

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILLIP LOTT and STEVEN L.)
SPRATT,)
)
 Petitioners,)
) Case Nos. 05-3662
vs.) 05-3664
)
CITY OF DELTONA and ST. JOHNS)
WATER MANAGEMENT DISTRICT,)
)
 Respondents.)

)

RECOMMENDED ORDER

A final administrative hearing was held in this case on January 24, 2006, in Deltona, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Phillip Lott, pro se
948 N. Watt Circle
Deltona, Florida 32738

For Respondent St. Johns River Water Management District:

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

For Respondent City of Deltona:

George Trovato, Esquire
City of Deltona
2345 Providence Boulevard
Deltona, Florida 32725

STATEMENT OF THE ISSUE

This case involves a challenge to St. Johns River Water Management District's (District or SJRWMD) intended issuance of an Environmental Resource Permit (ERP) granting the City's Application No. 4-127-97380-1, for the construction and operation of a surface water management system for a retrofit flood-relief project known as Drysdale Drive/Chapel Drive Drainage Improvements consisting of: excavation of the Drysdale Drive pond (Pond 1); improvement to the outfall at Sterling Lake; and the interconnection of Pond 1 and four existing drainage retention areas through a combination of pump stations and gravity outfalls (project or system). The issue is whether the applicant, the City of Deltona (City or Deltona), has provided reasonable assurance the system complies with the water quantity, environmental, and water quality criteria of the District's ERP regulations set forth in Chapter 40C-4, Florida Administrative Code,¹ and the Applicant's Handbook: Management and Storage of Surface Waters (2005) (A.H.).²

PRELIMINARY STATEMENT

The Petitioners received notice of, and timely filed petitions for an administrative hearing challenging, the District's proposed issuance of the ERP. The matters were referred to the Division of Administrative Hearings (DOAH) to conduct an administrative hearing pursuant to Section 120.57(1), Florida Statutes.³ The cases were consolidated and scheduled for final hearing on January 24-25, 2006, in Deltona, Florida.

On January 19, 2006, the District's Motion for Official Recognition of the pertinent statutes and rules was filed and granted without objection.

The Petitioner in Case No. 05-3664, Steven L. Spratt, did not participate in any of the required prehearing procedures and did not appear at the final hearing. His petition is subject to dismissal for failure to participate.

At the outset of the hearing, the Petitioner in DOAH Case No. 05-3662, Phillip Lott, raised a new issue--namely, whether the City was the proper entity to apply for the permit at issue and to pay the cost of constructing, maintaining, and operating the proposed project. He alleged that Sterling Lake, the source of the water being managed by the proposed project, is privately-owned and that the owners of the lake, who are developers, should apply and pay for the project. Mr. Lott's requests to address only those issues in the final hearing and

then for a summary recommended order were denied. Then, the parties agreed that this issue would be addressed in the final hearing.

At the hearing, the City presented the testimony of: Michael Galura, engineer of record for the system; Donald J. Silverberg, an expert in wetlands; and Glenn Kerns, Director of Public Works for the City of Deltona. City Exhibits 1-6 were admitted in evidence. The District presented testimony from: Lee Kissick, an expert in wetland and wildlife ecology, mitigation planning, wetland delineation and environmental resource permitting and regulations; and Marjorie Cook, an expert in water resource engineering, surface water and stormwater management systems, and environmental resource permitting and regulation. SJRWMD Exhibits 1, 2, and 3 were admitted in evidence. The Petitioner in Case No. 05-3662, Phillip Lott, testified in his own behalf but called no other witnesses and offered no exhibits in evidence.

After presentations of evidence, the District ordered a transcript of the hearing, and the parties were given ten days from the filing of the Transcript to file proposed recommended orders (PROs). The District, the City, and Mr. Lott timely filed PROs.

FINDING OF FACTS

A. Site Description

1. The City of Deltona is located in Southwest Volusia County. The City was built on a broad sand ridge that was historically dominated by sand-pine forest interspersed with sinks, shallow lakes and isolated, seasonal marshes. The City's infrastructure was largely designed and constructed in the 1960s-1970s; the City was incorporated in 1995.

