

**STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

STEVE DUFOUR,

Petitioner,

v.

**OGC CASE NO.: 24-2935
DOAH CASE NO.: 25-0050**

**STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION,**

Respondent.

FINAL ORDER

On November 18, 2024, the Florida Department of Environmental Protection (Department) received a Petition for Administrative Hearing (Petition) from the Petitioner, Steve DuFour (Petitioner). The Petition challenged the Department's decision to issue a Notice of Denial of an Environmental Resource Permit/Water Quality Certification to fill 5,673 square feet of on-site wetlands and installation of 360 ln. ft. of riprap around the perimeter of the fill area. The activity is located in wetlands at 29727 Newfound Boulevard, Big Pine Key (Section 26, Township 66 South, Range 29 East), in Monroe County (Latitude N 24° 39' 55.7406", Longitude W -81° 22' 5.0282"). The permit number is 44-0240788-002-EI.

On May 28, 2025, a Final Hearing was held before the Division of Administrative Hearings (DOAH). On July 18, 2025, the assigned Administrative Law Judge issued a Recommended Order (Exhibit A) suggesting that the Department enter a final order granting the Environmental Resource Permit to Petitioner conditioned as recommended in paragraph 47 of the Recommended Order. No party submitted exceptions to the Recommended Order. The history of these proceedings is accurately shown in the Recommended Order.

The Recommended Order includes findings of fact regarding the application of volume I, section 10.1 of the Environmental Resource Permit Applicant's Handbook, incorporated by reference in subsection 62-330.010(4) of the Florida Administrative Code. The ALJ found that the applicant's final, proposed design modification complied with requirements to reduce and eliminate adverse impacts to wetlands. The ALJ has the authority, as the fact finder, to determine whether a given set of facts constitutes a violation of a rule. *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). However, those findings do not imply any change in the Department's interpretation of its rules in determining whether an applicant has adequately avoided or minimized impacts to wetlands.

There being no further matters to consider,

IT IS ORDERED:

- A. The Recommended Order is adopted in its entirety and incorporated by reference.
- B. Petitioner's application for Environmental Resource Permit (44-0240788-002-EI), conditioned as recommended in paragraph 47 of the Recommended Order, is granted. The Southeast District Branch Office is directed to issue a permit consistent with this Final Order.


JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; or by electronic mail to Agency_Clerk@dep.state.fl.us and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The

Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 28 day of August, 2025, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION



ALEXIS A. LAMBERT
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Lea Crandall Digitally signed by Lea Crandall
Date: 2025.08.28 11:35:31 -04'00'
Clerk

August 28, 2025
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by electronic mail to the following on this 28th day of August, 2025.

<p>Steve Dufour, pro se 29727 Newfound Boulevard Big Pine Key, FL 33043 dufoursd@comcast.net</p>	<p>Cameron Polomski, Esq. Assistant General Counsel 3900 Commonwealth Boulevard, MS 35 Tallahassee, FL 32399-3000 <i>Counsel for Respondent</i> cameron.polomski@floridadep.gov adrienne.kidder@floridadep.gov</p>
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STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jeffry Brown

JEFFREY BROWN

Fla. Bar No. 0843430

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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

STEVE DUFOUR,

Petitioner,

vs.

Case No. 25-0050

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in the above referenced proceeding before Francine M. Ffolkes, an Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) on May 28, 2025, by Zoom videoconference.

APPEARANCES

For Petitioner: Steve R. Dufour, pro se
29727 Newfound Boulevard
Big Pine Key, Florida 33043

For Respondent: Cameron Michael Polomski, Esquire
Mark Manglardi, Certified Legal Intern
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Petitioner, Steve Dufour (Petitioner), is entitled to issuance of an environmental resource permit (ERP) from Respondent, Department of Environmental Protection (DEP or Department).

