

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KEVIN BURKETT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 05-4308
)	
OSCEOLA COUNTY; HABITAT)	
RESTORATION, INC.; AND SOUTH)	
FLORIDA WATER MANAGEMENT)	
DISTRICT,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

A formal administrative hearing in this case was held on March 14 and 15, 2006, in Orlando, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Eric T. Olsen, Esquire
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For Respondent Osceola County:

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For Respondent South Florida Water Management District:

Peter Cocotos, Esquire
South Florida Water Management District
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STATEMENT OF THE ISSUES

The issues in this case are whether Petitioner has standing to initiate this proceeding and whether Respondents Osceola County and Habitat Restoration, Inc., demonstrated their entitlement to the permit modification they are requesting.

PRELIMINARY STATEMENT

On November 2, 2005, South Florida Water Management District ("the District") gave notice of its intent to issue a Modification to Environmental Resource Permit No. 49-00121-S-02 ("the ERP Modification") to Respondents Osceola County ("the County") and Habitat Restoration, Inc. (HRI), for a project known as Poinciana Boulevard, Phase II. Petitioner timely filed a petition challenging the proposed agency action, and the District referred the matter to DOAH to conduct a formal evidentiary hearing.

At the hearing, the County presented the testimony of Rod Schultz, Stuart Bradow, and John Atkins. The County's Exhibits C-1 through C-5, C-7 through C-9, C-11 through C-16, C-18

through C-25, and C-27 were admitted into evidence. Joint Exhibits 1, 1-A, J-1(c), J-1(d), J-1(f), J-1(g), J-1(i), J-1(j), 2, 2-A, and J-9 (including Exhibit 5 to Joint Exhibit J-9) were also admitted into evidence at the request of the County.² The District presented the testimony of Susan Elfers and Jennifer Stout. Joint Exhibit J-1(h) was admitted at the request of the District. Petitioner presented the testimony of Kevin Burkett and Tom Odom. Petitioner's Exhibits P-1, P-6 through P-8, and P-14 through P-17 were admitted into evidence. Petitioner's Exhibit P-20 was not admitted into evidence, but at the request of Petitioner, a proffer of the exhibit was allowed.

Official recognition was taken of Florida Administrative Code Chapters 40E-4 and 62-345, as well as the District's Basis of Review for Environmental Resource Applications (Basis of Review).

The four-volume Transcript of the hearing was filed with DOAH on May 10, 2006. The parties jointly moved for an extension of the date for filing their post-hearing submittals, and the parties were given a new deadline of June 19, 2006. Each party timely filed a Proposed Recommended Order that was carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Background

1. Petitioner resides in Orlando and is a recreational hunter.

2. The District is a multi-purpose water management district, operating pursuant to Chapter 373, Florida Statutes, and Florida Administrative Code Chapter 40E. Its principal office is in West Palm Beach, Florida.

3. The County has been an applicant/permittee at all times material to this proceeding.

4. HRI is co-permittee and operates a regional mitigation area near the town of Holopaw.

5. On October 13, 2004, the District issued Environmental Resource Permit No. 49-00121-S-02 ("the Original ERP") to the County, authorizing construction and operation of a surface water management system in conjunction with the widening of Poinciana Boulevard ("the Road Project"). The Road Project is expected to adversely impact 6.61 acres of wetlands.

6. In the Original ERP, mitigation for the wetland impacts was to be provided through the purchase of mitigation credits in the 1600-acre Florida Mitigation Bank (FMB).

7. The Road Project and the wetlands that it would impact are located within the Shingle Creek Drainage Basin.

8. As shown in Petitioner's Exhibit P-6, only a very small portion of the FMB is located within the Shingle Creek Drainage Basin. Almost all of the FMB is within the Reedy Creek Drainage Basin, which is west of the Shingle Creek Drainage Basin.

9. The County applied for a modification of the original permit, and the District issued the ERP Modification to the County and HRI. The ERP Modification changes only the mitigation plan for offsetting the wetland impacts of the Road Project.

