

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA ASH, <u>et al.</u>,	)	Case Nos. 04-2399
	)	04-2400
Petitioners,	)	04-2401
	)	04-2403
vs.	)	04-2404
	)	04-2405
CITY OF DELTONA AND ST. JOHNS	)	04-2406
RIVER WATER MANAGEMENT	)	04-2408
DISTRICT,	)	04-2409
	)	04-2411
Respondents.	)	04-2412
_____	)	04-3048

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 30 through March 31, 2005, in Deltona, Florida.

APPEARANCES

For Petitioners Barbara Ash, Francell Frei, Bernard J. and Virginia T. Patterson, and Ted and Carol Sullivan:

Barbara Ash, Qualified Representative
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Deltona, Florida 32738

For Petitioners Howard Ehmer and Nina Ehmer:

Howard and Nina Ehmer, pro se
1081 Anza Court
Deltona, Florida 32738

For Petitioners Steven L. Spratt, James E. Peake, and
Alicia M. Peake:

Steven L. Spratt, Qualified Representative
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Deltona, Florida 32738

For Petitioners Steven E. Larimer, Kathleen Larimer, and
Helen Rose Farrow:

J. Christy Wilson, Esquire,
(No Appearance)
Wilson, Garber & Small, P.A.
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For Petitioner Diana E. Bauer:

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For Petitioner Gloria Benoit:

Gloria Benoit, (Appeared First Day Only)
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For Petitioner Gary Jensen:

Gary Jensen, (No Appearance)
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For Petitioner Phillip Lott:

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Deltona, Florida 32738-7919

For Respondent City of Deltona:

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City of Deltona
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Deltona, Florida 32725

For Respondent St. Johns River Water Management District:

Kealey A. West, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

STATEMENT OF THE ISSUE

The issue is whether the applicant for an Environmental Resource Permit ("ERP"), the City of Deltona ("City" or "Applicant"), has provided reasonable assurance that the system proposed complies with the water quantity, environmental, and water quality criteria of the St. Johns River Water Management District's ("District") ERP regulations set forth in Florida Administrative Code Chapter 40C-4, and the Applicant's Handbook: Management and Storage of Surface Waters (2005).

PRELIMINARY STATEMENT

Petitioners received notice of the District's intent to issue the ERP to the City and timely filed Petitions for a Formal Administrative Hearing challenging the District's intended issuance of the ERP. The matter was referred to the Division to conduct a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. At the hearing, the City presented the testimony of William Musser, an expert in stormwater management, hydrology, and ecology; and

Roderick Cashe, an expert in stormwater management. Exhibit Nos. 1, 2, 4, 5, 7-9, 13, and 14A-F were offered by the City and were admitted into evidence.

Petitioner Ash testified herself and on behalf of Petitioners Francell Frei, Bernard J. and Virginia T. Patterson, and Ted and Carol Sullivan. Exhibit Nos. 1-6 and 12-24 were offered by Ms. Ash were admitted into evidence. Petitioner Diana E. Bauer testified herself, and offered no exhibits into evidence. Petitioner Howard Ehmer testified himself, and offered no exhibits into evidence. Petitioner Phillip Lott testified himself, and had Exhibit Nos. 1-19 admitted into evidence. Petitioner Stephen Spratt testified himself and on behalf of James E. and Alicia M. Peake, and offered no exhibits into evidence.

The District presented the testimony of Lee Kissick, an expert in wetland and wildlife ecology, mitigation planning, wetland delineation, and environmental resource planning and regulation; and Marjorie Cook, an expert in water resource engineering, surface water and stormwater management systems, and environmental resource permitting and regulation. Exhibit Nos. 5, 17, 24, 32, 33, and 38 were offered by the District and were admitted into evidence.

The Amended Pre-Hearing Stipulation, filed with the Division on March 29, 2005, was admitted into evidence as Joint Exhibit No. 1.

A three-volume Transcript was filed on April 19, 2005. The parties had been permitted to file their proposed recommended orders within 10 days of the date on which the transcript was filed. Petitioner Phillip Lott filed his Proposed Recommended Order on April 12, 2005, Petitioner Howard Ehmer filed his Proposed Recommended Order on April 13, 2005, and Petitioners' Barbara Ash, Francell Frie, and Gloria Benoit filed their Proposed Recommended Orders on April 15, 2005. Respondent St. Johns River Water Management District filed its Proposed Recommended Order on April 29, 2005, and Respondent City of Deltona filed its approval and adoption of St. Johns River Water Management District's Proposed Recommended Order on May 2, 2005.

