

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SYLVAN ZEMEL, et al.,)
)
 Petitioners,)
)
 vs.) CASE NO. 94-5479
)
 DEPARTMENT OF MANAGEMENT SERVICES,)
 DIVISION OF BUILDING CONSTRUCTION,)
 and SOUTH FLORIDA WATER)
 MANAGEMENT DISTRICT,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Final hearing in the above-styled case was held in Ft. Myers, Florida, on April 25 and 26, 1995, before Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

The parties were represented at the hearing as follows:

For Petitioner: Russell P. Schropp
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For Respondent O. Earl Black, Jr.
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Management Department of Management Services
Services: 4050 Esplanade Way, Suite 260
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For Respondent Vincent J. Chen
South Florida Toni M. Leidy
Water Management South Florida Water Management District
District: 3301 Gun Club Road
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue in this case is whether the Department of Management Services is entitled to operation and construction and operation permits for the management and storage of surface water.

PRELIMINARY STATEMENT

At the hearing, Petitioners called three witnesses and offered into evidence 17 exhibits. Respondent Department of Management Services called two witnesses and offered into evidence four exhibits. Respondent South Florida Water Management District called one witness and offered into evidence three exhibits. All exhibits were admitted except Petitioner Exhibit 12.

The transcript was filed May 17, 1995. Rulings on timely filed proposed findings of fact are in the appendix.

FINDINGS OF FACT

I. The Proposed Permit

1. This case involves a 65-acre site in north Lee County owned by the City of Ft. Myers. At all material times, the land has been zoned under industrial-equivalent designations.

2. By leases that are not part of this record, Ft. Myers has leased 21.4 acres of the 65 acres to various governmental agencies, including Lee County, Lee County Sheriff's Office, and possibly the Florida Department of Juvenile Justice (formerly known as Department of Health and Rehabilitative Services). The following facilities are presently located on the 21.4 acres: Juvenile Detention Center, Lee County Stockade, Price Halfway House, Sheriff's Office Aviation Department, and Emergency Operations Center.

3. By lease dated September 20, 1993, Ft. Myers leased the remaining 43.6 undeveloped acres to Lee County for a term of 50 years. This lease allows Lee County to use the 43.6 acres for \$1 per year, but only for the operation of a Juvenile Justice Facility. Under Paragraph 20 of the lease, Ft. Myers may terminate the lease if Lee County ceases to operate the facility. Likewise, Lee County may terminate the lease if the Department of Juvenile Justice ceases to fund the County's operation of the facility. Under the lease, preference is given to juvenile residents of Ft. Myers. Paragraph 22 of the lease allocates liability to Lee County for claims or damages arising from released fuels, including from pipelines.

4. The lease is not assignable without Ft. Myer's consent. By agreement dated December 17, 1993, Ft. Myers consented to the sublease of the entire 43.6-acre parcel to the Department of Juvenile Justice for the purpose of the construction of a juvenile residential commitment facility. Lee County receives no rent from the Department of Juvenile Justice. In Paragraph 10 of the agreement, the Department of Juvenile Justice agrees to maintain, at its expense, "all improvements of every kind . . ." Lee County must make any repairs to improvements if the Department of Juvenile Justice fails to do so.

5. By subsequent agreement, Respondent Department of Management Services (DMS) became the agent for the Department of Juvenile Justice for the design, permitting, and construction of the juvenile justice facility.

6. By Application for a surface water management permit executed June 16, 1994, DMS applied for a surface water management permit for the construction and operation of a 10.9-acre project known as the Lee County Juvenile Commitment Facility. This 10.9-acre project is part of the 43.6 acres leased to Lee County and subleased to the Department of Juvenile Justice. The application states

that the existing 21.4 acres of developed sites, which are leased under separate agreements to different governmental entities, "will be permitted as is."

7. The Staff Review Summary of Respondent South Florida Water Management District (SFWMD) describes the purpose of the application as follows:

This application is a request for Authorization for Construction and Operation of a surface water management system to serve a 10.9 acre Institutional project discharging to Six Mile [Cypress] Slough via onsite wetlands and road-side swales. The application also requests Authorization for Operation of a surface water management system serving a 21.4 acre existing facility and 32.7 acres to remain unchanged for a total permitted area of 65.0 acres. Staff recommends approval of both authorizations with conditions.

