

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROYAL PALM BEACH COLONY, L.P.,)
)
 Petitioner,)
)
vs.) Case No. 98-4163RX
)
SOUTH FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
 Respondent,)
)
and)
)
1000 FRIENDS OF FLORIDA, INC.,)
)
 Intervenor.)
_____)

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on October 20-22, 1998, and November 9 and 10, 1998, at West Palm Beach, Florida, before SUSAN B. KIRKLAND, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alfred J. Malefatto, Esquire
Theresa Moore, Esquire
Greenberg, Traurig, Hoffman,
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For Respondent: Douglas MacLaughlin, Esquire
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South Florida Water Management District
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For Intervenor: Terrel Arline, Esquire
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STATEMENT OF THE ISSUES

Whether Rules 40E-400.315(f) and 40E-4.301(f), Florida Administrative Code, and Section 4.1.1(f) and 4.2.7(a)-(d), Basis of Review Handbook for Environmental Resource Permit Application, are an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

On September 28, 1998, Petitioner, Royal Palm Beach Colony, L.P. (Royal Palm), petitioned for an administrative determination of the validity of existing Rules 40E-400.315(1)(f), and 40E-4.301(1)(f), Florida Administrative Code, and Sections 4.1.1(f) and 4.2.7(a)-(d), Basis of Review Handbook for Environmental Resource Permit Application.

The rule challenge was consolidated with a pending Section 120.57(1) proceeding concerning the denial of No-Notice General Permits by the Respondent, South Florida Water Management District (SFWMD) for three lots owned by Royal Palm.

Intervenor 1000 Friends of Florida, filed a petition for leave to intervene, which was granted.

At the final hearing of the consolidated cases, Royal Palm presented the following witnesses: Randy Rieger, K. Daniel Shalloway, Joesph A. Pike, James M. Hudgens, J. Bradley Melko, Jay Foy, and Sam B. Upchurch. Petitioner's Exhibits 1-68 were admitted in evidence.

SFWMD presented the testimony of the following witnesses: Terrie Bates, Robert Robbins, Anthony Waterhouse, Richard Orth, and Robert Mitchell. Respondent's Exhibits 1-28 were admitted in evidence.

Joint Exhibits 1-4 were admitted in evidence. 1000 Friends of Florida, Inc.'s Exhibits 1-3 were admitted in evidence. Official recognition was taken of Chapters 40E-4 and 40E-400, Florida Administrative Code, the "Basis of Review for Environmental Resource Permit Application within the South Florida Water Management District - November 1996," and Chapter 373, Part IV, Florida Statutes.

The parties were to file their proposed orders within 30 days of the filing of the transcript, which was filed on November 23, 1998. Petitioner requested and was granted two extensions of time to file the proposed orders. Respondent requested an additional extension of time to file proposed orders, and the time for filing proposed orders was extended to January 19, 1999. The parties' proposed orders have been considered in rendering this Final Order.

FINDINGS OF FACT

1. Respondent, South Florida Water Management District (SFWMD), is a public corporation existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes, and Title 40E, Florida Administrative Code, as a multipurpose water management district,

with its principal office in West Palm Beach, Florida.

2. Petitioner, Royal Palm Beach Colony, L.P. (Royal Palm), owns three lots in Unit 11 of the Indian Trail Improvement District, located in northwest Palm Beach County, Florida.

3. Intervenor 1000 Friends of Florida, Inc., is a not-for-profit, tax exempt membership corporation, organized and existing under the laws of the State of Florida.

4. By letter dated March 19, 1998, Royal Palm notified SFWMD that Royal Palm was entitled to No Notice General Permits for Activities in Uplands (NNGP) for three of the lots which it owns in Unit 11, Lots 61, 245, and 247.

5. Royal Palm intends to build one single-family home on each of the lots. The proposed development of the lots would include individual septic tanks and stormwater retention ponds.

6. By letter dated April 9, 1998, SFWMD informed Royal Palm that SFWMD staff had determined that the three lots do not qualify for no-notice general permits for single family home construction.

