

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

OLD FLORIDA PLANTATION, LTD.,            )  
                                                  )  
      Petitioner,                            )  
                                                  )  
vs.                                            )     Case No. 00-4928  
                                                  )  
POLK COUNTY BOARD OF COUNTY            )  
COMMISSIONERS and SOUTHWEST            )  
FLORIDA WATER MANAGEMENT            )  
DISTRICT,                                    )  
                                                  )  
      Respondents.                         )  
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                                                  )

RECOMMENDED ORDER

Final hearing in this case was held on July 26 and 27, 2001, in Bartow, Florida, before J. Lawrence Johnston, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Gregory R. Deal, Esquire  
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Lakeland, Florida 33803

For Southwest Florida Water Management District:

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For Polk County: Linda L. McKinley, Esquire  
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STATEMENT OF THE ISSUE

The issue in this matter is whether Respondent, Polk County Board of Commissioners (Polk County or County) has provided Respondent, Southwest Florida Water Management District (SWFWMD), with reasonable assurances that the activities Polk County proposed to conduct pursuant to Standard General Environmental Resource Permit (ERP) No. 4419803.000 (the Permit) meet the conditions for issuance of permits established in Rules 40D-4.301, and 40D-40.302, Florida Administrative Code. (All rule citations are to the current Florida Administrative Code.)

PRELIMINARY STATEMENT

On August 18, 1999, Polk County submitted a permit application to SWFWMD seeking authorization to construct a drainage improvement project. The project was intended to alleviate flooding experienced in the Eagle Lake/Millsite Lake Drainage Basin in Polk County, Florida, as a result of El Nino weather conditions experienced in 1998. SWFWMD determined that the permit application for the proposed project gave reasonable assurances that the conditions for issuance of permits have been met and a notice of final agency action for issuance of the Permit was issued by SWFWMD on October 6, 2000. Petitioner

submitted a timely Petition for Formal Administrative Hearing on October 30, 2000, and the matter was referred to DOAH on December 4, 2000.

An Initial Order was issued on December 12, 2000, and the parties responded by requesting that the case be placed in abeyance while the parties attempted to settle. On April 19, 2001, the parties reported that settlement discussions had failed and that final hearing should be scheduled.

Respondents filed their Pre-Hearing Statement on July 19, 2001, and filed an Amended Pre-Hearing Statement on July 20, 2001, to verify service on the parties. Petitioner did not file its Pre-Hearing Statement until July 24, 2001. On that same date, a telephonic conference was held to discuss the status of the case. On the afternoon of July 24, 2001, and also on July 25, 2001, Petitioner amended its Pre-Hearing Statement to add more exhibits.

At final hearing, Polk County presented the testimony of: Jeffrey Spence, an Environmental Planner who is the Polk County Natural Resource Director; Michael L. Whigham, the former Polk County Drainage Manager; and Walter R. Reigner, a Professional Engineer with the firm of BCI Engineers & Scientists, Inc. of Lakeland, Florida (accepted as an expert in the areas of surface water management systems, drainage and water quality). Polk County also had County Exhibits 1-17 admitted into evidence.

SWFWMD presented the testimony of: Jan R. Burke, Jr., a Senior Professional Engineer with SWFWMD (accepted as an expert in surface water management systems and environmental resource permitting); and Mark K. N. Hurst, an Environmental Scientist with SWFWMD (accepted as an expert in wetland system delineation, mitigation, and environmental resource permitting). SWFWMD also had SWFWMD Exhibits 1-6 admitted into evidence. Petitioner presented testimony from lay witnesses James W. Allen, III and Louis L. Roeder, III, and from Professional Engineer Richard C. Wohlfarth of CCL Consultants, Inc. (accepted as an expert in the field of water management). Petitioner's Exhibits 1-19 also were admitted in evidence. Respondents presented rebuttal testimony from Mark K. N. Hurst and Walter R. Reigner, and Petitioner presented surrebuttal testimony from Louis L. Roeder, III.

SWFWMD ordered a transcript of final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders and argument. The Transcript was filed on August 8, 2001. Respondents' Joint Proposed Recommended Order and Joint Argument were timely filed on August 20, 2001. Petitioner filed Arguments a day late on August 21, 2001, and Amended Arguments on August 22, 2001.