2. As a result of rainfall in 2002, residents located around the Beechdale Court and Drysdale Drive areas experienced major flooding. To provide flood relief to this area, the City of Deltona has proposed a project to retrofit and expand some of its existing drainage system to improve efficiency and optimize storage capacity for the 840-acre landlocked basin.⁴

B. The Project

3. The project consists of three elements: (1) excavation of the Drysdale Drive retention pond (Pond 1); (2) improvement to the outfall at Sterling Lake; and (3) the interconnection of Beechdale Court pond and four existing drainage retention areas through a combination of pump stations and gravity outfalls.

4. Pond 1 has chronically flooded the rear of adjacent homes along Drysdale Drive; the excavation will provide a larger permanent water body to better manage surface water runoff.

5. The improvement to the Sterling Lake outfall is to reduce chronic flooding to homes along Beechdale Court. Currently, when Sterling Lake exceeds its bank, water sheetflows to the northeast, directly into the rear of the homes along Beechdale Court. With the proposed improvement, water will be captured at a point to the north of Sterling Lake and redirected through a piped, gravity outfall system through a dedicated easement into the Beechdale Court pond. From there, water flows through an existing, maintained culvert under Fort Smith Drive into Pond 1.

6. Mr. Lott contends that this aspect of the proposed system benefits the owner(s) of Sterling Lake. He contends that Sterling Lake is the cause of the flooding problems and that its owners should be made responsible and should be required to apply for the permit and pay for the project instead of the City. However, there was no evidence to suggest that the owners of Sterling Lake are responsible for flooding.

7. Mr. Lott also suggests that, through this permit, the City will be paying to redirect water away from where it sheetflows out of Sterling Lake when it exceeds its banks during heavy rains in order to make that property suitable for residential development for the benefit of the owners of Sterling Lake, who are developers. He also seemed to contend that the project would lower the water level of Sterling Lake to

enlarge their developable land. He believes that the private owners receiving these benefits are required to apply for the ERP and pay for the costs involved. He contends in his PRO that the City is instead spreading the cost to taxpayers to redirect flood waters "from one neighborhood of upper middle class homes to another, of lower socio-economic status, in order to allow more development in the richer area, all at taxpayer expense." None of Mr. Lott's allegations were proven.

8. Contrary to Mr. Lott's contentions, there was no evidence that the owners of Sterling Lake have done anything to cause flooding of the existing homes along Beechdale Court and Drysdale Drive. In addition, the water level of Sterling Lake will not go down as a result of the proposed project since the inlet to the proposed pipe system will be set at the same elevation at which water now sheetflows. If redirection of the sheetflow into the pipe system to help reduce chronic flooding to the existing homes along Beechdale Court and Drysdale Drive benefits the owners where the water now sheetflows, the benefits would appear to be incidental to the willingness of those owners to cooperate and give the City an easement to enable the City to implement the project.⁵

9. The other four existing drainage retention areas (besides Pond 1) are: Monica Court Pond (Pond 2); a stormwater pond located on the south side of Bismarck Drive at its

intersection with Matico Avenue (Pond 3); a stormwater pond bounded by Bavon Drive on its north side, Temple Drive on its south side and Arlee Avenue on its west side (Pond 4); and the stormwater pond located on the south side of Chapel Drive (Pond 5).

10. Interconnection of the five ponds requires both pumped and gravity outfall systems, owing to the variable topography within the project area; ground elevations around the five basins range between +19 to +61 feet NGVD.

11. Pond 1 will be connected to Pond 2 through a pump station. Pond 2 will be connected to Pond 3 through a pump station. Pond 3 will be connected to pond 4 through a gravity flow system. Pond 4 is currently connected to Pond 5 through an existing corrugated metal pipe culvert. The existing culvert will be replaced by a concrete pipe of the same size and at the same elevation.

