

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA WILDLIFE FEDERATION,)
JUPITER FARMS ENVIRONMENTAL)
COUNCIL, INC., d/b/a)
LOXAHATCHEE RIVER COALITION,)
AUDUBON SOCIETY OF THE)
EVERGLADES, AND MARGE KETTER,)
)
Petitioners,)
)
vs.) Case No. 04-3064
)
SOUTH FLORIDA WATER MANAGEMENT)
DISTRICT, PALM BEACH COUNTY,)
AND LANTANA FARMS ASSOCIATES,)
INC.,)
)
Respondents.)
)
_____)

PALM BEACH COUNTY ENVIRONMENTAL)
COALITION, STEVEN BELL,)
ALEXANDRA LARSON, AND MICHAEL)
CHRISTIANSON,)
)
Petitioners,)
)
vs.) Case No. 04-3084
)
SOUTH FLORIDA WATER MANAGEMENT)
DISTRICT, PALM BEACH COUNTY,)
AND LANTANA FARMS ASSOCIATES,)
INC.,)
)
Respondents.)
)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted on
November 1 through 4, 2004, at West Palm Beach, Florida, before

Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners: Susan Kennedy, Esquire
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(DOAH Case 04-3064)

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STATEMENT OF THE ISSUES

Petitioners challenge the South Florida Water Management District's (the District) proposed action to issue Individual

Environmental Resource Permit (ERP) 50-06558-P to authorize conceptual approval of a surface water management (SWM) system to serve 1,919 acres of a phased, multiple-use development referred to as the Palm Beach County Biotechnology Research Park (BRP) and to authorize construction and operation of Phase 1A of that proposed project. The ultimate issue is whether the Applicants provided reasonable assurances that the proposed activities will not be harmful to the water resources of the District; will not be inconsistent with the overall objectives of the District; and will comply with the water quantity, environmental, and water quality criteria of the District's ERP regulations, which are set forth in Part IV of Chapter 373, Florida Statutes, Florida Administrative Code Chapter 40E-4, et. seq.; and the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District - September 2003 (BOR).¹

PRELIMINARY STATEMENT

Respondents, Palm Beach County (the County) and Lantana Farms (the Applicants), applied to the District for an ERP for the BRP, to be constructed on a 1,919-acre site known as Mecca Farms. The ERP application is for a conceptual permit for the SWM system for the BRP and for a construction and operation permit for work that is referred to as the Phase 1A construction. The on-site construction will entail a SWM

system, multiple buildings, and infrastructure. The conceptual plan also entails construction of off-site projects that will directly impact jurisdictional wetlands. The Phase 1A construction involves clearing, grading, and lake construction on 256 acres of the southern part of the Mecca property.

Following its review of the application and of the information submitted in support thereof, the District issued a Staff Report which describes the project at length. The undersigned has borrowed liberally from the Staff Report as it is found to accurately describe the work contemplated by the Phase 1A Construction and the Conceptual Plan.

After the District issued its notice of intent to issue the subject ERP, the Petitioners timely filed Petitions in opposition to the issuance of the permit. Thereafter, in separate orders, the District struck irrelevant portions of the Petitions. Each order determined that the respective Petitioners had complied with requisite rules and transmitted the respective Petitions (less the stricken portions) to DOAH for hearing, where the cases were assigned DOAH Case Nos. 04-3064 and 04-3084 and were consolidated.

The County moved for expedited proceedings pursuant to Sections 403.973 and 120.574, Florida Statutes, and the matter was duly noticed for formal hearing. Pursuant to Section 403.973(15), Florida Statutes, a recommended order, as opposed

to a final order, will be entered by the undersigned in this matter.

During the course of the formal hearing, there were many objections based on relevancy. The undersigned attempted to limit the evidence to issues relevant to applicable permitting criteria. The undersigned also excluded evidence pertaining to the portions of the Petitions that had been stricken by the District before being referred to DOAH.

At the final hearing, the County presented the testimony of Bevin A. Beaudet, Alan D. Wertepney, Kenneth Todd, Mark Brandenburg, and D. Steven Lamb. Mr. Beaudet, a professional engineer, is employed by the County as the Scripps Program Manager. Mr. Wertepney, a professional engineer, is employed by Mock, Roos, and Associates, Inc., a consulting firm employed by the County to design the project's surface water management system. Mr. Todd, a professional engineer, is employed by the County as its Water Resources Manager. Mr. Brandenburg is a biologist employed by Miller, Legg & Associates, Inc., a consulting firm employed by the County. Mr. Lamb is a geologist employed by MacVicar, Federico & Lamb, Inc., a consulting firm employed by the County. The County offered the following pre-marked Exhibits, each of which was admitted into evidence (these Exhibits were marked as "PBC Ex." followed by the Exhibit number and initialed by the undersigned): 3 (Secondary Impact Analysis

Report); 5 (Cumulative Impact Analysis Report); 6 (L-8 Basin cumulative impact analysis aerial photo chart); 7 (Florida panther telemetry location map); 8 (bald eagle nest activity location map); 11 (composites of aerial and ground photos of Mecca Property); 12 (composite lapse photos of a comparative mitigation area); 13 (composite photos of wildlife utilization of comparative mitigation areas); 14 (enlargement of previously identified exhibits 12 and 13); 15 (the Mecca Property's existing drainage pattern); 16 (the BRP proposed drainage pattern); 18 (site map for the Palm Beach Aggregates); 19 (July 2004 Final Draft of the Comprehensive Everglades Restoration Plan (CERP) for North Palm Beach County, Part 1); 20 (sketch of proposed BRP natural area); 21 (aerial photo with proposed Phase 1A area); 22A-E (resumes of the County's witnesses); and 25 (letter from Brian Barnett to M. Blakeslee dated April 8, 2004). The County offered, and subsequently withdrew, its pre-marked Exhibit 29. The County did not offer its pre-marked Exhibits 1, 2, 4, 9, 10, 17, 23, 24, 26, 27, and 28.

The District presented the testimony of three of its employees: Terri Bates, Damon Meiers, and Michael Voich. Ms. Bates is the Department Director of Environmental Resource Regulation. Mr. Meiers is the Deputy Director of Environmental Resource Regulation. Mr. Voich is the Project Manager for CERP Design and Implementation. The District offered the following

pre-marked Exhibits, each of which was admitted into evidence (these Exhibits were marked as "SFWMD Ex." followed by the Exhibit number and initialed by the undersigned): 1 (the Staff Report recommending approval of the ERP with standard and special conditions); 3 (the District's entire permit file); 8 (letter from Enrique Tomeu of Palm Beach Aggregates to Ms. Bates dated 9-29-04); 9 (potential secondary impacts chart); 10 (conceptual mitigation options); 12 (Mecca Farms site and regional facilities map); 13A and 13B (maps depicting alternatives for the management of water in the L-8 Basin); 15 (an attachment to a Board of Trustees agenda item pertaining to an easement/exchange/determination between Florida Fish and Wildlife Conservation Commission and Palm Beach County for the Corbett Wildlife Management Area (CWMA)); 16 (technical documentation pertaining to minimum flows and levels for the Northwest Fork of the Loxahatchee River); 21 (resume of Ms. Bates); 22 (resume of Mr. Meiers); and 23 (resume of Mr. Voich). The District did not offer its pre-marked Exhibits 2, 4, 5, 6, 7, 11, 14, 17, 18, 19, 20, and 24.