10. The ERP Modification calls for mitigation of the wetland impacts of the Road Project through the restoration of wetlands within the regional mitigation area operated by HRI. The proposed HRI mitigation site is within Osceola County, but outside the Shingle Creek Drainage Basin.

Standing

11. For the past six or seven years, Petitioner has been hunting within a small area of the FMB, along its eastern boundary, as shown on Petitioner's Exhibit 15. Petitioner hunts there approximately 20 times each year. He hunts for deer, turkey, and hogs. He also enjoys observing nature while he is hunting.

12. The FMB is not open to the general public for hunting. Petitioner hunts in the FMB with the verbal permission of the

owner. Petitioner expects the permission he has been given to hunt in the FMB will continue into the future.

13. A fence surrounds the FMB, but deer and turkey can get over a fence and hogs can get under a fence.

14. At the hearing, there was some dispute about the exact location of the boundary that divides the Shingle Creek Drainage Basin from the Reedy Creek Drainage Basin, and in which of the two basins Petitioner hunts. The dispute was caused by the fact that the area where Petitioner hunts is close to the boundary and the official maps of the basins are at such a small scale that the line which depicts the boundary covers a large area. No evidence was presented about the precise location of the topography that divides the basins. The more persuasive evidence in the record is that a small area of the FMB (the acreage was never established) is within the Shingle Creek Drainage Basin and includes the area where Petitioner hunts.

15. Petitioner's primary objection to the ERP Modification is the proposal to mitigate for the loss of 6.61 acres of wetlands by restoring wetlands that are outside the Shingle Creek Drainage Basin. He contends that the ERP Modification will serve as a precedent for future mitigation outside the Shingle Creek Drainage Basin.³ Petitioner's standing argument is that the future mitigation outside the Basin will reduce populations of the wildlife within the FMB where he hunts.

16. Undermining this premise for Petitioner's standing is the fact that drainage basin boundaries are hydrologic boundaries based on patterns of water movement; they are not boundaries associated with wildlife movement. The animals that Petitioner hunts move freely across drainage basin boundaries.

17. Therefore, drainage basin boundaries are not the proper focus for determining whether Petitioner is substantially affected by the proposed ERP Modification. Whether Petitioner is substantially affected depends on the effect the ERP Modification would have on environmental factors (including the quality and extent of wetlands) that determine the populations of wildlife Petitioner enjoys hunting and observing, no matter where those environmental factors are located.

18. Petitioner assumes that all future mitigation outside the Shingle Creek Drainage Basin will be detrimental to his interests. However, Stuart Bradow explained that whether future wetlands impacts and future mitigation would affect Petitioner's interests depends on the proximity of the future impacted wetlands and associated mitigation to the area where Petitioner hunts, without regard to which drainage basin the wetlands and mitigation are located within.

19. Some wetland impacts in the Shingle Creek Drainage Basin would be too distant to adversely affect Petitioner's interests. Some out-of-basin mitigation could be close enough

to positively affect Petitioner's interests. Because much of the Shingle Creek Drainage Basin is more distant from Petitioner's hunting area than areas of the Reedy Creek Drainage Basin, it can be reasonably inferred that there could be future mitigation in the Reedy Creek Drainage Basin to offset wetland impacts in the Shingle Creek Drainage Basin that would benefit Petitioner's interests.

20. Petitioner's precedent argument, that all future out-of-basin mitigation will per se be adverse to his interests, is contradicted by the more credible and persuasive evidence in the record.

21. The ERP Modification does not call for any construction or other activities within the area where Petitioner hunts or in any other part of the FMB.

22. The ERP Modification will not physically impact the area within the FMB where Petitioner hunts.

23. The ERP Modification does not reduce the number of acres within the FMB.

24. The ERP Modification will not affect Petitioner's access to the FMB for hunting.

25. The direct and indirect impacts associated with the loss off 6.61 acres of wetlands caused by the Road Project would not adversely affect Petitioner's hunting or nature observation within the FMB.

26. Petitioner's evidence regarding the biological processes that link the alleged future wetland losses within the Shingle Creek Drainage Basin to populations of deer, turkey, and hogs in the FMB was inadequate. There was no evidence presented, for example, about the variability in such game populations, the causes of the variability, and how wetland acreage affects population variability.