12. Pond 5 is the terminus of the project; there is no outfall from Pond 5.

13. An operating schedule is in place to determine when and under what conditions the pump stations need to be turned on and off. The operating schedule will allow the five ponds to operate in concert to optimize the storage capacity of the system.

C. Wetland Impacts

14. The only wetland within the project is a small, hydrologically-altered flatwood marsh at Pond 1. The City's proposed project will directly impact the entire 1.1-acre wetland for the excavation of Pond 1. The value of functions this wetland provides to fish and wildlife was evaluated using the five factors in A.H. 12.2.2.3. These factors are condition, hydrologic connection, uniqueness, location, and fish and wildlife utilization.

15. The quality of the wetland to be impacted is degraded. The wetland once supported a mature canopy of pines over shrubs and marsh vegetation, but deep pools (10 - 16 inches deep) of standing water in the past two-to-five years were sufficient to kill all the trees. The wetland is surrounded entirely by urban uses, including roads and single-family homes. The wetland has been significantly degraded by the surrounding development, receipt of untreated storm water run off from adjacent properties and roads, and the introduction of trash and debris from surrounding residences. The wetland is surrounded on all sides by single-family homes, and the trees that provided a natural canopy that surrounded the wetland have been cleared.

16. The hydrology of the wetland has been significantly altered as a result of ditching, its natural floodplain has been

partly filled, and untreated runoff is directed into its watershed from adjacent homes and streets.

17. The wetland to be impacted is not unique.

18. The location of the wetland to be impacted in relation to its surroundings is not ideal because of the extensive development that surrounds the wetland. The wetland is surrounded on all sides by single-family homes, with yards that are mowed down to the wetland fringe.

19. Based upon the degraded condition of the wetland, there is probably only minimal wildlife utilization. The marsh may serve as a refuge for urbanized wildlife. However, that is unlikely to continue owing to the effects of local disturbance and hydroperiod alterations from surrounding developed areas.

D. Secondary Impacts

20. Under the first part of the secondary impact criterion in A.H. 12.2.7, the City must provide reasonable assurance the secondary impacts from construction, alteration and intended or expected uses of the project will not adversely affect the functions of adjacent wetlands or other surface waters. No onsite wetlands will remain that could suffer adverse secondary impacts. The project is sufficiently distant from offsite wetlands to ensure the project will not cause unacceptable, adverse secondary impacts to those wetlands.

21. Under the second part of the secondary impact criterion, Deltona must provide reasonable assurance the construction, alteration, and intended reasonably expected uses of the system will not adversely impact the ecological value of the uplands to aquatic or wetland-dependent listed species for enabling existing nesting or denning by these species. No listed species occur onsite, and there are no upland areas on the project site that are suitable for nesting or denning by listed species.

22. Under the third part of the secondary impact criterion, and as a part of the public interest test, the District must consider any other relevant activities that are very closely linked or causally related to any proposed dredging or filling which will cause impacts to significant historical and archeological resources. When making a determination with regard to this part of the secondary impact criterion, the District is required by rule to consult with the Division of Historical Resources of the Department of State. The District received information from the Division of Historical Resources regarding classification of significant historical and archeological resources and indicating that there would be no adverse impacts from the project to significant historical or archeological resources.

23. Under the fourth part of the secondary impact criterion, Deltona must demonstrate that any future phase of a project and certain additional project-related activities would not result in adverse impacts to the functions of wetlands or result in water quality violations. The proposed project has been reviewed in its entirety and does not include any future phases.

E. Mitigation

24. Deltona has proposed offsite mitigation, through the purchase of 1.2 credits from the Farmington Mitigation Bank, to offset all adverse impacts to wetland functions as a part of its ERP application.

25. The Farmington Mitigation Bank (Bank) provides permanent, self-sustaining refuges for wildlife. The Bank size and location enables it to retain many natural characteristics and provide many ecological functions that probably could not be replicated if mitigation were to be confined to the project site.