The Petitioners in DOAH Case No. 04-3064 presented the testimony of Joseph Schweigart (a retired employee of the District and an expert in civil engineering, water resources management, and CERP), Mr. Meiers, D. Greg Braun (an environmental consultant), and Herb Zebuth (a retired Florida

Department of Environmental Protection employee and an expert in South Florida water resources). The Petitioners in DOAH Case No. 04-3064 presented seven Exhibits which were marked "P-64 Ex." followed by the number and initialed by the undersigned. P-64 Ex. 1 was the resume of Mr. Schweigart. P-64 Ex. 2 was an email to Mr. Meiers. P-64 Ex. 3 was the resume of Mr. Braun. P-64 Ex. 4 was the resume of Mr. Zebuth. P-64 Ex. 5 was a letter to Kathy LaMartina from an employee of the Florida Department of Environmental Protection dated June 18, 2001. P-64-Ex. 6 was a power point presentation pertaining to CERP. P-64-EX. 7 was information pertaining to CERP. All of P-64 Exhibits were admitted into evidence with the exception of P-64 Ex. 5, which was rejected.

The Petitioners in DOAH Case No. 04-3084 presented the testimony of Alexandra Larsen and Mike Christensen, both of whom are individuals who live in the vicinity of the proposed project. The Petitioners in DOAH Case No. 04-3084 presented two Exhibits which were marked "P-84 Ex." followed by the number and initialed by the undersigned. P-84 Ex. 1 was a subpoena form drafted by Mr. Silver.² P-84 Ex. 2 was a letter dated August 16, 2004, from Karen T. Marcus, Chairperson of the Palm Beach County Board of County Commissioners, to Mr. Silver and members of the Palm Beach County Environmental Coalition. P-84 Ex. 1 was not moved into evidence. P-84-Ex. 2 was admitted into evidence.

At the request of the Petitioners and with no objection from Respondents, a one-hour period for input from members of the public was conducted pursuant to Section 120.57(1)(b), Florida Statutes. The following persons made comments during the public input period: Sharon Waite, Daniel Larson, Kay Gates, Barbara Susko, and Rosa Durando. No finding of fact contained in this Recommended Order is based on the communications made during the public input period.

During the course of the formal hearing, the Respondents stipulated that the Petitioners have standing to bring these challenges to the ERP.

Also during the course of the formal hearing, Barry Silver, a named Petitioner in DOAH Case No. 04-3084, dismissed himself as a party Petitioner to these proceedings.

On the motion of the District and without objection, official recognition was taken by the undersigned of the following: Chapter 373, Florida Statutes; Florida Administrative Code Chapters 40E-4 and 40E-8; the BOR; the Central and Southern Florida Comprehensive Review Study, which the parties referred to as the Yellow Book; consent judgment in condemnation proceedings between the District and the Palm Beach Aggregates brought in circuit court in Palm Beach County bearing Case No. CA 03 0336AN; and consent judgment in condemnation proceedings between the District and the Palm Beach Aggregates

brought in circuit court in Palm Beach County bearing Case No. 502004 000669 MB AN.

A Transcript of the proceedings was filed on November 8, 2004. Each party filed a Proposed Recommended Order, all of which have been duly-considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

THE PARTIES

1. The Florida Wildlife Federation, Audubon Society of the Everglades, and Jupiter Farms Environmental Council, Inc. (d/b/a Loxahatchee River Coalition) are not-for-profit corporations in existence prior to 2003 with more than 25 members in Palm Beach County. Palm Beach County Environmental Coalition was formed in 1997 and is a private, county-wide, non-profit citizen's organization. Ms. Ketter, Mr. Bell, Ms. Larson, and Mr. Christensen are individuals affected by the proposed BRP. The Respondents stipulated that the parties who remained Petitioners after Mr. Silver's withdrawal as a Petitioner have standing to bring this proceeding.

2. The District, a public corporation existing by virtue of Chapter 25270, Laws of Florida, 1949, operates pursuant to Chapter 373, Florida Statutes, and Title 40E, Florida

Administrative Code, as a multipurpose water management district with its principal office in West Palm Beach, Florida.

3. The County is a duly-constituted governmental entity.

THE PROJECT SITE AND ADJACENT LANDS

4. The site of the project is generally referred to as the Mecca Farms, which is a contiguous tract of 1,919 acres of land. At present, the Mecca Farms is used for farming and mining operations. There presently exists a permitted, SWM system on the Mecca Farms that was first permitted in 1979, and has been modified from time to time since then. The existing SWM system includes 73 acres of ditches and a 272-acre above-ground impoundment area.

5. The Mecca Farms site is located within the C-18 Basin.

6. There are no jurisdictional wetlands or delineated surface waters on the Mecca Farms.

7. The following, which is taken from the Staff Report (SFWMD Ex. 1), accurately describes the project site and its adjacent lands:

The project site consists of 1,919 acres presently supporting an active orange grove with approximately 73 acres of associated drainage and irrigation ditches/canals and a 30-acre active sand mining operation. The ditches/canals are presently maintained at an elevation of approximately 17 feet NGVD.^[3] These ditches/canals provide drainage conveyance to a 272-acre above-ground impoundment located in the northeast corner of the site utilizing four (4) 22,000

gpm pumps. The above-ground impoundment discharges to the west leg of the C-18 Canal via gravity discharge. Project site ditches and canals also connect directly to the C-18 Canal through an 18,000 gpm pump. An additional 224-acre agricultural area east of the 1,919 acres of orange groves is connected to and drains into the canal/ditch system on the project site. This adjacent area was leased from the adjacent land owner by the grove owner for use as row crops and was connected to the grove canal/ditch system for better control of drainage and irrigation. The area is no longer used for row crops. There is also a small area on the site that contains caretaker housing and an equipment maintenance building for the orange groves. These facilities were originally permitted in 1979 under Surface Water Management Permit No. 50-00689-S and subsequent modifications. The citrus grove and primary drainage facilities have been in existence since the 1960s.

The Hungryland Slough is located north of the project site, separated from the project site by the C-18 Canal. This area is comprised primarily of publicly-owned natural areas, including an area referred to as Unit 11, which is owned in the majority by Palm Beach County. To the west is the J.W. Corbett Wildlife Management Area (CWMA) owned and managed by the Florida Fish and Wildlife Conservation Commission (FFWCC). To the east, a large area of low-intensity agricultural land exists under the ownership of Charles Vavrus and within the City of Palm Beach Gardens. These lands contain extensive wetlands that are adjacent to the Loxahatchee Slough to the east. The Acreage, a low-density residential area, is located directly to the south of the project site. The only access to the site at this time is an unpaved extension of Seminole Pratt-Whitney Road (SPW), connecting the site at its southwestern corner to the Acreage.

THE PROPOSED PROJECT

8. The subject application is for conceptual approval of the SWM system for the BRP and for construction and operation of Phase 1A of the project. All of the proposed Phase 1A construction will occur on the Mecca Farms site.

9. The following, taken from the Staff Report, accurately describes the proposed project:

The [BRP] is a phased multiple use development planned for approximately 1,919 acres and will consist of land uses related to science and technology, biotechnology, biomedical, and other related research and development industries and manufacturing. Additionally, proposed support and complementary land uses include educational, institutional, residential, commercial, and recreational facilities, along with utilities and a large created natural area.