PRELIMINARY STATEMENT

On January 16, 2024, Petitioner applied for an ERP to fill within wetlands at his property located on Big Pine Key in Monroe County, Florida. On October 30, 2024, the Department issued a Notice of Denial (NOD) finding that Petitioner's Proposed Project did not qualify for an ERP under the criteria of Florida Administrative Code Rule 62-330.301 and Section 10.2.1 of the ERP Applicant's Handbook (AH) Volume I. Petitioner timely filed a Petition for Administrative Hearing on November 18, 2024 (Petition), challenging the Department' NOD. The Petition was transmitted to DOAH on January 3, 2025.

At the final hearing, Petitioner presented the testimony of Janet Thomas (Ms. Thomas), co-owner, and Trent Meyer, environmental consultant. The deposition testimony of Kristin Erickson, environmental consultant, was presented in Joint Exhibit JE-12. The Department presented the testimony of Bailey Harding (Ms. Harding), environmental specialist III. Joint Exhibits JE-1 through JE-19 were received into evidence without objection.

DEP's Motion to Strike is denied. Petitioner's Exhibit 1¹ is also admitted into evidence, as explained below.

¹ Mitigation Bank Wetland Function Evaluation Matrix, W.A.T.E.R., filed on June 12, 2025.

Neither party filed a hearing transcript. The parties timely submitted their proposed recommended orders, which were carefully considered in preparation of this Recommended Order.

References to the Florida Statutes are to the 2024 version unless otherwise stated.

FINDINGS OF FACT

The following Findings of Fact are based on the evidence adduced at the final hearing.

The Parties

1. Petitioner is co-owner of the property on which the wetlands at the heart of the ERP application at issue in this case are located, at 29727 Newfound Boulevard, Big Pine Key, Monroe County, Florida (the Florida Keys).

2. DEP is the administrative agency of the State of Florida having the power to regulate activities in wetlands and other surface waters of the state pursuant to Florida Administrative Code Chapters 62-312 and 62-330.

The Proposed Project

3. The Proposed Project is located in unnamed wetlands at 29727 Newfound Boulevard, Big Pine Key in Monroe County, Florida (the Property). The Property is adjacent to a residential canal. The Property contains a single-family residence with wetlands adjacent to the residence.

4. On January 16, 2024, Petitioner applied for an ERP to place fill and riprap in wetlands at the Property.

5. The final proposal presented at the hearing can be found in Joint Exhibit 18. Petitioner would install 5,673± square feet and 420± cubic yards of clear fill; 360± linear feet, 727± square feet, and 53.8± cubic yards of rock

retaining wall inside the mangrove rootline. Hatching on Joint Exhibit 18 indicates 1,606± square feet of jurisdiction wetlands would be avoided; and 4,209± square feet of saltwater marsh jurisdictional wetlands would be impacted. Any required mitigation for jurisdictional wetland impacts would be made through payment to the Everglades Mitigation Bank.

6. The proposed riprap and fill project aims to address persistent, severe flooding affecting the Property. Property flooding extends beyond the western wetland project area, regularly inundating Petitioner's tiki hut and carport, leaving vehicles sitting in saltwater. Petitioner and Ms. Thomas are concerned about future threats to their residential home since flooding occurs frequently during regular high tides and not just king tides.

7. The Proposed Project would avoid all of the existing mangrove fringe, and the riprap was designed to prevent any impacts to these existing mangroves. Ms. Erickson testified that DEP considered the mangroves to be the higher quality wetland area on the Property.

8. Mr. Meyer persuasively testified that a bed of Number 57 (#57) stone covering 5,673 square feet to a depth of two feet could hold 33,946 gallons of water in the void spaces. For comparison, a typical backyard swimming pool might hold around 10,000 to 20,000 gallons. Thus, if the Property is filled, it would keep the water on-site and in the adjacent canal, but would not displace it to neighboring properties.

DEP's Reasons for Denial

9. DEP denied the permit application for two reasons. First, that practical modifications were not made to reduce or eliminate adverse impacts to wetlands. Second, no assurance was provided that the fill project would not displace floodwater to neighboring properties.