F. Cumulative Impacts

26. The Farmington Mitigation Bank is in the same regulatory drainage basin as the project site, Basin 18. Under A.H. 12.2.8, a regulated activity is considered not to have unacceptable cumulative impacts if mitigation offsets the

project's adverse impacts within the same basin where the impacts occur.

G. Reduction and Elimination

27. District staff reviewed the project to determine if the impacts met the elimination and reduction criteria of the District's rules and whether the adverse impacts would be offset by the mitigation. Under A.H. 12.2.2, reduction and elimination will not be required if the ecological value of impacted areas is low and proposed mitigation will provide greater long-term ecological value than the wetlands to be impacted, or if the proposed mitigation implements all or part of a plan that provides regional ecological value.

28. The Farmington Mitigation Bank will improve ecological conditions of the regional watershed by providing for the restoration of hydrologic patterns, the enhancement of significant forested wetland habitat, the enhancement of upland buffer habitat, and the improvement of wildlife habitat. The Bank contributes, in conjunction with adjacent resources, to the long-term viability of various listed species that are known to occupy the region.

H. Public Interest Test

29. Under A.H. 12.2.3, the public interest test applies to the parts of the project that are in, on or over wetlands, and such parts must not be contrary to the public interest. If they

are located in, on, or over an Outstanding Florida Water (OFW), or significantly degrade an OFW, then the project must be clearly in the public interest. No part of this project is located in, on, over an OFW, or will significantly degrade an OFW.

30. The public interest test has seven criteria. It is a balancing test and each factor need not be given equal weight.

i. Public health, safety and welfare

31. The project will not cause adverse environmental impacts to the property of others. The project will not cause an environmental hazard to public health or safety or cause flooding on the properties of others. The proposed project is considered neutral as to this factor.

ii. Conservation of Fish and Wildlife and Habitat

32. The project would, without mitigation, adversely affect the conservation of fish and wildlife and their habitats. However, the proposed mitigation, consisting of the purchase of 1.2 mitigation bank credits, will offset the proposed impacts. The mitigation implements all or part of a plan that provides regional ecological value and the proposed mitigation will provide greater long-term ecological value than the wetlands to be impacted. With the mitigation proposal, the proposed project is considered positive as to this factor.

iii. Navigation and Flow of Water

33. The proposed project will not adversely affect navigation or cause harmful erosion or shoaling. The proposed project is considered neutral as to this factor.

iv. Fishing, Recreation Value, Marine Productivity

34. The proposed project will not adversely affect fishing, recreation value, or marine productivity. The proposed project is considered neutral as to this factor.

v. Temporary or Permanent

35. The proposed project will be of a permanent nature. Even though the proposed project is permanent, it is considered neutral as to this factor because mitigation will offset the permanent adverse impact.

vi. Historical and Archeological Resources

36. There are no significant archeological or historical resources recorded within the project site or within any of the proposed mitigation sites. The proposed project is considered neutral as to this factor.

vii. Current Condition Relative Value

37. The current condition and relative value of functions being performed by the areas affected by the proposed activity is low. The proposed project is considered neutral as to this factor because the implementation of the mitigation offsets the wetland impacts.

I. Water Quality

38. The project as proposed will not adversely affect the quality of receiving waters. The system is in a landlocked basin with no outfall to surface waters of the State.

39. Mr. Lott contended that the project could impact groundwater quality by changing where surface water is conveyed and stored. However, he produced no evidence to support his contention, or counter the evidence presented by the City and District that there will be no adverse water quality impacts. His contention is speculative.

J. Engineering and Scientific Principles

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

K. Construction, Operation, and Maintenance

41. The evidence demonstrated that the City has the financial, legal and administrative capability of ensuring the project will be undertaken in accordance with the terms and conditions of the permit, if issued.

42. The City of Deltona will be responsible for the operation, maintenance, and repair of the surface water management system. Under A.H. 7.1.1(a), a local governmental unit is an acceptable operation and maintenance entity under District rules.