7. As part of the basis for denial of the NNGPs, the April 9, 1998, letter stated:

Reasonable assurances have not been provided to show that the proposed system or project is not part of a larger common plan of development. See Rule 40E-400.315(1)(f), Fla. Admin. Code. Royal Palm Beach Colony is the owner of approximately 170 lots within Unit 11 of the Indian Trail Improvement District, and the three proposed lots appear to be merely part of this large common plan of development.

8. As an additional basis for denial, the April 9 letter stated:

Reasonable assurances have not been provided to show that construction and/or operation of the proposed system will not cause adverse secondary impacts to the water resources, including, but not limited to, significant interference with the construction and operation of a regional stormwater system needed for adequate flood protection and stormwater treatment in the Unit 11 area. See Rule 40E-4.301(1)(f), Fla. Admin. Code.

9. Royal Palm filed a Petition for Administrative Determination of the Invalidity of the above-cited rules, Rule 40E-400.315(1)(f) and Rule 40E-4.301(1)(f), Florida Administrative Code. Also being challenged are those portions of SFWMD's "Basis of Review Handbook for Environmental Resource Permit Applications" (BOR), which discuss secondary impacts, Sections 4.1.1(f) and 4.2.7(a)-(d).

10. SFWMD's Environmental Resource Permit (ERP) program has four different types of permits: NNGPs, noticed general permits, standard general permits, and individual permits. The permits are grouped according to degree of potential impact and, correspondingly, according to degree of regulatory review.

11. NNGPs are for very minor activities that have no potential to cause adverse impacts or harm to water resources provided that the criteria in the rule are met. A NNGP typically receives no review by SFWMD staff. An applicant reviews the criteria, and if the proposed project meets the criteria the

project may be undertaken without notification to or approval by SFWMD.

12. The degree of regulatory review for water management systems that do not qualify for NNGPs will vary. A system that qualifies for a noticed general permit pursuant to Rule 40E-400, Subpart C, Florida Administrative Code, will be reviewed within 30 days of receipt of notice, and if the criteria listed in the general permit rule are met it is presumed that the project meets all SFWMD's standards and is permissible. If the system does not fit within a noticed general permit and if the proposed system is less than 100 acres total size or has less than one acre of wetland impact, the project will be reviewed as a standard general permit pursuant to Rule 40E-40, Florida Administrative Code. Standard general permits are reviewed and issued by SFWMD staff, and unlike the noticed general permits, there are no presumptions that if certain limited criteria are met that all the SFWMD standards are met. The proposed project is reviewed to determine if reasonable assurances have been provided that all standards have been met. Finally, if a proposed water management system is greater than 100 acres or entails more than one acre of filled wetlands, an individual environmental resource permit is required. As with standard general permits, these applications are reviewed to determine if the applicant has provided reasonable assurance that all SFWMD standards are met. Individual environmental resource permits require permit

authorization from SFWMD's governing board.

13. Unlike the noticed general, the standard general, and the individual environmental resource permits, the NNGP does not require any regulatory review. An individual minor system fitting within the specific criteria for a NNGP can proceed with the activity without noticing SFWMD. Such a permit is very similar to an exemption from the permitting requirements.

14. The use of a NNGP was not intended for approval of water management systems that contain shared or common water management facilities, such as a common drainage system for a housing development. Such systems require regulatory review to ensure that the system does not cause adverse water quality, water quantity, or environmental impacts.

15. To allow a series of individual projects to have authorization to proceed under a NNGP, when together they are part of a larger common plan of development or sale, cumulatively would have a significant adverse impact to flood protection and environmental protection. Such master systems are to have regulatory review under one of the other three SFWMD permits. Thus, the requirement that a project permitted pursuant to a NNGP not be part of a larger common development or sale was placed in Rule 40E-400.315(1)(f), Florida Administrative Code. Without such a requirement, it would be possible to development a larger system without regulatory review by permitting individual systems within the larger system using a NNGP.

16. The term "not part of a larger common plan of development or sale" contained in Rule 40E-400.315(1)(f), Florida Administrative Code, originated in Section 403.813(2)(q), Florida Statutes, which contains exemptions from permitting under Chapter 373, Florida Statutes. In developing Rule 40E-400.315(1)(f), SFWMD did not further define the term because the plain meaning of the term was deemed adequate, as it was by the Florida Legislature when it did not define the same term in Section 403.813(2)(q).