On August 24, 2001, SWFWMD and the County filed a Motion to Strike Petitioner's Arguments and Amended Arguments as untimely,

and Petitioner responded in opposition. The Motion to Strike is denied, and all post-hearing submittals have been considered.

#### FINDINGS OF FACT

##### Events Preceding Submittal of ERP Application

1. The Eagle-Millsite-Hancock drainage system dates back to at least the 1920's, and has been altered and modified over time, especially as a result of phosphate mining activities which occurred on OFP property in the 1950's-1960's. The system is on private property and is not owned and was not constructed by the County. Prior to 1996, the Eagle-Millsite-Hancock drainage system was in extremely poor repair and not well-maintained.

2. The Eagle-Millsite-Hancock drainage system originates at Eagle Lake, which is an approximately 641-acre natural lake, and discharges through a ditch drainage system to Lake Millsite, which is an approximately 130-acre natural lake. Lake Millsite drains through a series of ditches, wetlands, and ponds and flows through OFP property through a series of reclaimed phosphate pits, ditches and wetlands and ultimately flows into Lake Hancock, which is an approximately 4500-acre lake that forms part of the headwaters for the Peace River. The drainage route is approximately 0.5 to 1 mile in overall length.

3. The Eagle-Millsite-Hancock drainage system is one of eight regional systems in the County for which the County and

SWFWMD have agreed to share certain funding responsibilities pursuant to a 1996 letter agreement. To implement improvements to these drainage systems, Polk County would be required to comply with all permitting requirements of SWFWMD.

4. During the winter of 1997-1998, Polk County experienced extremely heavy rainfall, over 39 inches, as a result of El Nino weather conditions. This unprecedented rainfall was preceded by high rainfalls during the 1995-1996 rainy season which saturated surface waters and groundwater levels.

5. During 1998, Polk County declared a state of emergency and was declared a federal disaster area qualifying for FEMA assistance. Along the Lake Eagle and Millsite Lake drainage areas, septic tanks were malfunctioning, wells were inundated and roads were underwater. The County received many flooding complaints from citizens in the area.

6. As a result of flooding conditions, emergency measures were taken by the County. The County obtained SWFWMD authorization to undertake ditch cleaning or vegetative control for several drainage ditch systems in the County, including the Eagle-Millsite-Hancock drainage system. No SWFWMD ERP permit was required or obtained for this ditch cleaning and vegetative control.

7. During its efforts to alleviate flooding and undertake emergency ditch maintenance along the Eagle-Millsite-Hancock

drainage route, the County discovered a driveway culvert near Spirit Lake Road which was crushed and impeding flow. The evidence was unclear and contradictory as to the size of the culvert. Petitioner's evidence suggested that it consisted of a 24-inch pipe while evidence presented by the County and by SWFWMD suggested that it was a 56-inch by 36-inch arched pipe culvert. It is found that the latter evidence was more persuasive.

8. On February 25, 1998, the County removed the crushed arched pipe culvert at Spirit Lake Road and replaced it with two 48-inch diameter pipes to allow water to flow through the system. The replacement of this structure did not constitute ditch maintenance, and it required a SWFWMD ERP. However, no ERP was obtained at that time (although SWFWMD was notified prior to the activity). (One of the eight specific construction items to be authorized under the subject ERP is the replacement of this culvert.)

9. Old Florida Plantation, Ltd. (OFP) property also experienced flooding during February 1998. OFP's property is situated along the eastern shore of Lake Hancock, and the Eagle-Millsite-Hancock drainage system historically has flowed across the property before entering Lake Hancock. In the 1950's and 1960's, the property was mined for phosphate. The mining process destroyed the natural vegetation and drastically altered

the soils and topography, resulting in the formation of areas of unnaturally high elevations and unnaturally deep pits that filled with water.

10. OFP purchased the property from U.S. Steel in 1991. The next year OFP initiated reclamation of the property, which proceeded through approximately 1998. In 1996, OFP applied to the County for approval of a development of regional impact (DRI).

