STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERNARD M. CAMPBELL and BESSIE H. CAMPBELL, Petitioners, vs. SOUTHERN HY POWER CORPORATION and STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 99-0307 OGC No. 98-3033
SARAH E. BERGER, Petitioner, vs. SOUTHERN HY POWER CORPORATION and STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 99-0308 OGC No. 98-3022
SARAH E. BERGER, Petitioner, vs. SOUTHERN HY POWER CORPORATION and STATE OF FLORIDA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondents.	)	Case No. 99-0694 OGC No. 99-0244
BERNARD and BESSIE CAMPBELL, Petitioners, vs. SOUTHERN HY POWER CORPORATION	)	Case No. 99-0696 OGC No. 99-0247

and STATE OF FLORIDA, DEPARTMENT)
OF ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A hearing was held pursuant to notice, on September 22 through 24, 1999, in Inglis, Levy County, Florida, and on November 1 and 2, 1999, in Tallahassee, Florida, by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: John S. Clardy III, Esquire
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Crystal River, Florida 34426-2410

For Respondent Southern Hy Power Corporation:

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For Respondent Department of Environmental Protection:

Andrew Zodrow, Esquire
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STATEMENT OF THE ISSUE

Whether Southern Hy Power Corporation (Hy Power) has provided reasonable assurance, based on plans, test results, or other information, that its proposed hydroelectric facility will comply with the Management and Storage of Surface Water (MSSW) statutes and rules of Southwest Florida Water Management District

(SWFWMD) and the Wetland Resource Management permit (WRM)/water quality certification statutes and rules of the Florida Department of Environmental Protection (DEP).

PRELIMINARY STATEMENT

Hy Power applied to DEP on August 31, 1993, for a WRM permit/water quality certification to construct a hydroelectric facility on the Inglis By-Pass Channel immediately to the south of the spillway located on the Inglis Bypass Channel within the Town of Inglis, Levy County, Florida. On January 5, 1998, DEP issued a Notice of Denial of the Environmental Resource Permit. The reasons for the denial included a finding that the application was incomplete and that the applicant failed to provide reasonable assurances that the proposed project would comply with the MSSW provisions of Part IV of Chapter 373, Florida Statutes, and the rules adopted thereunder.

In response to the notice of denial, Hy Power filed on January 20, 1998, a motion for extension of time to file a petition for administrative proceeding to challenge the denial. In addition, on August 4, 1998, Hy Power filed with DEP an application for a MSSW permit. On November 6, 1998, DEP issued a Notice of Intent to Issue MSSW permit application number 38-0129249-002 to Hy Power to construct and operate its proposed hydroelectric facility. On December 21, 1998, DEP issued a Notice of Intent to issue WRM permit application number 38-2370696-3.001 for the proposed facility.

On November 21, 1998, Ms. Berger filed a petition for formal administrative proceedings objecting to DEP's intent to issue the

MSSW permit to Hy Power. On November 23, 1998, the Campbells filed a petition also challenging DEP's intent to issue the MSSW permit. On February 2, 1999, the Campbells filed a petition challenging that intent. DEP referred the petitions to DOAH. On February 8, 1999, Ms. Berger also filed a petition for formal administrative proceedings objecting to DEP's intent to issue the WRM permit to Hy Power to construct the facility. On March 18, 1999, an order was entered consolidating the four petitions.

WITNESSES

Hy Power called the following witnesses: Richard Volkin, who was accepted as an expert in the areas of engineering and drawing, construction and operation of hydroelectric facilities, including analysis of environmental impacts associated with such facilities; and Douglas Smith, who was accepted as an expert in the area of environmental engineering with special expertise in geology and hydrogeology.

DEP called the following witnesses: Ken Huntington, who was accepted as an expert in the areas of Environmental Resource Permitting criteria, and environmental impacts of dredge and fill projects and activities; Randy Cooper, who was accepted as an expert in the areas of civil engineering, surface water hydrology and MSSW permitting criteria; Mercily Toledo, who was accepted as an expert in the areas of environmental impacts of dredge and fill activities and wetland resource management permitting criteria; Eric Shaw, who was accepted as an expert in Outstanding Florida Water (OFW) water body classifications; Joe May, who was accepted as an expert in the areas of geology and hydrogeology;

Mary Duncan, who was accepted as an expert in the areas of permitting issues with respect to impacts on the West Indian Manatee and the activities regulated by DEP; and Louie Wainwright, who is the administrator of field operations for the DEP Office of Greenways and Trails.

Petitioners called the following witnesses: Linda Sloan, who was accepted as an expert on the requirements of the Comprehensive Plan of Inglis and Levy County; Stephen Wilson, who was accepted as an expert in the field of land surveying; James C. Bitter, who was accepted as an expert in occupational safety and technology; Bill Edwards, who was accepted as an expert in the areas of coffer dams and construction of concrete structures in aquatic and semi-aquatic environments; Stephen Boyes, who was accepted as an expert in geology and hydrogeology; Gary Maidhof, who was accepted as an expert in the Citrus County Manatee Protection Plan; David Gammon, who is Manager of Purchase Power Resources for Florida Power Corporation; Kenton Lambert, who is a maintenance and construction specialist for the DEP office of Greenways and Trails; Bessie Campbell, one of the Petitioners; and Sarah E. Berger, one of Petitioners.

EXHIBITS

The parties entered 12 joint stipulated exhibits into evidence. Hy Power entered 12 exhibits at hearing and one late-filed exhibit after the hearing had adjourned. DEP entered eight exhibits into evidence. Petitioners entered 15 exhibits into

evidence, and proffered one exhibit, a Land Surveyor's Drawing, which was not accepted into evidence.

PREHEARING STIPULATION

The parties filed a Joint Prehearing Stipulation on or about September 22, 1999, which stipulated certain issues of law and fact that described the parties to this proceeding and the project that is at issue. These stipulations are included or incorporated by reference as findings of fact and conclusions of law in this Recommended Order.

STIPULATED ISSUES OF LAW

The parties stipulated that pre-Environmental/Resource Permitting statutes and rules (ERP) are applicable to these WRM and MSSW permit proceedings. The following pre-ERP statutes and rules are being utilized, relevant portions of which are set forth below in Section 403.918, Florida Statutes (1991); and Chapter 40D-4, Florida Administrative Code (in effect prior to October 3, 1995) along with Basis of Review incorporated therein. The parties also stipulated to the following:

Jurisdiction

> The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Chapter 120, Florida Statutes.

