

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OTTO STANGL,)
)
Petitioner,)
)
and)
)
MARGARITA STANGL,)
)
Intervenor,)
)
vs.) Case No. 01-4919
)
CENTURY REALTY FUNDS, INC.,)
and SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondents.)
_____)
_____)

RECOMMENDED ORDER

On March 18-21, 2002, final administrative hearing was held in this case in Bartow, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner and Intervenor:

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Tampa, Florida 33607-1713

For District: Martha A. Moore, Esquire
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For Century: Joseph P. Mawhinney, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the Southwest Florida Water Management District (District) should issue to Century Realty Funds, Inc. (Century) Environmental Resource Permit (ERP) No. 44000227.002 (the ERP), which would modify Management and Storage of Surface Waters (MSSW) Permit No. 400227.000 (the Permit) and Stormwater Exemption No. EO1481, issued by the District to Century in July 1985 for construction of a surface water management system for Angler's Green Mobile Home Park located in Mulberry, Polk County, Florida.

PRELIMINARY STATEMENT

On October 29, 2001, the District issued Notice of Final Agency Action on the ERP to Century. Petitioner, Otto Stangl, timely filed a Petition for Formal Administrative Hearing (Petition), but the District dismissed the Petition as insufficient. Within the time given to amend, Petitioner and his wife, Margarita Stangl, filed a Petition for an Administrative Hearing (Amended Petition). The District dismissed the Amended Petition of Margarita Stangl as untimely but allowed it to stand as to Otto Stangl. The matter was

referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge on December 26, 2001; final hearing was set for March 18-21, 2002, in Bartow, Florida.

On February 20, 2002, Margarita Stangl moved to intervene; and her intervention was granted on February 27, 2002.

The District filed a Motion in Limine on March 8, 2002, seeking to insulate the 1985 MSSW Permit and Stormwater Exemption from challenge in this proceeding based on statute of limitations, estoppel, and waiver.

On March 11, 2002, Petitioner and Intervenor (the Stangls) jointly filed a Pre-Hearing Statement; and the District and Century each filed a Pre-Hearing Statement. On March 14, 2002, the District and Century filed an Amended Joint Pre-Hearing Stipulation.

Also on March 14, 2002, Century filed a Motion in Limine joining in the District's Motion in Limine and adding an additional statute of limitations as grounds.

On March 15, 2002, the Stangls filed a Response to Century's Motion in Limine. On March 18, 2002, the Stangls filed a Response to the District's Motion in Limine.

At the outset of final hearing, the District moved to strike the Response or for consideration of the District

memorandum in opposition to the Response. Oral argument was heard on the pending motions. The District's Motion to Strike was denied; the District's memorandum in opposition to the Response filed by the Stangls was considered, but each Motion in Limine was denied.

The parties had Joint Exhibits 1-5 admitted in evidence. Century then called the following witnesses: Otto Stangl; Larry Maxwell; Ivan King, P.E., project engineer for Century and the Angler's Green Project; and David Carter, P.E. (accepted as an expert in the areas of mobile home park permitting, mobile home park stormwater design, permit deviations and modifications, lake management practices, and fish kills). Century also had CRF Exhibits 1 through 7 admitted in evidence. The District called the following witnesses: Andreas Sager, P.E. (accepted as an expert in surface water management systems and environmental resource permitting); William Hartmann, P.E., (also accepted as an expert in surface water management systems and environmental resource permitting); and Jeffrey Whealton, Environmental Scientist (accepted as an expert in wetland system delineation, mitigation, and environmental resource permitting). The District also had District Exhibits 1 through 8 admitted in evidence. The Stangls called the following witnesses: Otto Stangl; John Stangl; William

Hartmann; and Guy Taylor. The Stangls also had P/I Exhibits 1-3 and 5-15 admitted in evidence. (Ruling was reserved on Century's and the District's objections to P/I Exhibits 4, 9, and 13. Objection to P/I Exhibit 4--the Harris deposition transcript--on grounds of relevance is sustained. Objection to P/I Exhibit 9--the Burris appraisal and attached survey--on grounds of hearsay is overruled. While the high-water mark on the unsigned survey attached to the signed appraisal is hearsay for which there is no exception under Section 90.803, Florida Statutes, the hearsay is admissible under Section 120.57(1)(c), Florida Statutes, "for the purpose of supplementing or explaining other evidence." Objection to P/I Exhibit 13--the Sager deposition transcript--also is overruled.) In rebuttal, the District called Jesse Graham Watson.

