

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PETER "PANAGIOTI" TSOLKAS, PALM)
BEACH COUNTY ENVIRONMENTAL)
COALITION, ALEXANDRIA LARSON,)
BONNIE BROOKS, DANNY BROOKS,)
and PETER SHULZ,)
)
Petitioners,)
)
vs.) Case No. 07-3151
)
GULFSTREAM NATURAL GAS SYSTEM,)
L.L.C. and DEPARTMENT OF)
ENVIRONMENTAL PROTECTION,)
)
Respondents.)
_____)

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by
Administrative Law Judge T. Kent Wetherell, II, on January 8-10,
2008, in West Palm Beach, Florida.

APPEARANCES

For Petitioners Peter "Panagioti" Tsolkas, Palm Beach
County Environmental Coalition, Bonnie Brooks, Danny
Brooks, and Peter Shulz:

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For Respondent Gulfstream Natural Gas System, L.L.C.:

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STATEMENT OF THE ISSUE

The issue is whether the Department of Environmental Protection should issue Environmental Resource Permit No. 50-0269698-002.

PRELIMINARY STATEMENT

On June 7, 2007, the Department of Environmental Protection (Department) gave notice of its intent to issue Environmental Resource Permit (ERP) No. 50-0269698-001 (the initial permit) to Gulfstream Natural Gas System, L.L.C. (Gulfstream). The initial permit authorized the installation of a 30-inch natural gas pipeline across 34.30 miles in Martin and Palm Beach Counties.

On June 28, 2007, a petition for administrative hearing was filed by Peter "Panagioti" Tsolkas and the Palm Beach County Environmental Coalition (PBCEC). The petition challenged the initial permit on a variety of grounds.

On July 11, 2007, the Department referred the petition to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge (ALJ) to conduct the hearing requested by Mr. Tsoikas and the PBCEC. The referral was received by DOAH on July 12, 2007.

The final hearing was initially scheduled for October 2-5, 2007, but on September 12, 2007, the case was placed in abeyance upon Gulfstream's motion so that the Department could consider Gulfstream's revised application modifying the pipeline route.

On October 12, 2007, the Department gave notice of its intent to approve ERP No. 50-0269698-002 (the proposed permit) for the revised pipeline route. The proposed permit authorizes the installation of a 30-inch natural gas pipeline across 34.26 miles in Martin and Palm Beach Counties.

On November 2, 2007, a petition for hearing was filed by Mr. Tsoikas, the PBCEC, Alexandria Larson, Bonnie Brooks, Danny Brooks, and Peter Shulz (collectively, "Petitioners"). The petition challenges the proposed permit on a variety of grounds.

A number of the allegations in the petition were directed to the potential impacts of a power plant project that will be served by the proposed pipeline. Those allegations were stricken as irrelevant under the ERP program. See Orders entered on December 5, 2007, and December 27, 2007.² Petitioners

were given an opportunity to make written proffers of evidence on the excluded issues, but they did not do so.

The final hearing was held on January 8-10, 2008.³ At the hearing, Gulfstream presented the testimony of Al Taylor, Chris Brown (expert in pipeline design, engineering, and construction methods), Kimberly Rhodes-Edelstein (expert in natural gas pipeline permitting and impact assessment), Kristoffer Bowman (expert in wetland and wildlife ecology, including protected species), Dr. Kate Hoffman (expert in the analysis of potential impacts to archaeological resources), and Dr. Gregory Hempen (expert in vibration analysis, blast mitigation, and soil analysis); the Department presented the testimony of Jennifer Smith; and Petitioners presented the testimony of Mr. Shulz, Mr. Tsolkas, James Schuette, Ms. Larson, and Dr. William Louda (expert in biological sciences, environmental sciences, ecology, and organic geochemistry). The following exhibits were received into evidence: Exhibits JT-1 through JT-3, AT-1 through AT-3, CB-1 through CB-3, KR-1, KB-1, KB-2, KH-1 through KH-5, GH-1, GH-2, DEP-2, and Petitioners' Exhibits 1, 2, and 4 through 6. Petitioners' Exhibit 3 was offered, but not received. Official recognition was taken of Sections 373.413, 373.414, 373.4141, 373.416, 373.417, 373.421, 373.4211, 373.422, 373.423, 373.426, 373.427, Florida Statutes⁴; the rules in Florida Administrative Code Chapter 40E that have been adopted by reference by the

Department⁵; and the August 1995 version of the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (BOR).

