recreational values. 1800 Atlantic did not meet its burden of showing that the project was clearly in the public interest. The hearing officer found that the project, even as amended, lacked the requisite specificity needed to provide reasonable assurances.</p>

<p><a href="#">Jeffery Jay Frankel v. DEP, Case no. 98-1326 (1998)</a></p>	<p>Petitioner seeks an exemption from the need to obtain an ERP or alternatively an ERP and a lease to use state sovereign submerged lands to collect and sell approximately 600 pounds of live sand per month.</p>	<p>Florida Keys National Marine Sanctuary – Class III OFW</p>	<p>Petitioner collects and sells "live sand," which is considered a dredging activity within a sanctuary. "Live Sand is a calcium carbonate sediment used in public and home aquaria as a decorative detoxifying agent." (¶ 3). "Live sand is found on offshore water bottoms in the Florida Keys (where Petitioner engages in his collection activities) and other areas in Florida." (¶ 4). Petitioner dives underwater to scoop with his hands and take away the live sand, which has significant environmental effects. Removing the live sand removes organisms that are important components to the aquatic food chain, reduces the biological diversity, leaves the newly exposed substrate unable to attract the same significant benthic community supported by live sand, and increases turbidity which affects the water quality and clarity.</p>	<p>Petitioner proposed no mitigation options. "If the Department authorizes the Project, it is reasonable to anticipate that other collectors of 'live sand' would seek the Department's approval to engage in similar activity in the area" (cumulative affects). (¶ 26).</p>	<p>"Petitioner has not provided, through his evidentiary presentation, reasonable assurances that the Project would not result in violation of state water quality standard or that the Project would be clearly in the public interest." (¶48). Further, the project is inconsistent with the goals and objectives of the Conceptual State Lands Management Plan. (¶ 23).</p>
<p><a href="#">Charles Griffin v. St. Johns River Water Management District and Live Oak Plantation No. 1, Ltd. (98-0818); Michael Rich and Coalition for Responsible EconLockhatchee</a></p>	<p>Application for a conceptual approval of an ERP for a multi-phased single-family project with two small commercial sites on approximately 1,041 acres.</p>	<p>Project site located near confluence the of Econlockhatchee (Econ) River and Little Econlockhatchee River. The Live Oak Reserve property includes approximately</p>	<p>"Historically, the Live Oak Reserve property has been used for agricultural practices, including silviculture and cattle production. Some areas of the property have been logged and some areas have been converted to pasture. Cattle have grazed in wetlands, thereby</p>	<p>Petitioner developed a site plan "which minimizes impacts to wetlands and other surface water functions, particularly as it relates to the Econ river, and maximizes the benefits to wildlife by establishing a series of wildfire corridors across the site." (¶ 14). Additionally, "the impacts are mostly limited to the small isolated wetlands, the</p>	<p>"Live Oak submitted detailed technical information, including but not limited to charts, maps, calculations, studies, analyses and reports necessary to show that the conceptual development plan was consistent with the permitting criteria of the</p>

<p><a href="#">Development, Inc. v. St. Johns River Water Management District and Live Oak Plantation No. 1, Ltd. (98-0819) (1998)</a></p>		<p>half of Horseshoe Lake, as well as a small creek, Brister Creek, which flows from Horseshoe Lake across the property to the Econ River. Econ River is a Class III water and an OFW.</p>	<p>decreasing the amount and diversity of groundcover vegetation on portions of the property. On-site drainage ditches have had a major impact on the hydrological characteristics of the wetlands on the property, including the reduction of surface water elevations.” (§ 9). Live Oak proposes to develop a large multi-phased single-family project with two small commercial sites. The project, to be known as Live Oak Reserve, will be on approximately 1,041 acres. Petitioners allege negative impacts to area wildlife.</p>	<p>upland/wetland transitional edges of the floodplain wetlands, and portions ... already degraded by a ranch roadway and ditch placement. Live Oak focused its impacts on areas, including wetlands, that were historically disturbed.” (§ 63). “The proposed on-site component of the mitigation plan entails the preservation of 19.3 acres of herbaceous marsh, 373.2 acres of forested wetlands, and 124.9 acres of uplands. The mitigation plan preserves approximately 5.65 acres of isolated wetlands on-site, and approximately 386.86 acres of [other] wetlands on-site.” (§ 68). “The off-site component of the mitigation plan is the contribution of \$160,525 towards participation in the SJRWMD acquisition of a conservation easement over the 3,456 acre Yarborough parcel. The Yarborough parcel is located in the northeastern corner of the Econ River Hydrologic Basin. The Yarborough parcel encompasses property north and south of the Econ River.” (§ 79).</p>	<p>SJRWMD found in Chapter 40C-4, Florida Administrative Code.” (§ 12). “The evidence presented at the final hearing demonstrated that Live Oak has provided reasonable assurance that the requirements of SJRWMD rules have been met and the permit should be granted.” (§ 119). Live Oak will have no adverse effects on the health, safety, or property of others and any adverse impacts will be adequately offset by mitigation. Live Oak is not contrary to the public interest. Therefore, the ERP approval was upheld.</p>
<p><a href="#">Michael Guttman v. FDEP and ADR of Pensacola. Case no. 00-2524 (2000)</a></p>	<p>Wetland resource permit and sovereign submerged lands authorization allowing the construction of a 30-slip docking facility on Big Lagoon, Escambia County, Florida.</p>	<p>Big Lagoon – Class III water and OFW.</p>	<p>Petitioner opposes the issuance of a WRP since he lives less than 1 mile from the proposed project, which is part of a condominium property to be constructed on the upland portion of the property. Reasons for Petitioner’s opposition include the status of the water as an OFW and added navigational hazards</p>	<p>The negative impacts were secondary in nature, meaning the facility itself (the dock, platform, and pilings) would not cause the negative impacts. Rather, the real negative impacts were the secondary impacts associated with increased boat traffic that would likely cause more turbidity. The applicant proposed placing pilings with signage reading “NO BOATS BEYOND</p>	<p>Originally, there were three positive, one neutral, and four negative benefits or impacts associated with the project. In the ALJ’s judgment, the negative impacts, which were secondary in nature, outweighed any positive benefits and the project was contrary to the public interest and was not</p>

			<p>from the project. Originally, the project was denied because of adverse affects of fish and their habitat because of a further thinning of seagrass colony and increased water turbidity.</p>	<p>THIS POINT” to deter boats from navigating across the seagrass. Similar pilings and signage have been successful on the North shore of Big Lagoon. (¶ 8). To mitigate the turbidity caused by wave action from the boats, the applicant proposes placing an aluminum baffle system along the outermost slips (waterward side) of the facility to disperse wave action. Once the baffle system is installed, it will become colonized with sessils (barnacles and oysters), which should provide new habitat for fish in the area.</p>	<p>permitted. However, on remand the applicant was given an opportunity to propose mitigation measures to offset the negative impacts. These were accepted by DEP and the permit was ultimately approved.</p>
<p><a href="#">Hernstadt Broadcasting Corporation v. DER and The Charter Club, Inc., Case no. 80-1702 (1981)</a></p>	<p>ERPs for building a radio transmitter tower and access dock in state owned submerged lands in Biscayne Bay.</p>	<p>Biscayne Bay, a State Aquatic Preserve and OFW.</p>	<p>Petitioner applied for ERPs to construct a radio transmitter tower and access dock in state submerged land within the Biscayne Bay. “The placement of the pilings would cause the destruction of certain seagrasses in that area, while at the same time promoting the introduction of marine life along the surfaces of the tower and dock supports. Seagrasses in the area where the grounding system would be placed may be destroyed and although the copper to be used would be nickel plated, thereby inhibiting the release of the toxic properties of the coated copper, eventually the nickel plating would break down and the marine life</p>	<p>Petitioner intends to place channel markers to divert boat traffic away from the tower to aid in navigation. Petitioner contends its public service function through programs it broadcasts and its emergency capabilities and the ancillary opportunities to be offered to governmental bodies to use the transmitter tower as a communication link.</p>	<p>“Petitioner has failed to affirmatively demonstrate that this project is clearly in the public interest. The project is not in keeping with the provisions of the Biscayne Bay Aquatic Preserve Act and although it would insure to the benefit of certain governmental agencies (i.e. the City of Miami) it is incompatible with the efforts of Dade County through its Comprehensive Master Plan, its Biscayne Bay Management Plan and the Biscayne Bay Restoration Plan which is administered by the DER. The Biscayne Bay Act and the various plans call for the availability of this area of Biscayne Bay for purposes of recreation in a way which protects the</p>

			<p>communities adjacent to the mesh would be harmed by the copper. The loss of seagrasses under the grid could cause a reduction in fish population.” (§ 16). Moreover, the installation of the radio tower and access dock in the Biscayne Bay is an impediment to navigation. (§ 17).</p>		<p>environment and emphasizes aesthetics.” (§ 33). “The project is an unreasonable interference with the lawful and traditional public uses contemplated for the preserve which would include fishing, boating and swimming, both in terms of the area that now exists and the area as it is contemplated to be developed in the future.” (§ 29).</p>
<p><a href="#">Ralph Jensen v. DER, Case no. 89-2064 (1989)</a></p>	<p>Permit to fill submerged areas waterward of the mean high water line abutting property owned by Petitioner on Big Pine Key. Petitioner also proposed to place a riprap revetment over seagrass in the submerged area, and pilings for a stilted structure in the submerged areas.</p>	<p>Florida Keys – Class III Special Waters OFW</p>	<p>The proposed project site is very diverse and productive. The filling of this area would result in the direct elimination of healthy seagrass beds, a drop in the diversity of organisms existing in the filled area, and violate standards of turbidity. “Petitioner contends he’s trying to reclaim a portion of his lot which has eroded, however the evidence of erosion was very slight and only found in a small area where the property adjoins the vertical seawall of the adjacent property.” (§ 5). Respondent claims valuable and diverse wildlife and habitat in the proposed activity area will be adversely affected.</p>	<p>“The filling proposal does not include any measures designed to mitigate for or offset these expected adverse impacts.”</p>	<p>Evidence did not establish that project is clearly in the public interest. In fact, the evidence established that project is contrary to public interest. Because of the destruction of a healthy seagrass and algae community and the lack of any mitigation measures, the project will adversely affect fish and wildlife, and marine productivity, and will degrade the current condition and relative value of the affected areas.” (§ 27). The cumulative impacts of the project are great and the effects of “similar projects for which applications reasonably may be expected must be considered.” (§ 28).</p>