References are to Florida Statutes (2004), unless otherwise noted.

FINDINGS OF FACT

1. The District is a special taxing district created by Chapter 373, Florida Statutes, charged with the duty to prevent harm to the water resources of the District, and to administer and enforce Chapter 373, Florida Statutes, and the rules promulgated thereunder.

2. The City of Deltona is a municipal government established under the provisions of Chapter 165, Florida Statutes.

3. The Lake Theresa Basin is comprised primarily of a system of interconnected lakes extending from Lake Macy in the City of Lake Helen to the Butler Chain of Lakes (Lake Butler and Lake Doyle). The Lake Theresa Basin is land-locked and does not have a natural outfall to Lake Monroe and the St. Johns River.

4. In 2003, after an extended period of above-normal rainfall in the Deltona area, the lakes within the land-locked Lake Theresa Basin staged to extremely high elevations that resulted in standing water in residential yards, and rendered some septic systems inoperable. Lake levels within the Lake Theresa Basin continued to rise and were in danger of rising above the finished floor elevations of some residences within the basin.

5. On March 25, 2003, the District issued an Emergency Order (F.O.R. No. 2003-38) authorizing the construction and short-term operation of the Lake Doyle and Lake Bethel Emergency Overflow Interconnection. Since wetland and surface water impacts would occur, the Emergency Order required the City of Deltona to obtain an ERP for the system.

6. The project area is 4.1 acres, and the system consists of a variable water structure on the west shore of Lake Doyle

connected to a series of pipes, swales, water control structures, and wetland systems which outfall to a finger canal of Lake Bethel, with ultimate discharge to Lake Monroe and the St. Johns River.

7. The first segment of the system extends downstream from the weir structure on the west shore of Lake Doyle via a pipe entrenched in the upland berm of the Sheryl Drive right-of-way. The pipe passes under Doyle Road and through xeric pine-oak uplands to the northeast shore of a large (approximately 15 acres) deepwater marsh. Water flows south through the deepwater marsh where it outfalls through four pipes at Ledford Drive.

8. Two of the four pipes are overflow structures, controlled by canal gates. The pipes at Ledford Drive discharge into a ditch and into a large (greater than 20 acres) shallow bay swamp.

9. The south end of the bay swamp is defined (and somewhat impounded) by a 19th Century railroad grade. Water flows through the bay swamp where it outfalls through five pipes at the railroad grade.

10. Three of the five pipes are overflow structures, controlled by channel boards. The pipes at the railroad grade discharge to a 1500-foot long finger canal that was dug some time during the period 1940-1972 from the north central shore of Lake Bethel.

11. The overflow interconnection system has three locations whereby the system can be shut down: 1) Lake Doyle--a control weir, controlled by three sluice gates; 2) Ledford Drive--two thirty-inch reinforced concrete pipes, controlled by canal gates; and 3) railroad grade--three thirty-inch reinforced concrete pipes, controlled by channel boards (collectively referred to as "Overflow Structures").

12. The Overflow Structures are designed to carry the discharge of water from Lake Doyle to Lake Bethel.

13. With the Overflow Structures closed the system returns to pre-construction characteristics, meaning there will be no increase or decrease in the quantity or quality of water throughout the path of the system as a result of the project.

14. An unequivocal condition of the permit is that the system would operate with all of the Overflow Structures closed.

15. As an added assurance, the City proposes to place a brick and mortar plug in the Lake Doyle weir structure outfall pipe to prevent any discharge from the weir.

16. The City has submitted to the District preliminary plans for a future phase in which the system would be modified for the purpose of alleviating high water levels within the Lake Theresa Basin when the water level in Lake Doyle rises above an elevation of 24.5 feet.

17. The District shall require a separate permit application to be submitted for such future plans.

18. Petitioner, Barbara Ash, has lived on Lake Theresa for 19 years. Ms. Ash lives upstream from the area of the weir that will be plugged in accordance with the ERP. She does not trust either the City of Deltona to comply with or the District to enforce the conditions of the ERP applied for by the City.