Flooding

10. The Proposed Project is designed to match the existing elevation of the single-family residence. The Property sits lower than the other neighboring

properties. Because of the Property's lower elevation, it acts like an inlet for the tidal canal water. If the property is filled, it would keep the water on-site and in the adjacent canal, but would not displace it to neighboring properties.

11. As found above, using the #57 stone results in a void ratio that allows a certain volume of water to saturate the filled area. Thus, water would be retained on-site and in the adjacent canal, but would not be displaced to neighboring properties.

12. Riprap was included in the plans to not only stabilize the shoreline but also act as a swale that would help contain any floodwater.

Reduction or Elimination of Impacts

13. Through a cycle of responding to DEP's requests for additional information, Petitioner submitted numerous plan design revisions. The final plan set increased the wetland area to be avoided from 830 square feet to 1,606 square feet and would include zero impacts to the mangroves on the Property. This would be almost double the amount of wetland avoidance initially presented in the project plans.

14. The riprap was redesigned to prevent fill from migrating into the mangrove root system. The riprap would help to stabilize the shoreline, which would improve the health and functionality of the mangrove area. The riprap is designed to leave a six-inch gap from the mangrove root system. The effect would also create a swale that would prevent any runoff into the adjacent canal.

15. Petitioner responded to DEP's requests for practicable design modifications to reduce and eliminate adverse impacts to wetlands by proposing various alternatives that reduced mangrove impacts and redesigned the riprap rock retaining wall.

16. DEP did not accept Petitioner's alternatives. Ms. Harding testified that DEP believed that reducing the footprint of a wetland fill project alone would not suffice if an applicant had not fully explored all practicable alternatives.

17. The practicable alternatives the Department would consider were the construction of a seawall or the construction of a north-south retaining wall. However, DEP cannot require a project that is significantly different in type or function.

18. The Department also argued that Petitioner did not provide any hydrologic studies, reports, or other data to corroborate his claim that a seawall would not be a viable alternative for the Proposed Project's purpose of flood control.

19. However, nothing in the permitting criteria requires that an applicant prove to the Department why the Department's preferred project is not feasible.

20. Petitioner's final proposal is a practicable design modification to reduce and eliminate adverse impacts to wetlands that meets the ERP requirements.

Mitigation

21. DEP's witness, Ms. Harding, testified that mitigation for wetland impacts in the Florida Keys is assessed using the Wetland Assessment Technique for Environmental Reviews (W.A.T.E.R.). The W.A.T.E.R. assessment is used to determine the number of credits that would offset wetland impacts through the purchase of credits from the FPL Everglades Mitigation Bank.²

22. Petitioner argued that while DEP requested additional information (RAI) that indicated that a mitigation plan could be submitted, a determination of the "impacted area" could not be made since DEP would not accept his project plans with the proposed impacted area square footage. Although Petitioner's application stated that "[i]f mitigation is required by D.E.P., we propose payment to the Everglades Mitigation Bank," he seemed

² In response to a direct question from the ALJ, Ms. Harding stated that the Uniform Mitigation Assessment Method (UMAM) is not used in the Florida Keys.

to believe it was not possible to present a mitigation plan and the W.A.T.E.R. assessment until DEP accepted his practicable design modification.

23. As explained in the Conclusions of Law, the W.A.T.E.R. document submitted with Petitioner's proposed recommended order on June 12, 2025, is admitted into evidence as Petitioner's Exhibit 1. The W.A.T.E.R. assessment mitigation calculations summarized on page 8 of Petitioner's Exhibit 1, propose mitigation in the form of 0.04280 credits to offset impacts to saltwater marsh not containing mangroves on the Property. Also described as a "[l]ow quality wetland area not containing mangroves." As proposed in the ERP application, the credits would be purchased by payment to the FPL Everglades Mitigation Bank.

Conclusions

24. By a preponderance of the persuasive evidence, Petitioner overcame DEP's stated reasons for denying his ERP permit application.