<p><a href="#"><u>Manasota-88, Inc. and Manatee County Save Our Bays Association, Inc., Martin Rosen, and Faye Rosen v. Hunt Building Corporation and DER, Case nos. 90-2350 and 90-2736 (1990)</u></a></p>	<p>Dredge and fill permit for construction of a 3,800 square foot dock and relocation of an existing access channel.</p>	<p>Property located contiguous to Sarasota Bay, a Class II water body and OFW.</p>	<p>Whether Hunt Building Corporation should be issued a permit to construct a linear dock along an artificial canal running into Sarasota Bay, and to relocate an existing access channel by dredging a replacement channel to the canal. DER identified several deficiencies in the proposal which it required be modified before a permit could be issued. Hunt agreed to comply with all of the Department's modifying requirements.</p>	<p>"Any sea grasses in the area of the channel will be protected by the installation of signs indicating their location. Speed will be limited by the installation of "No Wake" zone signs, and, in addition, the natural dog-leg in the channel should minimize the impact to adjacent shorelines and reduce the potential for shoaling or erosion." (§ 9). Plan calls for the removal of approx. 20 trees and the trimming of an additional 230. Because the trimming, as a part of an exempt activity, is also exempt, mitigation is not required. Hunt, however, proposed to plant 3 trees for every tree removed or trimmed. This proposal was considered acceptable to the Department and was incorporated as one of the permit conditions. As a result of the mitigation activities, mangrove and seagrass populations should be increased and the shoreline enhanced. In regards to turbidity and water quality, to insure that existing ambient water quality standards are maintained during construction, the Department has established a mixing zone and will require the use of double turbidity curtains. To protect the manatee population, "the Department has also included conditions to the permit requiring the posting of manatee awareness signs along the canal and channel and the installation of a permanent informational display at the facility." (§ 14).</p>	<p>ALJ found the project to be clearly in the public interest. There is no indication that significant historical and archeological resources will be substantially affected. In fact, none were shown to exist. The area is currently a mangrove swamp performing no function other than that of a step in the ecological water purification system. Evidence of record shows that this function, now only minimally effective, will be enhanced and improved by the project. As to the possible effect on the public health, safety, welfare, or the property of others, notwithstanding considerable cross examination of the applicant's and Department's witnesses, the Petitioners were unable to show any appreciable detriment to any." (§ 25). "Since any discharge of pollutants into Sarasota Bay, an OFW, would be minimal, non-detectable and non-measurable, such pollutants as would exist are permissible under the water quality standards." (§ 27).</p>
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<p><a href="#">Ocean Reef Club, Inc. v. DER, Case no. 87-4660 (1988)</a></p>	<p>Dredge and fill permit authorizing excavation of a marina basin, the connection through mangroves of that basin to an existing tidal creek, and the use of such creek for navigational access.</p>	<p>Key Largo – Class III Special Waters OFW. “The wetlands in and around the project site, including No Name Creek, are within an OFW, specifically the Florida Keys Special Waters. The project site is located in North Key Largo.” (§ 17).</p>	<p>Petitioner was issued a permit to construct residential docking spaces in Key Largo. “During the 2 year processing time leading to issuance of the permit, Petitioner sold a portion of their property including the access channel to third parties that then refused channel construction across their property.” (§ 5). Petitioners requested modifications to their permit. Respondent claims this project is so different that it requires a new permit application. (§ 6). “DER’s consistently applied policy is to require all such significant permit modifications to be processed de novo as wholly new permit applications because to do otherwise would not be in the public interest.” (§ 6).</p>	<p>“It is implausible that Petitioner’s plans to limit boat size through condominium documents to be enforced through a homeowners association, to install mirrors, signaling devices, and latches at certain points along the creek, and to install tide staffs at creek entrances will prevent potential head-on boat collisions or bottlenecks in No Name Creek. It is equally implausible that these procedures can provide reasonable assurances that there will not be a chronic increase in water turbidity from increased use or damage to biota from propellers and boat impact.” (§ 19).</p>	<p>Ocean Reef Club has not provided reasonable assurance that this project will be clearly in the public interest or that water quality standards will not be violated. (§ 32 and 35). “The increased boat use of No Name Creek inherent in this dredging project will adversely affect the quality and diversity of the biota,” which currently enjoys a strong ecological status. (§ 21). “ This project will adversely affect fishing and recreational values as well as marine productivity in the creek, even while there is some increase in recreational and fishing values for marina residents.” (§ 41). “The current condition and relative value of functions being performed by the creek are extremely high and the factors proposed in mitigation will not ensure recolonization of the same high quality and diverse biota.” (§ 43). Permit denied.</p>
<p><a href="#">Pine Island Properties, Ltd. v. FDEP, Case no. 93-2713 (1994)</a></p>	<p>Permit to fill 0.78 acres of wetlands for residential construction.</p>	<p>Project site immediately adjacent to Forty Acre Bay/Bay 36, a Class II OFW (part of the Pine Island Sound Aquatic Preserve).</p>	<p>FDEP initially denied Petitioner’s permit request, over concerns about the potential for turbidity-related water quality violations due to increased boat use, the adverse floristic impact caused by fill washout into adjacent</p>	<p>Petitioner presented mitigation options, but FDEP was still not reasonably assured that the project’s impacts would be offset.</p>	<p>“The evidence establishes that because this project will adversely affect the conservation and habitat of fish and wildlife, including endangered or threatened species, will cause harmful erosion of the shallow bay bottom,</p>

			wetlands, the loss of the filtering benefits provided via the filled wetlands and the adverse impact on wildlife habitat. (§ 22).		will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project, and will cause a permanent adverse impact on the current condition and relative value of functions being performed by areas affected by the proposed activity, the proposed permit is contrary to public interest” and will result in an adverse impact to and degradation of an OFW. (§ 67). The evidence establishes that adverse secondary and cumulative impacts will result from permitting this project. Permit denied.
<a href="#">Sarasota County and Midnight Pass Society, Inc. v. DER, Case no. 90-3533 (1990)</a>	Permit to dredge two access channels and a deposition basin along Bird Island to connect the inlet to the Intracoastal Waterway. Approximately 283,000 cubic yards of material would be dredged. Some of the dredged materials were to be deposited along the nearby beaches of Siesta Key and Casey Key. The County owns a stretch of beach and uplands along the areas to be dredged.	Little Sarasota Bay – Class III OFW. “The project site is located at the juncture of Siesta Key and Casey Key. These Keys form a barrier along the western boundary of Little Sarasota Bay.” (§ 3).	The County’s original plan for the reopening of an inlet that emptied into the Gulf of Mexico was denied by DER. The central issue in this case is whether the DER should grant a permit requested by Sarasota County. This request was supported by the Intervenor, Midnight Pass Society, Inc. and opposed by the Intervenors, Manasota-88, Inc., North Casey Key Association, Sierra Club, Inc., and Jeffrey Jones.	Since the area in discussion is critical habitat for the West Indian Manatee, the County proposed a manatee protection program. (§ 22-23). They also proposed a turtle protection program to combat impacts to the Loggerhead Sea Turtle’s nesting habitat. (§ 27). If the channels are constructed, “the flushing and arrival of predator fishes will adversely affect the nursery habitat.” (§ 32). “The dredging proposed by the County would eliminate at least 50 acres of wetlands. At least ten acres of seagrasses to be dredged would not be expected to reseed or colonize in the deep channel cuts” and mitigation for loss of dredged seagrasses has not been proposed	The County failed to establish that the proposed project is clearly in the public interest. (§ 43). “Based upon the criteria cited above, the County has not demonstrated that any of the positive consequences expected to flow from this project would balance or outweigh the negative impacts which are reasonably expected. Advantages to boaters or recreational users of the pass do not adequately offset the impacts to the manatee, the estuarine fisheries, the seagrasses, the mangroves, the turtles, and the birds

				<p>by the County while mitigation for lost mangroves was proposed. (§ 34). In order to complete both access channels it is expected that 43.8 acres of wetlands will be affected by the dredging. Additionally, “the proposed project will require beach renourishment to continue for an indefinite period of time.” (§ 37). Marine environments do not serve a more useful environmental purpose than estuarine systems. The water quality within LSB will not be significantly improved as a result of the reopening of the inlet. “The Department has not permitted the destruction of a habitat of this size without requiring the applicant to provide extensive mitigation.” (§ 40).</p>	<p>which are currently utilizing this estuarine environment.” (§ 49).</p>
<p><a href="#">James Slater et al. v. Orange County and South Florida Water Management District, Case no. 97-0437 (1998)</a></p>	<p>An ERP for a park and boat ramp project.</p>	<p>Lake Isleworth – Class III OFW, part of the Butler Chain of Lakes, a series of interconnected lakes in Orange county, covering in excess of 5,000 acres.</p>	<p>Whether Orange County should be granted an ERP to expand access to the Lake by the addition of another boat park and ramp in the vicinity of the petitioners and intervenor’s (Regina Gibbs) properties.</p>	<p>“The project is expected to result in 0.07 acres of secondary wetland impacts (removal of littoral zone vegetation) above that required for construction. (§ 56). “A total of 0.14 acres of wetland impacts will occur from direct construction and secondary wetland impacts.” (§ 57). “Mitigation for the 0.14 acres of wetland impact includes 0.56 acres of wetland creation.” (§ 58).</p>	<p>Orange County provided reasonable assurances that the construction and operation of the proposed boat ramp will comply with all applicable water quality, water quantity, and environmental permitting criteria, will not cause adverse water resource impacts, will not cause violations of applicable state water quality standards, and is clearly in the public interest.</p>

<p><a href="#">Sunset Acres Property Owners Association v. DEP. Case no. 91-7958 (1996)</a></p>	<p>Permit for the removal of a plug that, prior to a 1991 storm, had separated the Sunset Acres channel and canal system from Florida Bay. (¶ 67). The project also includes the shoaling of the shore-parallel canal and the construction of bulkheads. (¶ 67). The permit sought would authorize (after-the-fact) the connection of the Sunset Acres canals with the open waters of Florida Bay.</p>	<p>“Sunset Acre’s channel and canal system consists of a channel and four steep-sided canals.” (¶ 6). Three of the four canals run east-west and connect at their western end with a fourth canal, referred to as the shore-parallel canal because it runs parallel to the perimeter berm that separates the development from Community Harbor, which is a part of Florida Bay.” (¶ 7). Florida Bay – Class III OFW.</p>	<p>DEP denied a permit application by Sunset to connect to the then-closed (but now open) canal network in the Sunset Acres subdivision by removing a plug and excavating two flushing cuts through an earthen berm separating the shore-parallel canal from an existing access channel.</p>	<p>“Petitioner has not proposed, nor has it agreed to, any mitigation measures that likely would offset the adverse effects of the proposed project to such an extent as to justify the issuance of a permit.” (¶ 75). However, Petitioner has requested that the Department, in the alternative, approve a modified version of the proposed project with the option of either installing “three boat lifts, one at the basin end of each of the three finger canals,” in lieu of having notches in the bulkheads, or “install[ing] a single boat lift at the entrance channel and clos[ing] the entrance.” (¶ 77).</p>	<p>Denied Petitioner's request for a dredge and fill permit for the proposed project and granted Petitioner's request for a dredge and fill permit for the modified proposed project. Petitioner did not provide reasonable assurance that the proposed project will not degrade the water quality of Florida Bay. (¶ 73). Also, the “Petitioner failed to provide reasonable assurance that the proposed project is not contrary to the public interest (much less shown that such activity is clearly in the public interest).” (¶ 74). Specifically cited was § 373.4593, Fla. Stat., which “declar[ed] that an emergency exists regarding Florida Bay due to an environmental crisis manifested in widespread die off of sea grasses, algae blooms, and resulting decreases in marine life, conditions [which] threaten the ecological integrity of Florida Bay and surrounding areas and the economic viability of Monroe County and the State of Florida.” (¶ 71).</p>
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<p><a href="#">Delcie Suto, et al. v. Celebrity Resorts, Inc. and DER, Case no. 91-2722 (1991)</a></p>	<p>Permit for wastewater treatment and reuse/disposal facility.</p>	<p>Project located in northern Marion County on the southern border of Orange Lake, an OFW.</p>	<p>“Celebrity is seeking a DER permit to construct a 0.065 million gallon per day wastewater treatment and reuse/disposal facility to serve a proposed recreation vehicle (RV) park. (¶ 1). “The RV park is to be located on 75 acres of land, and is to contain 372 RV and ‘park model’ sites, four bath houses, a clubhouse, and an expanded boathouse.” (¶ 2).</p>	<p>No mitigation was discussed. However, although the proposed facility is not a highly sophisticated plant, reasonable assurances have been provided that it will comply with DER’s requirements for secondary treatment and basic disinfection and proper operation. (¶ 14).</p>	<p>“Evidence presented in this case indicates that there is reasonable assurance that none of the applicable DER rules will be violated by the construction of the [facility] and spray irrigation system as proposed by Celebrity Resorts, Inc.” (¶ 42).</p>
<p><a href="#">Harold and Charlotte Toms v. FDEP and Springs on King Bay, Case no. 93-5724 (1994)</a></p>	<p>Dredge and fill permit for Springs on King Bay, a condominium association, to construct a 12-slip docking facility.</p>	<p>Hunter Spring Run – a Class III OFW.</p>	<p>FDEP issued an Intent to Issue the requested permit. Petitioners Harold and Charlotte Toms filed a challenge to the issuance of the permit. (Order Denying Amended Motion to Tax Costs and Reasonable Fees). The weight of the evidence proved the proposed facility would not lower water quality standards, would only have temporary turbidity during construction, would not affect the public health, safety, or welfare. (¶ 18, 19, and 21).</p>	<p>Springs, in negotiation with FDEP, amended the original proposal to reduce the size of the dock facility and agreed to a conservation easement. “Because of the conservation easement, the cumulative impact of the proposed project will be in the public interest due to the decrease in the potential number of boat slips in the area.” (¶ 44). Moreover, Springs agreed to a number of measures to protect manatees during and after construction.</p>	<p>Springs provided reasonable assurance that, based upon a balanced consideration, the proposed project is clearly in the public interest. (¶ 59). Petitioners offered no evidence to rebut these assurances. Section 403.919(3), Florida Statutes, requires a consideration of the cumulative impacts of the proposed project. Cumulative impacts of the proposed project will be minimized and, because of the conservation easement, will be in the public interest. (¶ 60).</p>
<p><a href="#">Robert Vanwagoner (95-3621) and Save Anna Maria, Inc. (95-3622) v. DOT and DEP (1995)</a></p>	<p>Department of Transportation sought a dredge and fill permit for bridge reconstruction.</p>	<p>Anna Maria Island Bridge is about 9000 feet south of the confluence of Sarasota Pass and Lower Tampa Bay. Sarasota Pass</p>	<p>Whether DOT is entitled to a “dredge-and-fill permit from DEP for the purpose of demolishing the Manatee Avenue drawbridge to Anna Maria Island and constructing a fixed-span, high-level bridge 20 feet south of the existing</p>	<p>DOT has not minimized the project by proposing the no-build alternative, so consideration of seagrass mitigation is premature. (¶ 193). The seagrass mitigation in this permit is vague, unenforceable, and ultimately nonexistent. “The seagrass mitigation offered by</p>	<p>Denied the DOT’s application for a dredge-and fill permit. DOT failed to provide reasonable assurance that the proposed project is clearly in the public interest. “DOT has provided no reasonable assurance as to</p>

