

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OCTAVIO BLANCO,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-3274
)	
WESTFIELD HOMES OF FLORIDA and)	
SOUTHWEST FLORIDA WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by
Administrative Law Judge T. Kent Wetherell, II, on January 31
and February 1, 2006, in Brooksville, Florida.

APPEARANCES

For Petitioner: Marcy I. LaHart, Esquire
Marcy I. LaHart, P.A.
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West Palm Beach, Florida 33405-1443

For Respondent Westfield Homes of Florida (Westfield):

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For Respondent Southwest Florida Water Management District
(District):

Jack R. Pepper, Esquire
Nicki Spirtos, Esquire
Southwest Florida Water
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2379 Broad Street
Brooksville, Florida 34604-6899

STATEMENT OF THE ISSUE

The issue is whether the District should approve Environmental Resource Permit No. 43024788.002 for the construction of a surface water management system to serve the proposed residential subdivision on Westfield's property in southern Pasco County, and based upon the prior litigation between the parties in DOAH Case No. 04-0003 and the pre-hearing rulings in this case, the issue turns on whether Westfield has provided "reasonable assurances" in relation to the proposed development's potential impacts on Wetland A3 and fish and wildlife.

PRELIMINARY STATEMENT

On July 29, 2005, the District preliminarily approved Westfield's application for Environmental Resource Permit (ERP) No. 43024788.002. Petitioner, Octavio Blanco (Dr. Blanco), timely challenged the District's preliminary approval of the ERP through a Request for Administrative Hearing filed with the District on August 24, 2005.

The District referred the case to the Division of Administrative Hearings (DOAH) on September 13, 2005, for the assignment of an Administrative Law Judge to conduct the hearing requested by Dr. Blanco. At the parties' request, the final hearing was scheduled for January 31 through February 2, 2006.

The scope of the final hearing was narrowed based upon the prior litigation between the parties, Blanco v. Southwest Florida Water Management District, Case No. 04-0003 (DOAH Dec. 17, 2004; SWFWMD Jan. 27, 2005) (hereafter "Blanco-I"). See Order Granting Motion in Limine, dated January 27, 2006. The scope of the final hearing was further narrowed based upon a stipulation of the parties related to the fish and wildlife issue. See Transcript, at 131-38, 340-43.

At the final hearing, Dr. Blanco testified in his own behalf and also presented the testimony of Dr. Mark Stewart, who was accepted as an expert in hydrology, hydrogeology, water resource management, and environmental geophysics; and Dr. Mark Rains, who was accepted as an expert in hydrogeology, ecohydrology, and geomorphology.¹ Dr. Blanco's Exhibits P-1 and P-2 were received into evidence.

Westfield presented the testimony of Charles Courtney, who was accepted as an expert in wetlands, wetland delineation, environmental resource permitting, wetland monitoring, water quality and quantity analysis, and determination of wetland

type, nature and function; Kyle Cyr, who was accepted as an expert in drainage engineering and surface water computer modeling; Brian Skidmore, who was accepted as an expert in wetlands, wetland delineation, wetland mitigation, Florida wetland ecology, wildlife and listed species assessment, wetland hydroperiod determination, and Florida wetland plant identification; and Marty Sullivan, who was accepted as an expert in geotechnical engineering and ground and surface water management. Westfield's Exhibits R-1 through R-7 and R-9 through R-16 were received into evidence. Exhibit R-8 was offered but not received.

The District presented the testimony of Monte Ritter, who was accepted as an expert in surface water management systems, surface water modeling, and environmental resource permitting; Leonard Bartos, who was accepted as an expert in wetland assessment, aquatic ecology, wetland ecology, wetland mitigation, and ERP rules; and John Parker, who was accepted as an expert in geology, hydrogeology, and water use permitting rules. The District's Exhibits D-1 through D-8 were received into evidence.

Official recognition was taken of the Recommended and Final Orders in Blanco-I.

At the pre-hearing conference held on January 19, 2006, Petitioner's ore tenus motion to include the transcript of the

final hearing in Blanco-I as part of the record of this case was granted. Petitioner did not file any portion of that transcript with DOAH as directed,² and as a result, the Blanco-I transcript is not part of the record of this case.

The four-volume Transcript of the final hearing in this case was filed on February 21, 2006. The parties initially requested and were given 21 days from that date to file proposed recommended orders (PROs). The deadline was subsequently extended to March 20, 2006, on Westfield's unopposed motion. Each party timely filed a PRO. The PROs have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Dr. Blanco is a veterinarian. He grew up on, and has some sort of ownership interest in the property (hereafter "the Blanco property") immediately to the west of the property on which the proposed development at issue in this case will occur.