L. Water Quantity

43. District staff reviewed the City's submittal of detailed engineering modeling and stormwater calculations, and determined that the project as proposed will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impacts to existing surface water storage and conveyance capabilities.

M. Shellfish Harvesting Waters

44. The project is not located in, adjacent to or in close proximity to Class II waters or located in Class II or Class III waters classified as approved, restricted or conditionally restricted for shellfish harvesting.

N. Seawalls

45. The project does not contain any vertical seawalls in estuaries or lagoons.

O. Other Issues

46. Besides the issues already addressed, and irrelevant issues raised by him, Mr. Lott's case primarily contends that reasonable assurances were not provided because all of the witnesses for the City and for the District allegedly lied in this case, or lied in a previous cases (involving the so-called "Big Ditch," DOAH Case Nos. 04-2399, etc., and 05-3728, etc.) and cannot be trusted to tell the truth in this case.

Similarly, he contends that no permit should be issued in this case until all appeals in the previous cases, which challenge the veracity of the testimony of the witnesses in those cases, have been decided.⁶ The allegations were not proven, and those contentions have no merit.

CONCLUSIONS OF LAW

47. This is a de novo proceeding designed to formulate final agency action. See Hamilton County Board of County Commissioners v. State Department of Environmental Regulation, 587 So. 2d 1378, 1387-1388 (Fla. 1st DCA 1991); Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); § 120.57(1)(k), Fla.Stat.

P. ERP Criteria

48. The permitting criteria for the City's proposed project are found in Rules 40C-4.301 and 40C-4.302, as well as in the Applicant's Handbook, the applicable portions of which are adopted by reference in Rule 40C-4.091(1). For its proposed project to be permitted, the City must give reasonable assurance of compliance with those criteria.

49. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade County v. Coscan Florida Inc., 609 So. 2d 644 (Fla. 3d DCA 1992). Absolute guarantees are not necessary, and a permit applicant is not required to eliminate all contrary

possibilities or address impacts that are only theoretical and cannot be measured in real life. See City of Sunrise v. Indian Trace Community Development District, et al., DOAH Case No. 91-6036, 1991 Fla. ENV LEXIS 6997, 92 ER FALR 21 (DOAH 1991, SFWMD 1992); Manasota-88 Inc. v. Agrico Chemical Co. and Department of Environmental Regulation, DOAH Case No. 87-2433, 1990 Fla. ENV LEXIS 38 (DER 1990).

50. Issuance of an ERP must be based solely on compliance with applicable permit criteria. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983). Several issues raised by Mr. Lott, including whether someone other than the applicant should pay the costs of a proposed project, or whether there are less expensive alternatives, are not permit criteria. Indeed, the cost of a project is not a permit criterion and is not relevant except insofar it might relate to the applicant's ability to provide reasonable assurance. See, e.g., Rule 40C-4.301(1)(j); A.H. 12.4.8.

51. Rule 40C-4.301(1)(a)-(c) require the applicant to 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; and
- (c) will not cause adverse impacts to existing surface water storage and conveyance capabilities.

52. Rule 40C-4.301(1)(d) and A.H. 9.1.1(d), 12.1.1(a), and 12.2, et. seq., require an applicant to provide reasonable assurance 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.

53. To qualify for an ERP, an applicant must eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed system, by implementing practicable design modifications as described in A.H. 12.2.1.1, unless either alternative set forth in A.H. 12.2.1.2 applies.

A.H. 12.2.1.2, provides:

The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

- a. the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low . . . and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or

b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

54. Section 373.4136(1)(a), Florida Statutes, establishes standards for mitigation banks. To obtain a mitigation bank permit, an applicant must show, among other things, that "[t]he proposed mitigation bank will improve ecological conditions of the regional watershed." § 373.4136(1)(a), Fla. Stat. In issuing the mitigation bank permit, the Governing Board found that the Farmington Mitigation Bank provides regional ecological value.

55. As found, the requirements of A.H. 12.2.1.2 have been met in this case, and the City was not obligated to implement design modifications to reduce or eliminate wetland or surface water impacts.