		connects to the Tampa Bay estuary to the north and Sarasota Bay estuary to the south. Sarasota Pass and Sarasota Bay are OFWs. The waters in the vicinity of the Bridge are Class II waters. (§ 58).	bridge.” The project is likely to affect seagrass, manatees, and mangrove.	DOT is deficient in three respects. First, the transplant receiving site is too small. It is 0.19 acres as compared to the likely permanent loss of 2.5 acres and temporary loss of 2.0 acres. The second deficiency is that the primary seagrass mitigation is too speculative. The third deficiency of the seagrass mitigation plan is its contingent nature, which is perhaps inevitable when the primary seagrass mitigation plan is widely conceded as unlikely to succeed.” (§ 87-95).	five of the six applicable criteria and has provided reasonable assurance only as to part of the sixth criterion.” (§ 183). DOT failed to provide reasonable assurance that the project would not lower ambient water quality in Sarasota Pass. “DEP and DOT have not analyzed the water-quality impacts attributable to the probable destruction of an extensive area of seagrass. Underestimating the seagrass losses by an order of magnitude and lacking many important measures of water quality, DOT cannot provide reasonable assurance that the proposed project would not degrade ambient water quality in the area of the bridge. To the contrary, the proposed project would likely degrade water quality.” (§ 111).
<a href="#">Town of Windermere v. Orange County Parks Dept. and DER, Case nos. 90-1782, 90-1813, 90-2155, 90-2156 (1990)</a>	Orange County Parks Department applied for a dredge and fill permit for construction and installation of a floating boat dock to accommodate boats and pedestrians loading and unloading boats from an existing boat ramp.	The Butler Chain of Lakes, including Lake Down, Wauseon Bay, and the interconnecting waterway – All OFWs. (§ 93).	Whether the “Orange County Parks Department is entitled to a dredge and fill permit from the DER for the construction and installation of a boat dock on Lake Down.”	“Suggestions that the dock could be moved lakeward of its proposed location were vague and never crystallized into a formal request to amend the application. If such suggestions qualify as a proffer of a mitigative condition, the condition is concluded to be insufficient.” (§ 103).	Orange County has failed to provide reasonable assurance that the proposed project would not result in a violation of applicable ambient water quality standards and has failed to provide reasonable assurance that the proposed project is clearly in the public interest. (§ 98-99).

<p><a href="#">Henry Ross v. City of Tarpon Springs and FDEP. Case no. 00-2100 (2003)</a></p>	<p>City of Tarpon Springs applied for an ERP and lease to use Sovereign Submerged Lands for dredging and maintenance dredging of sediment from eleven locations in or adjacent to the Anclote River and surrounding bayous and lagoons in order to maintain/improve navigation for commercial and recreational boating.</p>	<p>Pinellas County waters – all of which are designated aquatic preserves and OFWs.</p>	<p>After Tarpon Springs applied for the permits, DER issued a notice of intent to issue. Petitioner challenged the intent to issue. The issue is whether Tarpon Springs should be issued an ERP and Authorization to Use Sovereignty Submerged Lands for the dredging of existing channels in order to improve/maintain navigation for commercial and recreational boaters.</p>	<p>The City amended the original application to address several of DER's concerns. The modified application "significantly changed the whole concept of the project from one that would increase boating traffic to one that would maintain the current boating traffic." (§ 16). However, no additional mitigation was offered.</p>	<p>The evidence established that the project will not result in violations of the water quality standards nor degrade the ambient water quality in an OFW. The City provided reasonable assurances that its activities will not adversely impact OFWs or Class II waters and will not contribute to boat traffic in a manner that will adversely impact the manatee. The evidence demonstrates that the proposed activity is clearly in the public interest.</p>
<p><a href="#">Stanley Dominick, et al. v. Leland Eglad and FDEP. Case no. 01-1540 (2002)</a></p>	<p>Leland Eglad, applied for an ERP "to fill an illegally-dredged trench or channel in mangrove wetlands between Florida Bay and what was a land-locked lake, to restore preexisting conditions."</p>	<p>Florida Bay – Class III OFW. The channel connecting the land-locked lake to Florida Bay was man-made and not an OFW. Manatees began using the channel to enter the lake from Florida Bay.</p>	<p>DEP issued a notice of intent to issue the permit and Petitioners challenged. This issue is whether DEP should grant the application of Leland Eglad.</p>	<p>N/A</p>	<p>Eglad gave reasonable assurance that filling the trench or channel at issue to restore preexisting conditions will not degrade the water quality of Florida Bay. To the contrary, "if the water quality changes as a result of this project, it will likely improve since less lower-quality water from South Lake will enter Florida Bay." (§ 35). Eglad provided reasonable assurances that the restoration project will not adversely impact manatees. (§ 40). "Eglad's evidence was sufficient to provide reasonable assurance that his proposed restoration project is clearly in the public interest." (§ 41).</p>



<p><a href="#">Singer Island Civic Association, Inc. and 1000 Friends of Florida, Inc. v. Robert Simmons, Jr., Little Munyon Island of Palm Beach County, and DEP, Case no. 01-1800 (2001)</a></p>	<p>ERP and consent to use sovereign submerged lands for construction of a single-family residential dock and to fill wetlands on Little Munyon Island located in Lake Worth Lagoon, a saltwater estuary. (¶ 1). “The proposed dock is significantly larger than a typical private, single-family dock. No other of its proportions can be found in Palm Beach County” and it is more of a commercial nature. (¶ 49). “The dock was specifically designed for use in construction of an 8,000 to 10,000 square-foot residence, plus swimming pool, on the island.” (¶ 23). Little Munyon Island is a 1.5 acre undeveloped island surrounded by 16 acres of privately owned, mostly submerged land. (¶ 4-5). The area is vegetated with very high quality seagrasses and there is a high degree of biological diversity. (¶ 15).</p>	<p>Little Munyon Island is located just south of the John D. MacArthur State Park and Big Munyon Island. The Park waters are Class II OFWs</p>	<p>Whether Respondent, Robert J. Simmons, Jr. should be issued an ERP and a Consent to Use Sovereign Submerged Lands to construct a private, single-family, residential dock for access to Little Munyon Island and to fill jurisdictional wetlands on the island in order to construct a residence on the island. It was estimated that, to fill the island, if applicant “used barges 120-130 feet long and capable of hauling 300 tons of fill, he would need to deliver 27-30 barge loads of fill to the dock and there is a reasonable likelihood that some of this fill will fall into the water.” (¶ 64).</p>	<p>Simmons modified the application, which proposed mitigation for the loss of .15 acres of wetlands. (¶ 29). The proposed mitigation did not create wetlands, but rather would replace “submerged and intertidal habitat with mangroves and cordgrass habitat. (¶ 34). “Simmons proposed placement of rip-rap breakwaters just landward of the existing limit of seagrass, or further landward, to provide wave and scouring protection and planting of mangrove and other species landward of the rip-rap.” (¶ 29). After DEP denied the modified application, another modification was made with more mitigation steps related to the proposed dock. “Simmons also offered to record a conservation easement on the 16 acres of privately-owned submerged lands surrounding Little Munyon Island.” (¶ 40).</p>	<p>ALJ found the real purpose of the dock was to construct a 8,000 – 10,000 square foot home. “A less intense use of the island would have fewer impacts on the environment” and alternatives were available. (¶ 50). Damage to the seagrasses will result from direct construction of the dock and resulting shading. Even if the dock was shortened by 35 feet to avoid the need to obtain consent to use sovereign submerged lands, the water depths at the alternative location would be even shallower and impacts on seagrasses from scouring and turbidity would be even greater. (¶ 85). “Simmons did not provide reasonable assurances that resulting secondary impacts ... would be acceptable.” (¶ 107). Even if the dock is not shortened, there are significant secondary impacts to water quality and seagrasses surrounding Little Munyon Island and possible impacts on the Class II OFW in MacArthur State Park. Risk of those impacts is contrary to the public interest. (¶ 107).</p>
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<p><a href="#">Daniel Rothenberger, Michael Irwin, and Vernon Powers v. Southwest Florida Water Management District and DOT, Case no. 02-3423 (2003)</a></p>	<p>Florida Department of Transportation applied for an ERP “to construct the Pinellas Bayway Bridge Replacement and associated surface water management system.”</p>	<p>The existing Pinellas Bayway Bridge is a two-lane bascule structure located within and spanning Boca Ciega Bay, an OFW.</p>	<p>Whether the DOT should be granted an ERP authorizing constructions of “the Pinellas Bayway Bridge Replacement and associated surface water management system.”</p>	<p>“The mitigation project to compensate for impacts by the Replacement Bridge to sea grass beds within the affected surface waters is a water circulation project at Fort DeSoto Park, located at the southern end of Boca Ciega Bay,” in the same receiving waters where the impacts will occur. (¶ 31).</p>	<p>ALJ found the Project will not degrade water quality in Boca Ciega Bay. Also found the record established that the Project will actually improve water quality in the Bay. (¶ 32). The project will not adversely impact fish or wildlife “based upon the stipulation with respect to the adequate protection of sea turtles and manatees during bridge construction.” (¶ 52). “The Department has presented a prima facie case that it has provided the reasonable assurances necessary to obtain the ERP.” (¶ 72). Reasonable assurance has been provided that the Project will be clearly in the public interest. “Petitioner has failed to present contrary evidence of equivalent quality showing that the Department is not entitled to the permit.” (¶ 72).</p>
<p><a href="#">Butler Chain Concerned Citizens, Inc. v. Windermere Botanical Garden, L.P., and DEP, Case no. 03-2471 (2003)</a></p>	<p>ERP for a muck-removal project in an eight-acre cove at the northwest corner of Lake Butler. Windermere Botanical Gardens sought to remove invasive aquatic vegetation from wetlands within the landward extent of Lake Butler.</p>	<p>Lake Butler, part of the Butler Chain of Lakes, is an OFW.</p>	<p>Petitioners challenge DEP’s consent agreement with WBG that, after the fact, authorized WBG to remove invasive aquatic vegetation. Petitioners alleged the scope of the work far exceeded the work permitted. Despite finding multiple violations, DEP issued the consent agreement.</p>	<p>N/A</p>	<p>Petitioner lacks standing despite the multidimensional role of Lake Butler in the lives of substantial numbers of its members and WBG’s obvious violations of the laws protecting OFWs and governing the private use of sovereign submerged lands. Petitioner’s standing is precluded by the fact that the record</p>

					<p>does not support a finding that the acts and omissions of WBG contributed to any water quality violations in Lake Butler, including an algae bloom that took place in early August 2002. To the contrary, the ALJ found that the removal of the tussock and muck from the cove, especially in tandem with the completion of the revegetation required by a 2001 permit, will improve the water quality of Lake Butler and add to the diversity of the habitat associated with the lake. And, in the short run, the berm and turbidity barriers protected the open waters of the lake from construction- and stormwater-related turbidity. Under these circumstances, Petitioner lacked standing to dispute the proposed agency action of DEP in finalizing the consent agreement with WBG. (¶ 60-61). WBG's multiple violations were left to DEP to punish.</p>
<p><a href="#">Bd. of Comm'rs of Jupiter Inlet Div. and Jeffery and Andrea Cameron and Doug Bogue v. Paul Thibadeau and DEP, Case no. 03-4099 (2005)</a></p>	<p>ERP and authorization to use Sovereign Submerged Lands for noticed general permit to construct a single family dock.</p>	<p>Loxahatchee River-Lake Worth Creek Aquatic Preserve – Class II OFW.</p>	<p>Noticed general permit to “install a 900 square-foot dock comprising a three-foot by 250-foot access walkway, a six-foot by 25-foot terminal structure, and two eight-foot by 30-foot boat slips – one a wet slip and the other a boatlift” in</p>	<p>“The platform covers submerged bottom that is uncolonized by seagrass, and, given its coarse sand and shell hash, as well as the water depths and water clarity, this bottom is unlikely ever to be colonized by seagrass. The portion of the dock that traverses seagrass will shade</p>	<p>“The Revised Application meets the requirements of an NGP. It is a single-family pier that will accommodate the mooring of no more than two boats. The handrails and high deck will discourage mooring along the dock,</p>