8. The Staff Review Summary accurately states that the owner of the land is Ft. Myers. Of questionable accuracy is the statement that Ft. Myers leases to Lee County the 21.4 acres devoted to the five existing facilities. Although Lee County probably is a lessee of some of these parcels, the Lee County Sheriff's Office is the lessee (or perhaps sublessee) of at least two parcels. One of the other parcels may involve a state agency, again under either a lease or a sublease.

9. The Staff Review Summary inaccurately states that the project developer is Lee County. The project developer is DMS or its principal, the Department of Juvenile Justice.

10. The Staff Review Summary reviews the existing development on the 21.4 acres. The improvements consist of the 4.8-acre Juvenile Detention Center, 2.9-acre Price Halfway House, 4.7-acre Lee County Stockade, 5.1-acre Sheriff's Office Aviation Department, and 3.9-acre Emergency Operations Center.

11. The Staff Review Summary states that the footer of the Juvenile Detention Center was inspected in February 1980. The site drains into a 1.2-acre retention pond, which was a natural pond dug out to accept the drainage from the Juvenile Detention Center. A small amount of surface flow drains from the Juvenile Detention Center to a perimeter swale that drains west into a ditch running along Ortiz Avenue.

12. The Staff Review Summary states that the building permit for the Price Halfway House was issued in October 1982. The site drains into the 1.2-acre retention pond, which was apparently enlarged a second time to accept the additional flow. A small amount of the flow from the Price Halfway House also drains to the perimeter swale and west into the Ortiz Avenue ditch.

13. The Staff Review Summary states that the building permit for the Lee County Stockade was issued on May 25, 1976. SFWMD issued an exemption and a determination that no permit was required for two additions to the stockade in 1988 and 1989. For the additional impervious surface added by these additions, one inch of water quality treatment was provided. After the abandonment of a pumping system, drainage of the stockade site consists of water building up in existing onsite ditches and sheet flowing into the Ortiz Avenue ditch. The Staff Review Summary adds that a small retention area constructed at the

southeast corner of the site treats stormwater from the stockade and the Sheriff's Office Aviation Department. The summary adds that a small amount of stormwater drains north into an exterior swale that drains into the Ortiz Avenue ditch.

14. The Staff Review Summary states that a building permit was issued for the Sheriff's Office Aviation Department in August 1977. Stormwater from the site sheetflows to exterior swales north and south of the building. When the swales fill up, the water flows into the Ortiz Avenue ditch.

15. The Staff Review Summary states that a building permit was issued for the Emergency Operations Center on October 11, 1977. Drainage from the center flows directly into the Ortiz Avenue ditch.

16. Under "Water Quality," the Staff Review Summary reports that SFWMD "did not require compliance with discharge rate or criteria" based on Section 1.6, Basis of Review for Surface Water Management Permit Applications within the [SFWMD] March 1994 (Basis of Review), which contains guidelines issued by SFWMD for the construction and operation of surface water management systems. The summary adds that there have been no "water quality or quantity complaints associated with this site over the past 18 years since its initial construction."

17. Noting that a surface water management permit is requested for the entire 65-acre parcel, the Staff Review Summary states that the above-described drainage systems for the five existing facilities are "operational and will remain as they now exist."

18. Turning to the proposed development, the Staff Review Summary states that the remaining 43.6 undeveloped acres "will also be leased to Lee County by the City for the proposed commitment facilities." The facilities are accurately described as a 5.2-acre halfway house and a 5.7-acre bootcamp, both of which will be drained by internal drainage swales and culverts flowing into detention areas, which will discharge through a control structure into onsite wetlands leading to the Ortiz Avenue swale.

19. Addressing designed discharge rates, the Staff Review Summary acknowledges that the bootcamp's discharge rate will exceed the allowable rate for a 25-year, three-day storm event. The allowable rate is .33 cfs, and the design rate is .37 cfs. The Staff Review Summary explains that this discrepancy results from the use of the minimum size orifice (three inches) in the control structure.

20. Addressing water quality, the Staff Review Summary reports that commercially zoned sites are required to provide one-half inch dry pretreatment for water quality unless reasonable assurance can be provided that hazardous material will not enter the surface water management system. Determining that no hazardous material will be stored or generated on the site, SFWMD did not require the one-half inch dry pretreatment of runoff.