After presentation of evidence, the District ordered a transcript of the final hearing, and the parties requested and were given 30 days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript (in volumes I-VI) was filed on April 25, 2002; and on May 28, 2002, the Stangls filed a joint PRO, and Century and the District filed a joint PRO. However, the Stangls' PRO exceeded the 40-page limit in Florida Administrative Code Rule 28-106.215 by 15 pages; and on May 31, 2002, Century filed a

Motion to Strike Petitioner/Intervenor's Proposed Recommended Order. Also on May 31, 2002, the Stangls filed a Motion for Leave to File a [Proposed] Recommended Order in Excess of the Page Limit and Leave to File this Motion out of Time, along with an Affidavit of Joseph D. Magri. On June 17, 2002, Century's Motion to Strike was granted. But the alternative relief requested by the Stangls was granted, and they were given five days to file a PRO in compliance with Florida Administrative Code Rule Chapter 28-106, including the 40-page limit, by deleting parts of the previously-filed PRO without making any other substantive changes. The Stangls' shortened PRO was filed on June 25, 2002, and has been considered, along with the joint PRO filed by Century and the District.

FINDINGS OF FACT

1. The District issued Management and Storage of Surface Waters (MSSW) Permit No. 400227.000 and Stormwater Exemption No. E01481 to Century in July 1985 for construction of a surface water management system for Angler's Green Mobile Home Park (MHP) located in Mulberry, Polk County, Florida.

A. Angler's Green MHP

2. Angler's Green MHP is an 83-acre residential golf course development of approximately 385 homes located off of State Road 37 near Mulberry. Residents at Angler's Green own their own mobile homes and lease the residential lots pursuant

to annual leases expiring December 31 of each year, with guaranteed renewal conditioned upon owner compliance with the terms and conditions of the lease.

3. Prior to being developed as a mobile home park, the property which is now Angler's Green MHP was part of a phosphate mining operation and was reclaimed under a phosphate mining land reclamation plan approved by the Florida Department of Natural Resources and a reclamation contract dated September 4, 1984. Final contours of the Angler's Green site were made in accordance with the approved reclamation plan.

4. After reclamation contouring, a 23-acre manmade (former phosphate mine pit) lake remained in the northeast quadrant of the Angler's Green site. The resulting lake had a finger arm (bay or cove) extending from the southwest corner of the main body of the lake, oriented in a north-to-south direction and located west of a peninsula of land extending into the northwest part of the lake from the north. The lake also had a short, narrow canal leading into the main body of the lake from the south; the canal connected at a right angle to longer narrow waterway to the south of and extending parallel to the main body of the lake in an east-to-west orientation. There also were two smaller ponds on the property after reclamation contouring.

5. After reclamation, surface water onsite generally flowed westerly and discharged from the property to a railroad ditch along the western boundary of the property. The recorded post-reclamation, pre-development water level for the 23-acre lake, as indicated on the site grading plans, was around 127.1 to 127.8 feet above Mean Sea Level (M.S.L.).

B. The 1985 Permits

6. On July 10, 1985, the District issued MSSW Permit No. 400227.000 and Stormwater Exemption No. E01481 to Century to authorize the construction of a surface water management system for Angler's Green. The MSSW Permit had an expiration date of July 10, 1988.

7. As designed, the permitted Angler's Green surface water management system was to route internal stormwater runoff to swales, detention ponds, and catchment areas before discharging through a sidebank sand filtration system (a berm approximately 300 feet long containing an 8" perforated drain pipe covered by a filter fabric and sand filter material) to receiving waters at the northwest corner of the property.

8. The permitted system was designed with five drainage areas known as Basins A through E. Basin A was in the southeast quadrant of the site; Basin B was to its east in the southeast quadrant of the site; Basin E was to the north of Basin A and included the 23-acre former phosphate mining pit

reclaimed as an artificial lake, which was referred to as "Lake E" or sometimes "Pond E"; Basin C was to the west of Basin E; and Basin D was to the west of Basin C and to the north of Basin B. The two smaller ponds on the property were designated Pond C-1 and Pond B-1 and were located in Basin C and Basin B, respectively. Basin D was in the northwest corner of the site; the discharge structure was in the northwest corner of Basin D.

9. As the system was designed, stormwater from Basin E would appear to sheet flow naturally into Lake E; stormwater from Basin A would appear to flow naturally to the southwest, away from Lake E, but the system routed the water from the southwest corner of Basin A to the western end of the waterway on Lake E through an underground pipe. Stormwater from Basin B was to flow to and be retained in Pond B-1; as the system was designed, surface water was not designed to discharge offsite from Basin B.