			<p>the central embayment of the Loxahatchee River in Palm Beach County.</p>	<p>this vegetation, but the effect of shading is mitigated by the seven-foot elevation of the deck, translucency of the decking material, and near north-south orientation of the deck.” (§ 28). “To mitigate for any cumulative impacts to these resources, to avoid adverse precedent for two dock structures per parcel, and to limit adverse precedent for lengthy docks to comparable water depths, the Letter of Consent must contain the condition – already agreed to by Applicant – that he remove the existing dock before constructing the new dock.” (§ 66).</p>	<p>and the terminal platform is not designed to moor safely more than two boats. At the boat moorings, the water depth will be in excess of two feet at mean low water. The terminal platform and moorings are not over seagrass. The deck that traverses seagrass is elevated two feet more than what is required in the rule, and it is one foot narrower than what is permitted in the rule. The platform and deck do not significantly impede navigation. Applicant will conduct no dredging and filling beyond what is required to install the pilings.” (§ 40-42).</p>
<p><a href="#">Captiva Civic Association, Inc. et al. v. SFWMD and Plantation Development Ltd., Case no. 06-0805 (2006)</a></p>	<p>ERP for construction and operation of a surface water management system serving a 78.11-acre condominium development known as Harbour Pointe at South Seas Resort, with discharge into wetlands adjacent to Pine Island Sound.</p>	<p>Pine Island Sound – Class II OFW.</p>	<p>Whether the SWFWMD should issue a ERP Modification to Plantation Development, Ltd. for construction and operation of a surface water management system. “The project will destroy and fill 2.98 acres of these wetlands. Indirect (secondary) impacts to the adjacent preserved wetlands will result from alteration of hydrology of the 2.98 acres of directly impacted wetlands.” (§ 50).</p>	<p>“The proposed mitigation for the mangrove impacts included: restoration (by removal and replanting) of .6 acre of the north-south sand/shell road, with resulting enhancement of the adjacent preserved mangrove wetlands through improved hydrologic connection across the former shell/sand road and improved tidal connection to Pine Island Sound to the east; and preservation of the rest of PDL’s property.” (§ 17). “A conservation easement was offered for the 73.31 acres to be preserved, including 71.10 acres of wetlands. PDL also offered to purchase .11 credits of offsite mitigation from the Little Pine</p>	<p>“The current condition and relative value of the functions being performed by the areas affected by the proposed activity are very valuable. That is why the reduction and elimination analysis is particularly important in this case. Assuming appropriate reduction and elimination, mitigation according to the UMAM assessment can offset unavoidable impacts to the functions performed by the areas affected by the proposed activity.” (§ 79). Moreover, “the proposed system is not located in</p>

				<p>Island Wetland Mitigation Bank.” (§ 19). A monitoring program lasting at least five years was offered to ensure success of the restoration and mitigation proposal.</p>	<p>the Pine Island Sound OFW; rather, it discharges into adjacent wetlands. Secondly, PDL offered the un rebutted expert testimony that the system will not measurably degrade Pine Island Sound. Therefore, PDL’s burden was to provide reasonable assurances that the project is not contrary to the public interest” and they provided such reasonable assurances. (§ 117).</p>
<p><a href="#">Ian and Keli Lineburger, et al. v. Prospect Marathon Coquina and FDEP, Case no. 07-3757 (2008)</a></p>	<p>ERP for construction of a dock expansion to serve a residential condominium development. Prospect Marathon Coquina (PMC) is the developer.</p>	<p>Big Bayou, near the southern end of the St. Petersburg peninsula. The mouth of the bayou opens to Tampa Bay. Big Bayou is part of the Pinellas County Aquatic Preserve, which includes most of the coastal waters of Pinellas County. Pinellas County Aquatic Preserve is a Class II water and OFW.</p>	<p>Whether PMC is entitled to an ERP for the proposed expansion of a docking facility, and whether PMC is entitled to a modified sovereignty submerged land lease for the proposed project.</p>	<p>PMC agreed to the following to meet the public interest criteria: (a) contribute \$300,000 to the construction of a second boat ramp at the current Sutherland Bayou Boat Ramp project in Palm Harbor; (b) install and maintain navigational aides marking the main channel in the bayou; (c) install markers indicating the location of seagrass beds; (d) install and maintain an informational display at the public boat ramp in Grandview Park, relating to the protection of seagrasses and natural resources within the bayou; and (e) install and maintain an aerial map at the Grandview Park boat ramp depicting the location of the navigation channel and the seagrass beds in the bayou. (§ 56).</p>	<p>Taking into account the proposed conditions, the adverse environmental impacts would be insignificant. However, the second ramp would put boats into waters where there has been greater seagrass losses, more prop scarring, and more manatees killed by boat collisions than in Big Bayou. PMC’s contribution to the boat ramp would actually increase the secondary and cumulative impacts of PMC’s proposed project and causes it to fail the public interest criteria. Without the \$300,000 contribution, PMC would meet the “clearly in the public interest” test because the other mitigation would offset the impacts of the proposed project.” (§ 61-61).</p>

<p><a href="#">Normandy Shores, LLC v. DEP, Case no. 08-0217 (2008)</a></p>	<p>Exemption from ERP requirements for the construction of ten docks to serve a luxury townhome community.</p>	<p>Normandy Waterway and Indian Creek. Both of these waterbodies are in the northern portion of the Biscayne Bay Aquatic Preserve, a Class III water and OFW.</p>	<p>Whether the applications filed by Petitioner for an exemption from ERP requirements to construct and install ten docks to serve eighteen private boat slips and a letter of consent to use sovereign submerged lands in Indian Creek, within the Biscayne Bay Aquatic Preserve, Miami Beach, Florida, should be approved.</p>	<p>No mitigation discussed.</p>	<p>Because the private docks were associated with upland “multi-family living complexes,” and less than 65 feet apart, the project does not meet the requirements of the rule and cannot qualify for an exemption. To qualify for a letter of consent, the docks must first qualify for an exemption from ERP requirements. (¶ 38). Petitioner also failed to show that the project will not cause unacceptable cumulative impacts: “the more credible evidence supports a finding that the proposed activities will cause direct and indirect adverse impacts on the Preserve’s natural systems, so that the submerged lands and associated waters will not be maintained “essentially in [their] natural or existing condition” as required by r. 18-18.001(1), Fla. Admin. Code.</p>
<p><a href="#">Project Key West and the Florida Keys, Inc. d/b/a Last Stand v. Monroe County and South Florida Water Management District, Case no. 08-3823 (2009)</a></p>	<p>Modification to ERP for an airport runway safety area.</p>	<p>Airport located in the City of Key West. There are approximately sixteen wetlands, five surface waters, and some salt ponds in and around the project area. The salt ponds are OFWs.</p>	<p>Whether to approve an application by Monroe County to modify its ERP to authorize the construction and operation of Runway Safety Area improvements for the existing runway and associated wetland mitigation work at Key West International Airport.</p>	<p>The County proposes to implement a mitigation proposal at two different locations within and adjacent to the Airport that includes 11.30 acres of mangrove swamp and tidal flat creation, 3.64 acres of bay and estuary creation, 5.21 acres of wetland enhancement, and 0.96 acres of upland hammock enhancement, for a total of 21.11 acres. (¶ 13).</p>	<p>Although Last Stand failed to prove the elements of associational standing, it was allowed to fully participate and litigate all issues raised in its Petition. “The County has established its entitlement to the requested modification of its ERP. Where conflicting evidence</p>

				In addition to Mitigation Area Nos. 1 and 2, which on their own offset the wetland impacts, the County agreed to preserve an additional 55 acres of salt pond habitat. These 55 acres are referred to as Preservation Area No. 3.	on the issues was presented, the more credible and persuasive evidence was accepted in favor of the applicant. Therefore, the County's application to modify its existing ERP should be approved." (§ 109).
<a href="#">Bayshore Homeowners Association, et al. v. DER and Grove Isle, Inc., Case nos. 79-2186, 79-2324, 29-2354 (1980)</a>	Water quality control permit for the construction of a 90-foot wet-slip marina on Grove Isle.	Biscayne Bay – Class III OFW.	Whether Grove Isle has provided reasonable assurances that the construction and operation of the proposed marina will not cause a violation of state water quality standards, will not interfere with the conservation of fish and other marine wildlife, and will not create a hazard to safe navigation of Florida waters.	No mitigation was discussed. However, "the original plan for the marina, which was objected to by DER was modified to protect a bed of seagrasses." (§ 1). DER attached several conditions to the notice to issue the permit, including: measures to control turbidity, prohibition of live-aboard vessels, water markers, a chemical monitoring program, and manatee warning signs.	Grove Isle failed to demonstrate that its project is affirmatively in the "public interest" and it is undetermined whether the applicant can meet ambient water quality standards within the project area. "After a consideration of all the foregoing factors, the intent of the preservation acts, and DER's rules, it is concluded ... that the greater benefit to the greater number of Floridians lies in denying the application of Grove Isle." (§ 25).
<a href="#">Charlie Toppino &amp; Sons, Inc. v. DOT and DER, Case no. 80-0854 (1980)</a>	Variance for construction and operation of a borrow pit (mining operation) in the Florida Keys to provide fill material, currently provided by a pit in Cudjoe Key.	Proposed site comprised entirely of tidally inundated wetland areas in Key Deer Refuge, in the Florida Keys, an OFW. The area is a feeding ground for the Florida Key deer.	DOT is seeking a variance from various water quality provisions to construct and operate a "borrow pit" in the Florida Keys. "The issue in this proceeding is whether the variance sought by DOT should be granted because of the financial benefit that would accrue to the State, or denied because of adverse environmental impacts."	No mitigation was discussed.	Proposed borrow pit would result in violations of DER's standards for dissolved oxygen. But, operation of state-owned borrow pit would save the state money. Variance request should be denied because potential savings were not established with precision; the project is in an OFW; and the adverse environmental consequences were established with precision.

<p><a href="#">Wilber Walton v. DER, Case no. 80-2315 (1981)</a></p>	<p>Dredge and fill permit for the construction of a 12-foot wide road across approximately 270 feet of swampy area dominated by bald cypress. The proposed fill would result in permanent elimination of at least 3,240 square feet of area within the landward extent of the Suwannee River.</p>	<p>Project site is a tract of land adjacent to the Suwannee River in Dixie County, Florida. Suwannee River – Class III OFW.</p>	<p>Whether petitioner has established his entitlement to the requested permit and concomitantly whether the proposed project will be in the public interest and whether it will have a negative impact on the waters of the state.</p>	<p>Mitigation not discussed.</p>	<p>Project was clearly shown to reduce the quality of the receiving waters below the classification established for them, and exacerbate the degradation of the receiving waters of the river already occasioned by existing fill roads in the swamp. Petitioner failed to provide affirmative reasonable assurances that proposed project will not result in violations of water quality standards. A preponderance of the evidence demonstrates clearly that the proposed project will cause pollution in contravention of the Department's rules and will result in violations of the water quality standards. Moreover, the cumulative effect of permitting the project is great.</p>
<p><a href="#">Raymond Hodges, Jr. and Anne Hodges v. DER, Case no. 81-1088 (1981)</a></p>	<p>Dredge and fill permit for construction of boat basin, boat ramp, and a retaining wall. The proposed dredging operation would connect the canal system to the navigable portion of the Suwannee River. The area in question provides flood protection and controls sedimentation.</p>	<p>Tract of land adjacent to and partially within the landward extent of the Suwannee River in Dixie County, Florida. The Suwannee River is a Class III OFW.</p>	<p>Whether Petitioners provided affirmative reasonable assurances that the proposed project will not result in violations of the water quality standards or Department rules and whether the project will cause pollution.</p>	<p>No mitigation was discussed to offset the numerous and serious adverse affects of the project.</p>	<p>Petitioner failed to provide reasonable assurances that project will not result in violations of water quality standards. Thus, project is not in the public interest. Preponderance of the evidence also demonstrates that the project will cause pollution in contravention of Chapter 17, Fla. Admin. Code.</p>



<p><a href="#">DER v. Noel Brown and Carolyn Brown Case no. 81-2629 (1981)</a></p>	<p>Unauthorized filling activities were discovered during an aerial inspection of property along Yellow River. The filling and bulkheading activities around a boat slip occurred in an area dominated by species listed in r. 17-4.02(17), Fla. Admin. Code.</p>	<p>Activities occurred in the Yellow River marsh system. The Yellow River is classified as a Class II water, an Aquatic Preserve, and an OFW.</p>	<p>During an aerial inspection in August 1980, a DER employee noticed what appeared to be unauthorized filling activities on Respondents' property. The issues was whether Respondents may continue to operate and maintain the stationary installation, consisting of a bulkhead and fill, on the subject property without an appropriate and valid permit from DER.</p>	<p>Mitigation was not discussed. However, DER issued an Order of Corrective Action that set forth the following requirements: Respondents (1) must stop further dredging or filling, (2) pay a fine to reimburse the expenses of investigation, and (3) submit a plan of the total restoration of the area following specific requirements of DER. (§ 11).</p>	<p>Respondents' activities were undertaken without an appropriate and valid permit. "The activities resulted in the alteration of the chemical, physical, and biological integrity of the waters of the Yellow River, including the marsh area fringing the river, by the destruction of wetlands which provide food and habitat for wildlife, and which provide a filtrative and assimilative capacity to remove nutrients and other pollutants from the lake waters. The discharge of fill onto the marsh areas ... resulted in injury to the biological community that existed there." (§ 9). The discharge of fill "has resulted in injury, and in the obliteration of animal, plant, and aquatic life." (§ 23). Thus, the Respondents have violated § 403.161(1)(a), Fla. Stat.</p>
<p><a href="#">George DeCarion and James Roberts v. DER, Case no. 81-3242 (1982)</a></p>	<p>Dredged and fill permit from DER to construct an upland canal and access channels for a private, 70-acre, residential development on Key Largo in Monroe County, Florida.</p>	<p>John Pennekamp Coral Reef State Park is a Class III OFW renowned for its unique coral reef formation and a diversity of marine organisms.</p>	<p>Whether any portion of this project, specifically the northern circulation channel, lies within the boundaries of the John Pennekamp Coral Reef State Park.</p>	<p>Petitioners propose to recreate a similar number of mangroves as are removed by the dredging and to replant seagrasses in the proposed channels. However, "the probability of a successful replanting of seagrasses in the proposed artificial canal and access channels was not adequately demonstrated by the evidence in this proceeding." (§ 19).</p>	<p>"For purposes of locating a boundary, the physical location of a monument controls over written calls of its location." (§ 14). It was determined that the project site was not within the Park boundaries, but located approximately 363 feet south of the Park's southerly boundary. "The petitioners have failed to affirmatively provide reasonable assurances</p>

					that the construction of a 4,400 foot long upland canal with access channels, and the consequent destruction of mangroves and grass bed communities, will not cause violations of the State water quality standards regarding dissolved oxygen and biological integrity. The petitioners have likewise failed to demonstrate that their project, located in close proximity to the John Pennekamp Coral Reef State Park, will not cause environmental damage to such an extent as to be contrary to the public interest.” (§ 21). Thus, the petitioners have failed to provide reasonable assurances that the short- and long-term effects of the proposed activity will not violate water quality standards for Class III waters and will not significantly degrade the OFW located just 363 feet to the north.
<a href="#">Sierra Club, Calusa Group, c/o Ellen Peterson, Co-chair v. Lee County, Black Island Resort, and DER, Case no. 82-0159 (1982)</a>	Three permits for a sewage treatment plant, disposal system, and reverse osmosis water treatment plant.	Groundwater at the drain field site mixes with the surrounding waters within Estero Bay Aquatic Preserve, a OFW.	Whether the proposed sewage treatment plant and attendant waste disposal system will violate water quality standards.	No mitigation discussed.	Applicant did not provide reasonable assurance that the nutrient pollutants involved will not constitute significant degradation of the OFW, will not lower existing ambient water quality, or that the project is clearly in the public interest. Permit denied.