THE PROPOSED SWM SYSTEM

10. The proposed SWM system will consist of several interconnected lakes that will provide wet detention for storm water runoff from the property site and from 39 acres of off-site flows from SPW Road and a proposed Florida Power and Light (FPL) Substation. The lakes will collect, store, and treat the runoff. The storm water will pass through the lakes, through a 247-acre area referred to as the "Natural Area" (which will be created as part of the mitigation plan), and discharged to the C-18 Canal. To provide additional water quality treatment,

these lakes will include planted littoral zones and the southern lake will include a filter marsh.

11. The Natural Area will, in subsequent construction phases, be constructed on the western boundary of the Mecca site with discharge to the C-18 canal, which is adjacent to the northern boundary of the Mecca Farms. The southern boundary of the Natural Area will be the north boundary of the lake that is to be constructed on the southern end of the property. This is the area that is available for use as a flow-way (which will be discussed in greater detail in a subsequent section of this Recommended Order). The Natural Area will be a wetland type system that will move water slowly through that system providing additional storage and water quality benefits prior to discharging through a gravity control structure into the C-18 Canal.

12. The C-18 Canal discharges to either the Northwest or Southwest Fork of the Loxahatchee River, depending on how structures are operated downstream. Discharges travel in the C-18 Canal for approximately nine miles before reaching the Loxahatchee River.

13. The existing SWM system for the Mecca Farms currently discharges to the C-18 Canal, as will the proposed SWM system. The proposed project will not discharge to the CWMA or the Hungryland Slough. The Grassy Waters Preserve and the

Loxahatchee Slough are several miles from the project site and will not be affected by the project's proposed activities.

14. The following, which is taken from the Staff Report, accurately describes the proposed SWM system.

The proposed conceptual surface water management system which will serve the 1,919-acre site will consist of site grading, storm water inlets and culverts which will direct all runoff to a series of interconnected lakes for water quality treatment and attenuation of the peak runoff rate. Pumps will control the runoff rate from the developed site into the adjacent onsite BRP natural area. The BRP natural area will discharge into the C-18 canal via a gravity control structure. The system has been designed to accommodate 39 acres of off-site flows from SPW [Road] and a proposed Florida Power and Light (FPL) Substation. The existing control elevation of the citrus grove is 17.0' NGVD. The proposed control elevations are 18.0' NGVD for the developed area and 19.0' NGVD for the natural area. The control elevations are being raised to provide a "step down" of water elevations from wetlands to the north, west and east of the site (20.5' to 21.0') to lower elevations to the south (17.0').

PHASE 1A CONSTRUCTION

15. The following, which is taken from the Staff Report, accurately describes the proposed Phase 1A construction:

The Phase 1A construction activities will allow the applicant to proceed with lake excavation, clearing and site grading of 536 acres in the southern portion of the site. No permanent buildings or parking areas are proposed at this time. Stormwater from Phase 1A and the remainder of the site, to remain in agricultural use, will be treated

in the Phase 1A lakes and then pumped into the existing impoundment for additional water quality treatment and attenuation prior to discharging to the west leg of the C-18 Canal via the existing weir structures. The existing 18,000 gpm pump that connects the on-site ditches and canals directly to the C-18 Canal will remain, but will only be used if the impoundment is full. (See Special Condition No. 21). Approval of Phase 1A authorizes the use of the existing, previously permitted surface water management facilities, therefore, the previous permit no. 50-00689-S is superceded by this permit.

The 224 acre agricultural area east of the existing grove that is connected to the grove canal/ditch system will be severed as part of Phase 1A. The pipe connecting this area will be removed and portions of the berm around this area will be regraded so the area will sheetflow into the adjacent pasture land's canal/ditch system as it did previously [sic] to being connected to the grove system.

16. Of the 536 acres involved in the Phase 1A construction, 87 acres will become lake bottom and 449 acres will remain pervious area, subject only to grading.

CONCEPTUAL APPROVAL

17. Pertinent to this proceeding, Florida Administrative Code Rule 40E-4.021(5) defines the term "conceptual approval" to mean an ERP issued by the District which approves a conceptual master plan for a surface water management system or a mitigation bank.

18. Florida Administrative Code Rule 40E-4.305, pertains to conceptual approvals and provides, in relevant part, as follows:

(1) Conceptual approvals constitute final District action and are binding to the extent that adequate data has been submitted for review by the applicant during the review process.

(2) A conceptual approval does not authorize construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system or the establishment and operation of a mitigation bank.

* * *

(4) For phased projects, the approval process must begin with an application for a conceptual approval which shall be the first permit issued for the project. An application for construction authorization of the first phase(s) may also be included as a part of the initial application. As the permittee desires to construct additional phases, new applications shall be processed as individual or standard general environmental resource permit applications pursuant to the conceptual approval. The conceptual approval, individual and standard general permits shall be modified in accordance with conditions contained in Chapters 40E-4 and 40E-40, F.A.C.

(5) Issuance of a conceptual approval permit pursuant to Chapter 40E-4, F.A.C., shall not relieve the applicant of any requirements for obtaining a permit to construct, alter, operate, maintain, remove, or abandon a surface water management system or establish or operate a mitigation bank, nor shall the conceptual approval permit applicant be relieved of the District's informational requirements or the need to meet the standards of issuance of permits

pursuant to Chapters 40E-4 or 40E-40,
F.A.C. . . .

PERMITTING CRITERIA

19. In order to obtain an ERP, an applicant must satisfy the conditions for issuance set forth in Florida Administrative Code Rules 40E-4.301 and 40E-4.302. The conditions for issuance focus on water quantity criteria, environmental criteria, and water quality criteria.

20. Florida Administrative Code Rule 40E-4.301 contains the following permitting conditions applicable to this proceeding:

(1) In order to obtain a standard general, individual, or conceptual approval 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 and other surface waters;

(e) will not adversely affect the quality of receiving waters ...;

(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 ...;

(h) will not cause adverse impacts to a work of the District ...;

(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 sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) will comply with any applicable special basin or geographic area criteria established in Chapter 40E-41 F.A.C.

21. Florida Administrative Code Rule 40E-4.302 provides the following Additional Conditions for Issuance of Permits applicable to this proceeding:

(1) In addition to the conditions set forth in section 40E-4.301, F.A.C., in order to obtain a standard general, individual, or conceptual approval permit under this chapter or Chapter 40E-40, F.A.C., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system:

(a) 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, as determined by balancing the following criteria as set forth in subsections 4.2.3 through 4.2.3.7 of the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District:

(1) Whether the activity will adversely affect the public health, safety or welfare or the property of others;

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

(3) Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

(4) Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

(5) Whether the activity will be of a temporary or permanent nature;

(6) Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S.; and

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

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in subsections 4.2.8 through 4.2.8.2 of the Basis of Review. . . .

THE BASIS OF REVIEW

22. The District has adopted the BOR and incorporated it by reference by Florida Administrative Code Rule 40E-4.091(1)(a). The standards and criteria found in the BOR are used to determine whether an applicant has given reasonable assurances that the conditions for issuance of an ERP have been satisfied. Section 1.3 of the BOR provides, in part, as follows:

. . . Compliance with the criteria established herein [the BOR] constitutes a presumption that the project proposal is in conformance with the conditions for issuance

set forth in Rules 40E-4.301 and 40E-4.302,
F.A.C.