11. OFP blamed the flooding on its property in 1998 on the County's activities upstream, claiming that the property had never flooded before. But upon investigation, the County discovered a 48-inch diameter pipe on OFP property which, while part of OFP's permitted drainage system, had been blocked (actually, never unopened) due to OFP's concerns that opening the pipe would wash away wetlands plants recently planted as part of OFP's wetland restoration efforts. With OFP and SWFWMD approval, the County opened this pipe in a controlled manner to allow flowage without damaging the new wetlands plants. Following the opening of this blocked pipe, OFP property upstream experienced a gradual drop in flood water levels. When the water level on OFP's property stabilized, it was five feet lower and no longer flooded.

12. Nonetheless, OFP continues to maintain not only that the County's activities upstream caused flooding on OFP property



but also that they changed historic flow conditions. This contention is rejected as not being supported by the evidence. Not only did flooding cease after the 48-inch pipe on OFP's property was opened, subsequent modeling of water flows also demonstrated that the County's replacement of the crushed box culvert at the driveway on Spirit Lake Road as described in Finding 8, supra, did not increase flood stages by the time the water flows into the OFP site and did not cause flooding on OFP property in 1998. (To the contrary, OFP actions to block flows onto its property may have contributed to flooding upstream.)

13. On October 6, 1998, the County entered into a contract with BCI Engineers and Scientists to initiate a study on the Eagle-Millsite-Hancock drainage system, identify options for alleviating flooding along the system and prepare an application for an ERP to authorize needed improvements to the system.

14. Prior to the County's submittal of an ERP application, SWFWMD issued a conceptual ERP to OFP for its proposed wet detention surface water management system to support its proposed DRI on the OFP property. OFP's conceptual permit incorporated the Eagle-Millsite-Hancock drainage system and accommodated off-site flowage into the system.

15. Before submitting an ERP application to SWFWMD, the County had communications with representatives of OFP concerning an easement for the flow of the drainage system through OFP

property. In March 1999, the County reached an understanding with OFP's engineering consultant whereby OFP would provide the County with an easement across OFP lands to allow water to flow through to Lake Hancock. In turn, the County would: construct and pay for a control structure and pipe east of OFP to provide adequate flowage without adversely affecting either upstream or downstream surface waters; construct and upgrade any pipes and structures needed to convey water across OFP property to Lake Hancock; and provide all modeling data for OFP's review.

#### The ERP Application

16. Following completion of the engineering study, the County submitted ERP Application No. 4419803.000 for a Standard General ERP to construct improvements to the Eagle-Millsite-Hancock drainage system on August 18, 1999.

17. Eight specific construction activities are proposed under the County's project, at various points along the Eagle-Millsite-Hancock drainage system as follows: 1) Add riprap along channel bottom; 2) Modify culvert by replacing 56-inch by 36-inch arch pipe by two 48-inch pipes (after-the-fact, done in 1998, as described in Finding 8, supra); 3) Add riprap along channel bottom; 4) Add box, modify culvert by replacing existing pipe with two 48-inch pipes, add riprap along channel bottom; 5) add riprap along channel bottom; 6) Add weir, modify culvert by replacing existing 24-inch pipe with two 48-inch pipes, add

riprap along channel bottom; 7) Add box and modify culvert by replacing existing 24-inch pipe with two 48-inch pipes; 8) Modify existing weir.

18. Under the County's application, construction activities Nos. 6, 7, and 8 would occur on OFP property. In addition, it was proposed that surface water would flow across OFP's property (generally, following existing on-site drainage patterns), and it was indicated that flood elevations would rise in some locations on OFP's property as a result of the improvements proposed in the County's application. (Most if not all of the rise in water level would be contained within the relatively steep banks of the lakes on OFP's property--the reclaimed phosphate mine pits.) In its application, the County stated that it was in the process of obtaining easements for project area.

19. As part of the ERP application review process, SWFWMD staff requested, by letter dated September 17, 1999, that the County clarify the location of the necessary rights-of-way and drainage easements for the drainage improvements and provide authorization from OFP as property owner accepting the peak stage increases anticipated in certain OFP lakes as a result of the County's proposed project activities.