The six-volume Transcript of the final hearing was filed on January 16, 2008. The parties were given until January 31, 2008, to file proposed recommended orders (PROs). Gulfstream and the Department filed PROs on January 31, 2008, and the Petitioners represented by Mr. Silver filed a "Proposed Final Order" on that same date. Ms. Larson did not file a PRO. The parties' post-hearing filings have been given due consideration.

FINDINGS OF FACT

A. Parties

1. Mr. Tsolkas is a resident of Lake Worth, which is in southeastern Palm Beach County. He is the co-chair of the PBCEC, and he uses the Dupuis and J.W. Corbett Wildlife Management Areas (WMAs) for various recreational and "peace of mind" activities. He is concerned that the proposed pipeline will adversely impact his enjoyment of the WMAs.⁶

2. PBCEC is an organization comprised of environmental groups and individuals that are concerned about the environment and quality of life in Palm Beach County. PBCEC has undertaken public outreach, protests, and other advocacy efforts targeting the West Coast Energy Center (WCEC) that will be served by the

proposed pipeline. No evidence was presented regarding PBCEC's membership numbers.

3. Mr. Shulz is a resident of Hope Sound, which is on the eastern coast of Martin County. He is a member of the PBCEC, and he uses the Dupuis and J.W. Corbett WMAs for various recreational activities. He is concerned that the proposed pipeline will adversely impact his enjoyment of the WMAs. He also has concerns regarding the safety of the proposed pipeline.

4. Ms. Larson is a resident of the Loxahatchee area in western Palm Beach County. She uses the Dupuis and J.W. Corbett WMAs for various recreational activities, and she is concerned that the proposed pipeline will adversely impact her enjoyment of the WMAs. She also has concerns regarding the safety of the proposed pipeline.

5. Bonnie Brooks and Danny Brooks were not present at the final hearing, and the record contains no evidence about these Petitioners.

6. Gulfstream is a joint venture owned by Spectra Energy Corporation and the Williams Companies and is in the business of transporting natural gas through pipelines. Gulfstream is a Delaware limited liability company with its principle office in Tampa.

7. The Department is the state agency responsible for regulating construction activities in surface waters and

wetlands under the ERP program in conjunction with the water management districts. The Department is responsible for taking final agency action on the proposed permit at issue in this case.

B. The Proposed Pipeline

(1) Generally

8. The proposed pipeline is a 34.26-mile, 30-inch diameter natural gas pipeline.

9. The proposed pipeline starts in western Martin County, slightly northwest of Indiantown, and ends in western Palm Beach County at the site of the WCEC being constructed by Florida Power and Light Company (FPL), just north of Twenty Mile Bend.

10. The proposed pipeline is the third phase a pipeline that runs from natural gas supply areas on the coasts of Alabama and Mississippi across the Gulf of Mexico into central and southern Florida. The entire pipeline is 691 miles long, with approximately 240 miles in Florida.

11. The first phase of the pipeline began operating in May 2002, and the second phase began operating in February 2005. The pipeline currently transports approximately 1.1 billion cubic feet per day of natural gas into Florida.

12. The proposed pipeline begins at the existing Gulfstream Station 712, which is referred to as milepost (MP) 0.00. It runs in a southerly direction along the east side of

the L-65 Canal, crossing the St. Lucie Canal (at MP 6.34) and continuing to the Martin/Palm Beach county line (at MP 8.50); then runs east to a point west of the Dupuis WMA (at MP 10.20) and runs south along the western boundary of the Dupuis WMA adjacent to an existing power line right-of-way; then turns southeast (at MP 12.14) and runs on the east side of the L-8 Canal; and then turns due south (at MP 30.08) and runs in an existing FPL transmission line right-of-way to its terminus on the WCEC site (at MP 34.26).

13. Gulfstream acquired a non-exclusive pipeline easement from the South Florida Water Management District (SFWMD), which authorizes it to install the proposed pipeline within the L-8 and L-65 canal rights-of-way. The agreement limits the width of the permanent easement to 20 feet, but it provides for 95-foot wide temporary construction easements along the pipeline route. The agreement requires the proposed pipeline to be installed at least three feet below the surface.