2. Dr. Blanco is particularly concerned about the impacts of the proposed development on the ecological health of Wetland A3, a significant portion of which is on the Blanco property. He has spent considerable time over the years observing and enjoying that wetland.

3. Westfield is the applicant for the ERP at issue in this case, and it owns the property (hereafter "the Westfield

property") on which the development authorized by the ERP will occur.

4. The District is the administrative agency responsible for the conservation, protection, management, and control of the water resources within its geographic boundaries pursuant to Chapter 373, Florida Statutes, and Florida Administrative Code Chapter 40D. Among other things, the District is responsible for reviewing and taking final agency action on ERP applications for projects within its boundaries.

5. The District includes all or part of 16 counties in southwest Florida, including Pasco County.

B. The Proposed Development

(1) Generally

6. The Westfield property consists of 266.36 acres.³ It is located in southern Pasco County on the north side of State Road 54, approximately three miles west of U.S. Highway 41 and less than one-half mile east of the intersection of State Road 54 and the Suncoast Parkway.

7. The Westfield property is bordered on the south by State Road 54,⁴ on the north by an abandoned railroad right-of-way and undeveloped woodland property, on the east by pastureland and property that has been cleared for development, and on the west by the Blanco property.

8. The development proposed for the Westfield property is a residential subdivision with 437 single-family lots and related infrastructure (hereafter "the Project" or "the proposed development"). The ERP at issue in this proceeding is for the surface water management system necessary to serve the Project.

9. There are 19 isolated and contiguous wetlands on the Westfield property, including Wetland A3, which is partially on the Westfield property and partially on the Blanco property. Wetlands cover 72.69 acres (or 27.3 percent) of the Westfield property.

10. The proposed development will result in 1.61 acres of the existing wetlands -- Wetlands B4 and C4, and a portion of Wetland B12 -- being permanently destroyed. The remaining 71.08 acres of existing wetlands will be preserved.

11. Wetlands B4 and C4 are small (each less than 0.75 acres), shallow, wet depressions in a pasture that have been significantly impacted by livestock grazing and periodic mowing. Wetland B12 is a low-quality, small (0.58 acres), isolated, forested wetland that has been impacted by livestock grazing and the intrusion of exotic species.

12. The proposed development will create 2.89 acres of new wetlands, which means that the Project will result in a net gain of 1.28 acres of wetlands. The created wetlands, referred to as Wetland B2 or the "mitigation area," are in the northern portion

of the property along the abandoned railroad right-of-way and to the east of Wetland A3.

13. The proposed ERP includes a number of special conditions, Nos. 6 through 11, related to the mitigation area. Among other things, the conditions require monitoring of the mitigation area to ensure that it develops into the type of forested wetland proposed in the ERP application.

(2) Prior ERP Application

14. The ERP at issue in this case is the second ERP sought by Westfield for the Project.

15. The first ERP, No. 43024788.000, was ultimately denied by the District through the Final Order in Blanco-I.

16. Blanco-I, like this case, was initiated by Dr. Blanco in response to the District's preliminary approval of Westfield's ERP application.

17. Administrative Law Judge David Maloney held a three-day final hearing in Blanco-I at which the parties, through counsel, fully litigated the issue of whether Westfield satisfied the regulatory criteria for the issuance of an ERP for the proposed development.

18. On December 17, 2004, Judge Maloney issued a comprehensive, 64-page Recommended Order in which he recommended that Westfield's ERP application be denied.

19. Judge Maloney determined in his Recommended Order that Westfield failed to provide reasonable assurances as required by the applicable statutes and rules because "[1] it omitted an adequate wildlife survey from the submission of information to the District and [2] it failed to account for seepage from Pond P11 and its effect on Wetland A3 and the Cypress-forested Wetland."⁵ In all other respects, Judge Maloney determined that the applicable permit requirements had been satisfied.

20. Dr. Blanco did not file any exceptions to the Recommended Order in Blanco-I.

21. Westfield's exceptions to the Recommended Order in Blanco-I were rejected by the District, and the Recommended Order was adopted "in its entirety" in the District's Final Order.

22. The Final Order in Blanco-I was rendered on January 27, 2005, and was not appealed.

(3) Current ERP Application

23. On April 29, 2005, approximately three months after the Final Order in Blanco-I, Westfield submitted a new ERP application for the Project.