10. As designed, Lake E served as a detention pond for water from Basin E and Basin A. It was to have a control structure (CS-1) in the arm of Lake E that would produce a seasonal fluctuation range of two feet, from 127.5' above M.S.L. to 129.5' above M.S.L. Stormwater discharging from CS-1 was to be conveyed by pipe to Pond C-1, where it was to mingle with surface water draining from Basin C. When full,

Pond C-1 would cascade into the golf course area in Basin D and, as necessary, in a portion of Basin B. After catchment and detention in the golf course area, overflow was eventually and ultimately to discharge offsite through the side-bank sand filtration system in the northwest corner of Basin D.

11. In this manner, the Angler's Green surface water management system was designed to accommodate the 24-hour, 25-year storm event, which was estimated to produce approximately 8 inches of water in a 24-hour period. It also was designed to comply with the water quality requirements as specified in Florida Administrative Code Chapter 17-25 (1985 Ann. Supp.) by detaining the first half-inch of runoff before discharging it offsite through the sidebank sand filtration system in the northwest corner of Basin D. (All rule citations are to the Florida Administrative Code.)

C. Omission of the Stangls

12. During the review process, the District noted from drawings submitted as part of Century's MSSW Permit application that the project area did not include approximately the eastern third of the main body of Lake E. District staff brought this to Century's attention in a request for additional information (RAI) and stated: "If possible, you should obtain a perpetual right to operate and maintain the lake from other owners." In response, Century

falsely represented to the District that L. Kirk McKay, a joint venture partner of Century, was the only riparian owner on Lake E and that Century had obtained from him a perpetual right to operate and maintain Lake E as part of the MSSW Permit.

13. In fact, the Stangls owned property on the east side of the lake, including approximately 500 feet of lakefront and contiguous lake bottom. The Stangls and two partners purchased the property from McKay himself in 1979. The Stangls bought out their partners in 1984.

14. The District relied on Century's misrepresentation. The District would not have issued the MSSW Permit to Century if the District had known that Century did not own or control all the land being used for the Permit--specifically, including all of Lake E. See Rule 40D-4.101(1)(d) and (2)(d)6. (1985) (application must include "evidence of ownership or control").

15. In addition, because the District was unaware of the Stangls' ownership of a portion of Lake E, the District did not require Century to give the Stangls direct, actual notice of the Century's permit application. Instead, the District only required that Century publish notice of the District's receipt of the permit application. Notice was published on April 3, 1985, in the Lakeland Ledger, a newspaper of general

circulation qualified under the terms of Section 50.011, Florida Statutes.

16. But the Stangls did not see the published notice, were unaware of the permit application, and did not ask to participate in the permitting process.

17. The Stangl property adjacent to Angler's Green remained undeveloped and unoccupied until 1999, when the Stangls' son, John, established a business on the site. Prior to 1999, the Stangls visited the property a couple times a year. They were fully aware of the construction and operation of Anglers Green as a mobile home park across Lake E. During this time, Century leased 385 lots with guaranteed annual renewal conditioned only upon compliance with lease terms and conditions. Amenities under the leases included clubhouse and golf course privileges. At no time before 2000 did the Stangls take any action to challenge the validity of Century's 1985 MSSW Permit.

D. 1985 Surface Water Management Permitting Requirements

18. In 1985, permitting requirements for surface water management systems were divided between two regulatory schemes. Surface water management permits in Polk County were issued by the District under Chapter 373, Florida Statutes, and Rule Chapters 40D-4 and 40D-40, which addressed water quantity and flooding issues for projects greater than and

less than 40 acres, respectively. Water quality permits or exemptions from water quality permitting requirements were issued by the Department of Environmental Regulation under Chapter 403, Florida Statutes, and Rule Chapter 17-25 to address water quality concerns. It was not until 1988 that permitting requirements were consolidated into the MSSW regulatory program administered by the District under Rule Chapters 40D-4 and 40D-40.

19. In 1985, the District did not have a Basis of Review (BOR) to specify system design requirements for applicants to provide reasonable assurances that the conditions for issuance of surface water permits were satisfied. Standards and criteria for the design and performance of surface water management systems were contained in Rule 40D-4.301(2) (1985) Under subsection (2)(i) of that rule, projects designed to meet the requirements of Chapter 17-25 [Regulation of Stormwater Discharge] were presumed to meet applicable State water quality requirements. There were no requirements for wet detention pond littoral zones.

