

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AHMED THALJI, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 99-1919  
 )  
 SOUTHWEST FLORIDA WATER )  
 MANAGEMENT DISTRICT and )  
 HBJ INVESTMENTS, INC., )  
 )  
 Respondents. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tampa, Florida, on July 8, 1999.

APPEARANCES

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For Respondent HBJ Investments, Inc.:

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For Respondent Southwest Florida Water Management District:

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STATEMENT OF THE ISSUE

The issue is whether Respondent HBJ Investments, Inc. is entitled to an environmental resource permit to facilitate the construction of the Betty Jones Spa on property adjacent to property owned by Petitioner.

PRELIMINARY STATEMENT

By Notice of Final Agency Action for Approval, Respondent Southwest Florida Water Management District informed Respondent HBJ Investments, Inc. of the District's intent to issue an environmental resource permit to facilitate the construction of the Betty Jones Spa on 1.62 acres in downtown Saint Petersburg.

By Amended Petition for Formal Administrative Proceeding served April 14, 1999, Petitioner challenged the issuance of the environmental resource permit to Respondent HBJ Investments, Inc. The grounds for challenging the permit are that Respondent HBJ Investments, Inc. failed to provide reasonable assurance that the proposed activity would not cause adverse water quantity impacts to receiving waters and adjacent lands; would not cause adverse flooding to on-site and off-site property; would not adversely impact existing surface water storage and conveyance capabilities; would not adversely impact the value of functions provided to fish and wildlife, including listed species and aquatic and wetland-dependent species, by wetlands, other surface waters, and other water-related resources of the District; would not adversely affect the quality of receiving waters so that

applicable water quality standards would not be violated; would not cause adverse secondary impacts to the water resources; would not adversely impact the maintenance of surface water or groundwater levels of surface water flows established pursuant to Section 373.042, Florida Statutes; would not adversely impact works of the District, pursuant to Section 373.086, Florida Statutes; would be capable, under generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed; would be conducted by an entity with sufficient financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit; would comply with any applicable special basin or geographic area criteria established pursuant to Chapter 40D-4, Florida Administrative Code; and would not be contrary to the public interest or, if the proposed activity would significantly degrade or would be within an Outstanding Florida Water, would be clearly in the public interest. The amended petition also alleges that the application was not filed and completed in accordance with applicable statutes and rules.

By Prehearing Stipulation presented at the start of the hearing, the parties agreed that Petitioner timely filed its amended petition, Respondent HBJ Investments, Inc. is a lawfully constituted business entity, and the immediate vicinity of the proposed activity contains no wetlands.

The Prehearing Stipulation identifies the legal issues as the compliance of the application with Rules 40D-4.301(1)(a), (b), (d), (e), and (f); Rule 40D-4.302(1)(b) and (c); Rule 40D-40.301(1)(f), (h), and (j); and Rule 40D-40.302(1)(a), Florida Administrative Code.

At the hearing, Petitioner called one witness, Respondent HBJ Investments, Inc. called two witnesses, and Respondent Southwest Florida Water Management District called three witnesses. The District offered the only exhibits: District Exhibits 1-10, which were all admitted.

During the hearing, Petitioner sought leave to add to the record, following the end of the hearing, evidence of water quality in Tampa Bay. Over objection of Respondents, the Administrative Law Judge allowed Petitioner to do so. By a filing dated July 16, 1999, Petitioner added four items in response to this ruling with an explanation of the items. This filing is Petitioner Composite Exhibit 1.

By a filing dated July 28, 1999, Respondent Southwest Florida Water Management District announced that it had no objection to the Administrative Law Judge's taking official notice of the federal Clean Water Act, 33 United States Code Section 1313(d). Respondent Southwest Florida Water Management District added that it had no evidence to contradict the assertion that Tampa Bay waters are classified as "noncompliant" or "impaired," according to the "parameters of concern" stated in

the "1998 303(d) List." Likewise, Respondent Southwest Florida Water Management District stated that it had no evidence to contradict the assertion that Tampa Bay waters are closed to shellfish harvesting, effective as of sunset, July 5, 1999.

However, Respondent Southwest Florida Water Management District noted that the "1998 303(d) List" did not identify the pertinent geographic area of "Lower Tampa Bay" subject to the shellfish harvesting moratorium and referred only to "direct runoff to bay" as problematic in areas that might encompass the Tampa Bay waters in question. On a related note, Respondent Southwest Florida Water Management District also objected, as beyond the scope of the permissible proffer, to the portion of the proffer that attempted to show that the runoff from the property of Respondent HBJ Investments, Inc. entered the portion of Tampa Bay that is noncompliant under the Clean Water Act and closed to shellfish harvesting. The Administrative Law Judge overrules this objection, as well as the restatement of the objections made at the hearing to this additional evidence.