24. The current ERP application, No. 43024788.002, is identical to the application at issue in Blanco-I, except that the depth of Pond P11 was reduced in certain areas from a maximum of approximately 25 feet to a maximum of approximately

12 feet, an analysis of the potential impact of Pond P11 on Wetland A3 resulting from "seepage" was included with the application, and additional wildlife surveys were included with the application.

25. On July 29, 2005, the District gave notice of its preliminarily approval of the current ERP application. The notice was accompanied by a proposed ERP, which contained a description of the Project as well as the general and special conditions imposed by the District.

26. On August 24, 2005, Dr. Blanco timely challenged the District's preliminary approval of the current ERP application.

27. The Request for Administrative Hearing filed by Dr. Blanco in this case is identical to the request that he filed in Blanco-I.

C. Disputed Issues Related to the
Current ERP Application

(1) Impact of Pond P11 on Wetland A3

28. Dr. Blanco's primary objection to the Project is the excavation of Pond P11 adjacent to Wetland A3.

29. Wetland A3 is on the western border of the Westfield property and, as noted above, the wetland extends onto the Blanco property. The portion of Wetland A3 that is on the Westfield property is approximately 30 acres, and the portion of

the wetland on the Blanco property appears to be slightly larger.

30. Wetland A3 is a large, mature, Cypress-forested wetland. It has been impacted by nearby development and is not a pristine wetland, but it is still a mid to high quality wetland for the area.⁶

31. Wetland A3 is part of a larger wetland system that extends northward and westward beyond the abandoned railroad right-of-way that serves as the northern boundary of the Westfield and Blanco properties.

32. Cypress-forested wetlands, such as Wetland A3, are very tolerant of prolonged periods of drought and inundation.

33. The seasonal high groundwater level in Wetland A3 is approximately one foot below the surface in most areas of the wetland. There are, however, areas in Wetland A3 in which water is frequently a foot or two above the surface.

34. The groundwater levels in Wetland A3 have, in the past, been significantly impacted by drawdowns in the aquifer caused by pumping in nearby wellfields. The impact has been less significant in recent years as a result of the reductions in pumping mandated by the Tampa Bay Consolidated Water Use Permit. The planned interconnection of several nearby wellfields is also expected to minimize the drawdowns in the

aquifer and should further stabilize the groundwater levels in Wetland A3.

35. Pond P11 will be located adjacent to Wetland A3. There will be a 25-foot buffer between the pond and the wetland.

36. The location of Pond P11 is unchanged from the first ERP application.

37. Pond P11 will have a surface area of approximately 37 acres.

38. The surface area of Pond P11 is unchanged from the first ERP application.

39. Pond P11 is a necessary component of the surface water management system for the Project. It also serves as a "borrow pit" because the soil excavated from the pond will be used on-site as fill for the proposed development.

40. The excavation of Pond P11 to the depth proposed in the current ERP application is not necessary for water storage. The pond could be excavated to the seasonal high water level -- approximately 2.5 feet deep -- and still function as intended as part of the proposed surface water management system.

41. Pond P11 will be used for attenuation, but the pond is also expected to provide at least some amount of water quality treatment, which is an added benefit to Wetland A3 into which the proposed surface water management system will ultimately discharge through Pond P11.

42. The only change made to Pond P11 between the first and current ERP applications was a reduction in the pond's maximum depth. The pond, which had a maximum depth of approximately 25 feet in the first ERP application, was "shallowed up" in the current ERP application.

43. Pond P11 will now be approximately 12-feet deep at its deepest point, unless the District authorizes excavation to a greater depth in accordance with special condition No. 28. The shallowest area of Pond P11 will be along the western edge of the pond adjacent to Wetland A3 where there will be an expansive "littoral shelf" that will have almost no slope and that will be excavated only to the seasonal high water level.⁷

44. There was no change in the design of the surface water management system between the first ERP application and the current ERP application. The reduction in the depth of Pond P11 will have no impact on the operation of the system, which was described in detail in Blanco-I.⁸

45. Pond P11 will have a control structure to allow water to be discharged into Wetland A3 near its southern end, which is a more upstream location than water is currently discharged as a result of the ditches that intercept surface water flowing across the Westfield property. This design feature of the surface water management system is intended to mimic historic

hydrologic conditions and is expected to increase the hydration of Wetland A3.

46. The ERP includes a special condition, No. 28, relating to the excavation of Pond P11. The condition provides:

A. Maximum depth of excavation will be +38 feet NGVD^[9] unless additional field observations and data are provided that support excavation to greater depth, subject to review and approval by District staff. Proposed maximum depths of excavation . . . may be exceeded based upon field observations and approval as specified.