25. Petitioner proposed to implement practicable design modifications to reduce and eliminate adverse impacts to wetlands in accordance with the applicable permitting criteria.

26. Petitioner provided reasonable assurance that the fill project would not displace floodwater to neighboring properties.

CONCLUSIONS OF LAW

Jurisdiction

27. DOAH has jurisdiction over the parties and the subject matter of this proceeding under sections 120.569, 120.57, and 120.60, Florida Statutes.

Scope of the Proceeding

28. This is a de novo proceeding under section 120.57, intended to formulate final agency action, and not to review action taken earlier or preliminarily. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 785

(Fla. 1st DCA 1981) (quoting *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977)). The de novo nature of this proceeding allows Petitioner to make changes to the Proposed Project during the pendency of the proceeding.

29. Before making a recommendation or in response to a motion to reopen the evidence, an ALJ has discretion to reopen the evidence after considering "whether granting the motion would unfairly prejudice the opposing party and whether it would serve the best interests of justice." *See, e.g., Robinson v. Weiland*, 936 So. 2d 777, 781 (Fla. 5th DCA 2006); *Hernandez v. Cacciamani Dev. Co.*, 698 So. 2d 927, n.1 (Fla. 3d DCA 1997) (reflecting that the granting of this type of motion is, in a sense, always prejudicial to the opposing party; but the criterion will be satisfied only where the prejudice suffered is "unfair."). In addition, the denial of a motion to reopen the evidence is reviewed for abuse of discretion. *See Lovelass v. Hutchinson*, 250 So. 3d 701, 705 (Fla. 4th DCA 2018).

30. The undersigned deems Petitioner's filings of the W.A.T.E.R. document on June 12, 2025, and the arguments in his Proposed Recommended Order as a motion to reopen the evidence, which is hereby granted.

31. Since this de novo proceeding is designed to formulate final agency action and not just to review DEP's preliminary action in the NOD, as proposed, mitigation for the wetland impacts would not unfairly prejudice DEP. Petitioner and DEP's focus was on the disagreement over practicable design alternatives. However, the evidence does indicate that Petitioner is willing to provide required mitigation for filling jurisdictional wetland areas on the Property in accordance with DEP's stated policy of using the W.A.T.E.R. assessment to determine the number of credits that would offset wetland impacts through payment to the Everglades Mitigation Bank. Consideration of the W.A.T.E.R. assessment would serve the best interests of

justice in this de novo proceeding. Both factors to consider for granting a motion to reopen the evidence are met here. *See Robinson*, 936 So. 2d at 781.

Burden and Standard of Proof

32. Petitioner has the burden to demonstrate, by a preponderance of the evidence, entitlement to issuance of the ERP. *See Fla. Dep't of Transp. v. J.W.C. Co.*, 395 So. 2d 778, 790 (Fla. 1st DCA 1981).

33. The standard of proof for findings of fact is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

34. The issuance of an ERP requires reasonable assurances that the Proposed Project would meet the applicable statutory and regulatory standards. "Reasonable assurances" means "a substantial likelihood that the project will be successfully implemented." *See Metro. Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. *See FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012), *aff'd*, 118 So. 3d 809 (Fla. 1st DCA 2013). Rather, an applicant must provide reasonable assurance that considers contingencies that might reasonably be expected. *See, e.g., Chipola Basin Protective Group, Inc. v. Dep't of Env't Regul.*, Case No. 88-3355 (Fla. DOAH Nov. 14, 1988; Fla. DER Dec. 30, 1988).

35. Petitioner met his burden to demonstrate, by a preponderance of the evidence, reasonable assurances that the Proposed Project met the permitting criteria that formed the bases for DEP's NOD.

ERP Permitting Criteria

Flooding

36. The Department identified Petitioner's failure to comply with rule 62-330.301(1)(b) as a reason for denying an ERP. Rule 62-330.301(1)(b) provides

that an applicant must provide reasonable assurance that the construction of the project "[w]ill not cause adverse flooding to on-site or off-site property."