<p><a href="#">Richard Buchanan v. DER, Case no. 82-3543 (1983)</a></p>	<p>Permit to dredge an access channel.</p>	<p>Apalachicola Bay – Class III OFW.</p>	<p>Whether petitioner should be authorized to dredge a channel to restore the access he had to deeper water before another’s illegal “prop-dredging” caused sediment to accumulate and block his access. Before the disturbance, the configuration of the bottom allowed small boats to come all the way into shore.</p>	<p>Rule 17-4.28(8)(a), Fla. Admin. Code, requires a plan for minimization of the environmental effects of projects of this kind. Ordinarily, it would fall to the applicant to devise such a plan to conserve Departmental resources. In the present case, however, “where petitioner is volunteering to effect partial restoration at his own expense, it would be oppressive to saddle him with the additional burden of retaining persons with the expertise necessary to formulate such a plan, particularly when respondent, whose interests petitioner is advancing, has persons with such expertise in its employ.” (¶ 18).</p>	<p>“It is very clearly in the public interest to allow a citizen, at his own expense, to restore bottomlands to the condition in which they existed for decades before illegal activities of a stranger altered them, especially where the citizen alerted the authorities to the illegal activities while they were in progress.” Neither petitioner nor any predecessor in title was responsible for the sudden man-made transformation. Petitioner complained to the appropriate authorities contemporaneously with the illegal acts that caused the problem and took steps to prevent the illegal damage. “It is sound policy to encourage such participation by citizens in protecting the environment.” (¶ 17). Evidence didn’t suggest any long-term adverse, cumulative, environmental impact, if petitioner's proposed project was allowed. (¶ 14). Permit granted “on such reasonable conditions, including turbidity curtains, as are necessary adequately to protect the project vicinity.” (Recommended Order at 6).</p>
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<p><a href="#">Joel Beardsley et al. v. Mark Bartecki and DER, Case no. 83-1532 (1983)</a></p>	<p>Permit to construct a dock and boat slips. “The proposed dock would be the first structure of its type permitted by DER on Cudjoe Bay.” (¶ 13).</p>	<p>Cudjoe Bay – Class III OFW within the Key Deer National Wildlife Refuge.</p>	<p>Mark Bartecki and associates are seeking various governmental approvals for construction of a 50-unit duplex housing development on 25 lots on the shore of Cudjoe Bay. Bartecki initially sought mooring facilities for as many as 25 boats, but through negotiations with the Department amended the application to provide that no more than eight boat slips and eight boats will be accommodated. Issue is whether permit should be granted.</p>	<p>Bartecki’s planned to mark a channel which would help reduce random boat traffic and concentrate boat traffic in the marked lane so as to reduce consequential propeller damage to grass beds in a wider area of Cudjoe Bay.</p>	<p>“[N]o such construction [should] be permitted in waters accorded this high degree of protection unless the public will actually be substantially served by the installation of such a facility.” (¶ 25). Although applicant affirmatively demonstrated reasonable assurances that the project would be environmentally palatable, he has nevertheless failed to meet the heavy burden of the “public interest test.” Permit denied.</p> <p>***REVERSED by the District Court of Appeal for the First District in holding that “Denial by the [DER] of a permit to construct a dock adjacent to applicant’s property, based on applicant’s failure to show that the project was clearly in the public interest, was erroneous, as reflected in contemporaneous case in which imposition of such a public interest requirement prior to issuance of construction permit for stationary installation not involving the discharge of waste into state waters was an invalid exercise of delegated authority.”</p>
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<p><a href="#">Craig Zabin (84-0358) and Judy Ryan and Robert Sampson (84-0449) v. Brevard County and DER (1984)</a></p>	<p>Permit to construct a sludge wastewater treatment plan utilizing chemical additives, a tertiary sand filter, disinfection by chlorination, and effluent disposal to a drainage canal and then to Newfound Harbor.</p>	<p>Effluent will be discharged into a ditch that eventually intersects with Newfound Harbor. At that point the Harbor waters are classified as Class III waters. A portion of the Harbor, well to the south of the discharge point, is classified as an OFW. The discharge would not have an impact that was technically measurable on that portion of Newfound Harbor.</p>	<p>Whether a permit should be issued to Brevard County authorizing the construction of certain modifications to its Fortenberry wastewater treatment and disposal plant in Merritt Island, Florida. Petitioners contend that the construction would result in the discharge of effluent containing toxic substances into an OFW. Furthermore, petitioners contend that the plant has no operating permit, that it has violated “discharge standards” for the last three years, and that the plant’s present discharge is harmful to human health and aquatic life in violation of various DER rules.</p>	<p>No mitigation was discussed. However, the draft permit authorized the activity subject to fifteen general and ten specific conditions. (§ 3).</p>	<p>Applicant provided reasonable assurance that the proposed improvements to the Fortenberry Plant will comply with the various standards and not discharge, emit, or cause pollution in contravention of Department standards or rules. The permit is granted in accordance with the terms and conditions of the draft permit. “The construction of the improvements authorized by the permit should not be delayed since the Fortenberry Plant is currently violating its waste load allocation and polluting the waters of Newfound Harbor.” (§ 13).</p>
<p><a href="#">Sierra Club, et al. v. DER and Port Bougainville, Inc. Case nos. 84-2364, 84-2365, 84-2385, 84-2327: (1984)</a></p>	<p>Seeking authorization to modify an existing boat basin and marina on northern Key Largo Florida. The facility is designed to serve a real estate development.</p>	<p>Existing boat basin in marina lies on northern Key Largo in Monroe County, adjacent to Garden Cove, an embayment of the Atlantic Ocean. Garden Cove is a Class III OFW. Marina is also on the western edge of John Pennekamp Coral Reef State Park, an OFW.</p>	<p>Whether an existing marina, already authorized by DER, DNR and by the “Development of Regional Impact” Development Order, should be granted an application for modification and reconstruction. In addition, whether the marina modification project will comport with the various water quality, marine life protection and environmental safety parameters, and if so, whether and under what conditions, the permit should be issued.</p>	<p>Port Bougainville agreed to modify the marina to shoal the marina basin and canal system to a depth of no more than -4 feet mean low water at the north end of the basin and -6 feet in other areas; to reduce the capacity of the marina to 311 boat slips; to install a bubble screen around the fueling facilities and relocate those facilities; to provide for marking of the access channel and installing tidal gauges at the entrance; to reconfigure the access channel; to grant the Department a conservation easement providing that there would be no connection between the marina and certain upland</p>	<p>The Department shall issue a permit to Port Bougainville to make the proposed modifications to the marina. It was established that “the modification of the marina as proposed will actually be clearly in the public interest inasmuch as it will substantially improve the existing marina.” (§ 43). “Moreover, the evidence clearly shows that the activity sought to be permitted will not ‘significantly degrade’ the waters of Pennekamp Park either alone or in combination with other</p>

				lakes, that Port Bougainville would not use boat lifts requiring dredging and filling, that it would not apply to increase the number of boat slips above 311, and that it would take certain precautions to protect John Pennekamp State Park.	existing installations. Thus, it has not been established that the OFW rule will actually apply, [as it was not established that] the modifications to the marina will significantly degrade these [OFW].” (¶ 44). Permit granted subject to the conditions incorporated in the agreement and the conservation easement. A further condition was added to the conservation easement that the deposition of boats from the inland lakes system into the marina and its access canal be prohibited.” (RO pg. 22).
<a href="#">Jolly Rogers Estate Property Owners Association, Inc. v. Charles Loverino and DER, Case no. 84-2716 (1984)</a>	Permit to construct a 165-foot extension to an already existing wooden dock.	National Key Deer Refuge and Pine Channel, classified as an OFW.	Whether permit should be granted to construct a 165-foot long by 6-foot wide extension to his present wooden dock. “The dock will run parallel to an existing canal which serves as the main entrance channel to Jolly Roger Estates, a subdivision which is currently being developed, and which possesses a network of dead end canals.” (¶ 2).	No mitigation discussed.	No evidence was introduced that proved the project would lower existing ambient water quality. “The existence of the proposed dock extension will have no effect on ambient water quality itself.” (¶ 15). Petitioners were concerned that live-aboards would adversely affect water quality. “However, DER’s proposed permit conditions would prohibit live-aboards from utilizing the proposed dock extension.” (¶ 15).

<p><a href="#">River Trails, Ltd. v. South Florida Water Management District, Case nos. 85-2272 and 85-3678 (1986)</a></p>	<p>Permit for the construction of a boat ramp and docking facility.</p>	<p>The Loxahatchee River, classified as an OFW and critical habitat for the Florida manatee. Portions of the River and the canal system have also been included by the Department of Natural Resources as within the Loxahatchee River Zone of the Florida Manatee Sanctuary Act.</p>	<p>Whether petitioner should be granted a right of way occupancy permit to construct a boat ramp and docking facility within the works (canal system) of the South Florida Water Management District. River Trails' facility will increase boating within C-18 (within the Loxahatchee River) well beyond the 37-slip capacity of its dock facility. The District's management plan for the area is designed to restructure the canal's present configuration to provide natural habitat, reduced erosion and scenic beauty.</p>	<p>No mitigation discussed.</p>	<p>"Due to the restricted access from C-18 into the Loxahatchee River, boats located at River Trails' development will likely be approximately 23' in length and powered by outboard motors. Such watercraft, through their introduction of oils and greases, contribute to a degradation of water quality." Neither party, however, addressed the potential impacts to water quality from the total number of boats that would utilize the boat ramp and boat slips at the proposed facility. "By failing to address this issue, and limiting its proof to the impacts from a maximum of 97 boats, River Trails has failed to give reasonable assurances that its proposed project will not cause or contribute to a violation of Class II water quality standards." (§ 22). Permit denied.</p>
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<p><a href="#">Ralph Kehn, et al. v. City of Sarasota and DER, Case nos. 85-2382 and 85-2385; Myakka Valley Ranches Improvement Association, Inc. v. City of Sarasota and DER, Case no. 85-3409; City of Sarasota v. DER, Case no 85-3410; Wyatt Bishop, et al. v. City of Sarasota and DER, Case nos. 85-0337, 85-0338, 85-0339, 85-0340, 85-0341 (1986)</a></p>	<p>Permits for wastewater treatment improvements, dredge and fill, and exemption to use wetlands for recycling.</p>	<p>Surface and groundwater presently flows from the proposed spray site to the south-southwest into Howard Creek, and to the south-southeast into East Ditch, both Class III waters, which then converge and flow into Upper Lake Myakka, a Class I water and a OFW. From Upper Lake Myakka, water flows into Vanderipe Slough, a class III water body, and Lower Lake Myakka; a Class I water and OFW via the Myakka River.</p>	<p>The city has three applications involved in this matter, including: (1) an application for a permit to construct wastewater treatment plant and disposal system improvements; (2) an application for a permit for dredging and filling for activities associated with this project and (3) an application for a wetlands exemption to allow the use of wetlands for water and wastewater recycling through the use of a sprayfield.</p>	<p>Proposed project will preserve 96 acres of natural wetlands on the East Ditch and create a total of 196 acres of artificial or mitigation wetlands. (§ 11).</p>	<p>Recommended that the Department enter a Final Order denying the City of Sarasota's Application for Wetlands Exemption, Application for Construction Permit, and Application for Dredge and Fill Permit. Since the City has not demonstrated its entitlement to a wetlands exemption, its efforts to mitigate the project's adverse effects with the use of mitigation wetlands cannot be pursued, and the exemption provided in § 403.918(2)(b), Fla. Stat. from dredge and fill criteria and water quality standards is therefore not applicable.</p>
<p><a href="#">Friends of Fort George, Inc., et al. v. Fairfield Communities, Inc. and St. Johns River Water Management District, Case nos. 85-3537 and 85-3596 (1986)</a></p>	<p>Permit for surface water management system and Consumptive Use Permit.</p>	<p>Fort George Island and surrounding surface waters, which are Class II and III OFWs.</p>	<p>Friends of Fort George, Inc., et al., challenge the District's proposed issuance of a conceptual approval with conditions for the surface water management system of a development which includes residential units, commercial space, and a 27-hole golf course on Fort George Island. Fairfield Communities concedes that even if</p>	<p>"Mitigation will be required for any disturbance of a small wetland area on the west side of the Island which is approximately 3/4 of an acre in size." (§ 56). Moreover, the District recommended that fourteen specific conditions be placed on the conceptual approval.</p>	<p>Recommended that the District issue a conceptual approval to Fairfield Communities for the surface water management system, as well as the Consumptive Use Permit with conditions as set forth by the District. This recommendation was affirmed and ordered in the final agency order</p>