19. Petitioner, Barbara Ash, also served as the qualified representative for Petitioners, Francell Frei, Bernard J. and Virginia Patterson, and Ted and Carol Sullivan. Ms. Ash represented that Ms. Frei has lived on Lake Theresa for 12 years, and both the Pattersons and the Sullivans live on Lake Louise, which is within the area of concern in this proceeding.

20. Petitioner, Diana Bauer, has lived on Lake Theresa since February 2004. She fears that the lake will become too dry if the system is allowed to flow. She also believes the wildlife will be adversely affected if the water levels are too low since many species need a swampy or wet environment to thrive. She fears her property value will decrease as a result of the approval of the ERP. She also does not trust either the City to comply with or the District to enforce the conditions of the ERP.

21. Petitioner, Howard Ehmer, lives two to three hundred yards down Lake Theresa from Ms. Bauer. He is concerned about

the lake bed being too dry and attracting people on all terrain vehicles who enjoy driving around the lake bottom. He is concerned about his property value decreasing if the lake bed is dry. Further, when the lake level is too low, people cannot enjoy water skiing, boating, and fishing on Lake Theresa.

22. Petitioner, Phillip Lott, a Florida native, has also owned and lived on property abutting Lake Theresa since 1995. Mr. Lott has a Ph.D. in plant ecology, and M.P.A. in coastal zone studies, an M.B.A. in international business, and a B.S. in environmental resource management and planning. Mr. Lott has been well acquainted with the water levels on Lake Theresa for many years. Based upon his personal observations of the lake systems in the Deltona area over the years, Mr. Lott has seen levels fluctuate greatly based upon periods of heavy and light rainfall.

23. Mr. Lott is concerned that the District will permit the City to open the weir to let water flow through the system and cause flooding in some areas and low water levels in other areas. He fears that the District will allow the water to flow and upset the environmental balance, but he admits that this ERP application is for a closed system that will not allow the water to flow as he fears. Mr. Lott similarly does not trust the City to comply with and the District to enforce the conditions of the ERP.

24. Petitioners, James E. and Alicia M. Peake, who were represented by Steven L. Spratt at hearing as their qualified representative, live on Lake Louise, which is interconnected with the Lake Theresa basin. The Peakes are concerned that if the level of Lake Louise drops below 21 feet, nine inches, they will not be able to use the boat launch ramps on the lake.

25. Petitioner, Steven L. Spratt, also lives on Lake Louise, and is concerned about the water levels becoming so low that he cannot use the boat launch on the lake. He has lived on the lake since 2000, and remembers when the water level was extremely low. He fears that approval of the ERP in this case will result in low levels of water once again.

26. Petitioner, Gloria Benoit, has live on Lake Theresa for two years. She also enjoys watching recreational activities on the lake, and feels that approval of the ERP will devalue her lakefront property. Ms. Benoit appeared at the first day of the hearing, but offered no testimony on her behalf.

27. J. Christy Wilson, Esquire, appeared prior to the final hearing as counsel of record for Petitioners, Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow. Neither Ms. Wilson nor any of the three Petitioners she represented appeared at any time during the hearing, filed any pleadings

seeking to excuse themselves from appearing at the final hearing, or offered any evidence, testimony, pre- or post-hearing submittals.

28. Petitioner, Gary Jensen, did not appear at hearing, did not file any pleadings or papers seeking to be excused from appearing at the final hearing, and did not offer any evidence, testimony, pre- or post-hearing submittals.

29. Both the City and the District recognize that areas downstream from the project site, such as Stone Island and Sanford, have experienced flooding in the past in time of high amounts of rainfall.

30. The system proposed by the City for this ERP will operate with the overflow structures closed and a brick and mortar plug in the outfall pipe to prevent water flow from Lake Doyle to Lake Bethel. So long as the overflow structures are closed, the system will mimic pre-construction flow patterns, with no increase in volume flowing downstream.

31. The District has considered the environment in its proposed approval of the ERP. The area abutting the project is little urbanized and provides good aquatic and emergent marsh habitat. With the exception of the western shore area of the deepwater marsh ("west marsh area"), the bay swamp and remaining deepwater marsh area have good ecological value.

32. In the 1940's, the west marsh area was incorporated into the drainage system of a poultry farm that occupied the site. This area apparently suffered increased nutrient influxes and sedimentation that contributed to a proliferation of floating mats of aquatic plants and organic debris.