27. Petitioner's expert, Tom Odom, acknowledged that drainage basin boundaries do not limit wildlife movement, yet offered an opinion that seemed to assume the opposite. For example, his opinion that Petitioner's enjoyment of deer hunting in the FMB might diminish as a result of the ERP Modification was based on his belief that deer populations would be restricted to "a certain area" and prevented from intermixing.

28. Mr. Odom's opinion was also based on the assumption that HRI's mitigation proposal at its site near Holopaw would not be successful. That opinion contradicts Petitioner's basic contention that the HRI mitigation site is too far away to offset the wetland impacts caused by the Road Project. According to Petitioner, the HRI site is too far away to offset those wetland impacts but close enough to adversely affect Petitioner's hunting in the FMB if the mitigation site fails to function as proposed.

29. Mr. Odom also opined that the elimination of small wetland areas can be detrimental to wildlife and are not mitigated by increasing the size of a large wetland area. However, in this regard there is no difference between the Original ERP and the ERP Modification. Both permits would allow the loss of the small wetlands caused by the Road Project and would mitigate the losses by adding to or enhancing larger, regionally significant wetland areas. Petitioner did not challenge the Original ERP. He cannot collaterally attack in this proceeding the District's previous determination to allow the loss of the small wetlands caused by the Road Project.

30. Petitioner failed to demonstrate that the ERP Modification would reduce populations of deer, turkey, and hogs in the FMB to the extent that Petitioner's enjoyment of hunting would be diminished. Petitioner failed to demonstrate that he will be substantially affected by the District's approval of the ERP Modification.

31. At the hearing, the parties presented evidence on all factual disputes related to the ERP Modification. Therefore, despite the foregoing finding that Petitioner did not demonstrate his standing, findings related to the other factual disputes are set forth below.

Cumulative Impact Analysis

32. Pursuant to Subsection 373.414(8)(a), Florida Statutes (2005), the District is required to consider the cumulative impacts upon wetlands and other surface waters within the same drainage basin as the proposed activity. The cumulative impact analysis is supposed to consider existing projects, projects under construction, projects for which permits have been sought, developments of regional impact, and other activities regulated under Chapter 373, Florida Statutes, or which may reasonably be expected based upon local government comprehensive plans. Although Petitioner claimed otherwise, the record shows the District considered these projects and activities in the cumulative impact analysis it conducted for the ERP Modification.

33. Section 4.2.8 of the Basis of Review provides that, when adverse impacts to wetlands are not fully offset within the same drainage basin as the impacts, the applicant must provide reasonable assurance that the proposed activity will not result in unacceptable cumulative impacts to the functions of wetlands within the drainage basin where the impacts would occur.

34. In conducting its cumulative impacts analysis, the District considered future projects within the Shingle Creek Drainage Basin which the District determined would likely have

similar impacts. It determined that similar impacts would be caused by future road-widening projects.

35. Petitioner complained that the County did not perform a cumulative impact assessment of the Orange County portion of the Shingle Creek Drainage Basin, but the testimony revealed that was because the District already had this data. The District reviewer who conducted the cumulative impact analysis, Susan Elfers, is also the reviewer for all road projects in the Orlando area. The Florida Department of Transportation routinely provides the District projections of future road projects. Because Ms. Elfers had considerable information regarding Orange County transportation projects, the District did not require the County to provide that information.

36. In performing the cumulative impact analysis, the District is directed by Section 4.2.8 of the Basis of Review to consider the functions of wetlands and other surface waters in the basin "as a whole."

37. Approximately 20,000 acres of the Shingle Creek Drainage Basin lies within Osceola County. Of this total, 4,631 acres are wetlands. More than a quarter of the wetlands are in some form of conservation status. According to the County, there are 3,113 more acres of wetlands proposed for conservation in the Shingle Creek Drainage Basin. Altogether, 94 percent of

the wetlands in the Shingle Creek Drainage Basin in Osceola County are either in conservation or proposed for conservation.

38. More than half of the Shingle Creek Drainage Basin lies in Orange County, north of Osceola County. Tom Odom determined that the entire Shingle Creek Drainage Basin was comprised of over 22,000 acres of wetlands, of which 88 percent are protected.