17. The plain meaning of the term is consistent with SFWMD's regulatory scheme for permitting water management systems. The most minimal permit authorization, the NNGP, should not authorize projects that are part of a larger common plan of development or sale because the larger projects are more likely to have larger water resource impacts.

18. Interpretations of the term "part of a larger common plan of development" by staff from SFWMD are consistent. The interpretations indicate that the individual project and the larger master plan have shared or common water management systems. The focus is on whether common infrastructure would be needed to carry out the individual project.

19. In its permitting program, SFWMD looks at all adverse impacts to water resources, whether direct, secondary, or cumulative. When evaluating secondary impacts, SFWMD looks for the same adverse impacts on water resources that it would for

direct impacts, such as adverse impacts on the functions of wetlands or surface waters or adverse impacts on water quality.

20. SFWMD interprets a secondary impact as some impact, other than a direct impact in the footprint of the proposed project, which is closely linked and causally tied to proposed activity to be permitted.

21. Section 4.2.7, BOR sets guidelines for how SFWMD considers secondary impacts from water management systems. In developing Section 4.2.7, SFWMD applied existing case law concerning secondary impacts.

22. Section 4.2.7(a), BOR, regulates construction, alteration, and reasonably expected uses of a proposed system so that the functions of wetlands to fish and wildlife and listed species are protected from adverse impacts caused by activities in adjacent uplands. Such secondary impacts may result, for example, from disturbance during adjacent upland construction or disturbance due to the close proximity of human habitation to a wetland where none previously existed. Section 4.2.7(a), BOR, gives examples of secondary impacts, and provides a mechanism in the form of a buffer that creates a presumption that provides reasonable assurance that secondary impacts to habitat functions of wetlands will not be adverse, assuming a wetland is not being used by a listed species for nesting, denning, or significant feeding habitat.

23. Section 4.2.7(b), BOR, protects existing upland nesting

or denning sites of listed aquatic or wetland dependent species and the adjacent uplands which are necessary to enable these nests or dens to be used successfully by such species.

24. Section 4.2.7(c), BOR, looks at potential adverse secondary impacts to significant historical and archeological resources. The intent of the section is to allow consideration of secondary impacts of a project that may have a very minor impact from construction, but more serious implications once in operation. For example, a water control structure that may have a footprint of only a tenth of an acre may result in greater water velocities that would harm submerged archeological resources.

25. Section 4.2.7(d), BOR, considers specific water resource impacts from future project phases and activities that will be very closely linked and causally related to the proposed system. This section seeks to prevent future impacts that may be necessitated by a proposed project design. As part of the analysis, SFWMD will consider the impacts of the intended or reasonably expected uses of future activities on water quality and wetland and other surface water functions.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.56, Florida Statutes.

27. Under Section 120.56(3), Florida Statutes, the party

challenging existing rules has the ultimate burden of establishing that the rule is invalid. See St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998). Therefore, the case law which presumes a rule to be valid until the challenger establishes the rule is invalid is applicable when considering challenges to existing rules. Id. at 76.

28. Royal Palm challenges Rules 40E-400.315(1)(f) and 40E-4.301(1)(f), Florida Administrative Code, and Sections 4.4.(f) and 4.2.7 of the District's Basis of Review incorporated by reference in Rule 40E-4.091, Florida Administrative Code, under subsections 120.53(8)(c) and (d), Florida Statutes, which define "invalid exercise of delegated legislative authority" as:

[A]n action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency

29. Rule 40E-400.315(1)(f), Florida Administrative Code, provides:

(1) A no notice general permit is hereby granted for the construction or alteration of minor systems located entirely

within uplands, provided that the proposed system meets all of the following criteria:

* * *

(f) the project is not part of the larger common plan of development or sale.

30. The general test for vagueness of a rule is whether persons of common intelligence are required to guess at the rule's meaning and differ as to the rule's interpretation. State v. Cumming, 365 So. 2d 153 (Fla. 1978); St. Petersburg v. Pinellas County Benevolent Association, 414 So. 2d 293 (Fla. 2d DCA 1982). The test for vagueness is more lenient where an administrative rule, rather than a penal statute is being examined. Id. at 295. A rule vests unbridled discretion in an agency when it fails to establish adequate standards and reserves to the agency the arbitrary power to determine private rights. Brown v. Holland, 125 So. 2d 749 (Fla. 1960).