20. Under Rule 17-25.03(2)(b) (1985 Ann. Supp.), stormwater management systems for projects with drainage areas less than 100 acres that provided retention or detention with filtration of the first half-inch of runoff were exempt from the permitting requirements of Rule Chapter 17-25.

21. In 1985, District Rule 40D-4.301(2)(j) (1985) allowed for natural areas and existing water bodies to be used for stormwater retention or detention purposes when not in conflict with environmental or public use considerations. Areas that could be considered for this purpose included previously-degraded areas or man-made areas (such as borrow pits). Apparently, the District allowed Century to use Lake E as a detention pond under this provision.

E. Deviations from MSSW Permit

22. Angler's Green MHP was constructed in two phases, with the first phase completed in 1985, and the second phase completed in 1987. Construction of at least the part of the surface water management system to serve the first phase took place prior to 1985; it was not clear from the evidence whether construction of the part of the surface water management system to serve the second phase also took place prior to 1985, but it clearly took place prior to construction of the second phase in 1987.

23. Condition No. 4 of Century's MSSW Permit required the submittal of a certification that the system was constructed in accordance with the approved and permitted design. But Century did not provide any such certification. Century also never certified to the District that its new stormwater discharge facility, as constructed, continued to

qualify for exemption from State water quality requirements. Although the surface water management system was constructed and operating, the District never transferred the 1985 Permit to the operation phase.

24. In several respects, the Angler's Green surface water management system was not constructed as designed, approved, and permitted in 1985. The pipe to convey stormwater from the southwest corner of Basin A back to the Lake E waterway apparently never was constructed; instead, stormwater from Basin A was routed to Pond B-1. (There also was a berm constructed in Basin A near the southern boundary of the site; but that berm apparently was a visual berm, and there was no evidence that it affected performance of the surface water management system.) Control structure CS-1 (which was supposed to be located in the arm or bay of Lake E) and the pipe to convey overflow from there into Pond C-1 also never were constructed.

25. By the early 1990's, Angler's Green was experiencing flooding in the golf course area in Basin D and B for extended periods of time. In November 1993, the District responded to a complaint of flooding in that vicinity. Upon investigation, the District determined that malfunction of the surface water management system serving Reservation Lakes (now known as Paradise Lakes), a development to the north and downstream of

the Angler's Green system, was causing water to back up through the wetlands and the sand filtration system in the northwest corner of the Angler's Green project. As a result, water overtopped the discharge structure, equalized at levels above the top of the discharge structure's berm, and flooded the golf course for extended periods of time.

26. At some undetermined point in time, an unpermitted pond was dug in Basin D, apparently in an attempt to alleviate flooding of the golf course. In addition, possibly for the same purpose, a pump was installed in Basin D near Pond C-1, and a pipe was installed to convey stormwater from there into Lake E.

27. The sidebank sand filtration system designed to provide filtration of stormwater prior to discharge from the northwest corner of the site does not appear to exist today. It may be present but difficult to see after 15 years of plant growth; or it may have been removed or disturbed as a result of re-grading in the area. However, the evidence proved that the discharge structure was present in 1993, and there is no reason to believe that it was not installed during construction of the surface water management system--i.e., by 1987 at the latest.

28. In addition, at some undetermined point in time, a pipe was installed at the northeast corner of Lake E to convey

overflow from Lake E eastward to a drainage ditch located alongside SR 37 to the north of the Stangls' property. No witnesses could testify as to when the pipe to the SR 37 ditch was installed or its elevation. (The District and Century state in their PRO that Map No. 2 in P/I Exhibit 14--an aerial map/survey submitted to the District by Century on August 13, 1990, as part of Century's 1990 Water Use Permit No. 209993.000 application--notes the pipe's elevation as 127.95 feet above M.S.L.; but no such finding could be made from review of the exhibit.)

29. Roads in Angler's Green have inverted crowns to convey runoff from roads, driveways, and roofs away from mobile home lots. Some runoff from these impervious surfaces appears to be directed into a swale on the east side of the site; this swale leads to Lake E. In addition, approximately 12 drains have been installed in or near roads in Angler's Green that convey water through pipes directly into Lake E or Pond C-1. Under current Rule Chapters 40D-4 and 40D-40, road drains connecting impervious surfaces to Lake E would have to be shown on application construction drawings, and separate stormwater calculations would have to be provided in an application. But in 1985 this was not required. Century's calculations, together with flow arrows on drawings showing the direction of stormwater flow towards the detention ponds,

were considered sufficient--especially since Century's calculations used a relatively high runoff co-efficient. As a result, the existence of these drains and pipes are not considered to be substantial deviations from the original, approved design.