56. Rule 40C-4.301(1)(d) and A.H. 9.1.1 (d), 12.1.1 (a), and 12.2, et. seq., require that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. To meet those requirements, Deltona was required to demonstrate compliance with the two-prong test in A.H. 12.2.2 and 12.2.2.4. See A.H. 12.1.1(a), 12.2.2 and 12.2.2.4.

57. A.H. 12.2.2 requires consideration of whether Deltona will impact the value of wetlands and surface waters on the site so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife and listed species. A.H. 12.2.2.3 sets out the factors that the District considers when assigning the value of functions that any wetland or other surface water provides to fish, wildlife, and listed species. They include: (a) condition; (b) hydrologic connection; (c) uniqueness; (d) location; and (e) fish and wildlife utilization.

58. The evidence showed that Deltona is proposing to impact 1.1 acres of wetlands. As mitigation for these impacts, Deltona proposes to purchase 1.2 mitigation bank credits. The evidence showed that the mitigation replaces the functions provided by the wetlands that will be adversely impacted by the project. Therefore, the project meets Rule 40C-4.301(1)(d).

59. Rule 40C-4.301(1)(e) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will not adversely affect the quality of receiving waters such that the water quality standards as set forth in Rule Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, including any antidegradation provisions of Rule 62-4.242(1)(a)-(b),(2), and (3), Rule 62-302.300, and any special

standards for OFWs and Outstanding National Resource Waters set forth in Rule 62-4.242(2)-(3) would be violated.

60. In addition, A.H. 12.2.4 provides in part that reasonable assurances regarding water quality must be provided both for the short-term and the long-term, addressing the proposed construction, alteration, operation, maintenance, removal and abandonment of the system. The system occurs in a landlocked basin, has no outfall to receiving waters, and provides the required water quality treatment and attenuation. For these reasons, the project meets Rule 40C-4.301(1)(e).

61. Rule 40C-4.301(1)(f) requires an applicant to provide reasonable assurance that the system will not cause adverse secondary impacts to the water resources. Compliance with this Rule is determined by applying the four-part test in A.H. 12.2.7(a)-(d). As found, Deltona met these criteria.

62. Since no minimum surface or groundwater levels or surface water flows in the project area have been established in Rule Chapter 40C-8, the project meets Rule 40C-4.301(g).

63. Since there are no works of the District within the project area, the project meets Rule 40C-4.301(h).

64. Rule 40C-4.301(1)(i) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will be capable, based on generally

accepted engineering and scientific principles, of being performed and of functioning as proposed. As found, this criterion has been met.

65. Rule 40C-4.301(1)(j) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will be conducted by an entity with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued. As found, this criterion has been met.

66. Since the project is not located in a special basin or geographic area as established in Rule 40C-41, the project meets Rule 40C-4.301(1)(k).

67. Rule 40C-4.302(1)(a) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an OFW, that the activity will be clearly in the public interest.

68. Since no part of the system will significantly degrade or be located within an OFW, the City was not required to

provide reasonable assurance that the project will be clearly in the public interest. As found, the City has provided reasonable assurance that the project is not contrary to the public interest since the public interest factors were on balance at least neutral.

69. Rule 40C-4.302(1)(b) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will not cause unacceptable cumulative impacts upon wetlands and other surface waters, as set forth in A.H. 12.2.8 through 12.2.8.2. If an applicant proposes to mitigate adverse impacts within the same drainage basin as the impacts, and the mitigation fully offsets the impacts, the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters. See A.H. 12.2.8. Since the evidence showed the mitigation for the project is located within the same drainage basin as the project and offsets the adverse impacts, the project meets the requirements of Rule 40C-4.302(1)(b).

70. Rule 40C-4.302(1)(c) requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system located in, adjacent to or in close proximity to Class II waters or located in Class II waters or

Class III waters classified by the Department as approved, restricted, or conditionally restricted for shellfish harvesting, as set forth or incorporated by reference in Rule Chapter 62R-7, will comply with the additional criteria in A.H. 12.2.5. Since the project is not adjacent to or in close proximity to waters in those classifications, the requirement of Rule 40C-4.302(1)(c) is not applicable.