WATER QUANTITY

23. The term "control elevation" describes the level of freshwater water bodies established by a SWM system. The existing SWM system has a control elevation of 17' NGVD. The control elevation for the proposed lake system will be raised to 18' NGVD, and the control elevation for the proposed Natural Area will be raised to 19' NGVD. Raising the control elevations will permit more treatment of storm water prior to discharge and will permit a more controlled discharge. In addition, raising the control elevation will lessen seepage onto the project site from adjacent wetlands.

24. The Applicants provided reasonable assurances that the proposed project will not cause adverse water quantity impacts to receiving waters and adjacent lands, thereby satisfying the criteria set forth in Florida Administrative Code Rule 40E-4.301(a).

25. The Applicants provided reasonable assurances that the proposed project will not cause adverse flooding to on-site or off-site property, thereby satisfying the criteria set forth in Florida Administrative Code Rule 40E-4.301(b).

26. The Applicants provided reasonable assurances that the proposed project will not cause adverse impacts to existing

surface water storage and conveyance capabilities, thereby satisfying the criteria set forth in Florida Administrative Code Rule 40E-4.301(c).

VALUE OF FUNCTIONS OF WETLANDS AND SURFACE WATERS

27. Florida Administrative Code Rule 40E-4.301(d), requires the Applicants to establish that ". . . the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system . . ." ". . . will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." The District established that the term "value of functions," as used in the rule, refers to habitat and life support functions. Because there are no wetlands or delineated surface waters on the Mecca Farms site, there are no direct adverse impacts to the functions that wetlands provide to fish and wildlife. The Applicants have provided reasonable assurances to demonstrate that the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters will not be adversely affected.

28. The existing project site does not contain nesting areas for wetland-dependent endangered or threatened wildlife species or species of special concern. The potential for use of the existing project site for nesting by such species is minimal. The existing project site does contain habitat for the

American Alligator and foraging habitat for wading birds and birds of prey.

29. The primary foraging habitat on the existing site is around the perimeter of the existing 272-acre impoundment area in the northeast portion of the site. The existing impoundment will be replaced by on-site storm water treatment lakes and the BRP Natural Area that will have shallow banks planted with wetland plant species common to the area. Wildlife is opportunistic; and wading birds commonly feed in areas where there is water, wetland vegetation and wetland plants. The end result will be that the proposed project will have more and better foraging habitat acreage than the existing site.

30. The Natural Area will provide a wetland buffer between the developed area and CWMA that will prevent any adverse impacts both to the wetlands and other surface waters in CWMA and to the value of the functions those wetlands and other surface waters provide to fish, wildlife, and listed species.

31. The Natural Area will provide a wetland buffer between the developed area and Unit 11 that will prevent any adverse impacts both to the wetlands and other surface waters in Unit 11 and to the value of the functions those wetlands and other surface waters provide to fish, wildlife, and listed species.

32. There was no competent evidence that the proposed project would impact the ability of the Florida Fish and

Wildlife Conservation Commission to manage the CWMA through control burns or otherwise, thereby adversely affecting the diversity or abundance of fish and wildlife (including endangered species and their habitats).

33. Petitioners attempted to raise the issue of mosquito control in their Petitions and at the Final Hearing. The allegations pertaining to mosquito control were struck by the District and Special Condition Number 26 was added before the Petitions were referred to DOAH. Petitioners made no attempt to amend their Petitions and have not challenged Special Condition 26. The Addendum to Staff Report (SFWMD Ex. 2) contains the following Special Condition Number 26: "Upon submittal of an application for construction of any buildings, the permittee shall submit a mosquito control plan for review and approval by District Staff." Since there will be no buildings containing people or other facilities which would encourage the use of mosquito spraying, it is appropriate for the mosquito control condition to apply to only future phases of construction.

34. There was no competent evidence of impacts attributable to pesticides associated with the application for the SWM system or for Phase 1A construction and operation that would adversely affect the diversity or abundance of fish and wildlife including endangered species and their habitats.

35. The Applicants have satisfied the criteria set forth in Florida Administrative Code Rule 40E-4.301(d).

WATER QUALITY

36. The primary concern during Phase 1A construction will be erosion control. Best Management Practices ("BMPs") are operational and design elements used to either eliminate or reduce the amount of pollutants at the source so they do not get into a SWM system or move downstream. To contain erosion in Phase 1A, the Applicants will use the following BMPs:

- Silt screens and turbidity barriers within existing ditches and around the perimeter of property.

- Planned construction sequencing to reduce movement and stock piling of material;

- Slope stabilization and seeding or sodding of graded areas; and

- Containment of construction materials with berms.

37. All erosion and turbidity control measures will remain in place until the completion of the on-site construction and approval by the District's post-permit compliance staff.

38. The Applicants provided reasonable assurances that the proposed Phase 1A construction activities will not adversely impact the quality of receiving waters and that those activities will not violate State water quality standards.

39. Section 5.2.1, BOR, requires that a SWM system provide wet detention for the first one inch of runoff. The proposed

SWM system will provide wet detention for one and one-half inches of runoff.

40. The Applicants provided reasonable assurances to demonstrate that the technical criteria in the BOR will be met. Under Section 1.3 of the BOR, compliance with the criteria in the BOR constitutes a presumption that the Proposed Project is in conformance with the conditions for issuance. This presumption was not rebutted by the Petitioners.

41. The lake system will include planted littoral zones to provide additional uptake of pollutants. A filter marsh is also included in the southern lake. All of the storm water runoff from the lakes will pass through the filter marsh, which will be planted with wetland plants. The filter marsh will provide additional polishing of pollutants, uptake, and filtering through the plants. The discharge will then go into the BRP, which will provide the discharge additional uptake and filtering.

42. BMPs utilized during the Operations and Maintenance phase will include regular maintenance inspections and cleaning of the SWM system, street-sweeping, litter control programs, roadway maintenance inspections and repair schedule, municipal waste collection, pollution prevention education programs, pesticides, herbicides and fertilizer storage, and application training and education. The littoral zones, filter marsh, BRP

natural area, and BMPs were not included in the water quality calculations and are over and above rule requirements.

43. The Applicants provided reasonable assurances to demonstrate that the proposed project will not adversely affect the quality of receiving waters. Therefore, Rule 40E-4.301(1)(e), F.A.C., will be satisfied and water quality standards will not be violated.

HAZARDOUS SUBSTANCES

44. Pursuant to Section 5.5.5 of the BOR, commercial or industrial zoned projects shall provide at least one-half inch of dry detention or retention pretreatment as part of the required retention/detention, unless reasonable assurances can be offered that hazardous materials will not enter the project's SWM system. The Addendum to Staff Report reflects the following Special Condition 25 pertaining to hazardous materials:

Upon submittal of an application for construction of commercial or industrial uses the permittee shall submit a plan that provides reasonable assurances that hazardous materials will not enter the surface water management system pursuant to the requirements of section 5.2.2(a) of the Basis of Review.

45. Applicable permitting criteria does not require the Applicants to present a hazardous substances plan at this point because no facilities that will contain hazardous materials are part of the Phase 1A construction.

SECONDARY IMPACTS

46. Florida Administrative Code Rule 40E-4.301(1)(f) and Section 4.1.1(f) of the BOR, require an applicant to provide reasonable assurances that the proposed activities will not cause adverse secondary impacts to the water resources. A secondary impact is an indirect effect of a project resulting in adverse effects to wetlands or other surface waters. The District considers those adverse effects that would not occur "but for" the activities that are closely linked and causally related to the activity under review. This standard is discussed further in the Conclusions of Law section of this Recommended Order.