30. Similarly, approximately 64 roof drains and pipes conveying water from roofs directly into Lake E and Pond C-1 would not be considered substantial deviations from the original, approved design. In addition, these apparently were installed by mobile homeowners over the years, not by Century.

31. From 1985 to 2000, the District did not have occasion to address regulatory concerns at Angler's Green, except for the complaint of flooding in the golf course area that occurred in November 1993 and a more recent complaint about an area of the golf course that was designed to flood under certain conditions.

F. Otto Stangl's Complaint and the District's Response

32. Around November 1999, John Stangl noticed a fish kill in the ditch along SR 37 near the Stangl property. He also was contacted by a governmental compliance officer concerning the fish kill. Upon investigating, John Stangl saw the unpermitted pipe leading from Lake E that was discharging into the SR 37 ditch where the fish kill was observed, as well as the unpermitted pump that was pumping water from the

Angler's Green golf course area through a pipe that discharged into Lake E.

33. In February 2000, Otto Stangl complained to the District about the fish kill and the existence of the unpermitted structures associated with Lake E.

34. Upon receiving Otto Stangl's complaint, District staff conducted site visits of the Angler's Green project. Staff observed the unauthorized pump and pipe conveying water from Pond C-1 to Lake E and the unauthorized pipe conveying water from Lake E to the SR 37 ditch. Staff also observed that the Lake E control structure was missing, the pipe to convey stormwater from Basin A to Lake E was missing, and Basin D had been re-graded.

35. In February 2000, the District also became aware of the fact that Century did not have full ownership or control of Lake E.

36. On March 15, 2000, the District issued Century Notice of Non-Compliance and directed Century to either construct the system as designed and permitted or to seek a permit modification.

37. On May 8, 2000, Century submitted a letter application to modify the original MSSW Permit No. 400227.000 by constructing the originally permitted Lake E control structure and pipe conveying water from Lake E to Pond C-1,

but in a different location in Lake E than originally permitted due to the existence of homes at the location where these structures were originally planned. The application was subsequently amended to be a formal modification upon Century's request for further modification to allow Basin A stormwater to flow to Pond B-1 and to expand Pond B-1 and add a control structure and an effluent filtration system.

38. Despite having actual knowledge since at least February 2000 that the Angler's Green surface water management system was built partially on their property, the Stangls did not ask for a hearing on the 1985 Permit. Instead, they awaited the District's consideration of Century's modification application and sought to challenge the District's notice of intent to grant the modification permit issued on October 29, 2001.

G. The District's Regulatory Compliance Practices

39. In the 1980's, the District appeared to pay little or no attention to construction of permitted projects or submission of required post-construction certifications. Many projects permitted by the District in the 1980's, such as Angler's Green, were built and operating although no certifications had been submitted; as a result, the permits issued for these projects never were transferred to the operation phase.

40. Eventually, some projects not built in compliance with issued permits came to the attention of the District, typically through third-party complaints about drainage problems and flooding. By this time, there was a large backlog of issued construction permits for which no required post-construction certifications had been submitted. The backlog of these older projects was so large that the District decided not to initiate an aggressive, systematic, and comprehensive review of all permits for which no required certifications had been submitted. Instead, projects were checked on an ad hoc basis as complaints regarding the functioning of their surface water management systems were registered.

41. When it came to the attention of the District in this manner that a project had been built under an MSSW permit but that no required certifications had been submitted, the District first attempted to secure the required certifications in the form of certified as-built construction drawings and a Statement of Completion, as required by BOR 2.7. In so doing, it was common practice for the District to accept certifications beyond the expiration date on a permit. If projects were substantially completed, the District would not deem the permit as expired simply because the required certifications had not been submitted before the expiration

date; and such projects did not lose their status as being permitted.

42. It should be noted that, according to the testimony of the District's expert, William Hartmann, this agency practice was not based on an interpretation of Rule 40D-4.321(1)(b) (1985) (on duration of construction permits). Rather, the agency practice was to ignore the expiration of the construction permit under those circumstances. In addition, it does not appear from the evidence that the District ever before has faced the situation presented in this case--where a person on whose property part of a surface water management system was built without the person's consent opposes modification and asserts the construction permit has expired.