			conceptual approval is obtained, it will have to apply for actual construction, operation or maintenance permits pursuant to §§ 373.413 and 373.416, Fla. Stat.		after all exceptions to the original recommendation were heard.
<a href="#">Boca Grande Club, Inc. v. DER, Case no. 85-3849 (1986)</a>	Dredge and fill permit to construct an additional 25 boat slips with a private docking facility in conjunction with its multi-family, residential development. Boca Grande Club currently operates an existing 58-slip marina at the same location.	Project is to be located in Gasparilla Sound, in the Charlotte Harbor Aquatic Preserve, a Class II OFW	Whether Petitioner has provided reasonable assurances that the proposed dredge and fill project will not lower ambient water quality in the Charlotte Harbor Gasparilla Sound Aquatic Preserve or violate Class II water quality standards. Additionally, it must be determined whether the Petitioner has provided reasonable assurances that the proposed project is clearly in the public interest.	Petitioner failed to propose any measures designed to mitigate the adverse effects that may be caused by the project. The biological communities or “fouling organisms” which may attach to the proposed dock pilings will not constitute mitigation for the likely loss of the seagrass habitat. The fouling communities do not provide significant habitat for marine organisms or detrital production for the higher forms of marine organisms such as fish.	Petitioner failed to provide reasonable assurances that the project will not lower ambient water quality in the OFWs nor did it provide reasonable assurances that the project will be clearly in the public interest. The adverse effects to marine productivity, conservation of fish and wildlife and their habitats, and the other ill effects which will result from the advent of this project outweigh any benefits inuring to the public and to the local community from the project. (¶ 44).
<a href="#">Sante Fe Lake Dwellers Association, Inc. v. DER and Sante Fe Pass, Inc., Case no. 85-4446 (1986)</a>	Permit to construct sewage treatment plant to treat sewage generated by staff and diners at a 150-seat restaurant and by inhabitants of 150 lodge or motel rooms, comprising 100 distinct units. The applicant assumed that 150 rooms could house 275 persons who would generate 75 gallons of sewage a day and that a 150-	Sante Fe Lake and Little Sante Fe Lake are OFWs.	Whether SFP’s revised application for a permit to construct a sewage treatment plant with percolation ponds should be granted or should be denied for failure of SFP to give reasonable assurances that the plant will not cause pollution significantly degrading the waters of Gator Cove. Evidence showed that effluent from the proposed plant would enter OFWs under overflow conditions and there was a	No mitigation discussed.	It is likely that the proposed water treatment plant would indeed result in effluent seeping to the surface of the ground down slope from the percolation ponds and flowing overland to Gator Cove, ultimately inducing eutrophication of the Cove, in violation of the legal prohibition against significant degradation of waters designated OFW. (¶ 67). Permit denied.

	<p>seat restaurant would generate 50 gallons of sewage per seat per day. Full occupancy is projected to engender 28,125 gallons of sewage per day. (¶ 4).</p>		<p>likelihood that effluent would enter under normal weather conditions, therefore r. 17-4.242, Fla. Admin. Code, also applies. (¶ 57).</p>		
<p><a href="#">Leisey Shellpit, Inc. v. DER and Manasota-88, Inc., et al., Case nos. 86-0568 and 86-0569 (1986)</a></p>	<p>Variance and a dredge and fill permit to construct and operate a 870-boat marina. Petitioner proposes to develop 55 acres located on a 16-acre lake adjacent to the waters of Little Cockroach Bay in Hillsborough County. Leisey Shellpit proposes to widen and deepen existing canals and mosquito ditches to provide access from the marina to Cockroach Bay and the open waters of Tampa Bay. The developer also plans a flushing channel, a 250-seat restaurant, a 24-unit hotel or motel, a museum, fueling facilities with upland gas storage, an 8-boat ramp launching area, a convenience store, a boat repair facility, a dockmaster's office and 688 parking spaces. A 114-unit apartment complex and 23 single-family residential lots are</p>	<p>Cockroach Bay Aquatic Preserve – Class II OFW approved for shellfish harvesting. The proposed marina would be located in a lake created by shell mining, which is not a state water at this time. It will, however, become a state water when connected to other state waters by the proposed access channels and flushing channel. Upon connection, it would be classified as a Class III water body. (¶ 3).</p>	<p>Whether Leisey Shellpit, Inc. is entitled to a variance of Rule 17-4.28(8)(a), Fla. Admin. Code (renumbered as 17-4.280(8)(a) effective November 20, 1986) in order to apply for a dredge and fill permit for its project known as Mangrove Bay Marina located in Hillsborough County; and, if so, whether petitioner is in fact entitled to a dredge and fill permit from the DER.</p>	<p>Petitioner offers mitigation plans with regard to seagrasses, mangroves, stormwater, agricultural runoff and sewage treatment. Petitioner argued that this mitigation, along with the provision of a secure and well-policed facility, will have a beneficial effect upon public health, safety and welfare and will conserve fish and wildlife and their habitat. It is also urged that its well-marked and maintained channels will improve navigation and not contribute to harmful shoaling or erosion and will provide for an adequate flow of water.”</p>	<p>The Cockroach Bay and Little Cockroach Bay areas are relatively undisturbed by development. The area is important as a research area and as a nursery area for juvenile fish and shellfish. “Even if petitioner were entitled to a variance, it has not provided reasonable assurances that the short and long term effects of the proposed activities will not violate water quality standards and public interest requirements so as to be entitled to a dredge and fill permit.” (¶ 37). “The petitioner’s mitigation plans for the removal of seagrasses and mangroves is likewise unacceptable.” (¶ 42) “While the project may provide some advantages with regard to recreation and public safety, its adverse effects upon fish, wildlife, harmful erosion and shoaling, marine productivity and the present condition and value of the functions being performed in the area are contrary to the</p>

	also planned on other lakes nearby, which would require, stormwater and agricultural runoff systems and a sewage treatment plant.				public interest. Petitioner has failed to demonstrate any overriding public interest that would outweigh these considerations.” (§ 47). Permit denied.
<a href="#">Sante Fe Pass, Inc. v. DER and Sante Fe Lake Dwellers Association, Inc., Case no. 86-1445 (1986)</a>	Permit to construct stormwater management system to serve all of Phase II of the Santa Fe Pass development, which consists of approximately 20 acres. Phase II contains an access road, tennis and racquet ball facilities, 50 cabanas or villas (constructed as duplexes) which will serve as overnight accommodations for a private club, a restaurant and other common buildings for recreational use, and a dry boat storage facility.	Sante Fe Lake and Little Sante Fe Lake are OFWs.	Whether Petitioner is entitled to the issuance of an individual construction permit for a proposed stormwater management system intended to serve Phase II of the Petitioner’s land development project.	No mitigation discussed. However, “every aspect of the proposed stormwater management system exceeds the Department’s design and performance criteria, and the evidence clearly establishes that the facilities comply with the best management practices and performance standards outlined” by the Department. Moreover, “the design for this system includes ample considerations for sediment, turbidity, and erosion controls during the construction phase of this project, and the operation and maintenance schedule will ensure continuing compliance with Department criteria” (§ 6).	Because applicant provided additional storage as specified in § 17-25.025(9), Fla. Stat., it has presumptively afforded the OFWs additional protection. In addition, the special protections afforded OFWs by § 17-4.242(1) have been satisfied. “The applicant has provided competent and substantial evidence by comparing the predicted concentrations of the waters discharged with ambient water quality that there will be no degradation of the receiving waters. Furthermore, the public interest criteria ... are inapplicable to this application since the proposal does not involve the discharge of waste into an OFW.” (§ 12).
<a href="#">Richard O’Malley v. DER and Meister Developments, Case no. 86-4747 (1987)</a>	Dredge and fill permit issued to Meister Developments for a revetment with riprap. The project’s purpose was to combat erosion that was threatening to undermine a condominium complex. At the time of the	The revetment is located near the northerly coast of Pine Island in Charlotte Harbor. The property fronts on Pine Island Sound, a Class II OFW.	Whether DER should issue a dredge and fill permit to construct a 205 linear feet interlocking block revetment with riprap toe stones and deposit approximately 296 cubic yards of fill 196 feet waterward of mean high water in Charlotte Harbor. Challengers alleged that	No mitigation discussed. However, Meister agreed to grant a conservation easement to DNR and an easement to allow the public access across the property seaward of the residential development. Additionally Meister conferred with the OFW Group to obtain their acquiescence to the project and agreed to provide navigational aids to mark the Jug	The water quality issues were limited to those due to or caused by erosion and the public interest issues only involved the adverse effect on neighboring property. The effect of the project on other property should be considered, but the weight of the evidence suggests the revetment is not the

	challenge, the permit had already been issued and the project completed.		the project is causing severe erosion; does not meet water quality standards; is not in the public interest; and will have secondary and cumulative adverse impacts.	Creek Channel. Additionally, “to enhance the public interest concept the applicant agreed to place toe stones at the foot of the revetment and plant mangroves.” (§ 6).	proximate cause or a contributing factor of beach erosion at O’Malley’s property. Project, with the conditions imposed, is in the public interest. The permit was rightfully granted.
<a href="#">Harvey Higgins and Charles Coe v. George Roberts and DER, Case no. 87-1188; Villa City Homeowners Association, Inc. v. George Roberts and DER, Case no. 87-1253 (1987)</a>	Permit to construct a water ski course.	Lake Emma, a 175-acre lake located within the Palatlahaha River Basin. Lake Emma is the northernmost lake in the Clermont Chain of Lakes, an OFW. The course itself will take up only approx. 1.39 acres, however, with the turnarounds at each end and an additional 75 feet of width to complete the course’s circuit, 4.82 acres of lake surface would be affected.	Whether a permit/water quality certification should be granted to construct a permanent slalom water ski course 800 feet long and 75 feet wide in Lake Emma. “Harvey Higgins and Charles Coe (Case No. 87-1188) and the Villa City Home Owners Association, Inc. (Case No. 87-1253) timely filed petitions for a formal administrative proceeding to challenge the application.” (§ 2).	No mitigation was discussed. The project would have the greatest negative impact on the property of other Lake Emma shore owners and residents. However, Roberts proposes to make the ski course open to the public. “Ironically, the more the ski course is used by the public, the more that use will clash and interfere with existing use of the lake.” (§ 22).	Fourteen residents along the shore of Lake Emma opposed the project and no public sentiment in favor of the ski course was expressed at the hearing. (§ 13). “It is recommended that the DER enter a final order denying the application of George A. Roberts for a permit for a permanent slalom water ski course on Lake Emma.” (RO: pg. 7). “It cannot be found or concluded that the applicant has provided “reasonable assurance that the project will be clearly in the public interest.” (§ 28).
<a href="#">James and Regina Williams and Charles Causey v. Charles and Julia Moeller and DER, Case no. 87-5392 (1988)</a>	Dredge and fill permit to widen an existing dock to four feet wide. No dredging or filling is necessary to add plankings to the existing dock. The widening of the dock is to alleviate safety problems associated with the narrow dock. Mrs. Moeller’s (Respondent) mother,	Property located in Islamorada, Monroe County, located on Florida Bay, an OFW.	Whether or not Moeller is entitled to the issuance of a dredge and fill permit to widen and existing dock from two to four feet wide.	A number of factors stand to mitigate any adverse impact caused by increased shading from the wider dock, including the site’s high dissolved oxygen content, the movement of the dock’s shadow with the passage of the sun and the seasons, and ability of seagrasses to adapt to certain degrees of shading. DER also imposed conditions, including a prohibition on liveboards, fueling facilities,	“The only certain environmental impact associated with the widening of the existing dock is the additional shading of the grassbeds that lie under the dock.” (§ 13). “The applicants clearly demonstrated both reasonable assurances that the water quality standards will not be violated and that the