MSSW and WRM Permitting Criteria Generally

> Since Hy Power filed its WRM permit application on August 31, 1993, the statutes and rules applicable to this proceeding are those which were in effect prior to the promulgation of Environmental Resource Permitting Rules by DEP on October 3, 1995, as described more fully below. See Section 373.414(9), Florida Statutes.

MSSW Permitting Criteria

The criteria for review for the MSSW permit is contained in Rule 40D-4.301, F.A.C., as it existed on or before October 3, 1995, which stated as follows:

> 40D-4.301 Conditions for Issuance of Permits.
>
> (1) In order to obtain an individual construction and operation permit under this chapter, an applicant must give reasonable assurances that the surface water management system:
>
> (a) provide adequate flood protection and drainage,
>
> (b) will not cause adverse water quality and quantity impacts on receiving waters and adjacent lands regulated pursuant to Chapter 373, Florida Statutes,
>
> (c) will not cause discharges which result in any violation, in surface waters of the state, of the applicable standards and criteria of Chapter17-3, and Rule 17-4.242,
>
> (d) will not cause adverse impacts on surface and groundwater levels and flows,
>
> (e) will not diminish the capability of a lake or other impoundment to fluctuate through the full range established for it in Chapter 40D-8.
>
> (f) will not cause adverse environmental impacts, or adverse impacts to wetlands, fish and wildlife, or other natural resources,
>
> (g)can be effectively operated and maintained,
>
> (h) will not adversely affect public health and safety,
>
> (i) is consistent with the requirements of other public agencies,

(j) will not otherwise be harmful to water resources within the District,

(k) will not interfere with the legal rights of others as defined in Rule 17-40.07, and

(l) is not against public policy.

(2) The standards and criteria contained in the Basis of Review adopted by reference in Rule 40D-4.091(1) apply to the design and performance of surface water management systems to provide the reasonable assurances required under Rule 40D-4.301(1). Other methods of meeting overall objectives may be proposed and may be considered in determining whether the applicant has provided the reasonable assurances required by Rule 40D-4.301(1).

DEP AUTHORITY

DEP has the authority to administer the SWFWMD MSSW permitting rules pursuant to an interagency agreement with SWFWMD and §373.026, Florida Statutes.

WRM PERMITTING CRITERIA

The criteria for the WRM permit application aspects of this case are governed by Chapter 403, Part VIII, the "Warren S. Henderson Wetland Protection Act of 1984," including Section 403.918, Florida Statutes. (1991), which states in relevant part as follows:

(1) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that water quality standards will not be violated. . . .

(2) A permit may not be issued under ss. 403.91-403.929 unless the applicant provides the department with reasonable assurance that the project is not contrary to the public interest. However, for a project which significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the project will be clearly in the public interest.

(a) In determining whether a project is not contrary to the public interest, or is clearly in the public interest, the department shall consider and balance the following criteria:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;

5. Whether the project will be of a temporary or permanent nature;

6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the project. . . .

The WRM permitting criteria are also governed by Rule Chapters 62-4 (Permits), 62-302 (Surface Water Quality Standards), 62-312 (Dredge and Fill Activities) and 62-521 (Wellhead Protection), Florida Administrative Code.

The use of the property to generate hydroelectric power is compatible with Section 253.7829(2), Florida Statutes, which states:

> The development of hydroelectric power is a compatible use of greenway land and may be considered by the Board of Trustees of the Internal Improvement Trust Fund as an allowable use within the greenways of Lake Rousseau and the lower Withlacoochee River, provided that such hydroelectric power complies with all requisite state and federal environmental and water management standards.

POST-HEARING

An original Transcript has been filed with the Division of Administrative Hearings. Both sides filed proposed findings in the form of Proposed Recommended Orders which were read considered. Counsel for Petitioners, John S. Clardy, withdrew as counsel, and an order was entered striking certain of Petitioners' pleadings as an improper and untimely effort to adduce additional evidence relating to the credibility of witnesses.

FINDINGS OF FACT

STIPULATED FINDINGS OF FACT

1. By Joint Prehearing Stipulation the parties agreed to the following description of the parties and the project:

PARTIES:

2. The Department of Environmental Protection (the Department) is a government agency in the State of Florida existing by virtue of Section 20.255, Florida Statutes, and operating pursuant to Chapters 253, 373, 376, and 403, Florida

Statutes, and Title 62, Florida Administrative Code. Under an interagency agreement with SWFWMD, the Department also implements Title 40D, Florida Administrative Code. The Department is located in Tallahassee, Florida, and it has a district office in Tampa, Florida, which district includes Levy County.

3. Southern Hy Power Corporation is a Florida Corporation whose principal offices are located at 7008 Southwest 30th Way in Gainesville, Florida.

4. Betty Berger is an interested party with a mailing address of Post Office Box 83, Inglis, Florida.

5. The Campbells are an interested party with a mailing address of 245 Palm Street, Inglis, Florida.

6. Hy Power applied on August 31, 1993, to the Department for a WRM permit/water quality certification to construct a hydroelectric facility on the Inglis By-Pass Channel. The project is located in Section 12, Township 17 South, Range 16 East, within the town of Inglis in Levy County. The facility consists of a powerhouse located on the south side of the channel measuring about 28 feet wide by 115 feet long, drawing water from the Inglis By-Pass Channel, passing it through a single-pit type turbine and discharging downstream of the Inglis By-Pass Spillway Dam.

7. Hy Power applied on August 4, 1998, to the Department for a MSSW permit for the same proposed hydroelectric facility on the Inglis By-Pass Channel.

DESCRIPTION OF PROPOSED PROJECT

8. The project involves the construction of an intake structure, powerhouse, and tailrace on a 0.61-acre area located on the south side of the existing Inglis By-Pass Spillway. The facility will take advantage of the existing hydrostatic head that exists on either side of the Spillway Dam, to generate electricity.

9. The powerhouse will be constructed below grade and will contain a single megawatt turbine and generating unit. The intake structure will divert flows from the upstream side of the Spillway Dam through the powerhouse and back into the By-Pass Channel. A small one-story control building and low profile substation will be constructed above grade within the boundaries of the project area.