43. In cases where the agency's practice was applied, if the required certified as-built construction drawings and Statement of Completion could not be provided because the project was not built in accordance with the MSSW permit, the District would require the permittee to either bring the system into compliance with the approved permit designs or obtain a modification of the construction permit. Letter modifications would be accepted when the requested modification would not substantially alter the permit authorization, increase the authorized offsite discharge,

impact the environmental features of the project, decrease the required retention/detention, decrease the required flood control elevations for roads or buildings, or decrease pollution removal efficiency. See Rule 40D-4.331(2)(b) (1985). (The current version of the rule adds renewal or extension of the existing permit duration.) Alterations meeting the threshold requirements for a letter modification would be presumed to meet the conditions for issuance for a permit. Otherwise, formal permit modifications would be required.

44. When application is made for a permit modification, the District's practice is to evaluate those aspects of the surface water management system being modified. Review generally would not extend to the entire system. Permittees seeking to modify their surface water management systems generally are not required by the District to bring the unmodified portions of the system into compliance with current design criteria.

H. Proposed ERP Permit Modification

45. ERP Application No. 44000227.002 seeks authorization to modify portions of the Angler's Green surface water management system. The specific alterations for which approval is sought are: permanent removal of the existing, unpermitted 18-inch pipe between Lake E and SR 37 roadside

ditch; permanent removal of the pump and associated piping conveying water from Pond C-1 to Lake E; installation of the control structure (CS-1), together with installation of pipe to convey water from the control structure to Pond C-1, as designed and approved in the 1985 Permit but different location in the northwest corner of the main body of Lake E; re-grading of the northwesterly portion of the golf course to more closely conform to the original permitted plan and help keep Basin B separate from Basin D; reconstruction of the side-bank sand filter system in the northwest corner of the property, as designed and approved in the 1985 Permit but with a slightly higher invert elevation (122.04 feet above M.S.L.) to prevent water from backing up into Angler's Green from Paradise Lakes again, and with a concrete flume and spreader swale between Pond C-1 and the berm of the side-bank sand filter system; enlargement of Pond B-1; installation of a control structure on Pond B-1; and installation of 100 feet of 6-inch side-bank sand filter discharging to the southwest corner of the property from Pond B-1.

46. By removing the unpermitted pipe to the roadside ditch along SR 37 and by constructing control structure CS-1, with the same control elevations as in the 1985 Permit (albeit at a different location in Lake E), and connecting CS-1 by pipe to Pond C-1 as envisioned in the 1985 Permit, the

function of Lake E should approximate its function under the design approved in 1985.

47. Modifying the permitted design to authorize Basin A to flow to Pond B-1 instead of Lake E results in less water flowing to Lake E; these changes will not increase water quantity or quality impacts to Lake E, as compared to the 1985 Permit.

48. As compared to reclamation conditions prior to implementation of the 1985 Permit, water quantity and quality impacts to Lake E would be expected both under the system as designed and permitted in 1985 and as proposed to be modified, by virtue of the similar use of Lake E as a detention pond under either system.

49. Pond B-1 is being enlarged to better accommodate the flow from Basin A. The control structure being added at Pond B-1 will control flow into the swale to the west so as to address water quantity impacts in that area. Stormwater calculations for the revised Pond B-1 demonstrated that the post-development discharge rate will not exceed the pre-development discharge rate, so that there are no concerns for adverse water quantity impacts to receiving waters or adjacent lands or flooding impacts to on-site or off-site property. The historical flows to the west are still maintained.

50. The discharge structure being added at Pond B-1 will account for treatment of the Basin A flow. Based on calculations for revised Pond B-1, the enlarged pond will retain and percolate half an inch of stormwater runoff from the contributing area in 36 hours (which is consistent with current BOR design requirements). The proposed Pond B-1/Basin B modifications, including the routing of Basin A stormwater to Pond B-1, will not adversely affect the quality of receiving waters in that vicinity such that state water quality standards would be violated.

51. Angler's Green is located in the Southern Water Use Caution Area of Polk County. No surface or groundwater levels or surface water flows have been established for this area under Section 373.042, Florida Statutes.

52. The proposed modifications do not involve any works of the District.

53. The proposed modifications are based on generally accepted engineering and scientific principles and employ treatment methods of effluent filtration which involve commonly accepted designs that can be effectively performed and function as proposed.

54. There are no concerns about Century's financial, legal, or administrative capability to undertake the proposed modifications as specified in the permit, if issued.

55. There are no applicable special basin or geographic area criteria established for this area.

I. Environmental Concerns

56. As with its review of the proposed permit modification for water quantity impacts, the District's review of environmental concerns was limited to review of impacts from the proposed modifications to the original permitted design; unmodified portions of the original permit were not reviewed for compliance with current requirements.