39. Considering the wetland functions of the Shingle Creek Drainage Basin "as a whole," the projected cumulative loss of wetlands associated with road projects represents a very minor impact on the total wetland functions in the Shingle Creek Drainage Basin and a very small fraction of the wetland functions already under protection.

40. As discussed in detail below, the proposed HRI mitigation site will provide substantial environmental benefits to the region.

41. The County and HRI proved by a preponderance of the evidence that the ERP Modification will not result in unacceptable cumulative impacts within the Shingle Creek Drainage Basin.

Secondary Impacts

42. In addition to addressing the direct impacts of a project, the District's Basis of Review requires that a project's secondary impacts be offset. Petitioner contends that

the secondary impacts associated with the ERP Modification were not addressed. However, the record evidence indicates a qualitative analysis of secondary impacts was made by the District to determine whether the HRI mitigation site would offset the secondary impacts of the Road Project.

43. The District determined that the excess value of the proposed HRI mitigation over the lost value of the impacted wetlands was sufficient to offset the relatively minor secondary impacts expected from the Road Project. That determination was reasonable.

The Proposed Mitigation Site

44. HRI owns a regional mitigation area of over 2,000 acres. This area includes extensive wetland areas that were significantly degraded by the cattle and agricultural operations of previous owners. Portions of the 2,000-acre tract continue to suffer from over-drainage and widespread exotic nuisance species, including the area which HRI proposes to restore as mitigation for the wetland impacts of the Road Project.

45. The 2,000-acre mitigation area already contains 23 previously approved wetland mitigation projects. Wildlife use of the area has been steadily increasing as each mitigation project has been implemented. The area now supports a high diversity of wildlife, including an impressive array of endangered and threatened animal species.

46. The HRI mitigation site for the ERP Modification consists of 26.1 acres in four separate areas with separate mitigation activities proposed for each area. There would be high level enhancement of 6.8 acres of a forested wetland area, moderate level enhancement of 13.9 acres of mixed forested wetland, four acres of upland buffer enhancement and preservation, and 1.4 acres of herbaceous wetland enhancement.

47. The proposed mitigation will include filling in part of a drainage canal, removing exotic plant species, and planting cypress trees. The mitigation site will be managed for wildlife and protected by a conservation easement.

48. The mitigation proposal for the ERP Modification involves activities that are similar to those that HRI has successfully completed as part of several other mitigation projects in HRI's regional mitigation area. HRI's success with similar mitigation projects provides part of the reasonable assurances that the mitigation authorized by the ERP Modification will also succeed in creating wetlands of high functional value.

49. The proposed offsite mitigation area represents substantially greater wildlife habitat benefits than were provided by the 6.61 acres of wetlands impacted by the Road Project.

50. Petitioner claims that the County and HRI failed to demonstrate that the proposed mitigation site was engineered to allow water movement as needed to create and maintain appropriate hydrologic conditions for the restored wetlands. Petitioner did not claim that the proposed mitigation project was not properly engineered, but only that the District was not provided the kind of engineering analysis usually required for such projects.

51. At the hearing, the District witness, Ms. Elfers, explained that the District's determination that the proposed mitigation project was properly engineered was based in part on information exchanged during meetings with the applicant. Moreover, the County presented an expert engineering witness, John Atkins, who testified about the engineering aspects of the project site related to hydrology and offered his opinion that the project is properly engineered.⁴ The more persuasive evidence in the record is that the proposed mitigation project is engineered so that the hydrologic aspects of the project will allow for the successful restoration and maintenance of the wetlands involved.

Uniform Mitigation Assessment Method

52. The Uniform Mitigation Assessment Method (UMAM), codified in Florida Administrative Code Chapter 62-345, is used to determine the amount of wetland mitigation required. The

UMAM methodology provides a standardized procedure for assessing the function provided by wetlands. By examining a number of environmental factors, such as its community structure and its water environment, the UMAM can assess the value of the function being provided by a wetland. UMAM allows for the functional value of a wetland to be quantified and compared to the functional value of other wetlands.