The court reporter filed the Transcript on July 19, 1999.

#### FINDINGS OF FACT

1. On November 17, 1998, Respondent HBJ Investments, Inc. (Applicant) filed an application (Application) with the South Florida Water Management District (District) for an environmental resource permit (ERP). The Application is for a Standard General (minor systems) ERP.

2. The Application states that the proposed surface water management system is to serve a 11,564 square foot health spa with associated infrastructure improvements, such as parking, utilities, landscaping, and a stormwater detention facility.

3. Section H of the Application responds to form questions that are intended to determine whether an application meets the requirements of a standard general ERP for a minor surface water system. Among the threshold requirements is that the proposed discharges from the site "will meet State water quality standards, and the surface water management system will meet the applicable technical criteria for stormwater management in the Basis of Review." Another threshold requirement is that the proposed activities will not cause significant adverse impacts individually or cumulatively.

4. The Application states that the water quality treatment system will be on-line detention with effluent filtration. The Application and related documents describe the system in greater detail. The system consists of drains, inlets, a swale, an underground vault to provide effluent filtration through a sand filter and perforated pipe, an internal oil and grease skimmer, a control box, and a 15-inch diameter reinforced concrete pipe providing outfall from the vault.

5. By Notice of Final Agency Action for Approval dated February 4, 1999, the District proposed the issuance of a "Standard General for Minor Surface Water Management Systems" ERP

for the construction, operation, and maintenance of the proposed system (Permit).

6. Permit Specific Condition 2 requires: "The discharges from this system shall meet state water quality standards as set forth in Chapter 62-302 and Rule 62-4.242, F.A.C., for class waters equivalent to the receiving waters."

7. Permit Specific Condition 8 requires, for vault systems, that the system become dry within 72 hours after a rainfall event.

8. Permit Specific Condition 9 requires the operation and maintenance entity to submit inspection reports for inspections to be performed every 18 months.

9. Permit Specific Condition 10 requires a water quality monitoring program for systems, such as the proposed system, using an internal oil and grease skimmer. This condition obligates HBJ to take three samples during each of the first two annual rainy seasons following the commencement of operation of the system. The monitoring must take place immediately after rainfall events of sufficient magnitude to cause a discharge from the outfall structure. If the discharged water does not meet water quality standards for oil and grease, as established by Rule 62.302.510(3)(k), Florida Administrative Code, then the permittee must alter the system to attain compliance for this water quality parameter.

10. The subject parcel is bounded by Fourth Avenue South on the north, First Street South on the east, Second Street South on the west, and an unnamed alley on the south. This site is just south of Al Lang Field.

11. In its present state, the parcel is nearly entirely pervious surface. Some of the stormwater flowing onto the parcel percolates into the soils, and the remainder flows into City of Saint Petersburg stormwater sewers, from which it is carried about two city blocks to Tampa Bay, where it is discharged. The parcel was formerly used for single-family residential housing, but is now mostly cleared. The runoff from the site presently carries mostly sediments.

12. After the proposed construction, 79 percent of the parcel would consist of impervious surface. Although small areas of the developed parcel might remain vegetated, and thus add nutrients into the runoff, the primary change in the runoff will consist of the addition of automobile-related contaminants, including, but not limited to, oil and grease.

13. HBJ's engineer designed the proposed surface water management system to treat the first one-half inch of stormwater runoff. The engineer's report notes, in a letter dated November 13, 1998, that siltation in the vault reduces storage volume, so it is "required that cleaning be done every six (6) months." The report suggests the removal of grass clippings from the parking area, so that they are not transported to the



retention vault. The report suggests that the underdrain system should be backflushed periodically, and the control structure should be checked monthly and all debris cleared.

1. In general, the system would collect runoff from the roof downspouts and parking area. The system would provide treatment of the first 1/2 inch of runoff by capturing it in the vault, where it would filter through a layer of several cubic feet of sand before entering a perforated pipe leading to the City stormwater sewer. Runoff from rainfall in excess of the first 1/2 inch would receive little, if any, treatment.

2. It is implicit that the first 1/2 inch of rainfall contains the first flush of contaminants from impervious surfaces. Nothing in the record specifies the efficacy of treatment provided by this standard, although it obviously is less than 100 percent efficient because of the higher standard imposed upon systems discharging into Outstanding Florida Waters (OFW).