21. Noting that no surface water management permits have ever been issued for any part of the 65-acre parcel, the Staff Review Summary recommends that, subject to the customary Limiting Conditions, SFWMD issue:

Authorization for Construction and Operation
of a 10.9 acre Institutional Project discharging
to Six Mile Cypress Slough via onsite wetlands

and roadside swales, Operation of a 21.4 acre existing facility and 32.7 acres to remain unchanged for a total permitted area of 65.0 acres.

22. Limiting Condition 4 states that the permittee shall request transfer of the permit to the "responsible operational entity accepted by [SFWMD], if different from the permittee." Limiting Condition 8 adds:

A permit transfer to the operation phase shall not occur until a responsible entity meeting the requirements in section 9.0, "Basis of Review . . .," has been established to operate and maintain the system. The entity must be provided with sufficient ownership or legal interest so that it has control over all water management facilities authorized herein.

23. Special Condition 11 states: "Operation of the surface water management system shall be the responsibility of Lee County."

II. The Permittee and the Entity Responsible for Maintenance

24. The proposed permit consists of two authorizations. The first authorization is for the construction and operation of the surface water management system on the 10.9-acre parcel on which will be constructed the bootcamp and halfway house. The second authorization is for the operation of the existing surface water management system on the already-developed 21.4 acres and the unimproved surface water management system on the remaining 32.7 acres.

25. There are two problems with the designation of Lee County as the entity responsible for maintaining the permitted surface water management systems.

26. Basis of Review 9.1.B states:

To satisfy [P]ermit [L]imiting [C]ondition [8], the Permittee must supply appropriate written proof, such as either by letter or resolution from the governmental entity that the governmental entity will accept the operation and maintenance of all the surface water management system components

27. The authorization for operation of the systems on the 21.4-acre and 32.7-acre parcels does not await any construction. Once the permit is issued, the authorization is effective. Therefore, all prerequisites to the designation must have been satisfied before the operation permit issues.

28. For the 21.4-acre parcel, DMS has not provided reasonable assurance that Lee County is the lessee or sublessee of all of the parcels underlying the five existing facilities. In fact, it appears that Lee County is not the lessee or sublessee of all of these parcels. Even if Lee County were the lessee or sublessee of these five parcels, DMS has not provided reasonable assurance that Lee County has assumed responsibility for the maintenance of the surface water management system for the five parcels.

29. Contrary to Basis of Review 9.1.B, there is no written agreement by Lee County to assume operational responsibility, nor is there even an actual agreement to this effect. SFWMD's rules sensibly require that written consent be obtained before the operation permit is issued.

30. Likewise, DMS has failed to show that Lee County has agreed to assume responsibility for the operation and maintenance of the surface water management system for the 32.7-acre parcel. Again, SFWMD must obtain written consent before issuing the permit because no construction will precede operation for the surface water management system on this parcel.

31. Unlike the situation as to the 21.4-acre parcel, the 32.7-acre parcel is leased to Lee County as part of the 43.6-acre parcel. But in the December 17, 1993, agreement, the Department of Juvenile Justice, not Lee County, assumes responsibility for maintaining all improvements, which arguably includes drainage improvements.

32. As between Ft. Myers and Lee County, Lee County assumes secondary liability for the maintenance of all improvements. But the failure of the Department of Juvenile Justice to do so would likely represent a default under the agreement. In such a case, the lease and separate agreement probably would either be in litigation or Lee County would have terminated its obligations under the contracts. In either case, it is unlikely that Lee County would perform its secondary responsibility to maintain the drainage improvements, especially where it is receiving no rent from the Department of Juvenile Justice and priority is given to Ft. Myers juveniles in admission decisions.

33. Construction will precede operation as to the 10.9-acre parcel so the parties have an opportunity, even after the construction and operation permit is issued, to secure the necessary written consent before the operation permit goes into effect. But similar deficiencies exist with respect to the 10.9-acre parcel because the same agreement imposes upon the Department of Juvenile Justice, not Lee County, the obligation to maintain improvements.

34. An additional complication arises as to the 10.9-acre parcel. The Department of Juvenile Justice intends to contract with one or more private entities to operate the bootcamp and halfway house, so there is at least one more party that Lee County could claim was responsible for maintenance of the surface water management system.

35. The question of who is responsible for maintaining the surface water management systems is important. Drainage quantities and directions can change if swales clog up with vegetation or other matter. In this case, one roadside swale in the area of the 21.4-acre parcel is blocked with vegetation.

36. DMS and SFWMD have thus failed to provide reasonable assurance that the designated entity has assumed responsibility for the maintenance and operation of the existing systems or will assume responsibility for the maintenance and operation of the proposed system following its construction.