53. A UMAM analysis was performed on both the wetlands that would be impacted by the Road Project and the wetlands that HRI proposes to restore. Under UMAM, the functional gain score for the restored wetlands must at least equal to the functional loss score for the impacted wetlands.

54. The UMAM score determined for the wetlands impacted by the Road Project was 4.47 functional units. The UMAM score determined for the HRI mitigation site was 5.47 functional units. These scores mean that the wetland functional value gain for the proposed HRI mitigation site was determined to more than offset the functional loss that would be caused by the wetland impacts of the Road Project.

55. The four restoration areas within the HRI mitigation site were separately scored using the UMAM methodology. Among the factors considered were time lag and risk. Time lag means "the period of time between when the functions are lost at an impact site and when those functions are replaced by the

mitigation." Fla. Admin. Code R. 62-345.600(1)(a). Mitigation risk refers to the degree of uncertainty in achieving the mitigation objectives. Fla. Admin. Cod R. 62-345.600(2).

56. Petitioner disagreed with the risk factor used to score the HRI mitigation site because, according to Petitioner, no engineering modeling or information was provided for the hydrologic changes that would be required to achieve success. The adequacy of the engineering analysis for the HRI mitigation site was addressed above. The risk factor used in scoring this particular area was reasonable.

57. Petitioner also objected to the time lag values used to obtain the score for the HRI mitigation site areas designated Eastern Forested WL Enhancement (High Level) and the Western Forested WL Enhancement (Moderate). The time values used for these areas equate to an expectation that the functions lost because of the wetland impacts of the Road Project will be replaced within five years. Petitioner contends that expectation is unreasonable because the impacted wetlands contain mature wetland trees which cannot be replaced in five years.

58. The time lag value used, however, does not reflect an assumption that in five years all the trees planted in the mitigation site will be as mature as a particular tree or trees found in the impacted wetlands. The time lag value reflects the

time needed for the mitigation site to gain functional values equivalent to the functional values lost. Furthermore, there are already trees in the mitigation site. The more persuasive evidence of record indicates that the time lag value used was reasonable.

59. Petitioner argues that the use of the same time lag factor for the different types of wetland systems in the HRI mitigation site contradicts the "express direction" of Florida Administrative Code Rule 62-345.600(1)(a). That rule, however, merely contains a qualitative statement of the general comparison of time lags for different wetland systems. It does not require that time lags used for different systems must be different.

60. Wetlands are classified into different community types by the Florida Land Use Cover and Classification System (FLUCCS). Petitioner complains that none of the FLUCCS codes for the ecological communities at the HRI mitigation site match the FLUCCS codes of the wetlands proposed to be impacted by Road Project. Petitioner admits, however, that two of the HRI mitigation areas have similar FLUCCS codes. The two areas with dissimilar wetland types are the upland buffer and existing canal that will be restored to a deep water marsh. However, it was never suggested that these two areas were similar to the impacted wetlands. They are simply areas within the HRI

mitigation site that are being restored in conjunction with adjacent forested wetlands to enhance the overall diversity and quality of the resulting ecosystem.

61. The more persuasive and competent evidence in the record indicates that the UMAM scores for the impacted wetlands and the mitigation site were reasonable and that they fairly characterized the proposed HRI mitigation as exceeding in functional value what would be lost as a result of the wetland impacts caused by the Road Project.

CONCLUSIONS OF LAW

62. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 150.569 and 120.57, Florida Statutes (2005).⁵

63. The District is the agency with responsibility and authority to review and act upon the ERP Permit Modification at issue, pursuant to Chapter 373, Part IV, Florida Statutes, and the "Operating Agreement Concerning Regulation Under Part IV, Chapter 373, F.S." between the District and the Department of Environmental Protection, adopted by reference in Florida Administrative Code Rule 40E-4.091(1)(c).

64. Under Subsection 120.569(1), Florida Statutes, formal administrative proceedings are limited to persons whose substantial interests are determined by an agency.