20. On September 28, 1999, OFP obtained a DRI development order (DO) from the County. In pertinent part, the DRI DO

required that OFP not adversely affect historical flow of surface water entering the property from off-site sources. Historical flow was to be determined in a study commissioned by the County and SWFWMD. The DO appeared to provide that the study was to be reviewed by OFP and the County and approved by SWFWMD. Based on the study, a control structure and pipe was to be constructed, operated and maintained by the County at the upstream side of the property that would limit the quantity of off-site historical flow, unless otherwise approved by OFP. OFP was to provide the County with a drainage easement for this control structure and pipe, as well as a flowage easement from this structure, through OFP property, to an outfall into Lake Hancock. The DO specified that the flowage easement was to be for quantitative purposes only and not to provide water quality treatment for off-site flows. The DO required OFP to grant a defined, temporary easement prior to first plat approval.

21. In its November 11, 1999, response to SWFWMD's request for additional information, the County indicated it would obtain drainage easements and that it was seeking written acknowledgment from OFP accepting the proposed increases in lake stages.

22. During the ERP application review process, the County continued efforts to obtain flowage easements or control over the proposed project area and OFP's acknowledgment and

acceptance of the increase in lake stages. At OFP's invitation, the County drafted a proposed cross-flow easement. But before a binding agreement could be executed, a dispute arose between OFP and the County concerning other aspects of OFP's development plans, and OFP refused to enter into an agreement on the cross-flow easement unless all other development issues were resolved as well.

23. On August 4, 2000, in response to SWFWMD's request that the County provide documentation of drainage easements and/or OFP's acceptance of the increased lake stages on OFP property, the County submitted a proposed and un-executed Perpetual Flowage and Inundation Easement and an Acknowledgment to be signed by OFP accepting the increased lake stages.

24. On August 7, 2000, the OFP property was annexed by the City of Bartow (the City). On October 16, 2000, the City enacted Ordinance No. 1933-A approving OFP's DRI application. The City's DO contained essentially the same provision on Off-Site Flow contained in the County's DO. See Finding 18, supra. However, the City's DO specified that the historical flow study was required to be reviewed and approved by OFP (as well as by the County and by SWFWMD). OFP has not given formal approval to historical flow studies done to date.

25. On October 6, 2000, SWFWMD issued a Notice of Final Agency Action approving Polk County ERP No. 4419803.000. Permit

Specific Condition No. 7 provides that "all construction is prohibited within the permitted project area until the Permittee acquires legal ownership or legal control of the project area as delineated in the permitted construction drawings." As a result of this permit condition, the County cannot undertake construction as authorized under the Permit until any needed easement or legal control is obtained.

Precise Easement Route

26. Approximately two months before final hearing, a dispute arose as to the precise cross-flow easement route proposed by the County. OFP had understood that the County's proposed route was based on a detailed survey. But closer scrutiny of the County's proposed route indicated that it cut corners of existing lakes on OFP's property, crossed residential lots proposed by OFP, and veered north into uplands (also proposed for residential use) in the western portion of the route before looping south and then north again to the outfall at Lake Hancock. Information subsequently revealed in the course of discovery suggested that the County's proposed route may have been based on pre-reclamation topography of OFP's property.

27. After OFP recognized the implications of the cross-flow easement route being proposed by the County, OFP provided the County with several different alternative easement routes

through the OFP property. While agreement as to the precise route has not yet been reached, the precise route of the easement is not significant to the County, as long as water can flow across OFP property to Lake Hancock and so long as the County does not have to re-locate existing ditches. Such adjustments in the location of the proposed flowage easement would not affect SWFWMD staff's recommendation for permit issuance, as long as it covered the defined project areas.

28. In addition, OFP's current site plan is a preliminary, conceptual plan subject to change before it is finalized. Regardless what cross-flow easement route is chosen, it will be temporary and subject to modification when OFP's development plan is finalized.

29. If the County is unable to not negotiate a flowage easement across OFP property, it could obtain whatever easement is required through use of the County's eminent domain powers.

30. The County's acquisition of an easement to accommodate a flowage route and anticipated increased stage on OFP property gives reasonable assurance that any stage increases will not cause adverse impacts to OFP property and gives reasonable assurance that the County will have sufficient legal control to construct and maintain the improvements.

### Project Area

31. The County applied for a Standard General Permit and specified a total project area of 0.95 acre. This acreage reflects the area required for actual construction and alteration of control structures and drainage ditches in the preexisting Eagle-Millsite-Hancock system. It does not reflect the entire acreage drained by that system (approximately 1,800 to 2,000 acres). It also does not reflect the area of the cross-flow easement, which the County has yet to obtain.