33. These tussocks reduced the deepwater marsh's open water and diminished the historical marsh habitat. Water under the tussocks is typically anoxic owing to total shading by tussocks and reduced water circulation. Thick, soft, anaerobic muck has accumulated under the matted vegetation. Exotic shrubs (primrose willow Ludwigia peruvania) and other plants (cattails Typha spp.) dominate the tussocks.

34. The construction of the project, from the 2003 Emergency Order, resulted in adverse impacts to 1.3 acres of wetlands having moderately high- to high ecological value and 0.2 acres of other surface waters.

35. The 0.2 acre impact to other surface waters was to the lake bottom and the shoreline of Lake Doyle where the weir structure was installed.

36. The 0.3 acres of wetland impacts occurred at the upper end of the deepwater marsh where the pipe was installed.

37. The largest wetland impact (1.0 acre) was to the bay swamp. The bay swamp is a shallow body dominated by low hummocks and pools connected inefficiently by shallow braided

channels and one acre is filled with a 1-2 foot layer of sediment following swamp channelization. Disturbance plants (e.g., primrose willow, Ludwigia peruvania, and elderberry Sambucus Canadensis) now colonize the sediment plume.

38. Pursuant to the District's elimination and reduction criteria, the applicant must implement practicable design modifications, which would reduce or eliminate adverse impacts to wetlands and other surface waters. A proposed modification, which is not technically capable of being done, is not economically viable, or which adversely affects public safety through endangerment of lives or property is not considered "practicable."

39. The City reduced and/or eliminated the impacts to the lake bottom and shoreline of Lake Doyle and deepwater marsh, to the extent practicable. The impacts were the minimum necessary to install the weir structure and pipe for the system; the weir structure and pipe were carefully installed on the edges of the wetland and surface water systems, resulting in a minimum amount of grading and disturbance.

40. To compensate for the loss of 1.3 acres of wetlands and 0.2 acres of other surface waters, the City proposes to preserve a total of 27.5 acres of wetlands, bay swamp, marsh, and contiguous uplands. Included in this 27.5 acres are 6.4 acres of the west marsh, which are to be restored. The parties

stipulated that the mitigation plan would adequately compensate for losses of ecological function (e.g. wildlife habitat and biodiversity, etc.) resulting from the project.

41. Water quality is a concern for the District. Lake Monroe is included on the Florida Department of Environmental Protection's verified list of impaired water bodies for nitrogen, phosphorous, and dissolved oxygen. Water quality data for Lake Monroe indicate the lake has experienced high levels of nitrogen and phosphorous and low levels of dissolved oxygen.

42. Prior to construction of the project, there was no natural outfall from the Lake Theresa Basin to Lake Monroe and therefore no contribution from this basin to nitrogen and phosphorous loadings to Lake Monroe.

43. Lake Colby, Three Island Lakes (a/k/a Lake Sixma), and the Savannah are surface waters within the Lake Theresa Basin for which minimum levels have been adopted pursuant to Florida Administrative Code Chapter 40C-8.

44. The system will operate with the overflow structures closed and a brick and mortar plug in the outfall pipe to prevent water flow from Lake Doyle to Lake Bethel, resulting in no outfall from the Theresa Basin to Lake Monroe.

45. Minimum flows established for surface waters within the Lake Theresa Basin will not be adversely impacted.

46. Under the first part of the secondary impact test, the City must provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonable expected use of the project will not adversely affect the functions of adjacent wetlands or surface waters.

47. The system is designed as a low intensity project. As proposed, little activity and maintenance are expected in the project site area. The reasonably expected use of the system will not cause adverse impacts to the functions of the wetlands and other surface waters.

48. None of the wetland areas adjacent to uplands are used by listed species for nesting or denning.

49. In its pre-construction state, the project area did not cause or contribute to state water quality violations.

50. Under the second part of the secondary impact test, the City must provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of the system will not adversely affect the ecological value of the uplands to aquatic or wetland dependent species for enabling existing nesting or denning by these species.

51. There are no listed threatened or endangered species within the project site area.

52. Under the third part of the secondary impact test, and as part of the public interest test, the District must consider

any other relevant activities that are closely linked and causally related to any proposed dredging or filling which will cause impacts to significant historical and archaeological resources. When making this determination, the District is required, by rule, to consult with the Division of Historical Resources. The Division of Historical Resources indicated that no historical or archaeological resources are likely present on the site.