57. An approximately 20 square-foot permanent impact is proposed to Lake E due to the placement of the control structure (SW-1) in the water. A 379 square-foot temporary impact is proposed to Lake E due to the placement of a cofferdam to facilitate construction of the control structure. Temporary impacts to Lake E resulting from the construction of the control structure would be addressed through the use of sediment and erosion controls to prevent possible sedimentation and turbidity that may arise during the construction activity. The placement of a control structure in Lake E would create very minor permanent impacts resulting from the loss of the footprint of the control structure. These impacts would be insignificant. Due to the very minor nature of these proposed impacts, no mitigation would be required, and no loss of wetlands would be required to be

recorded on the Wetlands/Surface Water Table. Construction of SW-1 would 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. No secondary impacts would be expected from construction of SW-1.

58. No unacceptable cumulative impacts upon wetlands and other surface waters would be expected to occur as a result of construction of SW-1.

59. The project area includes .71 acre of herbaceous/forested wetlands (WL-1) in the northwest corner. The potential for secondary impacts is addressed by an existing fence surrounding WL-1, which eliminates concerns for secondary impacts to this wetland area. No adverse impacts would be anticipated to occur to these wetlands, and no adverse secondary impacts to the water resources would be expected to occur as a result of the proposed modifications themselves.

60. The proposed modifications would not cause unacceptable cumulative impacts to wetlands and other surface waters.

61. Class II or Class III waters would not be affected by the proposed modification project. Therefore, Rule 40D-4.302(1)(c) is not applicable.

62. No seawalls, lagoons or estuaries are involved in this project. Therefore, Rule 40D-4.302(d) is not applicable.

63. The proposed modifications would not be contrary to the public interest. Relocation of a control structure and enhancement of the Basin B portion of the system would create no significant change in impacts. The proposed modifications constitute a slight improvement over water quality from the original permitted design.

64. No threatened or endangered species were identified for Angler's Green. The proposed relocation and construction of the Lake E control structure, preservation of onsite wetlands in the northwest corner, and re-design of Pond B-1 present no environmental concerns. Consequently, the proposed modifications do not create any potential for adverse effects regarding the conservation of fish and wildlife, including endangered or threatened species or their habitats.

65. The proposed modifications do not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.

66. The project area does not involve navigable waters and does not affect the flow of water or cause harmful erosion

or shoaling. Hence, Rule 40D-4.302(1)(a)(3) does not apply to this permit modification application.

67. There are no significant historical and archaeological resources involved in this Project. Therefore, Rule 40D-4.302(1)(a)(6) is not applicable to this permit modification application.

68. The proposed modifications would not be contrary to the public interest; they would not adversely affect the public health, safety or welfare or the property of others. No adverse impacts are anticipated to occur as a result of the proposed modifications. The proposed modifications maintain the historic water elevation for Lake E and maintain historic flows for the project area. The modified system should also provide some improvement in water quality.

CONCLUSIONS OF LAW

J. Status of Permit to be Modified

69. In order for an application for permit modification to be granted, there has to be a valid permit to be modified. The Stangls contend that there is no permit to be modified for two reasons: (1) the 1985 permit was void ab initio because the Stangls owned part of Lake E used by Century for its surface water management system, the Stangls did not consent to this use of their property, and the Stangls did not get direct notice of the permit proceedings that resulted in the

1985 MSSW Permit; and (2), even if not void ab initio, the 1985 Permit expired on July 10, 1988.

70. As to their first contention, Rule 40D-4.101(1)(d) and (2)(d)6. (1985) required Century's application to include "a boundary survey and evidence of ownership or control." (Current Rule 40D-1.6105(1) provides that all permits "are contingent upon the continued ownership, lease, or other legal control of property rights in underlying, overlying, or adjacent lands") It was clear from the evidence that Century never had ownership or control over the Stangls' property. The District issued the 1985 MSSW Permit in reliance on Century's misrepresentation that Kirk McKay was the only riparian owner on Lake E. It also was reasonably clear that, had the District known the true facts, it would not have issued Century the 1985 MSSW Permit without consent of or at least direct notice to the Stangls. (The Stangls cite constitutional due process law that would require either consent or at least direct notice before Century was allowed to use the Stangls property as part of a detention pond for Century's surface water management system.)