B. Due to the potentially irregular depths to limestone, excavation will be stopped at a shallower depth if confining soils are encountered before reaching the maximum depth specified in Subcondition A, above. A geotechnical field technician will be present on site during the entire excavation process in order to monitor excavated soils. The field technician will be under the supervision of a Professional Geologist or Professional Engineer. For the purposes of the specific project, confining soils are defined as soils with more than 20 percent fines passing a No. 200 sieve. The field technician will be authorized to halt depth of excavation when confining soils are encountered. Excavation may proceed deeper than soils containing 20 percent or more fines if the soils are shown to be an isolated lens of material significantly above underlying confining soils or limestone, as determined by field observations and data subject to approval by District staff.

C. Confining soils do not uniformly overlie the limestone; therefore it is possible that the underlying limestone could be encountered in spite of precautions in Subconditions A and B above. If the

underlying limestone is encountered, excavation will be halted in the area of exposed underlying limestone. The area of exposed limestone will be backfilled to a minimum depth of two feet with compacted material meeting the specification of confining soils, having more than 20 percent fines passing a No. 200 sieve. The geotechnical field technician must certify that the backfill material meets this specification.

47. One of the reasons that the ERP application was denied in Blanco-I was that Westfield failed to take into account the potential hydrologic impacts on Wetland A3 caused by "seepage" of water from Pond P11 due to the depth to which the pond was to be excavated and the corresponding removal of the confining layer of soils between the bottom of the pond and the aquifer.

48. After Blanco-I, Westfield retained Marty Sullivan, a professional engineer and an expert in geotechnical engineering and groundwater and surface water modeling, to evaluate the seepage issue and the potential hydrologic impacts of Pond P11 on Wetland A3.

49. Mr. Sullivan developed an integrated or "coupled" groundwater/surface water model to assess these issues. The model was designed to project the change in groundwater levels caused by the proposed development more so than absolute groundwater levels.

50. The model utilized a widely-accepted computer program and incorporated data from topographic and soil survey

information maintained by the U.S. Geologic Service; data from soil borings performed on the Westfield property in the vicinity of Wetland A3 in the area where Pond P11 will be located; data from groundwater monitoring wells and piezometers installed around the Westfield property; data from soil permeability tests performed on-site and in the laboratory; data from a rain gauge installed on the Westfield property; and data from the District's groundwater monitoring wells in the vicinity of the Westfield property.

51. Mr. Sullivan "calibrated" the model based upon known pre-development conditions. He then "ran" the model with the data from the Interconnected Pond Routing (ICPR) model¹⁰ used to design of the surface water management system in order to project the post-development groundwater conditions over a simulated ten-year period.

52. Mr. Sullivan's coupled groundwater/surface water model addresses the shortcoming of the ICPR model set forth in Blanco-I.¹¹

53. The model projects that the post-development groundwater levels at the western boundary of the Westfield property in Wetland A3 adjacent to Pond P11 will be the same as the pre-development levels during the "wet season" of June to September, and that, on average and during the "dry season" of

October to May, the post-development groundwater levels will be 0.3 feet higher than the pre-development levels.

54. Mr. Sullivan summarized his conclusions based upon these projections in a report provided to the District with the current ERP application. The report states that:

no adverse hydrologic effects will result from the excavation of Pond P11 and the development of the surrounding area. Particularly, Wetland A3 will be essentially unaffected and will be slightly enhanced by this development. Some additional hydration of wetland A3 will occur due to eliminating the north-south drainage ditch and instead routing runoff to Pond P11, which is adjacent to Wetland A3.

55. The relative differences in the pre- and post-development levels are more important than the absolute levels projected by the model and, in this case, there is almost no difference in the levels.

56. The minimal change in the water levels expected in Wetland A3 will not affect the wetland's ecological functioning or its viability. A 0.3-foot change in the water level is well within the normal range of hydroperiod fluctuation for Wetland A3.

57. The rate at which water increases and decreases in a wetland can impact wetland ecology and wetland-dependent species.

58. The proposed surface water management system will not increase the surface water discharges from the Westfield property, and in compliance with Section 4.2 of the Basis of Review (BOR),¹² the post-development discharge rates will not exceed the pre-development peak discharge rates.

59. There is no credible evidence that there will be an adverse impact on Wetland A3 caused by changes in the discharge rate from the Westfield property through Pond P11 into Wetland A3.

60. The range of error, if any, in Mr. Sullivan's model is unknown. He has never performed a post-development review to determine how accurately the model predicts the post-development conditions that are actually observed.