3. However, a pre- and post-development analysis of the runoff from the subject parcel would reveal an unknown additional volume of runoff from the developed site, due to the replacement of pervious surface with impervious surface. It is unclear whether the developed site would generate a reduced volume of sediments in this increased volume of runoff. Although little vegetated surface would exist post-development, the record does not reveal the extent to which the pre-development pervious area

fails to capture the sediments prior to their entering the City stormwater system.

4. More problematic are the automobile-related contaminants, such as oil and grease, that will be introduced into the runoff by the developed site. Presumably, the runoff from the undeveloped site contains few, if any, such contaminants. Thus, any automobile-related contaminants discharged from the surface water management system would likely be an increase from the amount of such contaminants presently discharged from the site.

5. The runoff from the developed site would enter the City of Saint Petersburg stormwater sewer system and would be released in the nearby Tampa Bay. The record does not disclose the stormwater sewer line transporting the discharge, nor the outfall of the line into Tampa Bay.

6. By stipulation, the parties agreed that Tampa Bay is an OFW and that discharge from the developed site would enter the City of Saint Petersburg stormwater sewer system. Tampa Bay is classified as Class II waters, which are approved for shellfish harvesting.

7. The record does not disclose the point of discharge of the City stormwater line that would receive discharge from the developed site. However, the proximity of the site to Tampa Bay strongly suggests that the outfall would be in Tampa Bay, and it

is only slightly less probable that the outfall would be at a point in the bay in the immediate vicinity of the site.

8. The record suggests that the waters of Tampa Bay likely to receive the discharge from the site are impaired. For example, water quality conditions mandated the closing of "Lower Tampa Bay" to shellfish harvesting, for an unstated period of time, effective at sunset on July 5, 1999. Also, the Department of Environmental Protection listed two bayous in the immediate vicinity of the site as noncompliant with federal water quality standards due to excessive coliform bacteria counts and nutrients and insufficient levels of dissolved oxygen.

9. The Basis of Review (BOR) is a document adopted by the District. It contains specific "criteria" for permitting. However, as BOR Section 1.3 explains, the goal of these criteria is to meet District water resource objectives, and the criteria are "flexible." Alternative methods of meeting "overall objectives" may be acceptable, depending upon the "magnitude of specific or cumulative impacts."

10. The criteria, which are flexible, are the means by which the District assures that it meets its objectives, which are not flexible. BOR Section 3.1.0 recognizes that "a wide array of biological, physical and chemical factors affect the functioning of any wetland or other surface water community. Maintenance of water quality standards in applicable wetlands and

other surface waters is critical to their ability to provide many of these functions."

11. BOR Section 3.1.0 elaborates: "It is the intent of the Governing Board [of the District] that the criteria in subsections 3.2 through 3.2.8 be implemented in a manner which achieves a programmatic goal and a project permitting goal of no net loss of wetlands or other surface water functions."

12. BOR Section 3.1.1 requires that an applicant provide "reasonable assurance" of several things. BOR Section 3.1.1(a) requires that "a regulated activity will not adversely impact the value of functions provided to fish, wildlife and listed species, including aquatic and wetland dependent species, by wetlands and other surface waters and other water related resources of the District. (paragraph 40D-4.301(1)(d), F.A.C.) (see subsection 3.2.2)."

13. BOR Section 3.1.1(c) provides that:

a regulated activity will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-3, 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation provisions of Sections 62-4.242(1)(a) and (b), 62-4.242(2) and (3), and 62-302.300 and any special standards for Outstanding Florida Waters . . . set forth in sections 62-4.242(2) and (3), F.A.C., will be violated (paragraph 40D-4.301(1)(e), F.A.C.).

14. BOR Section 3.1.1(d) provides that "a regulated activity . . . located in close proximity to Class II waters

. . . will comply with the additional criteria in subsection 3.2.5 (paragraph 40D-4.302(1)(c), F.A.C.)."

15. BOR Section 3.1.1(f) provides that "a regulated activity will not cause adverse secondary impacts to the water resources (paragraph 40D-4.301(1)(f), F.A.C.) (see subsection 3.2.7)."

16. BOR Section 3.1.1(g) provides that "a regulated activity will not cause adverse cumulative impacts upon wetlands and other surface waters . . . (paragraph 40D-4.302(1)(b), F.A.C.) (see subsection 3.2.8)."

17. BOR Section 3.2.4 provides that an applicant must provide "reasonable assurance that the regulated activity will not violate water quality standards in areas where water quality standards apply. . . . The following requirements are in addition to the water quality requirements found in Chapter 5."