10. The hydroelectric project is considered to be a "Run of the River" type of facility because it can only use that water which flows down the existing channel. The geometry of the channel restricts flow to a certain amount, therefore the project cannot create or use flows above those that the By-Pass Channel can provide. The overall authority for control of water levels in Lake Rousseau and flow to the lower Withlacoochee River will remain with the DEP.

11. Lake Rousseau was created in 1909 when the Inglis Dam was constructed across the Withlachoochee River for the purposes of hydroelectric generation. The dam impounds over 11 miles of the Withlachoochee River and forms a lake approximately 3,000 to 4,000 acres in size. Prior to construction of the Barge Canal,

water released from the Inglis Dam would flow down the lower portion of the Withlachoochee River about 10 miles before entering into the Gulf of Mexico.

12. In the mid to late 1960's the Army Corps of Engineers (ACOE) built a portion of the Cross Florida Barge Canal between the Gulf of Mexico and Lake Rousseau. The canal severed the Withlachoochee River downstream of the Inglis Dam causing its flow to be diverted into the Barge Canal and then into the Gulf.

In order to maintain the flow of freshwater from Lake Rousseau to the lower segment of the River, the 8,900-foot long Inglis By-Pass Channel and Spillway were constructed. The resulting downstream flow ensures navigation in the lower portion of the River and sustains its freshwater and estuarine environment.

13. The water level in Lake Rousseau is generally maintained at an elevation of 27.5 feet above mean sea level (msl) by a combination of the Inglis Dam, the Inglis Lock, which is located in the Barge Canal, and the By-Pass Channel Spillway. These water control features are known collectively as the Inglis Project Works. The water levels in the lower Withlachoochee River immediately to the west of the By-Pass spillway are close to sea level. The resulting head provides the potential energy needed to drive the proposed generator turbine. Under normal conditions the majority of water released from Lake Rousseau flows over the Spillway Dam into the lower segment of the River. According to the DEP Office of Greenways and Trails (OGT), the maximum capacity of the existing By-Pass Channel Spillway is

1,540 cubic feet per second. The hydroelectric project will divert whatever flow is allowed around the existing spillway through the turbine and back into the channel.

14. When the Cross Florida Barge Canal project was cancelled in the 1990's, the ACOE transferred ownership of the property to the State of Florida Board of Trustees, who in turn has leased the property to the DEP for use as the Cross Florida Greenbelt State Recreation and Conservation Area. Management of this property, the control of river flow and lake levels, and operation of the Inglis Project Works are exercised by the DEP's OGT. The OGT utilizes a document entitled "Water Control Plan for Inglis Project Works," dated September 1994, as a guide to operating the structures. The Water Control Plan is incorporated as part of the MSSW intent to issue.

15. On or about April 25, 1995, the Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"), approved a request from Hy Power to sublease 0.61 acres of Greenway property at the project site for the purpose of providing electric power. The request was challenged by Berger and the Campbells, and resulted in an administrative hearing held on November 3, 1995.

16. As a result of the hearing, Administrative Law Judge Larry Sartin entered a Recommended Order on July 12, 1996, that the Board enter an order approving execution by the DEP of the proposed sublease and dismissing the petition of Berger and the Campbells. The Recommended Order was approved by the Trustees in

its entirety in a Final Order dated April 12, 1996 ("Final Order"). Berger v. Southern Hy Power Corporation et al., Case No. 95-3589.

17. A copy of the Final Order is listed as an exhibit to this Stipulation, and the Findings of Fact and Conclusions of Law contained therein are adopted herein. As previously ruled by the undersigned, the previous Final Order is res judicata as to Petitioners in this case, who are collaterally estopped from challenging any of the findings of fact or conclusions of law contained in the previous Final Order. Petitioners reserve the right to litigate issues of fact and law not addressed in the Findings of Fact or Conclusions of Law contained in that Final Order with regard to the permittability of this project under the WRM and MSSW permitting proposals, and to raise objections as to relevance to this proceedings of any of the Findings of Fact or Conclusions of Law in the Final Order.

18. On February 21, 1995, Hy Power filed application with the Federal Energy Regulatory Commission (FERC) for a conduit exemption from the licensing requirements of Part I of the Federal Powers Act (FPA) for the proposed project. Petitioners and various other persons filed protests with FERC in opposition to the project.

19. On April 21, 1997, FERC issued an Order Granting Conduit Exemption, a copy of which is listed as an exhibit to this Stipulation. Petitioners in this case are collaterally estopped from challenging any of the findings or conclusions contained in that Order Granting Conduit Exemption. Petitioners

reserve the right to litigate issues of fact and law not addressed in the Findings of Fact or Conclusions of Law contained in that Order Granting Conduit Exemption with regard to the permittability of this project under the WRM and MSSW permitting proposals, and to raise objections as to relevance to this proceedings of any of the findings or conclusions in the Order Granting Conduit Exemption.

FACTS ADDUCED AT HEARING

OUTLINE OF PROJECT

20. The proposed project calls for the construction of a water retention structure along the existing By-Pass spillway, the excavation of a large hole in which the powerhouse and turbine would be constructed "in-the-dry" south of the existing dam, and a millrace below the proposed project to return the water back into the existing water course.

21. Conflicting testimony was received regarding the facts surrounding the construction of the project. These included: whether the proposed project will touch the existing wing walls of the existing dam; whether the water retention structure is a coffer dam; whether the proposed water retention structure will safely retain the water; whether the powerhouse and turbine have sufficient negative buoyancy to stay in the ground; whether the proposed excavation will weaken the existing dam; and whether the de-watering of the excavation site will adversely impact ground and surface water.

PROJECT DESIGN AND ENGINEERING

22. Engineering for the project was directed by witness Richard A. Volkin, a professional engineer and president and CEO of Engineering Company, Inc., based in Canton, Massachusetts. Mr. Volkin has extensive national and international experience in the design, management, and operation of hydroelectric facilities.

23. Other engineers in Mr. Volkin’s firm worked on the project under Mr. Volkin’s direct supervision, including John May, who became registered as a professional engineer in Florida in order to sign and seal the engineering drawings for the project, which he initially did around 1994. Mr. May became ill and retired in 1998.

24. Because of the length of time the application process has taken and the fact that Mr. May retired, there was a time while the application was pending, when Hy Power's design team was without a registered Florida engineer. When this was brought to the attention of Hy Power, Hy Power substituted Steven Crockett for Mr. May as the Florida-registered professional engineer of record for the project. DEP routinely accepts an applicant’s changing its engineer of record during the course of permit application or construction.