47. The County's Exhibit 3 is a secondary impact analysis identifying the secondary impacts that may potentially result from the proposed project. These impacts are: 1) the widening of SPW Road; 2) the construction of an FPL substation; 3) the extension of PGA Boulevard; and 4) the potential relocation of a runway at North County Airport.

48. The secondary impact analysis performed pursuant to the Uniform Mitigation Assessment Method (UMAM) contained in Florida Administrative Code Chapter 62-345 reflects that up to 153.3 acres of wetlands may be partially or completely impacted by these secondary impacts, resulting in approximately 71.21 units of functional loss. Where future activities are expected

to directly impact wetlands, secondary impacts were assessed based on the loss of all current functional value within the direct footprint of that activity. Additionally, an assessment was conducted to determine the degree of partial functional loss where impacts beyond the footprint of these activities are anticipated.

49. SPW Road is an existing dirt road which is in the County's five-year road plan to widen as a four-lane paved road. Because the widening of the existing dirt road to a four-lane paved road is part of the five-year road plan, the impacts of that widening are not attributable to the subject project. However, as part of the proposed project, it is proposed to widen SPW Road to a six-lane paved road. The additional impacts associated with the widening from four to six lanes will be caused by, and are linked to, the proposed project. These impacts amount to approximately 2.2 acres.

50. The FPL substation, which is proposed to service the proposed project, may result in 1.6 acres of potential direct impacts to wetlands. In addition, 1.0 acre of potential indirect secondary impacts may occur to wetlands that are not going to be dredged and filled. Those indirect secondary impacts may have some adverse impact on the functional value to those wetlands for wildlife utilization.

51. The extension of PGA Boulevard to the Mecca Farms site has the potential to result in 45.6 acres of direct impacts to wetlands and 56.6 acres of indirect secondary wetland impacts which will not be dredged or filled, but will be in close proximity to the road. The secondary impact assessment for PGA Boulevard assumed the incorporation of wildlife crossings to minimize habitat fragmentation.

52. If the airport runway needs to be shifted, potential direct wetland impacts to an additional 22.7 acres may occur. Indirect impacts to 23.6 acres of wetlands in close proximity could also occur. Runway relocation may or may not be necessary due to the PGA Boulevard extension; however, the analysis assumed the need for the relocation.

53. Each of the projects listed above as potential secondary impacts will require a separate construction and operation permit from the District. The issuance of this permit does not in any way guarantee the issuance of permits for any of these identified potential secondary impacts.

MITIGATION PLAN

54. The Applicants provided a conceptual mitigation plan using UMAM to demonstrate how potential secondary impacts could be offset. Mitigation options have the potential to provide more than twice the functional gain than the functional loss from the identified secondary impacts.

55. The conceptual mitigation options include:

194 acres of the land that had been acquired for future mitigation needs in Unit 11.

227 acres of the BRP natural area.

32.6 acres in the southern lake wetland along with proposed upland habitat.

56. Sufficient mitigation is available in these options to offset the potential secondary impacts.

57. The mitigation for the four potential secondary impacts is not required to be implemented now because the impacts are not occurring now. Section 4.2.7 of the BOR requires that the District consider those future impacts now and that a conceptual mitigation plan be provided to demonstrate and provide reasonable assurances that those impacts, in fact, can be offset in the future.

58. The Governor and Cabinet sitting as the Board of Trustees considered and approved a request for public easement of approximately 30 acres to use a portion of CWMA for SPW Road, an FPL substation, and the land area that may be needed by District in the future for the connection to the flow-way. As consideration in exchange for the public easement over 30 acres, the County will transfer fee simple title of 60 acres to the State.

59. This public easement also provides a benefit for CERP as it includes the small portion that the District is going to

need for its future CERP project to connect to the flow-way on the proposed project site.

60. The Applicants provided reasonable assurances that mitigation will offset secondary impacts to wetlands and other surface waters.

UNIDENTIFIED SECONDARY IMPACTS

61. Testimony at the final hearing raised a question as to whether there is nesting or roosting by listed wading bird species in adjacent off-site wetlands outside the eastern boundary of the project site. Evidence was inconclusive on nesting or roosting in these areas.

62. Because the status of adjacent listed wading bird nesting or roosting is uncertain, the District suggested in its Proposed Recommended Order that a special condition requiring a wildlife survey prior to construction near the eastern project boundary be added to the permit as follows:

Prior to application for construction within 1000 feet of the eastern boundary of the above-ground impoundment, the applicant shall conduct a wildlife survey to identify any nesting or roosting areas in the adjoining off-site wetlands utilized by listed species of wading birds. If such nesting or roosting areas are found the permittee shall, if determined necessary by the District, incorporate additional buffers

or other appropriate measures to ensure protection of these wetland functions.

63. The District represented in its Proposed Recommended Order that the County has no objection to adding the foregoing condition.

CUMULATIVE IMPACTS

64. Pursuant to Section 373.414(8), Florida Statutes, the District is required to consider cumulative impacts upon wetlands and other surface waters delineated in Section 373.421(1), Florida Statutes, within the same drainage basin. Cumulative impacts are the summation of unmitigated wetland impacts within a drainage basin. The cumulative impact analysis is geographically based upon the drainage basins described in Figure 4.2.8-1 of the BOR. Cumulative impacts are unacceptable when they would result in unacceptable adverse impacts to the functions of wetlands and surface waters within a drainage basin.

65. There are no wetlands or other surface waters delineated pursuant to Section 373.421(1), Florida Statutes, on the Mecca Farms site. Therefore, no cumulative impacts are created by the direct impacts of the project.

66. Cumulative impacts may be created by a project's secondary impacts. If a wetland impact has been appropriately

mitigated on-site within the drainage basin, there is no residual impact, and therefore no cumulative impact.

67. The PGA Boulevard extension, a portion of the SPW Road widening, and the airport runway relocation are located within the C-18 Basin. The proposed mitigation options are all located in the C-18 Basin and will offset those impacts. Those potential secondary impacts are considered to meet the cumulative impact requirements of Section 373.414(8), Florida Statutes. The Applicants provided reasonable assurances that the proposed project will not result in cumulative impacts to the C-18 Basin.

68. The FPL substation is located within the L-8 Drainage Basin. The majority of the SPW Road expansion is located within the C-18 Basin, but a portion is located on the basin line between the C-18 Basin and the L-8 Basin. Because the mitigation for the L-8 impacts are proposed in a different basin, the Applicants were required to conduct a cumulative impact analysis for the L-8 Basin impacts. Based on the Florida Land Use Cover Classification System, there are 43,457 acres of freshwater wetlands within the L-8 Basin. Approximately 41,000 acres of the wetlands in L-8 Basin are in public ownership. This total constitutes approximately 95 percent of all the wetlands in the L-8 Basin. Public ownership of these wetlands provide a high level of assurance that these lands will be

protected in perpetuity. The Respondents established that proposed mitigation can fully offset the potential impacts from the SPW Road expansion and the FPL substation and the approximately four acres of impacted wetlands in the L-8 Basin. The Applicants provided reasonable assurances that there are no unacceptable adverse cumulative impacts on the L-8 Basin.⁴

GROUND WATER FLOWS, SURFACE WATER FLOWS, AND
MINIMUM FLOWS AND LEVELS

69. Florida Administrative Code Rule 40E-4.301(1)(g) requires an applicant to provide reasonable assurances that the proposed activity will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, Florida Statutes.