32. When determining project size for purposes of determining the type of permit applicable to a project, SWFWMD staff considers maximum project area to be limited to the acreage owned or controlled by the applicant. In addition, since this is a retrofit project for improvement of an existing drainage system not now owned or controlled by the County, SWFWMD staff only measured the area required for actual construction and alteration of control structures and drainage ditches. Future easements necessary for future maintenance of the system were not included.

33. When OFP applied for its conceptual ERP for its proposed DRI, the project area was considered to be the acreage owned by OFP. The rest of the basin draining through OFP's property to Lake Hancock (again, approximately 1,800 to 2,000 acres) was not considered to be part of the project area.



### Water Quantity Impacts

34. The County's project will retrofit certain components of the same drainage system which OFP will utilize for surface water management and treatment pursuant to its conceptual ERP. Modeling presented in the County's application demonstrates that there will be some rises and some lowering of some of the lake levels on OFP's property during certain rain events.

35. Anticipated rises are lower than the top of banks authorized in OFP's conceptual permit; hence the system will continue to function properly.

36. While there are some differences in the County's permit application and OFP's conceptual permit application concerning modeling estimates of flow rates through OFP property, the differences are minor and are attributed to differences in modeling inputs. The County used more detailed modeling information. Any such differences are not significant.

37. Differences in flow rates provided in the County's proposed permit and in OFP's conceptual permit do not render the permits as incompatible. If the County's permit were issued, any modeling undertaken in connection with a subsequent application by OFP for a construction permit would have to be updated to include the County's improvements to the system. This outcome is not a basis for denial of the County's permit.

38. While the rate at which water will flow through the system will increase, no change in volume of water ultimately flowing through the drainage system is anticipated as a result of the County's proposed improvements.

39. The increased lake stages which are anticipated to occur on OFP property as a result of the County's project will not cause adverse water quantity impacts to the receiving waters of Lake Hancock or adjacent lands.

40. The project will not cause adverse flooding to on-site or off-site property.

41. The project will not cause adverse impacts to existing surface water storage and conveyance capabilities.

42. The project will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, Florida Statutes.

#### Water Quality Impacts

43. No adverse impacts to water quality on OFP property are anticipated from the County's proposed drainage improvements. The project will not add any pollutant loading source to the drainage system and is not expected to cause any algae blooms or fish kills in OFP waters or cause any additional nutrient loading into OFP's surface water management systems.

44. As reclaimed phosphate mine pits, the lakes on OFP's property are high in phosphates. Meanwhile, water quality in

upstream in Millsite Lake and Eagle Lake is very good. Off-site flow of higher quality water flushing the OFP lakes will improve the water quality on the OFP site.

45. The County's project will have no adverse impact on the quality of water in the downstream receiving of Lake Hancock (which currently has poor water quality due in large part to past phosphate mining).

46. Upstream of OFP, the project will not cause any adverse water quality impacts and is anticipated to result in positive impacts by lessening the duration of any flooding event and thereby lessening septic tank inundation from flooding. This will have a beneficial impact on public health, safety, and welfare.

47. Thus, there is a public benefit to be gained in having the County undertake the proposed drainage and flood control improvements now, rather than waiting for OFP to finalize its plat and construct its development project.

48. The County's proposed improvements do not require any formal water quality treatment system. The improvements are to a conveyance system and no impervious surfaces or other facilities generating pollutant loading will be added.

49. Upstream of OFP, the Eagle-Millsite-Hancock drainage system flows through natural lakes and wetlands systems that provide natural water quality treatment of the existing drainage

basin. OFP expressed concern that the County's improvements to drainage through these areas (including the ditch maintenance already performed in 1998) will increase flow and reduce residence time, thereby reducing natural water quality treatment. But ditch maintenance does not require an ERP, and the County gave reasonable assurances that reduction in natural water quality treatment will not be significant, especially in view of the good quality of the water flowing through the system out of Eagle Lake and Millsite Lake. As a result, it is found that the County's proposed project will not adversely affect the quality of receiving waters such that any applicable quality standards will be violated.