53. No impacts to significant historical and archaeological resources are expected.

54. Under the fourth part of the secondary impact test, the City must demonstrate that certain additional activities and future phases of a project will not result in adverse impacts to the functions of wetlands or water quality violations.

55. The City has submitted to the District preliminary plans for a future phase in which the system would be modified for the purpose of alleviating high water levels within the Lake Theresa Basin when the level in Lake Doyle rises above an elevation of 24.5 feet.

56. Based upon the plans and calculations submitted, the proposed future phase, without additional measures, could result in minor increases in the loadings of nitrogen and phosphorous to Lake Monroe.

57. Lake Monroe is included on the Florida Department of Environmental Protection's verified list of impaired water bodies due to water quality data indicating the lake has experienced high levels of nitrogen and phosphorous, and low levels of dissolved oxygen.

58. Under this potential future phase, there would be an outfall from the Lake Theresa Basin to Lake Monroe. To address the impact on water quality of this potential future phase, the City has submitted a loading reduction plan for nitrogen, phosphorous, and dissolved oxygen. The plan includes compensating treatment to fully offset the potential increased nutrient loadings to Lake Monroe. Specifically, the loading reduction plan includes:

Construction and operation of compensating treatment systems to fully offset anticipated increased nutrient loadings to Lake Monroe. Weekly water quality monitoring of the discharge from Lake Doyle for total phosphorous and total nitrogen. A requirement that the overflow structure be closed if the total phosphorous level reaches 0.18 mg/l or higher or the total nitrogen level reaches 1.2 mg/l or higher in any given week and will remain closed until levels fall below those limits.

59. The implementation of these water quality mitigation measures will result in a net improvement of the water quality in Lake Monroe for nitrogen, phosphorous, or dissolved oxygen.

60. The future phase was conceptually evaluated by the District for impacts to wetland functions. The future phase as proposed could result in adverse impacts to wetland functions. Operation of the system with the overflow structures open could impact the bay swamp and deepwater marsh. The City has demonstrated that any adverse impacts could be offset through mitigation.

61. Based upon the information provided by the City and general engineering principles, the system is capable of functioning as proposed.

62. The City of Deltona will be responsible for the operation, maintenance, and repair of the surface waster management system. A local government is an acceptable operation and maintenance entity under District rules.

63. The public interest test has seven criteria. The public interest test requires the District to evaluate only those parts of the project actually located in, on, or over surface waters or wetlands, to determine whether a factor is positive, neutral, or negative, and then to balance these factors against each other. The seven factors are as follows:

- 1) the public health, safety, or welfare of others;
- 2) conservation of fish and wildlife and their habitats;
- 3) fishing, recreational value, and marine productivity;
- 4) temporary or permanent nature; 5) navigation, water flow,

erosion, and shoaling; 6) the current condition and relative value of functions; and 7) historical and archaeological resources.

64. There are no identified environmental hazards or improvements to public health and safety. The District does not consider impacts to property values.

65. To offset any adverse impacts to fish and wildlife and their habitats, the City has proposed mitigation.

66. The areas of the project in, on, or over wetlands do not provide recreational opportunities.

67. Construction and operation of the project located in, on, or over wetlands will be permanent in nature.

68. Construction and operation of the project located in, on, or over wetlands will not cause shoaling, and does not provide navigational opportunities.

69. The mitigation will offset the relative value of functions performed by areas affected by the proposed project.

70. No historical or archaeological resources are likely on the site of the project.

71. The mitigation of the project is located within the same drainage basin as the project and offsets the adverse impacts. The project is not expected to cause unacceptable cumulative impacts.

CONCLUSIONS OF LAW

72. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

73. Petitioners, Gary Jensen, Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow, neither appeared at hearing, personally or through counsel or qualified representative. Moreover, since none of these Petitioners filed any pleadings seeking to excuse themselves from appearing at hearing or offered any pre- or post-hearing submittals, they have apparently abandoned their claims. Accordingly, Petitioners Jensen, the Larimers, and Farrow are dismissed from these proceedings.

74. The City's application for an environmental resource permit is governed by Florida Administrative Code Chapter 40C-4, Regulation of Surface Water Management Systems, which implements, in part, Part IV of Chapter 373, Florida Statutes. Pursuant to this statute and rules, the District has regulatory jurisdiction over the permit applicant and project in this proceeding.