70. The term "maintenance of surface and groundwater levels or surface water flows" in Florida Administrative Code Rule 40E-4.301(1)(g) means that a project will not adversely impact the maintenance of surface water flows that contribute to meeting the minimum flow for the water body. An adverse impact to the maintenance of surface or groundwater levels or surface water flows may occur when a project discharging to a water body with a designated minimum flow level is proposed to be diverted.

71. An analysis was done to compare the peak discharge rate from the existing SWM system on the Mecca Farms site with the projected peak discharge rate from the proposed SWM system.

The analysis showed that the peak discharge rate under the proposed system will be less than that of the existing system. That result was expected since the proposed system will have higher control elevations, which, as noted above, will provide better treatment and permit a better control of the discharge into the C-18 Canal. Under the existing SWM system, storm event water in a dry period is frequently stored in the existing impoundment for future irrigation purposes. Under the proposed SWM system such storm event water will be discharged downstream, which will benefit those downstream areas during dry periods. The proposed system will also provide better control over pulse discharges during heavy storm events.

72. The Applicants provided reasonable assurances that the proposed activities will not adversely impact the maintenance of surface or ground levels or surface water flows as required by Florida Administrative Code Rule 40E-4.301(1)(g).

THE DISTRICT'S OBJECTIVES

73. Sections 373.414 and 373.416, Florida Statutes, require an applicant to provide reasonable assurances that a regulated activity will not be harmful to the water resources and will not be inconsistent with the overall objectives of the District.

74. Congress initially authorized the Central and Southern Florida ("C&SF") Project in 1948. Thereafter extensive work was

undertaken pertaining to flood control; water supply for municipal, industrial, and agricultural uses; prevention of saltwater intrusion; and protection of fish and wildlife. The work included construction of a primary system of 1000 miles each of levees and canals, 150 water-control structures, and 16 major pump stations. Unintended consequences of the C&SF Project have included the irreversible loss of vast areas of wetlands, including half of the original Everglades; the alteration in the water storage, timing, and flow capacities of natural drainage systems; and the degradation of water quality and habitat due to over-drainage or extreme fluctuations in the timing and delivery of fresh water into the coastal wetlands and estuaries.

75. In 1992, Congress authorized the C&SF Project Comprehensive Review Study, which is generally referred to as the "Restudy." The objective of the Restudy was to reexamine the C&SF Project to determine the feasibility of modifying the project to restore the South Florida ecosystem and provide for the other water-related needs of the region, such as water supply and flood protection.

76. In April 1999, the U.S. Army Corps of Engineers issued the Central and Southern Florida Project Comprehensive Review Study Final Integrated Feasibility Report and Programmatic Environmental Impact Statement ("Restudy Report"). The Restudy

Report recommends a comprehensive plan for the restoration, protection, and preservation of the water resources of Central and South Florida. The resulting plan is known as CERP.

77. The North Palm Beach County Part I project, which includes restoration of the Northwest Fork of the Loxahatchee River ("NWFLR"), is a component of CERP.

78. The successful completion of CERP and the successful restoration of the NWFLR are high-priority objectives of the District.

79. The Loxahatchee River is an important feature of the South Florida ecosystem, nationally and internationally unique, and an important natural and economic resource. Rules pertaining to MFL for the NWFLR and for the recovery of the NWFLR are found at Florida Administrative Code Rule 40E-8.011; 40E-8.221(4); and 40E-8.421. Recovery goals, which are not presently being met, have been established; and strategies to meet those goals have been identified.

80. The Mecca Farms site is located within the boundaries of the CERP North Palm Beach County Part I project and has the potential to affect CERP and the restoration of the NWFLR.

81. Projects that potentially would affect or would be within or adjacent to a CERP project are evaluated on a case-by-case basis to determine whether a proposed project would not be inconsistent with CERP and other District objectives.

82. There was a dispute between Respondents and Petitioners as to whether the proposed project was inconsistent with the District's objectives, including CERP and its goals pertaining to the restoration of the NWFLR. Petitioners contend that the District has insufficient evidence that the Mecca Farms will not be needed for the construction of a reservoir. That contention is rejected. The greater weight of the credible evidence established that sufficient storage is available at a superior site known as the Palm Beach Aggregates (PBA) site in the L-8 Basin, which is a unique geological site that will provide in-ground storage of water.⁵

83. Water from the PBA storage site can be conveyed to the NWFLR to increase dry season flows. Water can be stored at the PBA site in the wet season to prevent potentially damaging high flows.

84. The L-8 Basin, which is adjacent to the C-18 Basin, receives more water during the wet season than it uses. This means that at present a significant amount of water must be discharged to tide (lost) during the wet season to provide for flood protection in this area.

85. As envisioned, the water currently lost to tide could be stored at the PBA site for use during the dry season. By combining the water storage in the L-8 Basin with connective flow-ways to the C-18 Canal, water demands within the C-18

Basin, including the NWFLR, can also be met by the PBA storage site.⁶ An increase in freshwater flows to the NWFLR will further the District's restoration goals for the NWFLR.

86. Storage at PBA has regional benefits for other significant natural areas because it will provide additional flows to the Loxahatchee Slough and Grassy Waters Preserve. Those additional flows will further the District's CERP goals.

87. Since October of 2003, County staff and the District's ERP staff have coordinated review of the subject project with the District's CERP Planning and Federal Projects Division and other District staff working on projects in this region. The County asked the District to determine if the Mecca Farms' site could in some way accommodate CERP objectives, and three alternatives were considered: 1) no action; 2) a reservoir; and 3) a flow-way. As opposed to a reservoir, the more valuable and the more practical, use of the Mecca Farms site would be as part of the system to convey the stored water to the areas that would most benefit from its discharge. The proposed flow-way in the BRP Natural Area would be an integral part of that conveyance system and would provide the District with greater flexibility in managing and directing the discharge of the water stored at the PBA site.

88. Prior to the development of the flow-way concept as part of the proposed development, CERP identified a single route

to take water from PBA to the NWFLR. The flow-way will provide an additional route from PBA to the NWFLR. That additional route will provide the District with greater operational flexibility. The flow-way will complement the L-8 Basin flow-way and help reduce peak flows to the NWFLR and the Estuary. The flow-way also provides a potential route allowing excess water to be brought back from the C-18 Basin to the PBA site for storage. There are no other potential routes that allow water to be directed from the C-18 Basin in the wet season to the PBA site.

89. The flow-way provides a feature that was not part of the CERP original plan and is therefore an unanticipated benefit for CERP.

90. The Applicants provided reasonable assurances that the proposed project is not inconsistent with the District's objectives.⁷

CONCLUSIONS OF LAW

91. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this consolidated proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

92. This is a de novo proceeding designed to formulate final agency action. See Hamilton County Bd. of County Com'rs v. State Dep't. Environmental Reg., 587 So. 2d 1378 (Fla. 1st

DCA 1991); Dep't. of Transportation v. J.W.C., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); and § 120.57(1)(k), Fla. Stat.