III. Permit for Existing Development

37. Section 1.6, Basis of Review, states:

[SFWMD] issues construction and operation permits for proposed surface water management activities and operation permits for existing

systems. The criteria herein are specifically designed to apply to proposed activities (construction and operation permits). Therefore, some of the criteria may not be applicable to the permitting of existing systems (operation permits). For example, in some cases, existing systems may not meet flood protection criteria. Criteria deviation for existing systems will be identified in staff reports.

38. SFWMD has produced no evidence explicating the extent to which existing systems, such as the systems on the 21.4- and 32.7-acre parcels, are entitled to operating permits without meeting some of the criteria applicable to proposed systems, such as the system on the 10.9-acre parcel. There is nothing whatsoever in the record to explain why certain existing systems might not have to meet certain criteria, such as flood protection criteria. Except for the quantity deviation discussed below, there is nothing in the record disclosing the extent to which SFWMD has waived, or even considered the applicability of, certain or all criteria prior to the issuance of operation permits for the existing systems.

39. In practice, SFWMD does not adhere even to the vague standards implied in 1.6. According to the SFWMD witness, the practice of SFWMD, as reflected in this case as to the systems on the 21.4- and 32.7-acre parcels, is to permit existing systems "as is, where is," as long as they have had no reported problems.

40. There are numerous deficiencies in the "as is, where is" unwritten policy, apart from the obvious one that it conflicts with the assurance of 1.6 that only "some of the criteria may not be applicable" to existing systems. First, the record does not define what a "problem" is. Second, the record discloses no means by which reported problems are collected and later accessed, such as by a parcel index.

41. The "as is, where is" policy is an abdication of the limited responsibilities that SFWMD imposes upon itself in 1.6, especially when applied to the present facts.

42. The facts are straightforward. Neither Ft. Myers, Lee County, nor any other party has ever obtained a permit for any surface water management system, despite numerous improvements in the past 20 years requiring such permits, including the construction of a heliport, at which maintenance and refueling of helicopters takes place. In two relatively minor cases, discussed below, SFWMD erroneously determined that no permit was required. In one of those cases, the applicant, Lee County, candidly admitted the existence of a flooding problem. Based on the present record, neither DMS nor SFWMD has justified the issuance of an operation permit for the systems on the 21.4- and 32.7-acre parcels based either on Basis of Review 1.6 or on the "as is, where is" unwritten policy.

43. Construction of the five improvements on the 21.4 acres began between 1975 and December 1977 with construction of a portion of the Lee County Stockade building and parking, Emergency Operations Center building and parking, and a now- removed barn for the Lee County Sheriff's Office. At the same time, a lake was dug, probably for fill purposes. By the end of 1977, about 2.39 acres of the 21.4 acres were converted to impervious surface.

44. From 1978 to March 1980, another 0.96 acres of the 21.4 acres were converted to impervious surface by the construction of a perimeter dike and road. During this period, construction commenced on the Juvenile Detention Center, adding another 1.63 acres of impervious surface.

45. Between March 1980 and December 1981, additions were made to the Lee County Stockade building and the lake for an additional 0.45 acres of impervious area.

46. Between December 1981 and March 1984, the Price Halfway House building and parking were constructed, adding another 0.79 acres of impervious surface.

47. Between March 1984 and February 1986, a heliport facility and landing area were constructed for the Lee County Sheriff's Office, adding another 1.01 acres of impervious surface.

48. Between February 1986 and February 1990, an additional 2.31 acres of impervious surface were added through additions to the Lee County Stockade and parking area, juvenile detention center, and Emergency Operations Center parking area.

49. Between February 1990 and April 1993, another addition to the Lee County Stockade added 0.62 acres of impervious surface. An additional 0.17 acres of lake was excavated.

50. During this time, applicable rules and statutes required permits for the construction of "works" affecting surface water, including ditches, culverts, and other construction that connects to, or draws water from, drains water into, or is placed in or across the waters in the state. The buildings, parking, other impervious surfaces, ditches, swales, dikes, lake excavations, and, at one point, addition of a now-abandoned pump all constituted "works" for which surface water management permits were required.

51. In 1988, Lee County or Ft. Myers applied for an exemption for an addition to the Lee County Stockade. The basis for the claim of exemption was that the parcel consisted of less than 10 acres and the total impervious surface did not exceed two acres. Although rules in effect at the time required consideration of the contiguous 65 acres under common ownership and the total impervious surface for the 9.7-acre "parcel" exceeded two acres, SFWMD erroneously issued an exemption letter.