71. While the 1985 Permit was voidable by the Stangls for failure to have their consent, it was not necessarily void ab initio. The evidence was clear that the District required Century to give constructive notice of its application in 1985

by publication in the Lakeland Ledger, a general circulation newspaper qualified under Section 50.011, Florida Statutes. The published notice gave interested parties 14 days to file a request to be advised as to proposed agency action and provided an opportunity to request an administrative hearing regarding the application. The Stangls apparently did not see the notice; in any event, they did not file a request, they received no further notice of proposed agency action, and they did not request an administrative hearing regarding the application. The Permit was issued, and Century proceeded with construction of the MSSW, ceasing construction no later than 1987. After construction ceased, Century operated Anglers Green, including mobile home park and golf course. Prior to 1999, the Stangls visited their property on Lake E a couple times a year, and they were fully aware of the construction and operation of Angler's Green operating across Pond E. In time, 385 lots were leased and occupied by mobile homes in Angler's Green. In February 2000 the Stangls learned specifically and without question that the Angler's Green surface water management system used their property as part of Lake E, which was used as a detention pond. Yet, the Stangls still did nothing to challenge the 1985 Permit. Finally, after the District gave notice of intent on October 29, 2001,

to grant Century a permit modification, the Stangls finally challenged the validity of Century's 1985 MSSW Permit.

K. Expiration of 1985 MSSW Permit

72. Meanwhile, the 1985 Permit expired. Under Rule 40D-4.321(1)(b) (1985), the duration of Century's 1985 MSSW Permit was:

three years from the date of issuance for a construction permit unless the construction of the permitted surface water management system discharge structure has been completed. If the permitted discharge structure has been completed, then the construction permit is valid for the duration of the project.

The evidence was that, under the surface water management system designed and approved in 1985, the sidebank sand filtration system in the northwest corner of the site was the system's discharge structure, as contemplated by the 1985 version of Rule 40D-4.321(1). The evidence also was that construction of the discharge structure was completed by 1987; but so was construction of the rest of the system (albeit not in conformance with the approved design).

73. Neither Century nor the District attempted to make the argument that construction of the surface water management system continued beyond 1987 because parts of the design were not constructed, or were not constructed as designed.

(Besides being severely strained, the argument also would have to confront the fact that the linchpin of the argument--the

discharge structure--has been removed.) Instead, they argue: (1) that "duration of the project" means the Angler's Green MHP project, not construction of the surface water management system; and (2), regardless of the rule, the District's practice is to allow modification of old construction permits for systems built but not transferred into operation phase notwithstanding the construction permit's expiration date.

74. The first argument is almost as strained as the argument Century and the District declined to make. It is based on Rule 40D-4.321(1)(b)'s use of the word "project" instead of the term "project construction," as used in 40D-40.321(1)(b) (1985 Ann. Supp.) (for projects less than 40 acres in size), together with one of the rules of statutory construction. See Dept. of Prof. Reg., Bd. of Medicine v. Durrani, 455 So. 2d 515 (Fla. 1st DCA 1984). But Century and the District can point to no logical reason why the expiration date for projects greater than 40 acres should be different from projects less than 40 acres. Indeed, the rules governing expiration of construction permits have since been amended to make it clear that the rules are the same regardless of the size of the project. As reflected in the testimony of the District's own expert, William Hartmann, there was never any intention for "project," as used in Rule 40D-4.321(1)(b), to mean the development project using the surface water

management system being permitted; rather, it means the permitted surface water management system itself.

75. The other argument made by Century and the District fails for two reasons. First, it cannot be said that the District has a rule of practice governing the facts of this case because there was no evidence that the District ever has confronted the situation where a person on whose property part of a surface water management system was built without the person's consent opposes modification and asserts that the construction permit has expired. Second, Rule 40D-4.321(2) (1985) provides: "[C]onstruction permits expire automatically unless the permittee requests an extension before the expiration date." The purported agency practice would be directly contrary to the District's promulgated rules. See Section 120.68(6)(e)2. See also Cleveland Clinic Florida Hospital v. Agency for Health Care Admin., 679 So. 2d 1237 (Fla. 1st DCA 1996).

76. For these reasons, Century's construction permit expired on July 10, 1988. Since the construction permit is long expired, it cannot be modified.

RECOMMENDATION

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

RECOMMENDED that the Southwest Florida Water Management District enter a final order denying Century's permit modification application designated ERP No. 44000227.002.

DONE AND ENTERED this 8th day of July, 2002, in Tallahassee, Leon County, Florida.

J. LAWRENCE JOHNSTON
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Filed with the Clerk of the
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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.