31. The term "not part of a larger common plan of development or sale" is not vague and can be construed according to its plain and ordinary meaning. SFWMD has applied the plain and ordinary meaning when it prohibits the use of a NNGP for individual projects which share infrastructure with a larger project. By using the ordinary meaning of the term, SFWMD has adequate standards for its decision. Rule 40E-400.315(1)(f), Florida Administrative Code, does not vest unbridled discretion with SFWMD.

32. The laws being implemented by Rule 40E-400.315(1)(f),

Florida Administrative Code, are listed in the rule's history note as Sections 373.118, 373.414, 373.416, and 373.426, Florida Statutes.

33. Section 373.118, Florida Statutes, provides:

(1) The governing board may adopt rules establishing a general permit system, which have, either singly or cumulatively, a minimal adverse impact on water resources of the District. Such rules shall specify design or performance criteria which, if applied, would result in compliance with the conditions for issuance of permits established in this chapter and District rules.

34. Section 373.413, Florida Statutes, concerns permits for construction and states:

(1) Except for exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules and will not be harmful to the water resources of the district. . . .

Section 373.416, Florida Statutes, contains the same language for permits for maintenance and operation. Section 373.426, Florida Statutes, has similar language for permitting requirements for abandonment of systems.

35. Rule 40E-400.315(1)(f), Florida Administrative Code, does not enlarge, modify, or contravene the statutes listed in its history notes. The limitation on the use of NNGP for

projects which are not part of a larger common plan of development or sale is necessary in order to comply with the statutory requirements of allowing no more than a minimal impact, singly or cumulatively, on the water resources of SFWMD and that the stormwater management systems within SFWMD not be harmful to the water resources of SFWMD.

36. Rule 40E-400.315(1)(f), Florida Administrative Code, is not an invalid exercise of delegated legislative authority.

37. Rule 40E-4.301(1)(f), Florida Administrative Code, provides:

(1) In order to obtain a standard general individual, or conceptual approval permit under this chapter or Chapter 40E-40, F.A.C., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:

* * *

(f) will not cause adverse secondary impact to the water resources.

38. Section 4.1.1(f) of the BOR provides:

The District addresses the conservation of these beneficial functions in the permitting process by requiring applicants to provide reasonable assurances that the following conditions for issuance of permits, set forth in Sections 40E-4.301 (Conditions for Issuance) and 40E-4.302 (Additional Conditions for Issuance), F.A.C., are met. Applicants must provide reasonable assurances that:

* * *

(f) a regulated activity will not cause

adverse secondary impacts to the water resources (paragraph 40E-301(1)(f), F.A.C.) (see subsection 4.2.7);

39. Section 4.2.7(a)-(d), BOR, provides:

Pursuant to paragraph 4.1.1(f), an applicant must provide reasonable assurances that a regulated activity will not cause adverse secondary impacts to the water resource, as described in paragraphs (a) through (d), below. Aquatic or wetland dependent fish and wildlife are an integral part of the water resources which the District is authorized to protect under Part IV, Chapter 373, F.S. Those aquatic or wetland dependent species which are listed as threatened, endangered, or of special concern are particularly in need of protection.

A proposed system shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in subsection 4.2.2; water quality; upland habitat for aquatic or wetland dependent listed species; and historical and archaeological resources. De minimis or remotely related secondary impacts will not be considered. Applicants may propose measures such as preservation to prevent secondary impacts. Such preservation shall comply with the land preservation provisions of subsection 4.3.8. If such secondary impacts can not be prevented, the applicant may propose mitigation measures as provided for in subsections 4.3 through 4.3.8.

The secondary impact criterion consists of the following four parts:

(a) An applicant shall provide reasonable assurance that the secondary impacts from the construction, alteration, and intended or reasonably expected uses of a proposed system will not cause violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters, as described in subsection 4.2.2.