93. The Petitioners in DOAH Case No. 04-3084 argue that the subject permits cannot be issued because the Applicants failed to establish either their interest in the Mecca Farms site, whether that interest is by contract or deed. The argument was not raised in the Petition filed in DOAH Case No. 04-3084, nor was it argued by Petitioners at the final hearing. The argument is rejected because it fails to cite the authority on which the argument is based and because such an argument cannot be made for the first time in a Proposed Recommended Order. See Fla. Admin. Code R. 28-106.201(2) and Brookwood Extended Care Center of Homestead, L.L.P. v. Agency for Health Care Admin., 870 So. 2d 834 (Fla. 3d DCA 2003).

94. Petitioners alleged and attempted to present evidence that the ERP should be denied because other alternate sites existed that would in their opinions be better suited for the BRP. The District does not have the authority to consider alternative sites when reviewing an ERP Permit. Administrative agencies are creatures of statute and can exercise only those powers conferred by statute. See Ocampo v. Dep't of Health, 806 So. 2d 633 (Fla. 1st DCA 2002). The District possesses no inherent power and can only do what it is authorized to do by the Legislature. See State, Bd. of Trustees v. Day Cruise

Ass'n, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001). Consequently, evidence of alternative sites was excluded on the grounds of relevance.

95. Respondents have the burden to prove by a preponderance of the evidence that the Applicants provided reasonable assurances that the conceptual permit for the proposed SWM system and the Phase 1A construction are consistent with applicable permitting criteria. Respondents also have the burden to prove by a preponderance of the evidence that the Applicants provided reasonable assurances that that the proposed activity would not be inconsistent with the overall objectives of the District. See J.W.C., supra, 396 So. 2d at 787.

96. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). "Competent" evidence must be relevant, material and otherwise fit for the purpose for which it is offered. See Gainesville Bonded Warehouse v. Carter, 123 So. 2d 336 (Fla. 1960), and Duval Utility Co. v. FPSC, 380 So. 2d 1028 (Fla. 1980). "Substantial" evidence must be sufficient to allow a reasonable mind to accept the evidence as adequate to support a conclusion. See Degroot v. Sheffield, 95 So. 2d 912 (Fla. 1957), and Agrico Chemical Co. v. Fla. Dept. of Environmental Regulation, 365 So. 2d 759 (Fla. 1st DCA 1978).

97. The standard for an applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for the issuance of a permit have been satisfied.

98. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade Co. v. Coscan Fla., Inc., 609 So. 2d 644, (Fla. 3d DCA 1992).

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

100. If an applicant presents a prima facie showing of entitlement, the burden shifts to the party opposing the issuance of the permit to refute the prima facie showing by competent evidence that reasonable assurances have not been provided. Such evidence cannot be merely speculative.

101. With the exception of the unidentified secondary impacts discussed in paragraphs 61, 62, and 63 of this Recommended Order, it is concluded that the Applicants have provided reasonable assurances that all applicable permitting criteria set forth in Florida Administrative Code Rules 40E-4.301 and 40E.4.302 and the BOR have been met.

102. There are no wetlands on the project site. The ditches and impoundment on the property were constructed for

storm water treatment and are operated solely for storm water treatment as defined in Florida Administrative Code Rule 40E-4.0515 under a valid permit issued pursuant to Florida Administrative Code Rule 40E-4. Consequently, Mecca Farms' surface waters are exempt from the specified review criteria set forth in Florida Administrative Code Rule 40E-4.0515.

103. Pursuant to Florida Administrative Code Rule 40E-4.302(1)(f) and Section 4.1.1(f) of the BOR, an applicant must conduct a secondary impacts analysis and must provide reasonable assurances that the regulated activity "will not cause adverse secondary impacts to water resources." Secondary impacts are generally described as impacts that occur outside the direct footprint of the project, but which are closely linked and causally related to the activity to be permitted. A close cause and effect relationship must exist between an alleged impact and the project in order for it to be considered as a secondary impact. There must be a "but for" relationship. Closely linked and causally related means "but for this activity taking place, this cause and effect would not occur." The secondary impacts test then, by its very definition, cannot be speculative or consist of unproven allegations. There must be a direct cause and effect relationship. See del Campo v. State Department of Environmental Regulation, 452 So. 2d 1004 (Fla. 1st DCA 1984); Deep Lagoon Boat Club, Ltd., v. Sheridan, 784 So. 2d 1140 (Fla.

2d DCA 2001); and Conservancy Inc. v. A. Vernon Allen Builder, Inc., 580 So. 2d at 772, rev. denied. 591 So. 2d 631 (Fla. 1991).

104. Petitioners contend that potential future development of the neighboring Vavrus property should be considered a secondary impact of the proposed project. Petitioners failed to prove that contention by competent evidence. There was no evidence that any potential development on the Vavrus property will be closely linked and causally connected to the Scripps' construction, and there was no evidence that future development on the Vavrus property would not occur but for the construction of the proposed project. If or when the Vavrus property is developed, it will require its own ERP and other necessary permits.

105. Evidence should be excluded as irrelevant unless it can be shown to be "very closely linked and causally related" to measurable violations of state environmental standards. De minimis or remotely related secondary impacts will not be considered in the secondary impacts analysis. See Section 4.2.7, BOR.

106. Respondents established that secondary impacts were appropriately analyzed. Pursuant to Section 4.2.7, BOR, if secondary impacts cannot be prevented, the applicant may propose mitigation to offset the impacts. Respondents established that

the proposed mitigation plan offers adequate mitigation to offset these secondary impacts. The applicants therefore provided the required reasonable assurances to establish that the project will not result in adverse closely linked and causally related secondary impacts for which mitigation has not been provided.

107. Cumulative impacts are those created by the cumulative effects of similar future projects within the same drainage basin. See Caloosa Property Owners' Ass'n., Inc. v. Dep't of Env'tl. Reg., 462 So. 2d 523 (Fla. 1st DCA 1985).

108. Section 373.414(8)(a), Florida Statutes, provides:

The governing board . . . in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands . . . within the same drainage basin . . .

109. Cumulative impacts are the sum of any adverse impacts to wetlands and other surface waters attributable to the project which have not been fully offset within a drainage basin, including consideration of past impacts and reasonably anticipated future impacts.

110. The four secondary impacts delineated in the Findings of Fact section of this Recommended Order may affect wetlands or other surface waters, and thus those must be considered under the cumulative impact requirements of Section 373.414(8)(a),

Florida Statutes. No other cumulative impacts need to be analyzed.

111. The cumulative impact analysis examines impacts within the same drainage basin. All impacts, whether direct or secondary, will be fully offset by mitigation for the C-18 basin. Consequently, there will be no cumulative impacts to the C-18 basin. See § 373.414(8)(b), Fla. Stat.

112. There remain secondary impacts in the L-8 Basin that were not offset by mitigation in that basin. The District's cumulative impacts analysis presumes that a particular basin (in this case the L-8 Basin) can tolerate only so much loss of wetland function before there is a significant adverse basin impact. If the impacts reach that level, they are considered unacceptable. See Broward County v. Weiss, 2002 WL 31125094, 11 (DOAH). If a project's cumulative impacts are unacceptable, they must be reduced so that the impacts can be equitably distributed among the applicant and prospective applicants, such that there would not be significant adverse or unacceptable cumulative impacts when the basin is fully developed.