50. Indeed, OFP's expert consultant conceded in testimony at final hearing that OFP has no reason to be concerned about the quality of water at present. Rather, OFP's real concern is about water quality in the future. Essentially, OFP is asking SWFWMD to require the County to guarantee OFP that future development in the area will not lead to any water quality problems. Requiring such a guarantee as a condition to issuance of an ERP would go far beyond SWFWMD requirements and is never required of any applicant.

51. Besides being speculative on the evidence in this case, future development in the area will be required to meet applicable SWFWMD water quality requirements. SWFWMD permitting

required for such future development would be the proper forum for OFP to protect itself against possible future reduction in water quality (as well as possible future increase in water quantity).

#### Environmental Impacts

52. The drainage ditches to be improved by the County's project were originally constructed before 1984. These upland cut ditches were not constructed for the purpose of diverting natural stream flow, and are not known to provide significant habitat for any threatened or endangered species.

53. The County provided reasonable assurance that the proposed project will not change the hydroperiod of a wetland or other surface water, so as to adversely affect wetland functions or other surface water functions.

54. The functions of the wetlands and surface waters to be affected by the proposed project include conveyance, some water quality treatment, and possibly some wildlife movement or migration functions between the wetlands served by the ditches.

55. Wetland impacts from the project consists of .63 acre of permanent impacts and .21 acre of temporary impacts, for a total of .84 acre of impact. The permanent impacts consist of the replacement of pipes with new structures in the ditches and the addition of rip rap in areas to prevent sedimentation and erosion.

56. The proposed project's anticipated increase in the rate of flow is expected to lessen the duration of any flooding event at the upper end of the drainage system, and at the downstream end is expected to create a subsequent rise in some of the lakes and storage areas on the OFP property during certain rain events.

57. The anticipated rise in some of the reclaimed lakes on OFP property is not anticipated to have any adverse impact on the functions that those surface waters provide to fish, wildlife or any threatened or endangered species. The reclaimed lakes subject to rise in water levels for certain rain events are steep-sided and do not have much littoral zone, and little, if any, loss of habitat will result.

58. The County's application provides reasonable assurance that the anticipated stage increase in affected wetlands or surface waters will not adversely affect the functions provided by those wetlands or surface waters.

59. The County provided reasonable assurance that the proposed project will not violate water quality standards in areas where water quality standards apply, in either the short-term or the long-term. Long-term effects were addressed in Finding 43-51, supra. Short-term water quality impacts anticipated during the construction of the proposed improvements

will be addressed through the use of erosion and sediment controls.

60. The proposed project also will not create any adverse secondary impacts to water resources.

61. The project will not cause any adverse impacts to the bird rookery located to the north on OFP property.

62. The project will not cause any adverse impacts to the bass in OFP's lakes, a concern expressed by OFP relatively recently. To the contrary, since the project will improve water quality in OFP's lakes, the impact on OFP's bass is expected to be positive.

63. OFP raised the issue of a bald eagle nesting site located on its property. The evidence was that a pair of bald eagles has built a nest atop a Tampa Electric Company (TECO) power pole on the property in October of each year since 1996. Each year the pair (which is thought to be the same pair) has used a different TECO power pole. Most of the nests, including the one built in October 2000, have been on poles well south of any construction proposed under the County's ERP and clearly outside of the primary and secondary eagle management zones designated by the U.S. Fish and Wildlife Service. But one year, a nest was built on a pole farther north and possibly within the secondary eagle management zone.

64. OFP presented testimony that U.S. Fish and Wildlife would require OFP to apply for an "incidental take" in order to build homes within the primary eagle protection zones around any of the four poles on which eagles have built nests since 1996; timing of construction of homes within the secondary protection zones may be affected. Even accepting OFP's testimony, there was no evidence as to how U.S. Fish and Wildlife would view construction of the County's proposed drainage improvements on OFP property within those zones. In addition, the evidence was that, in order to accomplish its DRI plans to build homes in the vicinity of the TECO power poles that have served as eagle nests in recent years, without having to apply for an "incidental take," OFP plans to place eagle poles (more suitable for eagle nests than power poles, which actually endanger the eagles) in another part of its property which is much more suitable habitat in order to encourage the eagles to build their nest there. The new location would put the County's proposed construction activity far outside the primary and secondary eagle management zones.