37. Findings of Fact 10 through 12 above show that the Petitioner's project design provides reasonable assurance to meet the condition for issuance set forth in rule 62-330.301(1)(b).

Reduction or Elimination of Impacts

38. Section 10.2.1.1 of the AH Volume I requires that DEP "in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts." In addition, "[t]he term 'modification' shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function."

39. Petitioner responded to DEP's requests for practicable design modifications to reduce and eliminate adverse impacts to wetlands by proposing various alternatives that reduced mangrove impacts and redesigned the riprap rock retaining wall. DEP's desired alternatives were the construction of a seawall or the construction of a north-south retaining wall. However, DEP cannot require a project that is significantly different in type or function, or require that Petitioner explore the Department's preferred projects. *See Michael Casale v. Oculina Bank and Dep't of Env't Prot.*, Case Nos. 12-1227, 12-1228, 12-1229 (Fla. DOAH Apr. 19, 2013; *modified by* Fla. DEP Aug. 21, 2013) (DEP rejected the ALJ's interpretation of the rule requiring practicable design modifications because such interpretation imposed an extra requirement not contained in the plain language of the rule.).

40. Petitioner's final proposal is a practicable design modification to reduce and eliminate adverse impacts to wetlands that meets the requirements of Section 10.2.1.1 of the AH Volume I.

41. Section 10.2.1.2 of the AH Volume I provides that DEP "will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when . . . the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site specific analysis using the factors in section 10.2.2.3, below, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected."

42. The record evidence showed the proposed fill would directly impact an area of low quality saltmarsh as compared to the higher quality mangroves that would not be impacted. The documentary evidence and testimony support this conclusion "based on a site specific analysis using the factors in section 10.2.2.3."

43. Section 10.2.2.3 of the AH Volume I contains factors to consider when assessing impacts. Factors to consider include condition, hydrologic connection, uniqueness, location, and fish and wildlife utilization. These factors were considered in the W.A.T.E.R. assessment.

Mitigation

44. Section 10.3.1.2 of the AH Volume 1 provides that "[m]itigation can be conducted . . . through the purchase of credits from a mitigation bank." DEP's witness, Ms. Harding, testified that mitigation for wetland impacts in the Florida Keys is assessed using the W.A.T.E.R. assessment to determine the number of credits that would offset wetland impacts through the purchase of credits from the FPL Everglades Mitigation Bank.

45. The W.A.T.E.R. assessment mitigation calculations summarized on page 8 of Petitioner's Exhibit 1, propose mitigation in the form of 0.04280 credits to offset impacts to saltwater marsh not containing mangroves on the Property. As proposed in the ERP application, the credits would be purchased from the FPL Everglades Mitigation Bank.

46. In accordance with section 373.413, Florida Statutes, DEP may impose reasonable conditions as are necessary to assure that the proposed

construction will comply with applicable rules. The undersigned may propose additional permit conditions based on the record evidence.

See Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092-93 (Fla. 2d DCA 2009); *Hopwood v. Dep't of Env't Regul.*, 402 So. 2d 1296 (Fla. 1st DCA 1981).

47. A permit condition that requires DEP to verify the W.A.T.E.R. assessment of the necessary mitigation credits and for Petitioner to provide proof of intent to purchase credits from the FPL Everglades Mitigation Bank would satisfy the mitigation requirement of Section 10.3.2 of the AH Volume I.

Conclusions

48. By a preponderance of the persuasive record evidence, Petitioner overcame DEP's stated reasons for denying his ERP permit application.

49. The record evidence and the permit condition recommended in paragraph 47 above provide reasonable assurance for issuance of the requested ERP to Petitioner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order granting the ERP permit to Petitioner conditioned as recommended in paragraph 47 above.

DONE AND ENTERED this 18th day of July, 2025, in Tallahassee, Leon County, Florida.

Case No. 25-0050


FRANCINE M. FFOLKES
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.