65. In Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981), a two-pronged test was articulated to establish a party's substantial interest. A party must demonstrate (1) the proposed agency action will result in injury-in-fact of sufficient immediacy to justify a Section 120.57 hearing, and (2) the injury is of the type or nature the proceeding is designed to protect. The first prong involves the degree of the injury and the second concerns the nature of the injury at stake. Menorah Manor v. AHCA, 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005).

66. Petitioner failed to meet the first prong of the Agrico test because his claim that he will suffer injury as a result of the ERP Modification is speculative. His allegation of injury depends on several independent, future actions or effects which might never occur: (1) the ERP Modification will serve as a precedent for future wetland impacts in the Shingle Creek Drainage Basin that are mitigated outside the Basin; (2) the future out-of-basin mitigation will cause a net loss of wetlands in the Shingle Creek Drainage Basin; (3) the net loss of wetlands in the Basin will occur in locations and will be of such an extent as to cause a reduction in the populations of deer, turkey, and hogs within the FMB; (4) Petitioner will continue to have permission to hunt in the FMB; and

(5) Petitioner's enjoyment of hunting in the FMB will be diminished.

67. The second prong of the Agrico test requires a demonstration of an injury of the type that the applicable statute is designed to protect. The County argues that Petitioner does not meet this test because he has no legally enforceable entitlement to hunt and enjoy wildlife in the future on the FMB property. Petitioner, on the other hand, cites Subsection 403.412(5), Florida Statutes, for the proposition that he only needs to show the proposed activity affects his use or enjoyment of natural resources.

68. There is no decisional law on the precise question of whether a petitioner's use of natural resources on lands which he has access to by verbal permission of the owner is sufficient for standing. The undersigned is inclined to the view that the undisputed present right of Petitioner to hunt in the FMB is sufficient to confer standing on him to object to activities that affect his use and enjoyment of the natural resources of the FMB; no contract or other "formal" right of access is required. However, a legal conclusion on this particular question is unnecessary because Petitioner did not demonstrate that the ERP Modification will affect his use and enjoyment of the natural resources within the FMB.

69. The County and HRI, as the applicants for the ERP Modification, have the ultimate burden of proving their entitlement to the permit. Department Of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

70. In order to prove their entitlement to the ERP Modification, the County and HRI must provide reasonable assurances that the proposed mitigation is not contrary to the public interest, based on seven criteria enumerated in Subsection 373.414(1)(a), Florida Statutes. Relevant here are the following criteria:

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

* * *

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

* * *

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

71. An applicant must provide reasonable assurances, not absolute guarantees. "Reasonable assurance" contemplates a substantial likelihood that the project will be successfully implemented. Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992).

72. Subsection 373.414(1)(b), Florida Statutes, provides in relevant part:

If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, 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, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. 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.

73. Mitigation is further addressed in Section 373.4135, Florida Statutes, which provides in relevant part as follows:

(1) The Legislature finds that the adverse impacts of activities regulated under this part may be offset by the creation, maintenance, and use of mitigation banks and offsite regional mitigation. Mitigation banks and offsite regional mitigation can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management. Therefore, the department and the water management districts are directed to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation. Mitigation banks and offsite regional mitigation should emphasize the restoration and enhancement of degraded ecosystems and the preservation of uplands and wetlands as intact ecosystems rather than alteration of landscapes to create

wetlands. This is best accomplished through restoration of ecological communities that were historically present.

* * *

(b) It is the further intent of the Legislature that mitigation banks and offsite regional mitigation be considered appropriate and a permittable mitigation option under the conditions specified by the rules of the department and water management districts.

(c) Offsite mitigation, including offsite regional mitigation, may be located outside the regional watershed in which the adverse impacts of an activity regulated under this part are located, if such adverse impacts are offset by the offsite mitigation.

74. Although Petitioner frequently referred to the adverse precedent that would be created by the ERP Modification because it allows for mitigation outside the Shingle Creek Drainage Basin, Section 373.4135, Florida Statutes, expressly authorizes out-of-basin mitigation. The appropriate inquiry, therefore, is not whether the mitigation proposed in the ERP Modification is a precedent, but whether it meets the applicable criteria for approval.