52. The second instance involving a claim of exemption took place in 1989 when Lee County submitted plans for another addition to the Lee County Stockade, adding 0.51 acres of impervious surface. The submittal acknowledged a "flooding" problem, but promised a master drainage plan for the "entire site." SFWMD determined that no permit would be required due to the promise of a master drainage plan.

53. No master drainage plan was ever prepared. The flooding problem precluded issuance of the operation permit on an "as is, where is" basis for the already-developed 21.4-acre parcel, even assuming that SFWMD adequately justified the use of this unwritten permitting procedure.

54. In fact, SFWMD has not explained adequately its "as is, where is" permitting procedure or even the undelineated permitting criteria referenced in 1.6, Basis of Review. The 65-acre parcel is a poor candidate for preferential permitting of existing systems. The owner and developer constructed the

existing systems in near total disregard of the law. The two times that the owner and developer complied with the permitting process involved small additions for which exemptions should not have been granted. In one case, SFWMD exempted the proposed activity due to its error calculating minimum thresholds as to the areas of the parcel and the impervious surface. In the other case, SFWMD exempted the proposed activity partly in reliance on a promised master drainage plan that was not later prepared.

55. To issue operation permits for the existing systems on the 21.4- and 32.7-acre parcels would reward the owner and developer of the 65-acre parcel for noncompliance with the law and provide an incentive for similarly situated landowners and developers likewise to ignore the law.

56. Before issuing operation permits on systems that have received no comprehensive review and that have been added piecemeal over the years, SFWMD must evaluate the surface water systems on the entire 65-acre parcel to determine whether they meet all applicable criteria. The "as is, where is" unwritten policy has no applicability where there have been reports of flooding. If SFWMD chooses to dispense with criteria in reliance upon Basis of Review 1.6, it must be prepared to identify and explain which criteria are waived and why.

IV. Water Quality

57. Basis of Review 5.2.2 provides that projects that are zoned commercial or industrial, such as the present one, must provide one-half inch of "dry" detention or retention pretreatment, unless reasonable assurances are provided "that hazardous materials will not enter the project's surface water management system." There is no existing or proposed dry detention on the 65 acres.

58. The existing development includes the Sheriff's Office Aviation Department, which serves as a heliport. The fueling and maintenance of helicopters means that contaminants may enter the stormwater draining off the site. The functioning of the surface water system on this site is therefore of particular importance.

59. There also may be more reason to question the functioning of the surface water system on this site. It is south of the Lee County Stockade, where flooding has been reported. The heliport site has also been the subject of more elaborate drainage improvements, such as the location of a small retention pond near the Stockade boundary and a pump, the latter of which has since been abandoned.

60. The existing system on the 21.4-acre parcel, as well as the existing and proposed systems on the remainder of the 65 acres, require dry pretreatment for reasons apart from the presence of the heliport. The materials likely to be used with the existing and proposed developments are similar to those found on residential sites. SFWMD and DMS contend that there is therefore no need to require dry pretreatment as to these areas.

61. However, the existing and intended institutional uses, such as jails and bootcamps, represent an intensity of use that exceeds the use typical in areas zoned residential. This increased intensity implies the presence of typical residential contaminants, such as petroleum-based products or cleaning solvents, but in greater volumes or concentrations, if not also, in the case of solvents, different compositions. The lease addresses potential liability for

released petroleum. In the absence of a showing that such hazardous materials are prevented from entering the runoff, SFWMD must require dry pretreatment for the systems occupying the entire 65-acre parcel.

62. DMS and SFWMD have thus failed to provide reasonable assurance that the existing systems satisfy applicable water quality criteria or that the proposed system will satisfy applicable water quality criteria.

V. Water Quantity

63. The 65-acre parcel adjoins Ortiz Avenue on the west and property owned by Petitioners on the east and south that is undeveloped except for a borrow pit some distance from the 65-acre parcel. The parcel is roughly 1000 feet east-west and 2700 feet north-south.

64. The proposed halfway house is at the north end of the parcel. The halfway house is situated between a proposed detention pond on the west and a recreation field on the east. A paved road divides the halfway house from the rest of the 65-acre parcel.