18. BOR Section 3.2.4.2(c) provides that the applicant must address the long-term water quality impacts of a proposed system, including "prevention of any discharge or release of pollutants from the system that will cause water quality standards to be violated."

19. BOR Section 3.2.5 provides:

The special value and importance of shellfish harvesting waters to Florida's economy as existing or potential sites of commercial and recreational shellfish harvesting and as a nursery area for fish and shell fish is recognized by the District. In accordance with section 3.1.1.(d), the District shall:

(b) deny a permit for a regulated activity in any class of waters where the location of the system is adjacent or in close proximity to Class II waters, unless the applicant submits a plan or proposes a procedure which demonstrates that the regulated activity will not have a negative effect on the Class II waters and will not result in violations of water quality standards in the Class II waters.

20. BOR Section 3.2.7 provides that an applicant must provide "reasonable assurance" that "a regulated activity will not cause adverse secondary impacts to the water resource" as described in this section. However, this section explicitly disregards negligible or remotely related secondary impacts.

21. BOR Section 3.2.8 provides that an applicant must provide "reasonable assurance" that "a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters . . ."

22. BOR Section 4.2 limits off-site discharge "to amounts which will not cause adverse off-site impacts." For a proposed activity within an open drainage basin, as is the subject proposed activity, the allowable discharge is (presumably the greatest of) any amount determined in previous District permits, the legally allowable discharge at the time of the permit application, or historic discharge. Historic discharge is the peak rate at which runoff leaves a parcel of land by gravity under existing site conditions.

23. BOR Section 5.1 requires that proposed discharges meet applicable state water quality standards. This chapter of the

BOR requires that proposed systems satisfy certain quantitative criteria, depending on the type of water treatment system.

However, BOR Section 5.1 warns:

in certain instances a design meeting those standards may not result in compliance with the state water quality standards referenced above. Unless an applicant has provided reasonable assurance that a design will not cause or contribute to a violation of state water quality standards, the District may apply more stringent design and performance standards than are otherwise required by this chapter.

Projects designed to the criteria found in this section shall be presumed to provide reasonable assurance of compliance with the state water quality standards referenced above. . . .

24. BOR Section 5.2 sets quantitative criteria for various types of surface water management systems. The subject system is a detention, on-line treatment system.

25. BOR Section 1.7.5 defines "detention" as the "delay of storm runoff prior to discharge into receiving waters." BOR Section 1.7.28 defines "on-line treatment system" as a "dual purpose system that collects project runoff for both water quality and water quantity requirements. Water quality volumes are recovered through percolation and evaporation while water quantity volumes are recovered through a combination of percolation, evaporation, and surface discharge."

26. BOR Section 5.2.b applies to "[d]etention with effluent filtration system (manmade underdrains)." BOR Section 5.2.b.1 provides that proposed activities draining less than 100 acres

"shall treat the runoff from . . . the first one-half inch runoff." BOR Section 5.2.b.6 adds: "Maintenance of filter includes proper disposal of spent filter material."

27. BOR Section 5.2.c applies to "on-line treatment system[s]." This section also requires the treatment of the first one-half inch of runoff.

28. However, BOR Section 5.2.e provides:

Projects discharging directly into Outstanding Florida Waters (OFW) shall be required to provide treatment for a volume 50 percent more than required for the selected treatment system . . . .

29. Applicant has provided reasonable assurance that the proposed surface water management system would not cause adverse water quantity impacts to receiving waters and adjacent lands and would not cause flooding.

30. In terms of water quantity, the proposed system is designed to meet the requirements of the ten-year storm. The subject site is a short distance from Tampa Bay, and, as already noted, it is very likely that the runoff discharges into Tampa Bay at a location not far from the subject site. Thus, water quantity and flooding are irrelevant to this case.

31. However, Applicant has not provided reasonable assurance that the proposed surface water management system would not cause adverse impacts to the value of functions provided to fish and wildlife by nonwetland surface waters and would not adversely affect the quality of receiving waters.



32. The receiving waters of the discharge from the subject site are Class II waters that are OFW. However, these waters are also impaired sufficiently as to be in violation of certain federal water quality standards and to require the closure, at least at times, of shellfish harvesting.

33. There are three deficiencies in the proposed permit. First, it does not specify, in clear and enforceable language, an inspection and maintenance program, which includes the undertaking by the Applicant to backwash the system at specified intervals, to replace the sand filtration medium at specified intervals, to dispose of the sand filtration medium so that the captured contaminants do not reenter waters of the state, to monitor the water discharged from the oil and grease skimmer at specified intervals following the first two years' monitoring, and generally to take any necessary action to correct deficiencies uncovered from inspections.