	confined to a wheelchair, is not able to use the existing dock at all.			boat and motor maintenance, and hull scraping or painting. Also, the original dock permit was conditioned on the grant of a conservation easement prohibiting any other docking structures from being built upon their shoreline.	project is clearly in the public interest. The permit, as appropriately conditioned, and dependent upon the conservation easement, should be granted.” (§ 42).
<a href="#">Vincent Drost v. DER, Case no. 87-4067 (1988)</a>	Permit to construct vertical seawalls bulkheads and patios. Florida law prohibits the construction of vertical seawalls unless vertical seawalls already occupy the canal in whole or in part. Because the FDEP exempted most of the project, only 8,000 liner feet of shoreline is in issue.	Bow Channel and Cudjoe Bay – Class III OFWs	Whether petitioner’s application to construct vertical bulkheads and patios on top of existing caprock within the manmade canals of Cudjoe Gardens should be approved. DER issued a notice to deny based on § 403.918(5)(b), Fla. Stat., which “prohibits the installation of vertical seawalls in lagoons unless within existing canals that are currently occupied in whole or in part by vertical seawalls,” and § 403.918(2) which prohibits such activities in OFWs unless the project is clearly in the public interest.	No mitigation was discussed to offset the adverse impacts the seawalls would have on fish and wildlife, their habitats, and marine productivity. “The destruction of the intertidal vegetation where the seawalls would be replaced and the total isolation of the remaining wetland vegetation located landward of the seawalls, would prevent those species from providing their traditional wetland values.” (§ 15).	“Upon consideration of the criteria set forth in § 403.918(2), Fla. Stat., it is concluded that the petitioner has failed to meet the burden of proof” to show that the project is clearly in the public interest. (§ 32). “In fact, the weight of the evidence fails to show that the project is not contrary to the public interest.” (§ 32).
<a href="#">Sunland Estates, Inc. v. DER and The Izaak Walton League, Mangrove Chapter, Case no. 88-1813 (1989)</a>	Permit to remove a canal plug and dredge an access channel. Petitioner’s property in Key Largo contains a dead-end canal and a plug at the mouth of the canal prevents boat traffic from entering and exiting. Petitioner proposes to remove the plug and shallow the canal to a uniform depth of -10 feet and two years	Florida Keys Special Waters (Key Largo) – Class III OFWs.	Whether Petitioner’s application for a dredge and fill permit should be approved.	Sunland Estates contends it is willing to install a curb around the existing canal to prevent runoff into the canal, but no evidence was offered to show that such a result would in fact be likely. Further, even if such a curb could be constructed, it would not prevent surface runoff or have any effect on pollutants and nutrients discharging into the canal directly or through the adjacent ground. Similarly, Petitioner’s contention that the adverse impacts would be reduced by the mechanical	Given the additional discharge of pollutants and nutrients expected and the fact that the area is not expected to revegetate, the adverse effects of the project will not be offset. On balance, the proposed project fails to be clearly in the public interest, and in fact would be detrimental to the public interest. The increased pollution expected from the planned development by way of

	<p>later to a uniform depth of -6 feet. Petitioner further proposes to dredge an access channel from the mouth of the canal to an existing channel.</p>			<p>planting of seagrass and algae in the dredged channel is unlikely since the evidence clearly reveals that such replanting efforts have met with only very minimal success, and such efforts have been unsuccessful when attempted in an adjoining channel.”</p>	<p>septic tank discharges, boats and boat engines, lawn fertilizers, and stormwater run-off from paved areas will degrade the adjacent OFWs. Recommended denial of permit.</p>
<p><a href="#">Chipola Basin Protective Group, Inc. and Florida Chapter Sierra Club v. DER and Developers Diversified, Case no. 88-3355 (1988)</a></p>	<p>Dredge and fill permit to fill approximately 0.83 acres of wetlands and for construction and operation of a shopping center.</p>	<p>Project site includes an unnamed watercourse (referred to as the “north/south watercourse”) which exits the site under U.S Highway 90 and connects to a floodplain to the Chipola River, an OFW, which is about one mile away. The watercourses on the actual project site are not OFWs because they are not specifically named in the Florida Administrative Code.</p>	<p>Whether DER should issue a dredge and fill permit/ water quality certification to Developers Diversified to construct the Crossroads Shopping Center. Other issues involved include whether the unnamed jurisdictional watercourses on the project site are OFWs and whether Developers Diversified has provided “reasonable assurances” such that the permit should be issued.</p>	<p>The project was modified to reduce impact to the wetlands. The stormwater treatment system was also modified to alleviate DER’s water quality concerns. Additionally DER imposed a number of permitting conditions. “The project without mitigation would be contrary to the public interest because of the overall loss of 0.83 acres of wetlands, including approximately 0.4 acres of good quality seepage slope streams in the north and west areas of the project.” This permanent loss violates § 403.918(2)(a)(2) concerning effects on the conservation of fish and wildlife and their habitats. “This is especially important in view of the fact that the seepage slope systems are subject to adverse impacts from development which are not under the jurisdiction of the [DER]. Although the loss of these small wetlands alone would not greatly impact the existence of seepage slope systems in the region, the impact of the loss must be considered in light of the previous seepage slope systems lost in conjunction with the Merritts Mill Pond dam.” (¶ 62).</p>	<p>The watercourses on site are not OFW or tributaries to the Chipola River, because they are not specifically listed as such in r. 17- 3.041, Fla. Admin. Code. “Where the Department intends to include specific tributaries, they are expressly designated as part of the related river’s OFW designation. The express language of r. 17-3.041, clearly indicates that any tributaries intended to be so designated are listed in the rule.” (¶ 60). “Developers Diversified has provided reasonable assurances that the proposed project will not violate water quality standards.” (¶ 61). “The preponderance of the evidence indicates that the project with the proposed mitigation is not contrary to the public interest.” (¶ 63).</p>

<p><a href="#">Canrael Investments, Inc. and Jack and Harriet Kaye v. Sunrise Bay Harbour, Inc. and DER, Case nos. 88-5535 and 88-5536 (1989)</a></p>	<p>Fill permit to construct a 33-slip marina with four sections of dock facilities to accommodate yachts 70 feet in length or longer.</p>	<p>Proposed marina would be located on Coral Bay, which opens onto the Intracoastal Waterway at the Sunrise Boulevard Bridge. Coral Bay a Class III OFW.</p>	<p>Whether Sunrise is entitled to the permit to construct the proposed marina. Tidal flushing in Coral Bay is sufficient to remove incidental levels of discharged pollutants, so the marina will not have a significant impact on water quality.</p>	<p>No mitigation was discussed. However, a number of birds feed and rest in the area. “The docks are likely to displace the birds’ direct access to feeding areas but it is anticipated that the riprap will increase the surface areas available for organism development and thereby enhance the environment for fishes.” (¶ 13).</p>	<p>Sunrise has established that the proposed marina will not violate water quality standards, and that the project is not contrary to the public interest. The specific conditions required for this project adequately offset any adverse affect anticipated to result from this project. (¶ 21). Also, “the Kayes have not presented any facts which refute this evidence. The personal desire to have the property remain undeveloped and available for the general public’s use does not establish that the proposed project will adversely affect the water quality of Coral Bay or that the proposed project is contrary to the public interest.” (¶ 27).</p>
<p><a href="#">The Conservancy, Inc. and Florida Audubon Society (88-6212 and 89-4159) and Citizens to Preserve Naples Bay, Inc. (89-4407) v. Collier Development Corporation et al. and DER (1990)</a></p>	<p>Dredge and fill permit for a development project. DER authorized a Notice of Intent to Issue dredge and fill permit to Collier Development Corporation for a development project known as the Villages of Sabal Bay. This was issued after DER approved the mitigation and water quality monitoring program imposed upon CDC as requisite permit conditions. These</p>	<p>The closest OFW to the entire project is the Rookery Bay Aquatic Preserve, approximately 2.5 miles south of the proposed marina and about a mile south of the intersection of the Lely Canal and the Intercoastal Waterway south of Dollar Bay. The closest OFW to the proposed marina is located in</p>	<p>Whether DER should grant Collier Development Corporation a dredge and fill permit for a development project known as the Villages of Sabal Bay.</p>	<p>“Habitat changes within the development have been balanced with mitigation and monitoring requirements set forth as conditions in the Notice of Intent to Issue. This includes enhancing approximately 164 acres of wetlands, a donation of 740 acres of wetlands, and a conservation easement over another 200 acres.” (¶ 78).</p>	<p>“The flushing characteristics of the proposed marina are important because water quality in the marina and its affects on surrounding waters depend on how long the water resides in the marina.” (¶ 29). “The application does not provide reasonable assurance that the marina will have adequate flushing characteristics so as to prevent violations of water quality standards in the estuary.” (¶ 38). However, it was found that the OFWs in</p>

	measures were placed in the permit to offset adverse effects within the surrounding estuary that may be caused by the creation of the marina basin and the redesign of the Lely Canal proposed in the permit application.	portions of Dollar Bay.			the designated portions of Dollar Bay and Rookery Bay will not be significantly degraded by the project. (¶ 92).
Lester Westerman et al. v. Escambia County Utilities Authority and DER, Case no. 89-0035 (1989)	Permit to construct pumping station, force main, and land application facility	Big Lagoon – Class III OFW	Whether DER should grant the revised application Escambia County Utilities Authority (ECUA) has made for a permit to construct a pumping station, force main, and land application facility, in order to dispose of effluent from ECUA’s Warrington Sewage Treatment Plant on a site in southwest Escambia County near Big Lagoon.	No mitigation discussed	It was recommended that the permit should be denied. However, the evidence was clear that no direct discharge to OFWs would occur under any circumstances. Effluent already significantly diluted before reaching the lagoon would be further diluted dramatically before a portion mingled with the OFWs. The evidence gave reasonable assurance that the project would not significantly alter OFWs.
<a href="#">William Depkin v. DER, Case no. 89-1309 (1989)</a>	Permit to dredge a 600 square foot area of bay bottom in the cove immediately waterward of the seawall. The proposed dredging project would increase the water depth by two feet and “thereby enable the Depkins to dock their boat alongside the seawall, a location they consider safer than the one they presently use for this purpose.” (¶ 3)	Key Largo, Florida Bay – Class III OFW.	Whether Petitioner’s application for a permit to dredge 45 cubic yards of material in Florida Bay immediately adjacent to the seawall on his bayfront property in Key Largo should be granted. The project which the “Depkins now propose to undertake involves the dredging of primarily bedrock, not sand. Revegetation typically does not occur following such dredging activity.” (¶ 9).	“More likely than not, the Depkins’ proposed dredging project, if permitted, will result in the permanent loss of vegetation and consequently will have a long-term adverse effect on ambient water quality, the conservation of fish and other aquatic wildlife, and marine productivity. Furthermore, if the project was completed and the Depkins were to begin docking their boat alongside the seawall, there would be an increase in conflict turbidity attributable to the movement of the boat in and out of this area of shallow water. No measures to mitigate these	Petitioner failed to provide reasonable assurances that project will be in the public interest or that water quality standards will not be violated. “If anything, it appears that both water quality and the public interest would suffer, given that there would likely be a permanent loss of valuable and productive vegetation which would not be offset or mitigated.” (¶ 20). The area is dominated by a “marine macroalgae community” within the meaning of r.17-



				adverse consequences have been proposed or suggested.” (§ 9). No other mitigation was proposed except installing turbidity curtains during construction.	2.410(1)(a), Fla. Admin. Code, and the project should therefore not be permitted. (§ 19). Granting the permit would set a precedent that would have a cumulative impact and “adversely impact areas well beyond the boundaries of the proposed dredging site.” (§ 20).
<a href="#">Florida Audubon Society, et al. v. William Cullen and DER, Case nos. 89-3779, 89-3780, 89-3781, 89-3782, 89-4060, 89-4388 (1989)</a>	Dredge and fill permit for 42-slip commercial marina that would require the excavation of uplands and the dredging of an existing basin created by the excavation of materials used for road construction. The Applicant seeks to attract boats in the range of 30 – 50 feet in length.	The project site is in Key Largo, Florida and located in Buttonwood Sound, within Florida Bay, a Class III OFW.	Whether the DER should grant a dredge and fill permit to construct a commercial marina that would require the excavation of 30,170 square feet of uplands and the dredging of approximately 18,460 dredged square feet of an existing basin.	Applicant proposed to install turbidity curtains during the construction phase.	It was not established that water quality standards would be met and that the waters within the Buttonwood Sound would not be degraded. Applicant also failed to show that the project is clearly in the public interest. The Applicant even failed to meet the burden of the lesser standard, that the project is not contrary to the public interest. Permit denied.
<a href="#">Charms Clarke and Judith Clarke (89-6051) and Claudette Traurig (89-6135) v. Floyd Melton, Alice Melton and DER (1990)</a>	An “after-the-fact” dredge and fill permit for an already constructed 48’ x 20’ portion of a finger dock. There are seagrasses under the entire length of the dock.	Key Largo, Florida Bay – Class III OFW	Whether the applicants-respondents Floyd and Alice Melton have provided reasonable assurances that their proposed dock meets the requirements for issuance of an “after-the-fact” dredge and fill permit.	“The Meltons and DER entered into several stipulations which will promote the absence of impact to the seagrass community.” (§ 15). “It is strongly recommended that DER also condition the Melton dock permit with the requirement that the dangers at nighttime be mitigated by some form of reflective paint or lighting for that section of the dock which extends beyond the distance of the other docks in the immediate vicinity.” (§ 22).	The permit is granted, conditioned upon the stipulations and mitigation requirements. “Reasonable assurances have been given that the project will not adversely affect any water quality standards, and that it will affect neither the public interest in navigation nor public recreation in the vicinity.” (§ 19). Rule 17-312.420, Fla. Admin. Code creates a presumption that docks that extend out to the 5’ depth contour, where seagrasses are otherwise