The project does not contain any vertical seawalls in estuaries or lagoons; therefore, the requirement of Rule 40C-4.302(1)(d) is not applicable.

Q. Burdens of Proof and Persuasion

71. As applicant, the City has the ultimate burden of proof and burden of persuasion. See Florida Department of Transportation v. J.W.C. Company, Inc., supra at 786-789. However, upon presentation of a prima facie case of credible evidence of reasonable assurances and entitlement to the permit, the burden of presenting evidence is shifted to the permit challengers to present evidence of equivalent quality to refute the applicant's evidence of reasonable assurances and entitlement to the permit. Id.; Ward v. Okaloosa County, DOAH Case No. 88-5147, 1989 Fla. ENV LEXIS 105, 89 ER FALR 83 (DER 1989).

72. In this case, the evidence presented by the City and the District established a prima facie case of reasonable

assurances and entitlement to the permit. Based on that evidence, the permit challengers had the burden of producing evidence of equivalent quality to refute the prima facie case. Their burden cannot be met by mere speculation on what might occur. Citizens Against Blasting Inc., v. Department of Environmental Protection and Angelo's Aggregate Materials Ltd., DOAH Case No. 00-4007, 2001 Fla. ENV LEXIS 31, 1 ER FALR 94 (DEP 2001); Chipola Basin Protective Group Inc., et al. v. Department of Environmental Regulation, 11 F.A.L.R. 467, 480-481, 1988 WL 185574, at *3-7 (DER 1988).

73. In this case, the Petitioner in DOAH Case No. 05-3664 is subject to dismissal for failure to participate in the final hearing. Mr. Lott participated, but most of the issues he raised were not relevant to the permitting criteria, and he presented no substantive evidence. As found, the City proved its entitlement to the permit by a preponderance of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order issuing to the City of Deltona an

ERP granting the City's Application No. 4-127-97380-1, subject to the conditions set forth in the Technical Staff Report.

DONE AND ENTERED this 17th day of March, 2006, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March, 2006.

ENDNOTES

- 1/ All Rule references are to the current version of the Florida Administrative Code.
- 2/ The sections of the handbook relevant to this proceeding have been adopted by reference in Rule 40C-4.091(1). They will be designated by A.H. and the section number.
- 3/ All statutory references are to the 2005 codification of the Florida Statutes.
- 4/ The project is within the Theresa Basin; however, the 840-acre project area is in what has been referred to as a sub-basin, and has no outfall to Lake Theresa. Although Lake McGarity is referred to as the "Receiving Water Body" in the Technical Staff Report dated September 26, 2005, the system actually is land-locked.
- 5/ ERP General Condition 8 requires the necessary easements to be submitted to the District for approval.

6/ Mr. Lott appears to be under the mistaken belief that appeals from the final orders in those cases are pending. In fact, according to the appellate court's online docket, the appeal from Case Nos. 04-2399, etc., was dismissed on October 11, 2005, and there is no record of any appeal being taken from Case Nos. 05-3728, etc. (Cf. www.5dca.org and www.doah.state.fl.us) Although a paper indicating an intent to appeal to the Florida Land and Water Adjudicatory Commission (FLWAC) was filed in the DOAH docket on January 20, 2006, the paper does not appear to have been filed with FLWAC.

COPIES FURNISHED:

Kirby Green, Executive Director
St. John River Water Management
District
4049 Reid Street
Palatka, Florida 32177

Phillip Lott
948 North Watt Circle
Deltona, Florida 32738-7919

George J. Trovato, Esquire
City of Deltona
2345 Providence Boulevard
Deltona, Florida 32725

Kealey A. West, Esquire
St. Johns River Water Management
District
4049 Reid Street
Palatka, Florida 32177-2529

Steven L. Spratt
2492 Weatherford Drive
Deltona, Florida 32738

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.