61. Nevertheless, the more persuasive evidence establishes that Mr. Sullivan's model is reasonable, as are his ultimate conclusions based upon the model's projections.

62. Mr. Sullivan recommended in his report that Pond P11 be excavated no deeper than two feet above the limestone to avoid potential breaches of the confining soils above the aquifer. That recommendation led to the pond being "shallowed up," and it was incorporated by the District into special condition No. 28.

63. The provisions of special condition No. 28 are reasonable to ensure that excavation of Pond P11 will not breach the confining layer.

64. The standards in special condition No. 28 pursuant to which a geotechnical field technician will monitor the excavation of Pond P11, and pursuant to which the District will determine whether to authorize deeper excavation of the pond, are generally accepted and can be adequately monitored by professionals in the field and the District.

65. There is a potential for the loss of "significant volumes of water" from Pond P11 through evaporation "[d]ue to the sheer size of P11's open surface area."¹³

66. It is not entirely clear how the evaporation of water from Pond P11 was taken into account in Mr. Sullivan's model, but it appears to have been considered.¹⁴

67. Dr. Mark Rains, Petitioner's expert in hydrogeology, ecohydrology, and geomorphology, testified that evaporation from open water is generally about 12 inches more per year than evaporation from a wet meadow or Cypress forest, but he did not offer any specific criticism of the projections in Mr. Sullivan's model related to the issue of evaporation.

68. In sum, the more persuasive evidence establishes that Wetland A3 is not likely to suffer any adverse ecological or hydrological impacts from the proposed surface water management

system and, more particularly, from Pond P11. Westfield has provided reasonable assurances in that regard.

(2) Adequacy of the Wildlife Surveys

69. The other reason why the first ERP application for the Project was denied in Blanco-I was that the wildlife surveys submitted with that application were found to be inadequate.

70. Wildlife surveys are not required with every ERP application and, in that regard, Section 3.2.2 of the BOR provides that:

[t]he need for a wildlife survey will depend on the likelihood that the site is used by listed species, considering site characteristics and the range and habitat needs of such species, and whether the proposed system will impact that use such that the criteria in subsection 3.2.2 through 3.2.2.3 and subsection 3.2.7 will not be met.

71. Westfield conducted a "preliminary" wildlife assessment in 2001. No listed species were observed, nor was any evidence of their presence on the Westfield property.

72. Nevertheless, as detailed in Blanco-I,¹⁵ the District requested that Westfield perform a wildlife survey of Wetlands B4, C4, and B12, because all or part of those wetlands will be permanently destroyed by the proposed development.

73. In an effort to comply with the District's requests, Westfield conducted additional field visits in 2003 and also performed specific surveys for Southeastern Kestrels and Gopher

Tortoises. The field visits "confirmed" the findings from the preliminary wildlife assessment, and no evidence of Southeastern Kestrels and Gopher Tortoises was observed during the surveys for those species.

74. Judge Maloney found in Blanco-I that the wildlife surveys conducted by Westfield were inadequate because they "did not employ the methodology recommended by the District: the FWCC methodology."¹⁶

75. However, the wildlife surveys were not found to be inadequate in Blanco-I because they focused on Wetlands B4, C4, and B12, instead of evaluating the entire Westfield property and/or all of the potentially impacted wetlands, including Wetland A3.

76. After Blanco-I, a team of qualified professionals led by Brian Skidmore, an expert in wetlands, Florida wetlands ecology, and listed species assessment, conducted additional wildlife surveys of the Westfield property. Mr. Skidmore and his team had performed the preliminary wildlife assessment and the supplemental surveys submitted with Westfield's first ERP application.

77. The "FWCC methodology" referenced in Blanco-I is a methodology developed by the Fish and Wildlife Conservation Commission (FWCC) to evaluate potential impacts to listed species from large-scale projects, such as developments-of-

regional impact and new highways. It is not specifically designed for use in the ERP process, which focuses only on wetland-dependent species.

78. Mr. Skidmore adapted the FWCC methodology for use in the ERP process. The methodology used by Mr. Skidmore was reviewed and accepted by the District's environmental regulation manager, Leonard Bartos, who is an expert in wetland ecology and ERP rules.

79. The surveys performed by Mr. Skidmore and his team of professionals occurred over a five-day period in February 2005. The surveys focused on Wetlands B4, C4, and B12, and were performed at dawn and dusk when wildlife is typically most active.