#### Other Permitting Requirements

65. The County's proposed project is capable, based on generally accepted scientific engineering and scientific principles, of being effectively performed and of functioning as proposed.



66. The County has the financial, legal, and administrative capability of ensuring that the activity proposed to be undertaken can be done in accordance with the terms and conditions of the permit.

67. No evidence was presented by Petitioner that the Project will cause adverse impacts to any work of the District established under Section 373.086, Florida Statutes.

68. No evidence was presented by Petitioner that the project will not comply with any applicable special basin or geographic area criteria established under Chapter 40D-3, Florida Administrative Code.

#### CONCLUSIONS OF LAW

69. If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden at a formal administrative hearing of going forward with the presentation of a prima facie case of the applicant's entitlement to a permit. Once a prima facie case is made, the burden of going forward can be shifted to the Petitioner to present competent substantial evidence, consistent with the allegations of the petition, that the applicant is not entitled to the permit. Unless the Petitioner presents "contrary evidence of equivalent quality" to that presented by the applicant and agency, the permit must be approved. Florida

Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 789-790 (Fla. 1st DCA 1981).

70. The issuance of a permit must be based solely on compliance with applicable permit criteria. Council of the Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983).

Legal Ownership or Control

71. Rule 40D-4.101 provides in pertinent part:

(2) The application must be signed by the owner or the owner's authorized agent. Applications signed by an agent must contain a letter of authorization which is signed by the owner.

(3) Notwithstanding the provisions of subsection (2), persons authorized by entities with the power of eminent domain may sign the application in lieu of the owner when applying on behalf of the entity and notice to the property owner(s) is provided pursuant to 40D-1.603(5).

72. Rule 40D-1.6105(1) sets out the following limiting condition applicable to SWFWMD permits generally:

All permits issued pursuant to these Rules are contingent upon the continued ownership, lease, or other legal control of property rights in underlying, overlying, or adjacent lands, or the power to acquire such property rights through eminent domain.

(Emphasis added.)

73. Rule 40D-4.381(1) provides in pertinent part:

(r) This permit does not convey to the permittee or create in the permittee any property right, or any interest in real property, nor does it authorize any entrance upon or activities on property which is not

owned or controlled by the permittee, or convey any rights or privileges other than those specified in the permit and Chapter 40D-4 or Chapter 40D-40, F.A.C.

(s) The permittee shall hold and save the District harmless from any and all damages, claims, or liabilities which may arise by reason of the activities authorized by the permit or any use of the permitted system.

In compliance with this rule, Specific Condition 7 of the proposed permit prohibits construction "within the permitted project area until the Permittee acquires legal ownership or legal control of the project area as delineated in the permitted construction drawings."

74. In light of these rules, SWFWMD is authorized to issue the County an ERP subject to the County obtaining legal ownership or control of the project area through easements, as it did in this case.

#### Use of Standard General Permit

75. Rule 40D-4.021(15) defines a "general permit" as an ERP issued or denied by SWFWMD staff without being presented to the SWFWMD Governing Board. Standard General Permits are issued pursuant to Chapter 40D-40, Florida Administrative Code.

Conditions for issuance of a Standard General ERP are contained in Rule 40D-40.302. Subsection (2) of this rule provides, in relevant part, that to qualify for a Standard General ERP, the total project area must be less than 100 acres, and any construction or alteration in or on wetlands and surface waters

is limited to a total of one acre or less of such wetlands or surface waters.

76. Rule 40D-4.021(15) defines "project area" to mean "the area within the total land area, as defined in section 40D-4.021(11), which is or will be served by a surface water management system to be permitted." Rule 40D-4.021(11) defines "total land area" to mean "land holdings under common ownership or control which are contiguous, or land holdings which are served by a common surface water management system."

77. Interpreting these rule definitions in pari materia, SWFWMD staff considers maximum project area to be limited to "land holdings under common ownership or control." Although the wording of the rule definitions is ambiguous, staff's interpretation is reasonable. To the contrary, under OFP's interpretation, project area always would extend to the entire drainage basin; if so, there would be no need for the rest of the language in the rule definitions. OFP's interpretation does not make sense; it is not logical to assume that SWFWMD put superfluous language in its rule definitions.