14. The proposed pipeline crosses 121 artificial water bodies. It does not cross any natural water bodies.

15. Only three of the crossed water bodies -- the L-8 Canal, the L-65 Canal, and the St. Lucie Canal -- are navigable. The pipeline crosses the L-65 Canal once (at MP 0.11); the St. Lucie Canal once (at MP 6.34); and the L-8 Canal three times (at

MP 12.31, MP 13.28 and MP 29.72). The other crossed water bodies are agricultural ditches.

16. The active land uses along the pipeline route are primarily agricultural in nature, consisting of sugar cane fields and sod farms. The passive land uses include the Dupuis and J.W. Corbett WMAs, which are state-owned conservation areas.

17. There is an existing mining operation adjacent to the pipeline route in the vicinity of MP 32.80. The mining company, Palm Beach Aggregates (PBA), uses blasting to produce limestone aggregate and sand. The PBA property line is approximately 290 feet from the proposed pipeline at its closest point, but the actual blasting is as much as "500 feet to thousands of feet away" from the proposed pipeline.

18. The route of the proposed pipeline was revised in August 2007 at the request of the SFWMD and FPL.

19. The initial pipeline route was along the west sides of the L-65 and L-8 Canals. SFWMD requested that the route be shifted to the east side of the canals in order to accommodate potential future canal expansion.

20. The initial pipeline route was along the eastern edge of the FPL transmission line right-of-way. FPL requested that the route be shifted to the center of the right-of-way in order to accommodate future expansion of the transmission line facilities.

21. The revised pipeline route has fewer impacts than the initial route. For example, the initial route had 224 water body crossings, and two wetland crossings, whereas the revised route has only 121 water body crossings, and no wetland crossings.

22. Gulfstream submitted extensive documentation in support of the revised pipeline route. After reviewing that documentation, the Department gave notice of its intent to issue the proposed permit for the revised pipeline route.

23. Notice of the Department's decision was published in newspapers of general circulation -- the Stuart News in Martin County and in the Palm Beach Post in Palm Beach County -- on or about October 17, 2007.

(2) Design and Construction Methods

24. Federal law prescribes minimum pipeline design criteria, including standards for pipe wall thickness and the testing of pipeline welds.

25. Gulfstream took a "compliance plus" approach in the design of the proposed pipeline by going "above and beyond" the minimum requirements in federal law in several respects.

26. First, the pipe used in the proposed pipeline will meet or exceed the wall thickness requirements in federal law. Thicker-walled pipe will be used in areas where there is a potential for external forces to affect the pipe, such as under

road crossings and in the areas adjacent to PBA's blasting operations.

27. Second, Gulfstream will x-ray 100 percent of the welded joints on the proposed pipeline, which far exceeds the requirement in federal law that 10 percent of the welds be inspected.

28. Third, Gulfstream will hydrostatically test the proposed pipeline for leaks after construction is complete and before the pipeline is put into operation. Hydrostatic testing involves filling the pipeline with water under pressure higher than the pressure under which the pipeline will operate. A drop in pressure during the test is an indication of a leak in the pipeline, which will be fixed before the pipeline is put into operation.

29. Fourth, Gulfstream will coat the entire proposed pipeline with an anti-corrosive substance -- fusion bond epoxy - - and the pipeline will also be induced with a small DC current in a process known as cathodic protection. These measures will significantly reduce, if not eliminate potential corrosion on the proposed pipeline.

30. Gulfstream will use four construction methods to cross the water bodies within the pipeline route: the isolation plate open cut method; the sheet pile wet open cut method; the

horizontal directional drill (HDD) method; and the conventional bore method.

31. The isolation plate open cut method will be used at each minor and intermediate water body crossing, except for those associated with the HDD method.

32. The isolation plate open cut method involves the installation of steel plates upstream and downstream of the proposed crossing. The area between the plates is pumped out so that it is essentially dry. A trench is dug in the dry area and the pipeline is placed in the trench. The trench is then backfilled and stabilized with at least five feet of cover, and then the plates are removed and the water flows back into the area.