25. Mr. Crockett is a civil and structural engineer who has considerable experience in preparing dam structural designs. Mr. Crockett independently reviewed and evaluated the engineering

drawings for the project. Mr. Crockett resealed the drawings by using his drawn seal and signing the plans because his embossed seal was not readily available and time was of the essence. Mr. Crockett has advised DEP that he is now engineer of record for the project, using the appropriate DEP forms.

26. Mr. Volkin's firm performed all of the studies required by the various agencies, including a geotechnical study of the area, a 50-year analysis of water flow in and out of the Lake Rousseau regime, and water quality evaluations of water in the By-Pass Channel.

27. The ACOE performed deep hole borings of the soils (approximately 36-40 feet below sea level) in the area of the project site to determine soil stabilization conditions at the site when they were constructing the Inglis Project Works. The soil conditions found can reasonably be expected to be similar today.

28. Mr. Volkin's company also took its own eight-foot deep surface core samples. The purpose of those samples was to verify the ACOE data. The new core samples verified the original core samples.

29. Mr. Volkin also reviewed the ACOE's engineering drawings developed from construction of the Spillway Dam. These show that the dam is founded on limestone bedding that has been stabilized with concrete. The hydroelectric facility will be constructed adjacent to and south of the dam structure and

adjacent to and north of the barge canal. The same type of limestone bedrock is found in the area of the proposed construction.

30. The facility design includes an intake channel on the upstream channel and a tailrace downstream. Those are the only structures that will be constructed next to the By-Pass Channel.

31. The construction of the facility itself will be "in the dry." Hy Power will use coffer dams to seal off the construction site from the By-Pass Channel, so that there will not be water leakage from the Channel into the construction site. Water from the By-Pass Channel will enter the power plant when the coffer dams are lifted and the water is allowed to flow into the facility.

32. The Petitioners presented the testimony of Bill Edwards, an individual with considerable experience in the construction of bridges, cofferdams, and similar concrete structures in aquatic and semi-aquatic conditions. Mr. Edwards is a former hard-hat diver who worked all over the world and worked in Florida for many years prior to his retirement. Based upon his experience and expertise in construction related to projects of this type, his testimony is credible and worthy of consideration.

33. Mr. Edwards pointed out that if the proposed water retention structure did not touch the wing wall of the existing

dam, it could not keep the water out and would not have the strength that it needed to retain the water.

34. Hy Power's witnesses explained that the retention structure would be set close enough to the existing wing wall that waterproofing materials could be placed between the two structures to keep the water out. Further, that the existing plans did not show interior bracing which would be included for structural strength and integrity. In sum, the retention structure will be in contact with existing dam's wing wall, but will be free standing and not dependent upon the strength of the wing wall for its strength.

35. Mr. Edwards pointed out that a cofferdam by definition has walls on all sides of the structure. The structure proposed by Hy Power did not have walls all the way around the proposed excavation. In rebuttal, Hy Power presented evidence that its plans were conceptual, design drawing and not construction plans. Hy Power represented that in actuality it would put as many walls as were necessary to keep the water out of the hole it intended to excavate.

36. Trash racks will be constructed at the intake structures to protect aquatic life and make sure that trash and vegetation do not enter the intake structure or go down river. The trash rack bars will be two inches on center, which the U.S. Fish and Wildlife Service has determined as the appropriate size for the protection of fish.

37. The turbine blades are "double regulated," and operate generally between 60 and 90 revolutions per minute. The design enables the turbine to operate at a constant speed to generate a consistent flow of electricity, notwithstanding the fact that the flow of the water may vary. The blade speed is not very fast, and the 2.5-meter blades provide a two to three-foot opening. This design acts to prevent fish mortality.

38. There are four ways to shut off the flow of water through the proposed structure: close the pitch of the blades, close the wicket gates, allow the counter balance to the wicket gates to kick in and automatically close the gates, and close off the main gates. This is a fail safe system ("four level redundancy") designed to work upon any failure.

39. Once water goes through the generator, its velocity is reduced to no greater than its intake rate which is a maximum of three feet per second. This prevents the water being discharged from the tailrace from causing erosion. If the head of water in the dam produces a flow exceeding three feet per second, it can be diverted over the other dams which will be functional.

40. The power plant will be encased in concrete, except for a small access way that enables a person to go down a set of stairs to the plant. It will be a sealed, waterproof structure, as required by FERC and the ACOE. This will prevent penetration of groundwater, or flood waters in the event a massive flood

overtops the plant. The only water entering the powerhouse will be through the turbine tunnel for power generation purposes.

41. Mr. Edwards pointed out that the powerhouse was a closed structure and as such would have positive buoyancy, that is, it would float. Mr. Edwards pointed out that the proposed site is between the barge canal and By-Pass spillway and there is a great deal of groundwater and potentiometric pressure in the existing water table. In sum, there is a unlimited supply of groundwater at the site, and powerhouse could float out of the ground just like an empty swimming pool. Hy Power presented rebuttal evidence that the weight of the building, the turbine, and the water flowing through the turbine would be close to negative buoyancy, and they would add additional weight to the structure as necessary to keep it in place.

42. The project is designed to generate three megawatts of electric power which is enough electricity to serve between 300 and 3000 homes, depending on usage.

43. The project is designed to be unmanned. This is common for facilities such as this. The plant can be operated by remote control, unlike the existing controls at the By-Pass Dam, which are operated manually. DEP can access, monitor, and control remotely the generator's operation to include shutting the facility down at any time.

44. There will be remote sensors to monitor water elevations. Flood protection will improve because of the ability

of DEP to manage water flow from a remote location. If there is any major disruption, the plant will shut itself down.

45. The project is classified as "green power." In other words, it generates natural energy without any disruption to the environment.

46. The project will have minimal to no impact on the environment. There will be no significant changes in water quality compared to existing conditions as a result of either construction or operation of the facility.

WRM Permit Criteria

47. Hy Power has provided reasonable assurances that the proposed project will not cause a violation of state water quality standards of Section 403.918(a), Florida Statutes (1991). The parties stipulated that turbidity and dissolved oxygen were the two surface water quality issues of concern in this proceeding.