80. Additional wildlife surveys of the entire site were performed on five separate days between October 2005 and January 2006. Those surveys were also performed at dawn and dusk, and they included observations along the perimeter of Wetland A3 and into portions of the interior of that wetland on the Westfield property.

81. Mr. Skidmore reviewed databases maintained by FWCC to determine whether there are any documented waterbird colonies or Bald Eagle nests in the vicinity of the Project. There are none.

82. Mr. Skidmore contacted the Florida Natural Area Inventory to determine whether there are any documented rare plant or animal species on the Westfield property or in the vicinity of the Project. There are none.

83. The post-Blanco-I wildlife surveys did not evaluate the usage of the Westfield property by listed species during the wetter spring and summer months of March through October even though, as Mr. Skidmore acknowledged in his testimony, it is possible that different species may use the property during the wet season.

84. The post-Blanco-I wildlife surveys, like the original wildlife surveys, focused primarily on the species contained in Appendix 5 to the BOR -- i.e., wetland-dependent species that use uplands for nesting, foraging, or denning -- but Mr. Skidmore testified that he and his surveyors "were observant for any species," including wetland-dependent species that do not utilize uplands.

85. No listed wetland-dependent species were observed nesting or denning on the Westfield property. Several listed wetland-dependent birds -- i.e., snowy egret, sandhill crane, wood stork, and white ibis -- were observed foraging and/or resting on the property. Those birds were not observed in Wetlands B4, C4, or B12.

86. The parties stipulated at the final hearing that the determination as to whether Westfield provided reasonable assurances with respect to the statutory and rule criteria related to fish and wildlife turns on whether the wildlife surveys submitted by Westfield are adequate.¹⁷

87. BOR Section 3.2.2 provides that "[s]urvey methodologies employed to inventory the site must provide reasonable assurance regarding the presence or absence of the subject listed species."

88. The wildlife surveys conducted by Westfield subsequent to Blanco-I in accordance with the FWCC methodology meet this standard. Although the surveys could have been more extensive in terms of the species assessed and the period of time over which they were conducted, the more persuasive evidence establishes that the wildlife surveys are adequate to document the presence or, more accurately the absence of listed wetland-dependent species on the Westfield property.

89. The wetlands that will be directly impacted by the proposed development -- Wetlands B4, C4, and B12 -- do not provide suitable habitat for listed species. Those wetlands are small, low-quality wetlands, and Wetland B12 is technically exempt from the District's fish and wildlife review because it is a small isolated wetland.

90. There is no credible evidence that there will be any other adverse impacts to fish and wildlife from the proposed surface water management system. For example, even if there are undocumented listed species -- e.g., frogs, snakes, snails, etc. -- in Wetland A3, Mr. Skidmore credibly testified that the expected 0.3-foot increase in groundwater levels in that wetland during the dry season is not likely to adversely affect those species or their habitat because the water will still be below the surface.

91. In sum, Westfield has provided reasonable assurance that the proposed development will not adversely affect fish and wildlife.

CONCLUSIONS OF LAW

92. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005).¹⁸

93. Westfield and the District did not contest Dr. Blanco's standing in this case, and based upon the implicit finding in Blanco-I that Dr. Blanco had standing to challenge the first ERP sought by Westfield, it is determined that Dr. Blanco has standing to challenge the ERP at issue in this case.

94. Westfield has the burden to prove by a preponderance of the evidence that its ERP application should be approved.

See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981) (cited with approval in Department of Banking and Finance v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996)).

95. This is a de novo proceeding and no presumption of correctness attaches to the District's preliminary approval of the ERP, but, as explained in J.W.C. Co.:

as a general proposition, a party should be able to anticipate that when agency employees or officials having special knowledge or expertise in the field accept data and information supplied by the applicant, the same data and information, when properly identified and authenticated as accurate and reliable by agency or other witnesses, will be readily accepted by the [administrative law judge], in the absence of evidence showing its inaccuracy or unreliability.

J.W.C. Co., 396 So. 2d at 789.

96. In that regard, once the applicant makes a preliminary showing of its entitlement to the permit through "credible and credited evidence," the Administrative Law Judge is not authorized to deny the permit "unless contrary evidence of equivalent quality is presented by the opponent of the permit." Id. Accord Lake Region Audubon Society v. Southwest Florida Water Management District, Case No. 05-2606, 2005 Fla. Div. Adm. Hear. LEXIS 1356, at *47 (DOAH Nov. 10, 2005; SWFWMD Nov. 30, 2005).

97. An applicant for a permit to construct a surface water management system must demonstrate that the system "will not be harmful to the water resources of the district." See § 473.313(1), Fla. Stat.