34. Second, the treatment of the first 1/2 inch of runoff is insufficient for the system, which is discharging directly into an OFW. BOR Section 5.2.e raises this standard to 3/4 inch.

35. Direct discharges requires the identification of the first receiving waters. Receiving waters are waters of the state that are classifiable as Class I-V waters. Receiving waters thus do not include waters in a stormwater sewer pipe, which are not waters of the state nor are they classifiable.

36. Water quality determinations often require comparison of the quality of the discharged water with quality of the receiving waters. The off-site piping of the discharged water does not preclude such comparison. In such case, the analysis extends to the first receiving waters into which the pipe empties.

37. The District's argument to the contrary invites circumvention of those provisions enacted and promulgated for the protection of OFWs. For example, several owners of land abutting an OFW could establish a jointly owned stormwater sewer line so that the point of comparison for their discharge would be the waters in the pipe rather than the OFW.

38. Third, Applicant failed to submit a plan or propose a procedure demonstrating that the proposed activity would not have a negative effect on the Class II waters of Tampa Bay and would not result in violations of water quality standards in these Class II waters.

39. The District failed to determine the outfall of the discharge from the subject site, so it failed to enforce the requirement of the plan required by BOR 3.2.5 for the protection of the special value of Class II waters.

40. Although required to account for cumulative impacts, the plan will necessarily reflect the characteristics of the site--e.g., 1.6 acres contributing largely automobile-based contaminants and not nutrients--and the characteristics of the

receiving waters--e.g., Tampa Bay is vast and relatively impaired, though, in the vicinity of the subject site, more likely due to excessive nutrients.

#### CONCLUSIONS OF LAW

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

55. Applicant has the burden of proving its entitlement to the ERP. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

56. Section 373.414 generally provides that an applicant must show that its proposed activity will not be harmful to the water resources or inconsistent with the objectives of the District.

57. Rule 40D-4.091(1) incorporates the BOR into Chapter 40D-40.

58. Rule 40D-4.301(1) requires that, to obtain a standard, general, or conceptual permit, an applicant must provide reasonable assurance that the construction, operation, and maintenance of a surface water system:

- (a) will not cause adverse water quality impacts to receiving waters and adjacent lands;
- (b) will not cause adverse flooding to on-site or off-site property;
- (d) will not adversely impact the value of functions provided to fish and wildlife, and listed species including aquatic and wetland

dependent species, by wetlands, other surface waters and other water related resources of the District;

(e) will not adversely affect the quality of receiving waters such that the water quality standards set forth in chapters 62-3, 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation provisions of sections 62-4.242(1)(a) and (b), 62-4.242(2) and (3), and 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in sections 62-4.242(2) and (3), F.A.C., will be violated; [and]  
(f) will not cause adverse secondary impacts to the water resources.

59. Rule 40D-4.301(2) provides: "If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the applicant shall comply with the requirements set forth in Section 3.2.4.5 of the Basis of Review."

60. Rule 40D-4.301(3) provides: "The standards and criteria contained in the Basis of Review for Environmental Resource Permit Applications shall determine whether the reasonable assurances required by subsection 40D-4.301(1) and Section 40D-4.302, F.A.C., have been provided."

61. Rule 40D-4.302(1) provides additional requirements, including that a system:

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters . . . .

(c) Located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting pursuant to Chapter 16R-

7, F.A.C., will comply with the additional criteria in subsection 3.2.5 of the Basis of Review for Environmental Resource Permit Applications adopted by reference in Section 40D-4.091, F.A.C.

62. Rule 40D-40.301(1) provides that, to obtain a standard general permit, an applicant must provide reasonable assurance that:

- (f) Discharges from the site will meet state water quality standards;
- (h) The proposed activities do not cause significant adverse impacts to occur individually or cumulatively;
- (j) The surface water management system will meet the applicable water quality design criteria in the Basis of Review described in Rule 40D-4.091(1).

63. Rule 40D-40.302(1)(a) provides that the surface water management system must meet the conditions specified in Rules 40D-4.301 and 40D-4.302.

64. Due to the failure to address the three items set forth at the end of the Findings of Fact, Applicant has failed to provide the necessary reasonable assurance that its proposed system is entitled to an ERP.

#### RECOMMENDATION

It is

RECOMMENDED that the Southwest Florida Water Management District enter a final order denying the ERP application of HBJ Investments, Inc.

DONE AND ENTERED this 23rd day of December, 1999, in  
Tallahassee, Leon County, Florida.

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ROBERT E. MEALE  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of December, 1999.

COPIES FURNISHED:

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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 must be filed with the agency that will issue the final order in this case.