48. The receiving water body is the Inglis By-Pass Channel. The Inglis By-Pass Channel is a Class III surface water. The project is not located in a OFW. While the lower Withlacoochee River is an OFW, the OFW designation runs up the natural river itself, and does not include the Spillway Dam, tailrace, or the remainder of the By-Pass Channel. There would be no degradation of water quality at the point of contact with the Withlacoochee River OFW.

49. The DEP and FERC looked specifically at potential for turbidity and dissolved oxygen in determining whether the project would violate state water quality standards. The standards for turbidity and dissolved oxygen will not be violated.

50. Because the By-Pass Dam is an under flow structure, a minimum of oxygenation currently occurs as water flows through the existing dam. The proposed project runs the water underground through the generator; however, Hy Power will measure the dissolved oxygen below the dam in the Lower Withlacoochee River. In the event there is any lowering of dissolved oxygen, Hy Power can install a "sparge ring" to reoxygenate the water going through the turbine so that dissolved oxygen remains at current levels.

51. No turbidity will be added to the receiving water as a result of the project, because water velocity is low and the structure is encased in concrete and rip-rap.

52. The only other potential for turbidity would occur when the coffer dams are removed after construction is complete. The coffer dams can be removed with the generator closed to permit any turbidity to settle. The amount of siltation that might occur when the generator is opened would be insignificant.

53. Where a project is not in a OFW, an applicant must provide reasonable assurance that the project will not be contrary to public interest. See Section 403.918(2), Florida Statutes (1991). Hy Power has provided such assurances.

54. The project will not directly affect public health, safety or welfare, or the property of others. See Section 403.918 (2)(a)1., Florida Statutes. There are concerns relating to the structural integrity of the proposed facility and adjacent structures which are discussed extensively below.

55. The project will have no adverse impact upon the conservation of fish and wildlife, including threatened and endangered species and their habitat. See Section 403.918 (2)(a)2., Florida Statutes.

56. While manatees are not likely to be found at the project site, the installation of the trash racks will eliminate any potential adverse impact on manatees. In fact, the racks will be an improvement over the current unprotected Spillway Dam. DEP procedures require a specific manatee control plan be implemented to deal with site specific concerns.

57. The project will not adversely affect navigation or the flow of the water or cause harmful erosion or shoaling. See Section 403.918(2)(a)3., Florida Statutes.

58. The project will not adversely affect fishing or recreation values or marine productivity in the vicinity of the project. See Section 403.918(2)(a)4., Florida Statutes.

59. The permanent project and its construction will cause no significant environmental impacts. See Section 403.918(2)(a)5., Florida Statutes.

60. There will be no adverse impacts to significant historical and archeological resources. Section 403.918(2)(a)6., Florida Statutes.

61. With regard to the impact on current conditions and relative value of functions being performed by the areas affected by the proposed activity, there will be no negative impacts. See Section 403.918(2)(a)7., Florida Statutes. Improvement will result from better control of water flow at the project site, installation of trash racks and implementation of green power.

THE FORESEEABLE ADVERSE SECONDARY OR CUMULATIVE IMPACTS

62. Potential adverse secondary impacts related to power transmission are addressed through the fact that there is an existing power line corridor that can be used to transmit the electricity. Any need to change the corridor could be addressed by subsequent DEP permitting. Cumulative impacts are not at issue.

63. Mr. Gammon, with Florida Power, acknowledged that the current electric company, presumably Florida Power, would be required by FERC to transport the electricity generated by Hy Power over its existing corridor and poles.

64. No final decision has been made regarding how to access the site with equipment during construction. Several feasible construction options exist, and there are several ways of accessing the site with heavy equipment vehicles and without

impacting wetlands. Any final decision would be subject to DEP approval.

65. Since the project meets the public interest criteria of Section 403.918(2)(a), Florida Statutes, and wetland impacts are minimal, the project is permittable without the need for mitigation. See Section 403.918(2)(b), Florida Statutes.

66. The ACOE has issued a permit for the facility. The permit varies slightly from the DEP intent to issue in the use of reinforced concrete rather than rip-rap on the bottom half of the intake channel. This is to comply with ACOE preference, but the variation has only an environmental benefit.

67. Counsel for Petitioners sought to elicit testimony from Linda Sloan, Executive Director of the Withlacoochee Regional Planning Council, with regard to compliance of the proposed project with the Town of Inglis Comprehensive Plan and Land Development Code. Such compliance is not relevant to this proceeding. At any rate, Ms. Sloan conceded that any prohibition that might apply in the Land Development Code to construction of the proposed facility could potentially be alleviated by exemption or variance provisions in the Code.

MSSW PERMIT CRITERIA

68. The project will provide adequate flood protection and drainage in the conventional sense. See Rule 40D-4.301(1)(a), Florida Administrative Code. Because the amount of impervious area is minimal, runoff from the project will not in any way

contribute to increased flooding or adversely impact drainage patterns.

69. The total amount of impervious area of the facility is less than that of a single-family residence. SWFWMD rules do not even require MSSW permits for single-family residences because the impact is not significant. The only purpose for requiring a MSSW permit for the project is to review the project's potential

downstream impacts to the watershed, not stormwater runoff from the facility itself.

70. The project will not cause adverse water quality or water quantity impacts on adjacent lands in violation of Chapter 373, Florida Statutes, or cause a discharge that violates state water quality standards. See Rule 40 D-4.301(1)(b), Florida Administrative Code.

71. As indicated by the WRM water quality findings above, the project will not generally violate state surface water quality standards. See Rule 40 D-4.301(1)(c), Florida Administrative Code.

72. The project will not generally cause adverse impact on surface or groundwater levels or flows. See Rule 40 D-4.301(1)(d), Florida Administrative Code.

73. Since the project is a run-of-the-river, it will not diminish the capability of a lake or other impoundment to fluctuate through the full range established for it under Chapter

40D-8, Florida Administrative Code.

74. The project will not cause adverse environmental impacts, or adverse impacts to wetlands, fish, and wildlife or other natural resources.

75. The project can be effectively operated and maintained. See Rule 40D-4.301(1)(g), Florida Administrative Code. The project is a slow speed, low maintenance facility. The design concept is well established and has been successfully used for many years.

76. Possible adverse affects to public safety are discussed below.

77. The project is consistent with the requirements of other public agencies. See Rule 40D-4.301(1)(i), Florida Administrative Code.

78. Potential harm to water resources within the SWFWMD are discussed below. See Rule 40D-4.301(1)(j), Florida Administrative Code.