33. The sheet pile wet open cut method is similar to the isolation plate open cut method, except that it allows water to continue to flow in the center of the water body during installation of the pipe. This method will be used for the crossing of the L-65 Canal, the second and third crossings of the L-8 Canal, and the crossings of the forebays along the L-8 Canal.

34. Turbidity curtains or sediment barrier baffle systems will be installed upstream and downstream of the areas where the isolation plate open cut and the sheet pile wet open cut methods are used in order to control turbidity.

35. The HDD method will be used to cross the St. Lucie Canal and the Couse Midden archaeological site, as well as at the first crossing of the L-8 Canal.

36. The HDD method involves the boring of a horizontal tunnel along a pre-determined path under the surface feature to be avoided and then pulling a pre-fabricated section of pipe through the tunnel. The pipe installed using this method will be 35 to 40 feet below the surface feature to be avoided.

37. The conventional bore method will be used to cross the railroad track and adjacent agricultural ditch at MP 8.46, as well as the wetland at MP 16.65.

38. The conventional bore method involves the excavation of bore pits on both sides of the feature to be crossed. A tunnel is bored under the feature and then a section of pipe is pulled through the tunnel. The pipe installed using this method will be 10 feet under the railroad track, which is greater than the depth required by federal law, and will be at least five feet under the wetland.

C. Environmental Issues

(1) Wetlands and Vegetation

39. The proposed pipeline will not adversely impact the current condition or relative functions of any wetlands. All of the wetlands within the proposed pipeline route have been avoided.

40. The proposed pipeline will be installed under one jurisdictional wetland (at MP 16.65) using the conventional bore method described above. That wetland is a disturbed, low-quality wetland within the actively managed L-8 Canal right-of-way. It is routinely mowed and provides no significant water quality function or habitat value.

41. Gulfstream will install erosion control devices in areas where the pipeline construction corridor abuts wetlands. The erosion control devices will be in place and functional prior to commencement of earth disturbance. Gulfstream will utilize reinforced sediment barriers in lieu of standard sediment barriers, and increased buffers are proposed in areas where construction abuts wetlands on the Dupuis and J.W. Corbett WMAs.

42. The proposed pipeline will not adversely impact listed plant species. No listed plant species were observed or are likely to occur within the proposed pipeline route, which consists of disturbed rights-of-way and agricultural areas.

43. Vegetated areas that are disturbed during the installation of the proposed pipeline will be re-vegetated immediately after construction is complete. Impacts to these areas will be minor and temporary.

44. The disturbed areas will be re-vegetated with herbaceous cover such as bahia grass, common bermuda grass, or

annual ryegrass. The areas will be monitored for two growing seasons to determine the success of the revegetation.

45. The proposed pipeline route includes exotic and nuisance plant species, including Brazilian pepper, cogon grass, water hyacinth, and water lettuce.

46. The installation of the proposed pipeline has the potential to spread exotic and nuisance species if appropriate precautions are not taken during construction.

47. Gulfstream has developed, and will implement an Exotic, Nuisance, and Invasive Plant Management Plan to minimize the potential for spreading exotic and nuisance species. The plan requires, among other things, environmental training of construction personnel and "routine monitoring during all phases of construction, clean up, and restoration." The plan also includes procedures for onsite disposal of exotic and nuisance species disturbed during construction and the cleaning of vehicles and equipment to ensure that exotic and nuisance species are not inadvertently transported to uncolonized areas.

48. The proposed permit includes a specific condition that requires Gulfstream to monitor and maintain the proposed pipeline route -- a total of 214.85 acres -- free of exotic and nuisance species for a period of five years after construction of the pipeline is complete.

49. The easement agreement between Gulfstream and SFWMD requires Gulfstream to relocate approximately 158 native cabbage palm trees within the construction corridor to "suitable locations within the west right of way of L-8 within the Palm Beach County Department of Environmental Resources Management wildlife corridor."

(2) Dupuis and J.W. Corbett WMAs

50. The proposed pipeline route runs along the western boundary of the Dupuis WMA for approximately seven miles (between MP 13.30 and MP 20.18), and it runs along the western boundary of the J.W. Corbett WMA for approximately 9.5 miles (between MP 20.18 and MP 29.70).

51. The revised pipeline route puts the pipeline closer to the boundaries of the WMAs than did the initial pipeline route because the route was moved from the west side of the canals to the east side of the canals.