					present, are clearly in the public interest.” (§ 20). Project “is clearly in the public interest by preventing ongoing adverse impacts of the existing dock, allowing the recolonization of habitat in those disturbed areas, and by extending the dock to prevent the destruction of the bay bottom.” (§ 14).
<a href="#"><u>CW Pardee, Jr. v. DER, Case nos. 90-5734 and 90-0911 (1991)</u></a>	Permit to dredge a man-made canal and to construct two boathouses with six boat slips.	Property located in Marion County, Florida. Petitioner has legal access to a man-made canal that intersects the Oklawaha River, an OFW. While the canal itself is not an OFW, the Oklawaha River’s ambient water quality would be at risk from the dredging activities contemplated by this project. (§ 40).	Whether Petitioner’s request for a permit to dredge in a man-made canal and to construct two boat houses and six boat slips should be granted. DER initially issued a notice to deny the permit.	To mitigate the effects of this project, Petitioner has offered to place a recycling waterfall in or near the proposed boat basin to increase oxygenation. Petitioner also proposes to landscape the slopes of the basin with boulders and natural vegetation and place “no wake” signs along the basin. Moreover, Petitioner proposes to use a turbidity curtain to protect against violations of turbidity standards.	“Necessary reasonable assurances have not been given that the ambient water quality in the Oklawaha River will not be degraded by this project.” (§ 44). Turbidity and water quality violations are probable, given the river’s fast current which precludes the efficient use of turbidity screens or curtains. (§ 21). “Petitioner has failed to give reasonable assurances that the project is not contrary to the public interest. In this balancing test, the proof shows that the project would adversely affect fish and wildlife and their habitat. Further it has been shown that the project is contrary to public health, safety and welfare and to property of others.” (§ 45). The artificial waterfall is not an acceptable solution as it only would address dissolved oxygen water quality and not other regulatory parameters.

<p><a href="#">Kathryn Haughney v. DER, Case no. 90-7215 (1991)</a></p>	<p>Dredge and fill permit for dock and seawall construction.</p>	<p>The Halifax River, a Class III water. The Haughney property is located and the dock and seawall are proposed within the Tomoka Marsh Aquatic Preserve, an OFW.</p>	<p>Whether Petitioner is entitled to a dredge and fill permit to construct a dock and seawall.</p>	<p>The area to be filled provides lush wetland vegetation that provides valuable habitat for fish and wildlife. “There was no mitigation offered by Petitioner to make up for the loss of habitat to be occasioned by the proposed construction.” (¶ 6).</p>	<p>Because the proposed seawall is to be constructed within an OFW, Petitioner bears the burden to go forward and prove that the project is clearly in the public interest. “As the permit application now stands, it must be denied because it has the potential to adversely affect the property of others and the conservation of fish and wildlife, and because it may cause harmful erosion.” (¶ 17). “Construction of seawalls, especially those that extend out from the existing shoreline, typically causes erosion on adjacent shorelines, and additional seawalls exaggerate wave energy and can have a cumulative erosive effect.” (¶ 8).</p>
<p>John Armenia v. Board of Trustees of the Internal Improvement Trust Fund, et al., Case no. 91-3249 (1991); Case revisited in <a href="#">91-36770</a>.</p>	<p>Dredge and fill permit “to construct a 490-foot elevated driveway or timber bridge across Clam Bayou from the Sanibel-Captiva Island Road to Silver Key, on and in the vicinity of Sanibel Island to allegedly provide reasonable access to the property upon which he intends to construct residences.</p>	<p>Pine Island Sounds Aquatic Preserve, an OFW.</p>	<p>Petitioner argues that a statement by DER contained in a letter “was a rule, not duly promulgated, and thus that it constituted an invalid exercise of delegated legislative authority.” The agency statement in question, in effect, made a determination that the Petitioner’s proposed project was within the boundaries of the Pine Island Sound Aquatic Preserve and thus imposed a more restrictive body of rules on the Petitioner.</p>	<p>N/A</p>	<p>“It was not proven in this proceeding that the agency statement evidences any intent to amend or change the legal description of the preserve ... Rather, it represents ... an interpretation concerning whether the Petitioner’s property is located within the legal boundaries.” (¶ 8).</p> <p>Final Order: Although it was the intent of the Board of Trustees to include Clam Bayou in Pine Island Sound Aquatic Preserve, the ambiguity of</p>

					the legal description and the exclusion of Clam Bayou from DNR's maps do not effectuate this position. The Petitioner's challenge is dismissed. The DER statement is merely an interpretation of the scope of the existing rule, not a change to the existing rule.
<a href="#"><u>Sarah Berger v. William Kline, DER, and Citrus County, Case no. 93-0264 (1993)</u></a>	Permit to construct a private boat dock with a roof, designed to cover a boat.	Withlacoochee River – Class III OFW.	Whether Applicant for the dredge and fill permit has provided reasonable assurances that the project will comport with state water quality and public interest standards; whether Citrus County has standing to challenge the project; and whether the Department is required or authorized to enforce the provisions of the Citrus County Comprehensive Plan.	Conditions in the Notice of Intent to Issue required Kline to clear the existing bank of nuisance plants and to plant and maintain identified native plant species and to grant to the FDEP a perpetual conservation easement along his shoreline. The conservation easement was required in order to help protect the replanted shoreline and prevent further shoreline hardening through construction of a seawall or other structures in the future. Moreover, eleven specific permit conditions pertaining solely to protection of manatees were required.	The mitigation requirements are significant conditions that are “clearly in the public interest.” No adverse cumulative impacts are expected on water quality or the public interest because “evidence does not establish that other similar structures are contemplated or the subject matter of other permit applications.” (¶ 39). The application is granted under the conditions found and contained in the intent to issue.
<a href="#"><u>Helen Sutton v. Tana Hubbard and DEP, Case nos. 93-1499 and 93-6507 (1994)</u></a>	Dredge and fill permit and after-the-fact consent of use for existing retaining wall and dock.	The project is located in a lagoon off Kings Bay, in the Crystal River in Citrus County, Florida. It is in a man-altered Class III waterbody and OFW.	Whether DEP should issue a permit for an existing retaining wall and dock located at the residence of Respondent Hubbard and whether the Department should issue an after-the-fact consent of use for the dock.	The permit required Hubbard to create 346 square feet of wetlands as mitigation and to dedicate all remaining wetlands on the site to the FDEP as a conservation easement.	“Any impacts that have occurred from the dock are minimal and are compensated for in the mitigation plan. The project creates a permanent conservation easement over 400 feet of shoreline and wetlands, thereby preserving fish and wildlife habitat. The retaining wall provides some water quality benefit.” (¶ 64). “The as-built dock, existing docks, and reasonably anticipated

					future docks do not create any adverse cumulative impacts.” (§ 65). The Consent Order is approved and the after-the-fact application for consent of use for the sovereign submerged lands underlying the dock is granted.
<a href="#">Clifford Hunter v. DEP, Case no. 93-5924 (1994)</a>	After his home was destroyed by storm in 1993, Mr. Hunter applied for a dredge and fill permit for construction of a bulkhead, dock, and to rebuild his pile-supported house. “Approval of Mr. Hunter’s proposed project would allow the placing of fill in an intertidal area and the elimination of the portion of the intertidal area filled.” (§ 13).	A canal adjacent to Mr. Hunter’s northern property boundary connects with the waters of the Gulf of Mexico surrounding Dekle Beach. These waters, except for an area extending 500 feet outward from the town limits of Dekle Beach, is within the Big Bend Seagrasses Aquatic Preserve, an OFW. Therefore, the project site is adjacent to an OFW.	Whether Petitioner should be permitted to rebuild a pile-supported house, to construct a bulkhead, to fill 1750 square feet of salt marsh, and to construct a dock. DEP originally issued a Notice of Permit Denial denying the requested permit.	No mitigation discussed.	“Mr. Hunter failed to provide reasonable assurances that the existing ambient water quality of the canal adjacent to Mr. Hunter’s property and the OFW located 500 feet from the boundary of Dekle Beach will not be lowered.” (§ 39). “Mr. Hunter failed to provide assurances that his project is clearly in the public interest.” (§ 42). “Rather, the un rebutted evidence presented by the Department supports a finding that Mr. Hunter’s proposed project will not be in the public interest, especially when the cumulative impacts of the proposed project are considered.” (§ 16). Moreover, “the evidence presented by the Department proved that the proposed project in fact will negatively impact the public interest ...”(§ 43).

<p><a href="#"><u>Alden Pond, Inc. v. DEP, Case no. 93-6982 (1994)</u></a></p>	<p>Petitioner proposes to construct a canal with littoral zones on either side, a hydrological channel to enable a proper flow of water through the canal, and a barrier at the north terminus of the canal to prevent manatees and boats from entering the canal from the north. (¶ 33). An access channel is also proposed from the south terminus to the Intercoastal Waterway to enable boats access to the canal. A total of 62 docks are proposed.</p>	<p>Much of the property abuts a section of the Indian River. The Indian River at the project site is within the Indian River Aquatic Preserve, a Class II OFW.</p>	<p>Whether Petitioner is entitled to a wetland resource permit to construct an artificial waterway to be connected to the Indian River and, if so, the conditions that should be attached to the permit. Whether Respondent is estopped to deny the issuance of the permit. Whether Petitioner is entitled to a default variance pursuant to § 120.60(2), Fla. Stat., to dredge and fill in Class II waters that have been conditionally approved for shellfish harvesting.</p>	<p>After the original proposed project was rejected by DEP, Petitioner amended its application. “Under the revised project, Petitioner has taken all reasonable steps to minimize the adverse impacts associated with the type project it is proposing.” (¶ 81). “Petitioner proposes to create approximately 14 acres of wetlands. These areas will be revegetated with various wetland plant species including red, black, and white mangroves.” (¶ 83). Petitioner also proposes to create about three acres of littoral zones on either side of the waterway and the littoral zone will be revegetated with cord grass and red mangrove. (¶ 84). “Petitioner also proposes to implement an open marsh mosquito control management program consisting of the elimination of natural accumulations of water in low lying areas within the impoundment.” (¶ 85). “Petitioner will remove exotic plant species throughout the impoundment and will revegetate with native species such as red, black, and white mangroves.” (¶ 86). “Petitioner proposes to monitor the project area to assure that exotic plant species do not re-colonize.” (¶ 87). “After completion of the enhancement program, Petitioner proposes to donate all the property it owns within the impoundment to the State of Florida.” (¶ 88). “Petitioner offers to waive its right to construct single family docks from its property directly into the Indian River.” (¶ 89).</p>	<p>“Although Respondent established that boat traffic on the Indian River has increased, this project is unique in scope and design, and it is concluded that Petitioner has given reasonable assurances that no negative cumulative impacts will be associated with the project.” (¶ 77). However, Petitioner’s request for variance is denied. “Without the variance to construct the hydrological channel, the modified application for this project should be denied.” (¶ 114). “The modified application should be denied even if the variance to construct the hydrological channel is granted. Specific findings of fact have been made as to the adverse impacts of this project and as to the mitigation plan proposed to offset those adverse impacts.” (¶ 115).</p>
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<p><a href="#">DEP v. Ben Leasure, Case no. 04-3688 (2005)</a></p>	<p>Respondent allegedly filled wetlands on his property without a permit.</p>	<p>The western boundary of Leasure's parcel is approximately 500 feet east of the Withlacoochee River, a Class III OFW.</p>	<p>Whether Respondent Leasure should have a \$3,000.00 administrative penalty imposed, take specific corrective action, and pay investigative costs for allegedly illegally filling 0.17 acres of wetlands contiguous with the Withlacoochee River.</p>	<p>"While Respondent may have been well-intentioned in trying to prevent flooding on the backside of his property, there are no circumstances present here which would allow a mitigation of the statutory penalty." (§ 33).</p>	<p>"Here, there were no good faith efforts to comply prior to and after the discovery of the violation by the department. Had Respondent agreed to remove the fill after the first warning letter was sent, or even after the first inspection, it is likely that an enforcement action would not have been initiated." (§ 32). Section 403.121(3), Fla. Stat., sets forth the administrative penalties that must be imposed (absent mitigating circumstances) for specified violations. Paragraph (3)(c) provides that "the department shall assess a penalty of \$1,000 for unpermitted or unauthorized dredging and filling ... plus \$2,000 if the dredging and filling occurs in an ... [OFW]." Therefore, because the filling here occurred in an area connected to an OFW, absent mitigating circumstances, an administrative penalty of \$3000.00 must be imposed." (§ 30). Moreover, the Department has suggested specific corrective action that should be taken by Respondent.</p>
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