79. The proposed project generally will not interfere with the legal rights of others. See Rule 40D-4.301(1)(k), Florida Administrative Code.

80. The proposed project is not against public policy. See Rule 40D-4.301(1)(l), Florida Administrative Code.

81. The project complies with the requirements contained in the Basis of Review. See Rule 40D-4.301(2), Florida Administrative Code.

82. There is a dispute as to whether the project was within or at the edge of the 100-year flood plain. This dispute is related to how one interprets the rule as it relates to the millrace and the location of the facility which is under ground. In the conventional sense, the project is not in the flood plain. Further, the project is designed in such a way, that it is waterproof if it were topped with water.

83. While in the past SWFWMD may have had concerns that the project might cause downstream flooding, SWFWMD currently has no such concerns, given the run-of-the-river status of the proposed project. The operation of the project will not cause downstream flooding.

84. The DEP included in its intent to issue, conditions contained in the sublease between Hy Power and the DEP in order to ensure that the facility would remain run-of-the-river, would comply with the water control plan, and would otherwise comply with the terms of the sublease. The DEP has final control over water flow and can revoke the permit or otherwise take enforcement action against Hy Power if Hy Power fails to comply with the water control plan.

GROUNDWATER IMPACTS

85. Operation of the project will not cause groundwater contamination or otherwise have adverse groundwater impacts. Some concerns about groundwater during excavation of the

construction site were raised. The conflicting evidence received regarding them is discussed below.

86. An area of concern was the de-watering plan for the project. Everyone agrees there will be some water seepage into the construction site that will have to be pumped out. The parties disagree regarding the amount of water that will have to be removed. Their estimates of amount of water to be removed vary because their estimates of size and over-all depth of the site vary.

87. Petitioners presented credible evidence that a potential exists for the construction site to have a large quantity of water because of its location between two sources of surface water (the By-Pass Channel and Barge Canal), because of the makeup of the subsurface, and because of the depth of the construction.

88. Hy Power credibly represents that if excessive groundwater is found, it can address the adverse impacts through its de-watering plan that would have to be filed with FERC and DEP. The technology exists to address the de-watering of the project. Such plans are routinely considered by DEP after a construction permit is issued and before de-watering occurs.

89. There is very little evidence of sinkhole activity in the project area, and the construction activities are not expected to cause any sinkhole activity.

NOISE POLLUTION

90. Mr. Bitter expressed concerns that FERC would require the facility to install a very loud siren that would result in sudden noise adverse to the well-being of neighbors. Mr. Bitter is unfamiliar with FERC siren requirements at run-of the-river hydroelectric facilities.

91. In contrast, Mr. Volkin, who has substantial experience in this area, testified that the only alarm device that would be required would be for the protection of the workers during construction.

92. The purpose of the alarm is to warn persons below a dam spillway of a change in the volume of water being let out of the impoundment. In the case of a run-of-the-river facility, the volume is near constant, changing only gradually.

93. Therefore, even if a warning siren had to be installed its use would be limited to significant changes in flow or testing. This would not constitute a nuisance.

94. Further, the facility is located in the vicinity of the Crystal River Nuclear Power Plant which has its own warning sirens. It would be prudent to make any warning devices required for this structure significantly different from those at the nuclear plant and to limit their use.

DAM SAFETY AND FERC REVIEW

95. In reviewing whether Hy Power’s applications complied with the relevant permitting criteria, the DEP took into

consideration the review of the facility already performed by FERC. FERC will also be responsible for reviewing the project as it is being constructed.

96. Mr. Edwards also raised concerns about the structural stability of the By-Pass Dam itself. This has been a subject of concern by those responsible for the dam, and a survey of the structure was conducted in 1993, referred to as the Greiner Report.

97. The Greiner Report identified specific maintenance problems that have been and are being addressed by the DEP. However, DEP's maintenance plan does not address specifically the possibility that the weight of the dam over time has caused some shifting in the dam.

98. Hy Power has only a few core borings and only one at the location of the generator. Hy Power is using the ACOE's original borings, as confirmed by several new ones, to develop its preliminary plans.

99. The DEP considered FERC and the ACOE as responsible agencies for determining the structural integrity of the dam. DEP has taken FERC's review of this facility into consideration as part of DEP's own permitting review. It is normal for DEP to rely on outside sources and agencies for assistance in determining compliance with DEP permitting criteria such as public health and safety, and it is reasonable for DEP to do so in this instance. Most states do not have the full capability to

evaluate dam safety, and so they rely on FERC and ACOE.

100. On April 21, 1997, the project received a conduit exemption from FERC. The application process is illustrated in Hy Power Exhibit 11.

101. Hy Power submitted to DEP detailed information about the dam, the associated structures and the proposed project which had been reviewed by FERC and the ACOE, the two agencies in the United States who are responsible for dam structure design, control, and administration. Included in the package was the Greiner Report and Hy Power's review of it.

102. FERC evaluated the project, the Inglis By-Pass Dam structure, and the proximity of the project to the Dam in relation to structural impact, upstream and downstream impacts, water quality, and environmental issues.

103. Mr. Edwards raised concerns regarding the ability of the limestone bedrock to sustain additional construction in the area of proposed construction. This is a material issue in the controversy which impacts several aspects of the proposed construction.

104. Mr. Edwards pointed out that the barge canal channel was constructed with the use of explosives that caused a fracturing of limestone bedrock. He pointed out that the steel panels, which Hy Power proposes to drive into the bedrock to construct the water retention structure necessary to excavate the hole into which the turbine and powerhouse would be placed, will

further fracture this bedrock. This creates two potential dangers. It could permit water to move under and around the bottoms of the panels, potentially scouring the loosened material from the base of the panels and making them unstable and subject to failure. It could weaken the entire southern wing of the existing spillway dam. Mr. Edwards opined that this could result in catastrophic failure of the dam or the coffer dam.

105. Such a failure would cause major destruction and loss of life to those persons living and working in and along the lower Withlacoochee River.

106. Hy Power presented rebuttal evidence that it could and would, if necessary, inject concrete into the limestone to stabilize it and avoid the concerns raised by Mr. Edwards.

107. FERC specifically evaluated concerns raised by project opponents over the poor physical condition of the By-Pass Channel Spillway structures, relying particularly on the 1993 Greiner Report. FERC noted that the DEP had entered into a contract to correct any deficiencies listed in the Greiner Report, which "did not conclude that the deficiencies at the By-Pass Spillway threaten downstream life and property."