Impacts such as boat traffic generated by a

proposed dock, boat ramp or dry dock facility, which causes an increased threat of collision with manatees; impacts to wildlife from vehicles using proposed roads in wetlands or surface waters; impacts to water quality associated with the use of septic tanks or propeller dredging by boats and wakes from boats; and impacts associated with docking facilities as described in paragraphs 4.2.4.3(f) and (h), will be considered relative to the specific activities proposed and the potential for such impacts. Impacts of groundwater withdrawals upon wetlands and other surface waters that result from the use of wells permitted pursuant to Chapter 40E-2, F.A.C., shall not be considered under rules adopted pursuant to Part IV, Chapter 373, F.S., since these impacts are considered in the consumptive use permit application process.

Secondary impacts to the habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if buffers, with a minimum width of 15' and an average width of 25', are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat. The mere fact that a species is listed does not imply that all of its feeding habitat is critically important. Buffers shall remain in an undisturbed condition, except for drainage features such as spreader swales and discharge structures, provided the construction or use of these features does not adversely impact wetlands. Where an applicant elects not to utilize buffers of the above described dimensions, buffers of different dimensions, measures other than buffers or information may be proposed to provide required reasonable assurance.

Deminimis or remotely related secondary impacts such as changes in air quality due to increased vehicular traffic associated with road construction will not be considered unacceptable.

(b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a system will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including;

1. areas needed for foraging;
2. wildlife corridors, except for those limited area of uplands necessary in ingress and egress to the nest or den site from the wetlands or other surface water;

Table 4.2.7-1 identifies those aquatic or wetland dependent listed species that use upland habitats for nesting or denning.

For those aquatic or wetland dependent listed animal species for which habitat management guidelines have been developed by the U.S. Fish and Wildlife Service (USFWS) or the Florida Game and Fresh Water Fish Commission (FGFWFC), compliance with these guidelines will provide reasonable assurance that the proposed system will not adversely impact upland habitat functions described in paragraph (b). For those aquatic or wetland dependent listed animal species for which habitat management guidelines have not been developed or in cases where an applicant does not propose to use USFW or FGFWFC habitat management guidelines, the applicant may propose measures to mitigate adverse impacts to upland habitat functions described in paragraph (b), provided to aquatic or wetland dependent listed animal species.

(c) In addition to evaluating the impacts in the area of dredging and filling in, on, or over wetlands or other surface waters, and as part of the balancing review under subsection 4.2.3, the District will consider any other relevant activities that are very closely linked and causally related to any proposed dredging or filling which will cause impacts to significant historical and archaeological resources.

(d) An applicant shall provide reasonable assurance that the following future activities will not result in water quality violations or adverse impacts to the functions of wetlands and other surface waters as described in subsection 4.2.2:

1. additional phases or expansion of the proposed system for which plans have been submitted to the District or other governmental agencies; and

2. on-site and off-site activities regulated under Part IV, Chapter 373, F.S., or activities described in section 403.813(2), F.S., that are very closely linked and causally related to the proposed system.

40. The laws being implemented by Rule 40E-400.301(1)(f), Florida Administrative Code, are listed in the rule's history notes as Sections 373.413, 373.416, and 373.426, Florida Statutes. These cited statutes give SFWMD the authority to regulate adverse impacts to the water resources of the State. The statutes do not limit the impacts to direct impacts. A secondary impact can also adversely impact water resources.

41. Petitioner argues that the statutes do not mention secondary impacts; therefore, SFWMD has no authority to regulate adverse secondary impacts. An express recitation of a term in the enabling statute is not a prerequisite for a rule invoking the range of powers granted to an agency by the statute. For example, in upholding the validity of proposed rules that create standards pertaining to recharge, runoff, and floodplain storage, the First District Court of Appeal in Tomoka, supra, noted that Section 120.52(8), Florida Statutes, does not require the Legislature to refer to specific topics such as recharge, run-

off, and floodplain management in the enabling statutes. Rather, the question is whether the rule falls within the range of powers the Legislature has granted to the agency.