75. The applicant must satisfy the conditions for issuance set forth in Florida Administrative Code Rules 40C-4.301 and 40C-4.302. The applicant must provide reasonable assurances that the conditions for issuance have been satisfied.

76. An administrative hearing conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes, is a de novo proceeding designed to formulate final agency action. See County Comm'rs v. State, 587 So. 2d 1378,1387-88 (Fla. 1st DCA 1991); Fla. Dept. of Transportation v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

77. The initial burden is on the applicant to prove entitlement to the permit by a preponderance of the evidence. J.W.C., 396 So. 2d at 788. The applicant must provide reasonable assurances through presentation of credible evidence of entitlement to the permit that the proposed project will not violate applicable District rules or Florida Statutes. Id. At 789.

78. The applicant's burden is one of "reasonable assurances, not absolute guarantees." Manasota-88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319, 1325 (DER 1990); aff'd 576 So. 2d 781 (Fla. 1st DCA 1991). The "reasonable assurance" standard has been judicially defined to require an applicant to establish "a substantial; likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurances must deal with reasonable foreseeable contingencies. The standard does not require an absolute guarantee that a violation of a rule is a scientific impossibility, only that its

non-occurrence is reasonable assured by accounting for reasonably foreseeable contingencies. Ginnie Springs, Inc. v. Watson, 21 F.A.L.R. 4072, 4080 (DEP 1999); Manasota-88, 12 F.A.L.R. at 1325. In assessing the risk to resources or water quality, the District is not required to assume a "worst case scenario" unless such a scenario is "reasonably foreseeable." Florida Audubon Society v. South Florida Water Management District, 14 F.A.L.R. 5518, 5524 (SFWMD 1992); Rudloe v. Dickerson Bayshore, Inc., 10 F.A.L.R. 3426-2440-41 (DER 1988).

79. Once an applicant has presented evidence and made a preliminary showing of reasonable assurance, a challenger must present "contrary evidence of equivalent quality" to that presented by the permit applicant. J.W.C., 396 So. 2d at 789. "If the petitioner fails to present evidence, or fails to carry the burden of proof as to the controverted facts asserted -- assuming that the applicant's preliminary showing before the hearing officer warrants a finding of 'reasonable assurances'-- then the permit must be approved." Id. Simply raising concerns or even informed speculation about what "might occur" is not enough to meet the Petitioners' burden. See Chipola Basin Protective Group, Inc. v. Florida Dep't of Environmental Regulation, 11 F.A.L.R. 467, 480-81 (DER 1988). Thus, the City is not required to disprove all the "worst case scenarios" or "theoretical impacts" raised by Petitioners in this proceeding.

Lake Brooklyn Civic Ass'n v. Florida Rock Industries, 15 F.A.L.R. 4051, 4056 (Fla. LWAC 1993); Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (DER 1990).

80. Furthermore, since the proceeding is de novo, the proper test is not whether the District properly evaluated the original application, but whether the application as presented at hearing provides reasonable assurance of compliance with District permitting standards. See McDonald v. Dept. of Banking & Finance, 346 So. 2d 569,584 (Fla. 1st DCA 1997).

81. To meet their respective burdens of proof, Petitioners must present a preponderance of competent and substantial evidence. See Section 120.57(1)(j) and (l), Fla. Stat.; Gould v. Division of Land Sales, 477 So. 2d 612 (Fla. 1st DCA 1985).

82. The ultimate question of whether reasonable assurances have been provided is a conclusion of law rather than a finding of fact. Coscan Florida, Inc. v. Dep't of Environmental Regulation, 12 F.A.L.R. 1359 (DER 1990); see generally, 1800 Atlantic Developers v. Fla. Dep't of Environmental Regulation, 552 So. 2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So. 2d 345 (Fla. 1990).

83. In this proceeding, Petitioners failed to produce competent substantial evidence to refute the reasonable assurances proposed by the City.

84. The City has provided reasonable assurance the project meets the criteria set forth in Florida Administrative Code Rule 40C-4.301(1), since the "construction, alteration, operation, maintenance, removal, or abandonment of" the proposed 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 and other surface waters;
- (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 paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 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 groundwater levels or surface water flows established in Chapter 40C-8, F.A.C.;
- (h) Will not cause adverse impacts to a work of the District established pursuant to Section 373.086, F.S.;
- (i) Will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed;

- (j) Will be conducted by an entity with the 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 in Chapter 40C-41, F.A.C.