108. The FERC review concluded that the dam was safe. To ensure safety, FERC is requiring that Hy Power do a complete stability analysis of the dam prior to any construction. Articles 301 and 302 of the FERC exemption ensure that all final drawings and specifications be submitted to FERC prior to

construction, along with a supporting design report consistent with FERC's Engineering Guidelines; that FERC can require changes to assure a safe and adequate project; and that Hy Power must also submit approved coffer dam construction drawings and specifications at least 30 days prior to starting construction.

109. FERC has its own engineering staff who will go to the site and do their own analysis, along with the ACOE, of the dam and structures, prior to any construction commencing. This is a detailed design review evaluation so that the latest information on the dam will be made known immediately prior to construction, and will prevent any catastrophic event from happening. Under FERC procedures, FERC requires the applicant to obtain the DEP permits prior to requiring applicant to submit more detailed construction designs for FERC's consideration. These more detailed designs in turn will be subject to further review by DEP and FERC.

110. It is assumed that Hy Power will comply with the post-permitting procedures and requirements, and will present complete, detailed construction drawings for FREC and DEP approval. Hy Power's failure to complete the process would result in denial of a construction permit.

CONCLUSIONS OF LAW

111. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.57(1), Florida Statutes.

The applicant has the burden of providing reasonable assurance that the proposed project will not violate DEP Rules. Rule 62-4.070(1), Florida Administrative Code; Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981).

112. The applicant's burden is "one of reasonable assurances, not absolute guarantees." Manasota-88, Inc., v. Agrico Chemical, 12 FALR 1319, 1325 (DER 1990). In assessing the risk to resources, DEP is not required to assume a "worst case scenario" unless such a scenario is "reasonably foreseeable." Rudloe v. Gulf Specimen Co., Inc. v. Dickerson Bayshore, Inc. and DER, 10 FALR 3426 (DER 1988). Reasonable assurances must deal with reasonably foreseeable contingencies. The necessary reasonable assurance in a particular case that a proposed project will comply with applicable air or water quality standards is a mixed question of fact and law that must be made, in the final analysis, by DEP. See, e.g., Sierra Club, et al. v. Department of Env. Protection, et al., 18 F.A.L.R. 2257, 2260 (Fla. DEP 1996); Save Our Suwannee, Inc. vs. Piechocki and Dept. of Env. Protection, 18 F.A.L.R. 1467, 1471 (Fla. DEP 1996); VQH Development, Inc. v. Dept. of Environmental Protection, et al., 15 F.A.L.R. 3407, 3438 (Fla. DEP 1993); Barringer, et al v. E. Speer and Associates, Inc., and Department of Environmental Regulation, 14 F.A.L.R. 3660, 3667 n. 8 (Fla. DER 1992).

113. Simply raising "concerns" or speculation about what "might occur" is not enough to carry a petitioner's burden. See Chipola Basin Protective Group, Inc. v. Florida Department of Environmental Protection, 11 F.A.L.R. 467, 480-81 (DER 1988). Once the applicant has presented its evidence and made a preliminary showing of reasonable assurances, the challenger must present "contrary evidence of equivalent quality" to that presented by the permit applicant. J.W.C. supra, 396 So. 2d at 789.

114. Thus, a permit applicant is not required by Florida law to provide an "absolute guarantee" that a proposed project will comply with all applicable air or water quality standards. Piechocki, supra, 18 F.A.L.R. at 1472 (Fla. DEP 1996); Powell v. U.S. Navy and Dept. of Env. Protection, 15 F.A.L.R. 3386, 3394 (Fla. DEP 1993).

115. No third party, merely by filing petition seeking administrative hearing, should be permitted to require an applicant to completely prove anew all items in application "down to [the] last detail." J.W.C., supra, 396 So. 2d at 789. "The Petitioner must identify the areas of controversy and allege a factual basis for contention that the facts relied upon by the applicant fall short of carrying the 'reasonable assurances' burden cast upon the applicant." Id.

116. Under the system of regulation applicable to projects of this type, the applicant obtains several permits from more

than one regulatory entity and from the same regulatory entity as the project progresses. At the level this controversy is joined, the applicant has not been able to address specifically each concern raised by Petitioners; however, the applicant has indicated that it must, in order to obtain added permits from FERC and from DEP, present plans which do specifically address these concerns. At this level of review, this constitutes reasonable assurance under the regulatory scheme.

117. Rule 40D-4.301, Florida Administrative Code, requires that in order to obtain a permit "an applicant [for a MSSW permit] must give reasonable assurances" that the specific permitting criteria will be met. As discussed in the Findings of Fact section of this Recommended Order, Hy Power has provided reasonable assurance that the proposed project will comply with the MSSW permit requirements contained in Rule Chapter 40D-4, Florida Administrative Code (in effect prior to October 3, 1995), along with the Basis of Review incorporated therein.

118. Under the permit criteria contained in Section 403.918, Florida Statutes (1991), and rules promulgated thereunder, an applicant must first demonstrate that DEP water quality standards will not be violated. Section 403.918(1), Florida Statutes (1991). Hy Power has met that burden in this proceeding.

119. Rule 62-4.242, Florida Administrative Code, applies OFW standards to any proposed activity or discharge that is

within an OFW or significantly degrades an OFW. Since discharge from the project takes place outside of the Lower Withlacoochee River OFW and will not significantly degrade the OFW, the OFW permitting criteria do not apply, and DEP must determine whether the project is not contrary to the public interest, based upon a consideration and balancing of the seven fact tests set forth in Section 403.918 (2)(a), Florida Statutes (1991).

120. Hy Power has provided reasonable assurance that the proposed project is not contrary to the public interest under Section 403.918(2)(a), Florida Statutes (1991). This is demonstrated both by the factual findings that there will be no adverse impacts associated with the seven public interest criteria, as well as the legislative findings in Section 253.7829(2), Florida Statutes, that development of hydroelectric power is a compatible use of the project area.