98. An applicant for an ERP must also satisfy the criteria in Section 373.414, Florida Statutes, which is commonly referred to as the "public interest test" and which provides in pertinent part:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board . . . shall require the applicant to provide reasonable assurance that state water quality standards . . . will not be violated and reasonable assurance that such activity in, on or over surface waters or wetlands . . . is not contrary to the public interest. . . .

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands . . . is not contrary to the public interest, the governing board . . . shall consider and balance the following criteria:

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 enhance significant historical and archaeological resources under the provisions of s. 267.061; and

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

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board . . . , in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, and the purchase of mitigation credits from mitigation banks It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

99. The rules adopted by the District to implement Sections 373.413 and 373.414, Florida Statutes, provide in pertinent part:

40D-4.301 Conditions for Issuance of Permits.

(1) In order to obtain [an ERP], an applicant must provide reasonable assurance that the construction . . . 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 including aquatic and wetland dependent species, by wetlands, other surface waters and other water related resources of the District;

(e) will not adversely impact the quality of receiving waters such that . . . water quality standards . . . will be violated;

(f) will not cause adverse secondary impacts to the water resources;

(g) will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, F.S.;

(h) will not cause adverse impacts to a work of the district established pursuant to Section 373.086, F.S.;

(i) is capable, based on generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed;

(j) will be conducted by an entity with financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) will comply with any applicable special basin or geographic area criteria established pursuant to this chapter.

* * *

40D-4.302 Additional Conditions for Issuance of Permits.

(1) In addition to the conditions set forth in Rule 40D-4.301, F.A.C., in order to obtain [an ERP,] an applicant must provide reasonable assurances that the construction . . . of a system:

(a) . . . will not be contrary to the public interest . . . as determined by balancing the following criteria as set forth in subsections 3.2.3 through 3.2.3.7 of the [BOR]

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 enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. whether 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 3.2.8 through 3.2.8.2 of the [BOR]

Fla. Admin. Code R. 40D-4.301(1), 40D-4.302(1).

100. These statutory and rule criteria are further explained in the BOR. See BOR § 3.1.1 ("Environmental Conditions for Issuance"); BOR § 3.2 et seq. ("Environmental Criteria").

101. The BOR is used by the District to determine whether reasonable assurances have been provided. See Fla. Admin. Code R. 40D-4.301(3).

102. The "reasonable assurance" standard does not require the applicant to provide absolute guarantees, nor does it require the applicant to eliminate all speculation concerning what might occur if the project is developed as proposed. Instead, the applicant is only required to establish a "substantial likelihood that the project will be successfully implemented." See, e.g., Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); Lake Region Audubon Society, supra, at **46-49.

103. The doctrines of res judicata and collateral estoppel preclude Blanco from re-litigating issues in this case that were

determined in Blanco-I, and, in that regard, the final hearing in this case focused only on the deficiencies identified in Blanco-I and any circumstances and conditions that have changed since that case. See Thomson v. Dept. of Environmental Reg., 511 So. 2d 989, 991 (Fla. 1987); Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 n.4 (Fla. 2d DCA 2001); Holiday Inns, Inc. v. City of Jacksonville, 678 So. 2d 528, 529 (Fla. 1st DCA 1996).

104. It is determined, based upon findings and conclusions in the Recommended and Final Orders in Blanco-I, that the current ERP application satisfies the applicable regulatory criteria in all respects except as to the potential impacts of Pond P11 on Wetland A3 and the potential impacts of the proposed development on fish and wildlife. See Order Granting Motion in Limine, dated January 27, 2006.

105. With respect to the potential impacts of Pond P11 on Wetland A3 it is determined based upon the preponderance of the evidence of record that Westfield has provided the requisite reasonable assurances. As more specifically discussed in Part C(1) of the Findings of Fact, the more persuasive evidence establishes that Pond P11 will not adversely impact Wetland A3.

106. With respect to the potential impacts of the proposed development on fish and wildlife, it is determined based upon the preponderance of the evidence of record that the additional

wildlife surveys are adequate. See Findings of Fact, Part C(2). Therefore, based upon the parties' stipulations at the hearing, it follows that Westfield has provided reasonable assurance that the proposed development will not adversely impact fish and wildlife.

107. Westfield met its burden to prove that the Project will not be harmful to the water resources of the District. See § 373.413(1), Fla. Stat. The deficiencies identified in Blanco-I have been adequately addressed.