65. South of the road are the Lee County Stockade on the west, which abuts Ortiz Avenue, and the Juvenile Detention Center on the east. A berm separates these two sites. The berm runs from the road along the west shore of the twice-enlarged 1.2-acre retention pond and the west boundary of the Price Halfway House, which is south of the Juvenile Detention Center. To the west of the berm, south of the Lee County Stockade, is the Sheriff's Office Aviation Department or heliport facility, which abuts Ortiz Avenue.

66. South of the Aviation Department is an outparcel used by the Florida Department of Corrections that also abuts Ortiz Avenue. East of the outparcel is the proposed halfway house with a proposed detention pond west of the halfway house and south of the outparcel. The Emergency Operations Center, which abuts Ortiz Avenue, is south of the detention pond and surrounded on three sides by the 32.7 acres to be left undisturbed at this time.

67. There are perimeter berms around all of the parcels except for the Juvenile Detention Center and Price Halfway House, which are served by a single berm, and the Emergency Operations Center, which appears not to be bermed. The prevailing natural drainage is not pronounced either by direction or volume because the land is nearly level. The natural direction of drainage is to the south and west and remains so on Petitioners' land to the east and south and the undisturbed 32.7 acres to the south. The variety of drainage directions within the remainder of the 65-acre parcel reflects the extent to which berms, swales, ponds, pumps, roads, buildings, parking areas, and other works have been added to the northerly parcels.

68. Runoff reaching the northern boundary of the 65 acres will be diverted due west around the proposed detention pond to the swale running along the east side of Ortiz Avenue. Runoff from the recreation field and halfway house building and parking area drain into the proposed detention pond, which releases water through a gravity control device to the Ortiz Avenue swale. There appears to be a connection routing some runoff from the south side of the recreation field to the Juvenile Detention Center, where it travels west in a roadside swale to the Ortiz Avenue swale.

69. A little less than half of the area of the Juvenile Detention Center site drains into perimeter swales along the north and east borders and then to

the west before emptying into the Ortiz Avenue swale. The remainder of the Juvenile Detention Center drains into the retention pond. The same is true of the Price Halfway House.

70. The Lee County Stockade drains to each of its borders where the water then runs west along the north or south border to the Ortiz Avenue swale. The southern half of the Lee County Stockade site drains into the small retention pond at the northwest corner of the Sheriff's Office Aviation Department.

71. Most of the runoff from the heliport facility runs to the southwest corner of the parcel, which is the location of the abandoned pump. From there, the runoff continues to the Ortiz Avenue swale. Very little if any of the runoff from the heliport enters the small retention pond on the northwest corner of the parcel.

72. The bootcamp drains into the detention pond, which then releases water by a gravity control structure into a portion of the undisturbed 32.7-acres before entering the Ortiz Avenue swale. The Emergency Operations Center site drains in all directions away from the building and parking area, eventually draining into the Ortiz Avenue swale.

73. Stormwater discharge rates from the proposed halfway house and bootcamp are 0.28 cfs and 0.37 cfs. Under SFWMD rules, the allowable maximums in the Six Mile Cypress drainage basin are 0.30 cfs and 0.33 cfs, respectively. SFWMD and DMS contend that the excessive discharge from the bootcamp is acceptable because the gravity control device for the proposed detention pond is of the smallest size allowable, given the indisputable need to avoid clogging and ensuing upstream flooding.

74. Initially, SFWMD approved the discharge rates for the halfway house and bootcamp because, when combined, they did not exceed the total allowable value. However, this approach was invalid for two reasons. First, the two sites contain entirely independent drainage systems separated by several hundred feet. Second, after correcting an initial understatement for the value for the halfway house, the actual total exceeds the maximum allowable total.

75. SFWMD contends that the slight excess is acceptable because of the inability to use a smaller orifice in the gravity control structure. However, the discharge quantity easily could have been reduced by design alternatives, such as enlarging the detention pond, which is mostly surrounded by land that is to be left undisturbed. The ease with which the minimum-orifice problem could have been avoided rebuts the presumption contained in Basis of Review 7.2.A that excessive discharge quantities are presumably acceptable if due to the inability to use a smaller orifice. Also, SFWMD and DMS have failed to show that the effect of the excessive discharge quantities is negligible, so the exception in the SFWMD manual for negligible impacts is unavailable.

76. Neither SFWMD nor DMS provided any reasonable assurance as to the quantity of discharge from the 21.4 acres. Rough estimates suggest it is more likely that the quantity of discharge may greatly exceed the allowable maximum.