75. The applicable rule criteria for an Environmental Resource Permit in the District are set forth in Florida Administrative Code Rules 40E-4.301(1) and 40E-4.302, and in the Basis of Review which is incorporated by reference in Florida Administrative Code Rule 40E-4.091. Florida Administrative Code

Rule 40E-4.301(3) provides that the standards and criteria, including mitigation provisions, in the Basis of Review shall determine whether reasonable assurances required by Florida Administrative Code Rules 40E-4.301(1) and 40E-4.302 have been provided.

76. Section 4.2.8 of the Basis of Review requires an applicant to provide reasonable assurances that the proposed activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought.

77. Section 4.2.8.1 of the Basis of Review explains that the cumulative impacts analysis focuses on whether there will be 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."

78. The County and HRI provided reasonable assurances that that the ERP Modification will not result in unacceptable cumulative impacts in the Shingle Creek Drainage Basin.

79. The County and HRI provided reasonable assurances that the ERP Modification is not contrary to the public interest, taking into account the seven criteria set forth in Subsection 373.414(1), Florida Statutes.

80. The County and HRI provided reasonable assurances that the HRI mitigation site will offset the wetland impacts that

will be caused by the Road Project. In fact, reasonable assurances were provided that a net ecological benefit to the region will be achieved as a result of the proposed mitigation.

RECOMMENDATION

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

RECOMMENDED that the Governing Board of the South Florida Water Management District enter a final order issuing Modification to Environmental Resource Permit No. 49-00121-S-02 to Osceola County and Habitat Restoration, Inc., subject to the general and special conditions set forth in the District's Staff Review Summary.

DONE AND ENTERED this 9th day of August, 2006, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2006.

ENDNOTES

1/ Ms. Alderman did not participate in the final hearing but was substituted as counsel for Mr. Smith, who left the firm of Akerman Senterfitt after the conclusion of the final hearing.

2/ Although the parties pre-marked a number of exhibits as "Joint Exhibits," the parties reserved the right to object to the admission of these exhibits. Therefore, the joint exhibits were only admitted if requested by a party and after any objections thereto were overruled.

3/ The parties' pre-hearing stipulations include a stipulation that the wetland mitigation authorized in the Original ERP was within the Shingle Creek Drainage Basin. However, there is evidence in the record contradicting that stipulation. The County's witness, Stuart Bradow, expressed the opinion that the assignment of mitigation credit under the Original ERP to the small portion of the FMB located in the Shingle Creek Drainage Basin was arbitrary because it did not equate to actual environmental benefits occurring there. His opinion was based largely on the small size of the FMB area within the Basin and the number of mitigation credits previously purchased from the FMB and assigned to that Basin.

4/ Petitioner argues that Mr. Atkins' opinion that the proposed mitigation project is engineered properly does not provide reasonable assurances because all of the data and analysis that support his opinion were not presented at the hearing in this case. However, Petitioner did not object at the hearing to Mr. Atkins' opinion for lack of foundation, and an expert opinion is not insufficient to support a finding merely because the data upon which the opinion is based is not all described by the witness or contained in exhibits admitted into the record. It is the obligation of the cross-examining party to enquire into the factual basis of an expert opinion and to demonstrate that the factual basis is insufficient to support the opinion. See § 90.705, Fla. Stat. (2005). Petitioner's cross-examination of Mr. Atkins and Ms. Elfers on this subject did not reveal evidence that the project would not function properly.

Petitioner also objected to Mr. Atkins' testimony as being beyond the scope of rebuttal and more properly part of the County's prima facie case. However, the objection was raised after the testimony was given. Furthermore, Petitioner misapprehends the nature of a permit applicant's prima facie case. A permit applicant is not required to prove all the facts

associated with a proposed project (which can number in the tens of thousands) as part of his prima facie case. It is the responsibility of the challenger to present factual issues in dispute, at which point the applicant may offer new evidence in rebuttal. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Mr. Atkins' testimony was proper rebuttal to the testimony of Mr. Odom that there was insufficient engineering data to determine that the mitigation site would function as proposed.

5/ Unless otherwise indicated, all references to Florida Statutes are to the 2005 codification.

COPIES FURNISHED:

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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.