121. The permitting agency cannot consider non-environmental factors to reject a project under the "public health, safety, or welfare or property of others" prong of the public interest test. See Miller v. Department of Environmental Regulation, 504 So. 2d 1325 (Fla. 1st DCA 1987); Taylor v. Cedar Key Sewage District, 590 So. 2d 481 (Fla. 1st DCA 1991); Grove Island, Ltd. v. Department of Environmental Regulation, 454 So. 2d 571 (Fla. 1st DCA 1984); Counsel of the Lower Keys v. Charlie Toppino and Sons, Inc., 429 So. 2d 67 (Fla. 3rd DCA 1983). The public interest test is limited in scope only to environmental

impacts associated with the seven factors set forth in Section 403.918(2)(a), Florida Statutes (1991), and that list of seven factors is exclusive and exhaustive. VonWagoner v. Department of Transportation, 18 FALR 2277, 2285 (DEP 1996), aff'd sub nom, Save Anna Maria, Inc., v. Department of Transportation, 700 So. 2d 113, 116 (Fla. 1st DCA 1997).

122. In particular, DEP cannot consider whether a project complies or does not comply with a local government's comprehensive plan. Taylor, supra.; Charlie Toppino, supra. Cf., Florida Bay Initiative, Inc., et al. v. Fla. Dept. of Transportation, et al., 19 FALR 3712, 3719 (SFWMD 1997). The issue of the proposed project's compliance with the Inglis comprehensive plan and land development regulations is therefore irrelevant to this proceeding.

123. Petitioners have argued that the engineering diagrams prepared on behalf of Hy Power should be stricken for two reasons: first, they were not properly dated as required by Section 471.025, Florida Statutes; and secondly, Mr. John May, the original project engineer, no longer has a Florida P.E. license.

124. DEP rules do not require that engineering drawings be dated, only that they be signed and sealed. See Rule 62-4.050(3), Florida Administrative Code. The original drawings were validly signed and sealed by Mr. May. The subsequent drawings were signed and sealed by Mr. May, but he was no longer

registered in Florida. Furthermore, failure of an engineer to date his drawings does not render them inadmissible. As stated in Cape Development v. City of Cocoa Beach, 192 So. 2d 766, 769 (Fla. 1966), the law sets forth the procedure a professional engineer may take to authenticate his drawings; it does not purport to prescribe any requirements to make a drawing admissible in evidence. Since the parties have stipulated that authentication is not necessary for admissibility of documents authentication is not at issue.

125. To the extent there was any technical deficiency in the engineering drawings, they were cured by their being resealed by Mr. Crockett, who also resealed the MSSW application so that he would be designated as engineer of record. The Board of Professional Engineers authorizes a successor professional engineer to adopt as his own the work of another engineer. See Rule 61G15-27.001, Florida Administrative Code. In addition, DEP rules authorize permit modifications, see Rule 62-4.080(2), Florida Administrative Code, and it is common for DEP to allow engineering changes during the course of a permit processing. To require otherwise would be irrational and unreasonable.

126. Petitioners have argued that the engineering drawings do not have sufficient specificity to warrant a finding of reasonable assurance. Engineering drawings alone, however, are not the only criteria for determining reasonable assurance. Compare, for example, Hamilton County Commissioners v. TSI

Southeast, 12 FALR 3774, 3800 (DER 1990), aff'd sub nom, Hamilton Co. v. State Dept. of Env. Reg., 587 So. 2d 1378 (1st DCA 1991), in which the Department concluded:

> Although reasonable assurances can be shown in part by having specific engineering drawings and other design details in evidence in support of an application, their absence is not fatal to a showing of reasonable assurances. Here, testimony by the manufacturer, himself, who had extensive experience with the installation, operation and manufacture of such facilities as that proposed . . . is, in the absence of evidence to refute it, an adequate showing of reasonable assurance that all emission standards and the ambient air policy of DER . . . will be met. Reasonable assurances can be demonstrated by designs and plans stamped appropriately by professional engineers licensed in Florida, in part, and can also be shown by competent expert testimony, as was done here.

Accord, Haile Community Association v. Fla. Rock Industries, 96 ER FALR 133 (DEP 1996).

127. Any additional information necessary to provide reasonable assurance that the proposed facility would comply with the applicable permit standards can properly be provided at the hearing. See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) (a petition for a formal 120.57 hearing commences a de novo proceeding, and because the proceeding is intended to formulate final agency action and not to review action taken earlier and preliminarily, the hearing officer may consider changes or other circumstances external to

the application). See also Hamilton County Commissioners, supra, 587 So. 2d at 1387; JWC, supra, 396 So. 2d at 787-788.

128. Petitioners have also objected to the DEP's reliance on FERC in determining reasonable assurance. It is entirely appropriate, however, for the DEP to rely on the regulatory decisions of other agencies in making its reasonable assurance determinations Save Anna, supra, 700 So. 2d at 117. While the cited district court opinion referred to DEP's reliance on a permitting decision of SWFWMD, the underlying Final Order makes clear that reliance on the public safety decision of another agency, acting within the scope of its specific jurisdiction and expertise, is also appropriate:

> [W]hen the Department weighs and balances safety considerations in determining whether proposed dredging and filling as part of a DOT road project satisfies the [public safety component of the] public interest balancing test of former paragraph 403.918(2)(a) . . ., DOT's opinion of the safety of the design should be given great weight and acceptance by the Department absent compelling evidence of error or omission. Vonwagoner, supra, 18 FALR at 2288-2289. (Emphasis added.)

There was no compelling evidence of error or omission in this case that would justify any disregard of FERC's determination that the proposed project could be safely constructed.

129. No party has objected to the general and specific conditions associated with the proposed permit. There is sufficient basis in both fact and law to impose the requirements as set forth in the general and specific conditions. Prudence

dictates that DEP require as part of the permitting and design process, additional core borings in the area of intended construction. This would be a source of needed information about the stability of the limestone bedrock in that area and surface water.

130. Because of the significant issues raised by Petitioners and because of the catastrophic consequences of a dam or coffer dam failure, special attention should be given to review of the additional permits and to each of the concerns raised by the Petitioners.

131. The sought permit, along with the incorporated general conditions and specific conditions, to include those recommended above, should be issued.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the DEP enter a Final Order that issues the two permits challenged in this proceedings, WRM Permit No. 38-237096-3.001 and MSSW Permit No. 38-0129249-002, subject to the conditions contained in the Intents to Issue in the respective WRM and MSSW Permits and as described in the Recommended Order.

DONE AND ENTERED this 2nd day of March, 2000, in Tallahassee, Leon County, Florida.

STEPHEN F. DEAN
Administrative Law Judge
Division of Administrative Hearings
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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.