77. SFWMD must evaluate the water-quantity issues before issuing operation permits for the systems on the 21.4- and 32.7- acre parcels and a construction and operation permit for the 10.9-acre parcel. Obviously, if SFWMD determines that all water quantity criteria are met as to the existing systems, it may issue operation permits for the systems on the 21.4- and 32.7- acre parcels. Otherwise, SFWMD must quantify the extent of the deviation and, if it seeks to

waive compliance with any or all quantity standards in reliance on Basis of Review 1.6, evaluate the effect of the waiver and explain the basis for the waiver.

78. DMS and SFWMD have thus failed to provide reasonable assurance that the existing systems satisfy applicable water quantity criteria or that the proposed system will satisfy applicable water quantity criteria.

VI. Impacts on Adjacent Lands

79. Petitioners' property is impacted by the above- described drainage in two ways. First, Petitioners' property abutting the east side of Ortiz Avenue, south of the 65 acres, is especially vulnerable to flooding because the Ortiz Avenue swale is not a V-notch, but a half-V. The closed side of the swale prevents the water from running onto Ortiz Avenue. The open side of swale abuts Petitioners' property, so, if the swale's capacity is exceeded, stormwater will be released onto Petitioners' land.

80. Second, perimeter berming along the east side of the 10.9- and 21.4-acre parcels will impede flow off the part of Petitioners' property located to the east of the 65 acres. A swale between the proposed halfway house and the Juvenile Detention Center will receive runoff from a small portion of Petitioners' property to the east and mostly north of the 65 acres. But there is no indication how much runoff from Petitioners' property can be so accommodated, how much runoff is impeded by the existing berm along the east side of the Juvenile Detention Center and Price Halfway House, and how much runoff will be impeded by the addition of new berms along the east side of the proposed halfway house and bootcamp.

81. Basis of Review 6.8 requires that swales and dikes allow the passage of drainage from off-site areas to downstream areas. Rule 40E-4.301(1)(b), Florida Administrative Code, requires that an applicant provide reasonable assurances that a surface water management system will not cause adverse water quality or quantity impacts on adjacent lands.

82. Neither SFWMD nor DMS obtained topographical information for Petitioners' property, as required by the Basis of Review. Rough estimates suggest that the proposed project may require Petitioners' property to retain considerably more stormwater from the design storm event of 25 years, three days.

83. DMS and SFWMD have thus failed to provide reasonable assurance that the proposed system would not have an adverse impact on Petitioners' upstream and downstream land.

CONCLUSIONS OF LAW

84. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

85. Petitioners have standing.

86. Section 373.413(1) authorizes SFWMD to

require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system . . . or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

87. Section 373.413(9) provides that, until new rules are adopted, "existing rules adopted under this part and rules adopted pursuant to the authority of ss. 403.91-403.929 shall be deemed authorized under this part and shall remain in full force and effect."

88. Rule 40E-4.301 requires that an applicant for a surface water management permit "give reasonable assurances that the surface water management system:"

(a) provides adequate flood protection and drainage, without causing over-drainage.

(b) will not cause adverse water quality and quantity impacts on receiving waters and adjacent lands regulated pursuant to Chapter 373, F.S.

(c) will not cause discharges which result in any violation, in surface waters of the state, of the standards and criteria of Chapter 17-302, F.A.C.

(d) will not cause adverse on-site or off-site impacts on surface and groundwater levels and flows, including impacts to sources of water supply and wetland hydrology.

(e) will not cause adverse environmental impacts.

(f) can be effectively operated and maintained.

(g) will not adversely affect public health and safety.

(h) is consistent with the State Water Policy, Chapter 17-40, F.A.C.

* * *

(k) will not otherwise be harmful to the water resources of the District.

(l) will not interfere with the legal rights of others as defined in subsection 17- 40.401(8), F.A.C.

* * *

89. Rule 40E-4.091(1)(a) incorporates by reference the Basis of Review.

90. For the reasons set forth above, DMS and SFWMD have failed to provide reasonable assurances concerning operation responsibility, water quality, water quantity, and impacts on adjacent land to allow the issuance of the operation permits for the existing systems on the 21.4- and 32.7-acre parcels and the construction and operation permit for the proposed system on the 10.9-acre parcel.

RECOMMENDATION

It is hereby

RECOMMENDED that the South Florida Water Management District enter a final order denying the application of the Department of Management Services for all permits for the operation and construction and operation of surface water management systems on the 65-acre parcel.