85. The City demonstrated through competent substantial evidence that the proposed system will meet each of the conditions contained in Florida Administrative Code Rule 40C-4.301(1), and is therefore entitled to the issuance of the ERP by the District, with the exception of Subsection 40C-4.4.301(1)(k), which the parties stipulated does not apply to this project.

86. Moreover, the City demonstrated through competent substantial evidence that the proposed project meets each of the applicable criteria contained in Florida Administrative Code Rule 40C-4.302(1)(a), which requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the activity will be clearly in the public interest.

87. Since no part of the proposed system will significantly degrade or be located within an Outstanding Florida Water, the City was not required to provide reasonable assurances on this point.

88. Since the evidence clearly demonstrated that the mitigation for the project will offset the project's adverse impacts to wetlands, no adverse effects to the conservation of fish and wildlife or due to the project's permanent nature will occur. The evidence further showed that the project will produce no harmful erosion. Additionally, the project will not adversely affect the flow of water, navigation, significant historical or archaeological resources, recreational or fishing values, marine productivity, or the public health, safety, or welfare or property of others. The evidence showed that this project is permanent in nature and the project's design, including mitigation, is such that the current condition and relative value of functions performed by wetlands will be maintained. Therefore, the City has provided reasonable assurance that the project is not contrary to the public interest since the evidence established that, on balance, the public interest factors were neutral.

89. Florida Administrative Code Rule 40C-4.302(1)(b), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or

abandonment of a surface water management system will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in Sections 12.2.8 through 12.2.8.2 of the Applicant's Handbook. When an applicant proposes to mitigate adverse impacts within the same drainage basin as the impacts, and the mitigation fully offsets the impacts, the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters. See 12.2.8, Applicant's Handbook. The evidence showed that the mitigation for the project is located within the same drainage basin as the project and offsets the adverse impacts. Therefore, the project meets the requirements of Florida Administrative Code Rule 40C-4.302(1)(b).

90. Florida Administrative Code Rule 40C-4.302(1)(c), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system "[l]ocated 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 as set forth or incorporated by reference in Chapter 62R-7, F.A.C., will comply with the additional criteria in subsection 12.2.5 of the Applicant's Handbook" Since the parties stipulated that the project

is not located in or adjacent to Class II or III waters classified by the Department for shellfish harvesting, this criterion is not applicable.

91. Florida Administrative Code Rule 40C-4.302(1)(d), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system which constitute vertical seawalls in estuaries or lagoons, will comply with the additional requirements found in subsection 12.2.6 of the Applicant's Handbook. Since the parties stipulated that this project does not contain any vertical seawalls in estuaries or lagoons, this criterion is not applicable.

92. The belief by many of the Petitioners that the City will not construct the proposed system as set forth in the permit application, was not supported by competent substantial evidence. The evidence was unequivocal, from both the City and the District, that the system would be plugged so that no water would flow through the weir at Lake Doyle. In the event the City desires to seek a modification of the permit issued by the District for this system, it will be required, in accordance with Florida Administrative Code Rule 40C-4.331, to apply for such modification and demonstrate that the application for modification meets the requirements set forth in Florida

Administrative Code Rules 40C-4.301 and 40C-4.302, just as it was required to do in the case at issue. If the City were to open the plug in the system without first seeking a permit, it would be required to return the system to the condition that existed before the illegal construction pursuant to Florida Administrative Code Rule 40C-4.751. Both the City and the District testified at hearing that they are aware they must comply with the statutes and rules governing the issuance of permits. No competent substantial evidence was produced to prove that either the City or the District would act outside the law concerning the issuance of environmental resource permits. Based upon the evidence and testimony at hearing, Petitioners' fears are unfounded and, should their concerns come to fruition in the future, they will have adequate remedies at law to address them.

93. The evidence produced at the final hearing demonstrates that the City has provided reasonable assurance that the applicable requirements of the District's rules have been met and the environmental resource permit should be granted with the conditions proposed by the District in its Technical Staff Report.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered granting the City of Deltona's application for an environmental resource permit with the conditions set forth in the Technical Staff Report, and dismissing the Petitions for Formal Administrative Hearing filed by Gary Jensen in Case No. 04-2405, and by Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow in Case No. 04-3048.

DONE AND ENTERED this 27th day of May, 2005, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
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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.