108. Westfield also met its burden to prove that the Project is, on balance, not contrary to the public interest. See § 373.414(1), Fla. Stat. Indeed, as discussed above, the preponderance of the evidence establishes that the criteria that were found in Blanco-I to "weigh heavily toward a determination that the proposed activity is contrary to the public interest"¹⁹ have been adequately addressed. The other criteria are either not applicable or carry little weight in this case.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the District issue a final order approving Environmental Resource Permit No. 43024788.002, subject to the general and special conditions set forth in the proposed ERP dated July 29, 2005.

DONE AND ENTERED this 10th day of April, 2006, in
Tallahassee, Leon County, Florida.



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of April, 2006.

ENDNOTES

^{1/} Most of the testimony given by Drs. Stewart and Rains at the final hearing is in the form of a proffer because they were not allowed to testify regarding facts and opinions that they did not disclose during their depositions. See Transcript, at 11-12 (ruling on Westfield's Motion to Strike Pleadings and Witnesses). Accord Gouveia v. Phillips, 823 So. 2d 215, 219-23 (Fla. 4th DCA 2002) (holding that trial court did not abuse its discretion by excluding an expert's testimony at trial on an issue that the expert had no opinion on at the time of his deposition).

^{2/} See Order dated January 20, 2006, at ¶ 5. The parties were advised at the pre-hearing conference that the Blanco-I transcript is no longer in DOAH's possession because it was transmitted to the District in December 2004 along with the Recommended Order in that case.

^{3/} This figure includes the 4.49 acre "access easement" described in Endnote 4 and a one acre "drainage easement" on the same property as the access easement. See Construction Plans, Sheet 3 (contained in Exhibit D-3).

⁴/ The southern boundary of the Westfield property is approximately 1,000 feet north of State Road 54. The property has access to State Road 54 by way of a 4.49 acre "access easement" across the undeveloped property between State Road 54 and the Westfield property. See Construction Plans, Sheet 3 (contained in Exhibit D-3).

⁵/ Blanco-I Recommended Order, at ¶ 132. See also id. at ¶¶ 142-48.

⁶/ See Blanco-I Recommended Order, at ¶¶ 22-24 (describing the various historical impacts on Wetland A3, including the existing ditches on the Westfield property that channel surface water runoff away from the wetland).

⁷/ See Blanco-I Recommended Order, at ¶¶ 89-91 (describing the characteristics of the "shelf").

⁸/ Blanco-I Recommended Order, at ¶¶ 29-34.

⁹/ This measure corresponds to a maximum depth of approximately 12 feet.

¹⁰/ As explained in Blanco-I, ICPR is:

a type of hydrological computer model that takes into account surface water flows. It does not take into account groundwater flows, downward or lateral seepage or the lowering of the water table by well-field pumping. It models the surface water hydrology of a site as it might be affected, for example, by detention basins and channel pipes. It models pre-design of a site to be developed and then post-design of a site prior to actual development to provide comparative analysis. It is also a predictive tool. As with any predictive tool, its accuracy can only be definitively determined by observation and collection of data after-the-fact, in this case, after development.

Blanco-I Recommended Order, at ¶ 44.

¹¹/ See Blanco-I Recommended Order, at ¶ 64 ("ICPR, because it does not account for effects on groundwater, is a flawed model for determining the impact on all water resources in the area. It did not consider downward leakage as a means for water to escape from the pond P11.") (internal quotations and brackets omitted).

¹²/ BOR Section 4.2 provides that "[o]ff-site discharge is limited to amounts that will not cause adverse off-site impacts." Off-site discharges are computed by using the District's 24-hour, 25-year rainfall maps, BOR § 4.2.b., and must not exceed historic discharge, which is "the peak rate at which runoff leaves a parcel of land by gravity under existing site conditions." BOR § 4.2.a.1.

¹³/ Blanco-I Recommended Order, at ¶ 41.

¹⁴/ For example, there are references in Mr. Sullivan's report to changes in the evaporation rate in the post-development condition. See Exhibit R12, at 9. However, Mr. Sullivan did not elaborate on this issue in his testimony at the final hearing.

¹⁵/ Blanco-I Recommended Order, at ¶¶ 116-21.

¹⁶/ Blanco-I Recommended Order, at ¶ 125.

¹⁷/ See Transcript, at 131-38, 340-43.

¹⁸/ All statutory references in this Recommended Order are to the 2005 version of the Florida Statutes.

¹⁹/ See Blanco-I Recommended Order, at ¶ 145 (citing § 373.414(1)(a)1., 2., 5. and 7., Fla. Stat.).

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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.