ENTERED on June 19, 1995, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
on June 19, 1995.

APPENDIX

Rulings on Proposed Findings of Petitioners

- 1-18: adopted or adopted in substance.
- 19: rejected as subordinate.
- 20-21: adopted or adopted in substance.
- 22-24 (first sentence): rejected as irrelevant.
- 24 (remainder)-46: adopted or adopted in substance.
- 47-53: rejected as subordinate.
- 54-64 (first sentence): adopted or adopted in substance.
- 64 (second sentence)-66: rejected as subordinate.

Rulings on Proposed Findings of Respondent SFWMD

- 1-10: adopted or adopted in substance.
- 11: rejected as unsupported by the appropriate weight of the evidence.
- 12: rejected as unnecessary.
- 13: adopted or adopted in substance.
- 14-15: rejected as subordinate.
- 16: rejected as unsupported by the appropriate weight of the evidence.
- 17 (except for last sentence): adopted or adopted in substance.
- 17 (last sentence): rejected as unsupported by the appropriate weight of the evidence.
- 18-32 (first sentence): rejected as unnecessary.
- 32 (remainder): rejected as unsupported by the appropriate weight of the evidence.
- 33: rejected as subordinate.
- 34: rejected as unsupported by the appropriate weight of the evidence, except that the proposed ponds are wet detention.
- 35 (first sentence): adopted or adopted in substance.

35 (remainder): rejected as unsupported by the appropriate weight of the evidence.
36-45: rejected as unnecessary.
46-47: rejected as unsupported by the appropriate weight of the evidence.
48-50 (second sentence): adopted or adopted in substance.
50 (remainder): rejected as unsupported by the appropriate weight of the evidence.
51-52, 55-57 (first sentence), and 58: adopted or adopted in substance, although insufficient water quality treatment.
53: adopted or adopted in substance.
54: rejected as unsupported by the appropriate weight of the evidence.
57 (second sentence): rejected as unsupported by the appropriate weight of the evidence.
59: rejected as unsupported by the appropriate weight of the evidence.
60: adopted or adopted in substance, except after "therefore." None of remainder logically follows from what is said in 1.6.
61: rejected as unsupported by the appropriate weight of the evidence.
62-64: rejected as subordinate, unsupported by the appropriate weight of the evidence, and irrelevant.
65: rejected as subordinate.
66: rejected as irrelevant. The burden is on the applicant and SFWMD, if it wishes to issue the permits, to provide reasonable assurances as to the adverse impact of the drainage systems.
67-68: rejected as subordinate.
69: rejected as unsupported by the appropriate weight of the evidence.
70: rejected as unsupported by the appropriate weight of the evidence.
71: rejected as repetitious.
72: rejected as irrelevant, except for past report of flooding, which is rejected as repetitious.
73: rejected as repetitious.
74: rejected as irrelevant and subordinate.
75 (first three sentences): adopted or adopted in substance.
75 (remainder): rejected as unsupported by the appropriate weight of the evidence.
1 and 2: rejected as irrelevant insofar as the same result is reached with or without the permit modifications.

Rulings on Proposed Findings of Respondent DMS

1-4: adopted or adopted in substance.
5: rejected as subordinate.
6: rejected as unsupported by the appropriate weight of the evidence.
7: adopted or adopted in substance.
8: rejected as subordinate.
9: adopted or adopted in substance, except that the excessive discharge was not "caused" by the minimum-sized orifice, only defended on that basis.
10: adopted or adopted in substance.
11-12: rejected as subordinate.
13: rejected as irrelevant.
14: adopted or adopted in substance.
15: adopted or adopted in substance, except for implication that no flooding problems existed.
16: rejected as recitation of evidence.
17: rejected as subordinate.
18: rejected as irrelevant.

19: adopted or adopted in substance, to the extent that separateness of systems is relevant.
20: rejected as subordinate.
21: adopted or adopted in substance, except for last sentence, which is rejected as unsupported by the appropriate weight of the evidence.
22: rejected as subordinate.
23-30: rejected as unsupported by the appropriate weight of the evidence, recitation of evidence, and subordinate.
31: rejected as unsupported by the appropriate weight of the evidence.
32: rejected as unsupported by the appropriate weight of the evidence, based on the present record.
33: rejected as unsupported by the appropriate weight of the evidence and relevance.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.