42. Case law supports the validity of SFWMD's rules regulating secondary impacts to water resources. Prior to the adoption of SFWMD's secondary impact rule, there was well established case law that authorized review of secondary impacts. Most of these cases involved interpretation of Sections 403.021 and 403.918, Florida Statutes, concerning the Department of Environmental Protection's dredge and fill program prior to 1995. The requirements and purposes stated in those statutes are essentially the same as in Sections 373.016 and 373.414, Florida Statutes. There was no mention of secondary impacts in Chapter 403, Florida Statutes, but the courts held that secondary impacts to water resources were not a modification, enlargement, or contravention of the statute. See Florida Power Corp. v. DER, 605 So. 2d 149 (Fla. 1st DCA 1992) (DER may consider secondary impacts involving removal of wetland vegetation and removal of hydric soils as a result of installation and maintenance of a powerline involving an application for fill in wetlands for power poles.); Conservancy, Inc. v. A. Vernon Allen Builders, 580 So. 2d 772 (Fla. 1st DCA 1991), rev. den. 591 So. 2d 631 (Fla. 1991) (DER may consider the impacts of contemplated development of estate homes on a coastal barrier island in review of a permit application for installation of a sewage pipeline system where

development of the 75 estate homes was not speculative and was closely linked and casually related to the proposed dredging and filling.); Cape Cave v. DER, 498 So. 2d 1309 (Fla. 1st DCA 1986) (DER may consider the water quality impacts from septic tank discharges when considering a dredge and fill and stormwater permit for a development.); del Campo v. DER, 452 So. 2d 1004 (Fla. 1st DCA 1984) (Hearing Officer erroneously excluded evidence of possible environmental impact on the island of a proposed residential development during a hearing requiring a dredge and fill permit for construction of a bridge to the island.)

43. Rule 40E-400.301(1)(f), Florida Administrative Code, and Sections 4.1.1(f) and 4.2 (a)-(d) of the BOR, do not enlarge, modify, or contravene Sections 373.413, 373.416, and 373.426, Florida Statutes.

44. When evaluating secondary impacts, SFWMD is considering the same adverse impacts it would for direct impacts, such as not meeting SFWMD's criteria for water quality, for effects on upland habitat for aquatic and wetland dependent species, for effects on wetland and surface water functions, and for historical and archeological impacts. See Section 373.414(1), Florida Statutes, and the introductory paragraph of Section 4.2.7, BOR.

45. Section 4.2.7, BOR, establishes a comprehensive guideline describing secondary impacts, and how the SFWMD will regulate secondary impacts when they are present. When SFWMD

adopted Section 4.2.7, it interpreted and applied existing case law that had defined and authorized secondary impact consideration for water related regulation. See Florida Power v. DER, Conservancy, Inc. v. Vernon Allen Builder, Cape Cave v. DER, and del Campo v. DER, supra.

46. In Section 4.2.7(c), BOR, SFWMD will consider any impacts "that are closely linked and causally related to any proposed dredging and filling." This term comes directly from the holding in Conservancy, Inc., in which the court overruled a Department of Environmental Regulation order holding that secondary impacts did not apply. The court stated, "we disagree with Appellee [DER] that the contemplated development of 75 estate homes is speculative and is not closely linked and causally related to the proposed dredging and filling." Conservancy, Inc. at 779.

47. Section 4.2.7(d), BOR, provides that SFWMD will consider those future projects or activities which would not occur "but for" the proposed system. In Conservancy, Inc., the court explains in great detail the development of the secondary impact and cumulative impact in regulatory review. The court notes that secondary impacts have been limited to those impacts that may result from the permitted activity itself and that the secondary impact can not be too "remote in distance or conceptual relationship" from the permitted activity. Id. at 777, 778. Considering future activities or projects that would not occur

but for the proposed system is consistent with case law.

48. Rule 40E-400.301(1)(f), Florida Administrative Code, and Sections 4.1.1(f) and 4.2.7, BOR, are not vague, establish adequate standards for SFWMD's decisions, and do not vest unbridled discretion with SFWMD. The rule and sections from the BOR are valid exercises of legislative delegated authority.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Rules 40E-400.315(1)(f) and 40E-400.301(f), Florida Administrative Code, and Sections 4.1.1(f) and 4.2.7 of the Basis of Review for Environmental Resource Permit Applications for the South Florida Water Management District (1996), are valid exercises of delegated legislative authority and the petition of Royal Palm Beach Colony, L.P., is DENIED.

DONE AND ORDERED this 9th day of March, 1999, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.