113. Pursuant to Section 4.2.8.1, BOR, cumulative impacts are considered unacceptable when the proposed systems considered in conjunction with the past, present, and future activities would result in a violation of state water quality standards or significant adverse impacts to functions of wetlands or other

surface waters within the same drainage basin when considering the basin as a whole.

114. As the Findings of Fact indicate, two of the four secondary impacts are located in the L-8 Basin. The vast majority of the wetlands in that basin are in public ownership. Consequently, the District correctly concluded that the activities would not result in a violation of state water quality standards or significant adverse impacts to functions of wetlands or other surface waters within the same drainage basin when the L-8 Basin was considered as a whole.

115. Section 373.414(1), Florida Statutes, requires applicants to provide reasonable assurances that an "activity in, on, or over surfaces water or wetlands, as delineated in Section 373.421(1), Florida Statutes, is not contrary to the public interest. The public interest test requires a consideration and balancing of seven listed criteria.

116. The public interest test is limited in scope to only the seven factors set forth in Section 373.414(1)(a), Florida Statutes. The application of the public interest test does not involve consideration of non-environmental factors other than those expressly set forth in the statute such as navigation or preservation of historical or archaeological resources. Specifically, traffic concerns, congestion, quality of rural life, and school overcrowding are not within the seven factors

contained in Section 373.414(1)(a), Florida Statutes. See Van Wagoner v. Fla. Dep't of Transp., 18 F.A.L.R. 2277, 2285-88 (DEP 1996).

117. Respondents established by competent and substantial evidence that the four potential secondary impacts will not be contrary to the public interest.

118. The Applicants provided reasonable assurances that the proposed activities will not be inconsistent with the objectives of the District as required by Sections 373.414(1) and 373.416(1), Florida Statutes.

119. Section 373.414(1), Florida Statutes, does not specify District objectives. The evidence established that a high-priority objective of the District is the successful implementation of CERP, which includes goals pertaining to the restoration of the NWFLR.

120. After the overall objectives of the District for a specific geographic area are identified, the CERP project plans must be examined to determine if the specific property covered by the permit application is identified within or adjacent to planned CERP components or CERP study areas.

121. The next step is then for the applicant to demonstrate that the proposed activities are not inconsistent with the overall objectives of the District.

122. Respondents met their burden of establishing that reasonable assurances that the activities will not be inconsistent with the overall objectives of the District had been provided.

123. Petitioners did not refute the evidence that reasonable assurances have been provided.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the District issue the subject ERP for the conceptual approval of the SWM system for the BRP and the Phase 1A construction and operation subject to the general and special conditions set forth in the Staff Report and the Amended Staff Report. It is further RECOMMENDED that the District add the following special condition:

Prior to application for construction within 1000 feet of the eastern boundary of the above-ground impoundment, the applicants shall conduct a wildlife survey to identify any nesting or roosting areas in the adjoining off-site wetlands utilized by listed species of wading birds. If such nesting or roosting areas are found the permittee shall, if determined necessary by the District, incorporate additional buffers or other appropriate measures to ensure protection of these wetland functions.

DONE AND ENTERED this 3rd day of December, 2004, in
Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of December, 2004.

ENDNOTES

^{1/} Unless otherwise noted, all statutory references are to Florida Statutes (2004) and all rule references are to the version of the rule published in the Florida Administrative Code as of the date of this Recommended Order.

^{2/} On September 17, 2004, a Notice of Hearing was entered scheduling these consolidated proceedings for formal hearing on October 12, 2004. On September 29, 2004, a continuance was granted (occasioned by the hurricanes that struck Florida), and the consolidated cases were re-scheduled for the dates November 1 - 5, 2004. On October 28, 2004, the Petitioners in DOAH Case No. 04-3084 filed their witness list, which included Governor Jeb Bush and the individual members of the Palm Beach County Commission. During a break in the formal hearing on November 1, 2004, Mr. Silver asked the undersigned for subpoenas for the witnesses he wanted to call. The undersigned informed Mr. Silver that he should contact DOAH's clerk's office for witness subpoenas. Mr. Silver also asked counsel for the County to accept service of process on behalf of the individual commissioners and to ask Gov. Bush to appear as a witness at the formal hearing. Counsel for the County declined Mr. Silver's

requests. On Tuesday, November 2, 2004, Mr. Silver informed the undersigned that the DOAH subpoenas would have to be mailed to him and that he would not have time to get the subpoenas from DOAH before the formal hearing ended. Mr. Silver presented a witness subpoena form that he had drafted with the request that the undersigned sign the subpoena. The undersigned declined the request after informing Mr. Silver that the form he drafted was legally incorrect. Mr. Silver thereafter requested that P-84 Ex. 1, which purports to be the form Mr. Silver presented to the undersigned on November 2, 2004, be marked and kept as a part of the file of this proceeding in the event the matter is reviewed on appeal. Mr. Silver offered no explanation as to why he did not make any attempt to subpoena these witnesses on a timely basis.

^{3/} This is an acronym for National Geodetic Vertical Datum.

^{4/} There was a dispute between the Respondents and the Petitioners whether the Vavrus property should be considered as part of the wetland cumulative impact analysis. The undersigned concluded that the Vavrus property should not be considered as part of that analysis. Although Vavrus is also located within the C-18 Basin and there is a strong likelihood that Vavrus will be developed in a manner that shares BRP infrastructure and complements the BRP development, there is no pending ERP application for Vavrus. The greater weight of the competent evidence established that the potential Vavrus development is not closely linked or causally connected to the proposed BRP development.

^{5/} There was competent evidence to support the District's conclusion that the PBA site would provide more and better storage than an impoundment on the Mecca Farms site. There are currently 47,000 acre-feet of existing storage capacity at the PBA site. At most, only 15,000 acre-feet of storage would be available in an impoundment at the Mecca Farms site. Because of its unique geology, the subsurface movement of groundwater in the immediate area of the PBA site is very low compared to most areas of South Florida. This means that the water levels in the PBA site can be lowered below sea level with minimal seepage. Construction of an above-ground storage is very expensive since elaborate seepage controls have to be utilized. There was no evidence that any entity was prepared to pay the high cost of constructing an impoundment on the Mecca Farms site. An above-ground storage facility would lose more water to evaporation than an in-ground facility.

6/ Other basins that may increase freshwater flows to the Loxahatchee River are the C-44 and Cypress Creek, Pal-Mar Basins. Consequently, restoration of the River is not totally dependent on flows or storage from the C-18 or L-8 Basins. Natural storage areas in CWMA and in and around the Pal-Mar Water Control District can supplement dry season flows to the NWFLR.

7/ In reaching this finding, the undersigned has carefully considered the testimony of Mr. Schweigart (a former District administrator) and Mr. Zebuth (a former administrator with the Florida Department of Environmental Protection). Both witnesses are found to be highly credible and their testimony entitled to great weight. Mr. Schweigart's opinions were based largely on his belief that the District should be able to force the Applicants to look at alternative sites. While it may be desirable from an administrator's point of view for the District to have that authority, the District, as an agency of the state, has only the authority conferred upon it by the legislature, which has not conferred upon the District the authority to require the Applicants to propose alternate sites for their proposed project. Mr. Zebuth found the modeling studies of MFL relied upon by the District to be too preliminary to be of value in reaching the conclusion that the Mecca Farms site was not needed as a reservoir. Respondents' witnesses adequately explained how the modeling studies were utilized and established that the District had a sufficient basis to make its decisions as to the Mecca Farms site.

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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 these cases.