78. The County's project qualifies for consideration as an application for a standard general ERP consistent with Rules 40D-40.040(1)(b) and 40D-40.302(2).

Conditions for Issuance of Standard General Permit

79. The law which contains the conditions for issuance of Environmental Resource Permits and which is applicable to this proceeding is found in Rules 40D-4.301 and 40D-40.302.

80. Rule 40D-4.301(1) requires that, to obtain a standard general permit, "an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system:

- a. will not cause adverse water quantity impacts to receiving waters and adjacent lands;
- b. will not cause adverse flooding to on-site or off-site property;
- c. will not cause adverse impacts to existing surface water storage and conveyance capabilities;
- d. will not adversely impact the value of functions provided to fish and wildlife, and listed 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 Nation Resource Waters set forth in sections 62-4.242(2) and (3), F.A.C., will be violated;
- f. will not cause adverse secondary impacts to the water resources;
- g. will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, F.S.;

- h. will not cause adverse impacts to a work of the District established pursuant to Section 373.086, F.S.;
- i. is capable, based on generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed;
- j. will be conducted by an entity with financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued.
- k. will comply with any applicable special basin or geographic area criteria established pursuant to this chapter.

81. Rule 40D-4.301(3) provides that the standards and criteria contained in the Basis of Review for Environmental Resource Permit Applications (BOR) shall determine whether the reasonable assurances required by Rule 40D-4.301(1) and Rule 40D-4.302(1) have been provided. Rule 40D-4.091(1) incorporates the BOR into the rules of SWFWMD.

82. For projects involving alterations to drainage ditches constructed in uplands before a permit was required or pursuant to a permit, not for the purpose of diverting natural stream flow, and which do not provide significant habitat for threatened or endangered species, BOR Section 3.2.2.2 limits the environmental review necessary for determining whether an applicant has provided the required reasonable assurances.

83. BOR Section 3.2.2.2 is applicable to Polk County's application for a standard general permit.

84. By operation of BOR Section 3.2.2.2, the County's project is not required to comply with the provisions of Rules 40D-4.302 or 40D-4.301(1)(d) and (f). The only environmental criteria applicable to this project are those included in BOR subsections 3.2.2.4 and 3.2.4 through 3.2.4.5.

85. The County has provided reasonable assurance that the proposed project will not cause adverse water quantity impacts to receiving waters and adjacent lands.

86. The County has provided reasonable assurance that the proposed project will not cause adverse flooding to on-site or off-site property.

87. The County has provided reasonable assurance that the proposed project will not cause adverse impacts to existing surface water storage and conveyance capabilities.

88. The County has provided reasonable assurance that the proposed project will not adversely affect the quality of receiving waters such that water quality standards will be violated.

89. The County has provided reasonable assurance that the proposed project will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, Florida Statutes.

90. The County has provided reasonable assurance that the proposed project is capable, based on generally accepted

engineering and scientific principles, of being effectively performed and of functioning as proposed.

91. The County has provided reasonable assurance that the proposed project will be constructed by an entity with financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued.

92. Not at issue in this matter are conditions specified in Rules 40D04.301(1)(h) and 40D-4.301(1)(k).

93. While the County's project is not required to comply with the provisions of Rules 40D-4.301(1)(d) and (f) or 40D-4.302(1), the County has provided reasonable assurance that the proposed project will not cause adverse secondary impacts to the water resources, will not cause unacceptable cumulative impacts upon wetlands and other surface waters, and 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 SWFWMD.

94. Respondent Polk County met its initial burden of proof in presenting a prima facie case that the conditions for issuance of permits under Rules 40D-4.301 and 40D-4.302 have been met for Standard General Environmental Resource Permit No. 4419803.000.



95. Petitioner did not present "contrary evidence of equivalent quality" to that presented by Polk County and SWFWMD to support Petitioner's position that Polk County was not entitled to the permit. To the extent that Petitioner presented such evidence, it was not as persuasive as that presented by the County and SWFWMD.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Southwest Florida Water Management District enter a final order issuing Standard General Environmental Resource Permit No. 4419803.000.

DONE AND ENTERED this 17th day of September, 2001, in Tallahassee, Leon County, Florida.

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J. LAWRENCE JOHNSTON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of September, 2001.

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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.