52. The Fish and Wildlife Conservation Commission (FWCC) manages the Dupuis and J.W. Corbett WMAs. The WMAs, which include extensive wetlands and virtually no development, are used for a variety of public recreation purposes.

53. The proposed pipeline crosses approximately 3.67 acres of the J.W. Corbett WMA. This land, although technically within the boundaries of WMA, is subject to an easement for the L-8

Canal and has been actively managed by SFWMD for canal purposes for at least the past 55 years.

54. Gulfstream is in the process of acquiring approximately 3.75 acres of privately-held land within the boundaries of the J.W. Corbett WMA that it will donate to the State in accordance with the "linear facility policy"⁷ as mitigation for the crossing of the J.W. Corbett WMA.

55. The parcel that Gulfstream is in the process of acquiring contains oak trees, pine trees, and cypress trees. It also contains the last Indian mound within the J.W. Corbett WMA that is not already in public ownership.

56. Gulfstream will install reinforced sediment barriers and increase buffers adjacent to the wetlands on the WMAs in order to prevent impacts to those areas during construction.

57. The proposed pipeline will not have any direct or indirect impact on the Dupuis WMA.

58. The proposed pipeline's only impact on the J.W. Corbett WMA is the direct impact to the 3.67 acres of the WMA that the pipeline will cross.

59. This impact is negligible in light of the size of the J.W. Corbett WMA -- approximately 60,000 acres -- and in light of the fact that the portion of the J.W. Corbett WMA that is being crossed is disturbed land that has been actively used for

canal purposes for over 55 years. Moreover, this impact will be mitigated in accordance with the "linear facility policy."

60. Any adverse impacts to the aesthetic qualities of the Dupuis and J.W. Corbett WMAs will be temporary in nature during construction. Once construction is complete, the pipeline will not be visible from the surface.

(3) Wildlife

61. The proposed pipeline route consists of disturbed agricultural areas and canal and utility rights-of-way, which are low quality habitat for listed species and other wildlife.

62. The proposed permit is not likely to have any adverse impact on wildlife, including listed species, or their habitat.

63. Gulfstream conducted extensive wildlife surveys during the ERP application process. The survey corridor "extended beyond 150 feet to either side of the pipeline centerline for a minimum survey width of 300 feet," and also included the temporary work space areas, contractor yards, and aboveground facilities associated with the pipeline.

64. The listed species whose potential habitat includes the pipeline corridor are the wood stork, the Southeastern American kestrel, the crested caracara, the bald eagle, and the gopher tortoise and its commensal species.

65. The wood stork uses areas within and along the proposed pipeline corridor for resting, but not nesting or foraging.

66. Southeastern American kestrel and crested caracara habitat exists adjacent to the first four miles of the proposed pipeline corridor. There is no habitat within the pipeline corridor itself, and no kestrels or caracaras were observed in the adjacent habitat.

67. The nearest bald eagle nest is approximately 2,550 feet from the proposed pipeline route, which is well beyond the 660-foot regulatory protection zone. The nest is within a heavily wooded area of the Dupuis WMA and is not visible from the pipeline route.

68. A total of 18 gopher tortoise burrows were observed within the proposed pipeline route. The burrows are located along the berm of the L-65 Canal between MP 0.04 and MP 1.44.

69. Relocation is FWCC's preferred method for avoiding impacts to gopher tortoises that inhabit a construction area. The gopher tortoises are moved to another area during construction, but they are free to return to the area from which they were relocated after construction is completed.

70. In December 2007, FWCC issued a permit (No. WR07530a) that allows Gulfstream to capture and relocate up to 18 gopher tortoises. The permit also allows Gulfstream to capture and

relocate commensal species, such as the indigo snake, Florida mouse, and gopher frog.

71. The FWCC permit addresses the listed species' concerns raised by James Schuette, the FWCC employee who provided comments to the Department on the ERP application and who testified at the final hearing in Petitioner's case-in-chief.⁸

72. Gulfstream successfully used gopher tortoise relocation during construction of the first two phases of the pipeline project.

73. Gulfstream will conduct pre-construction surveys to ensure that no listed species have moved into the proposed pipeline route. Qualified environmental inspectors will be on-site on a daily basis during construction to look for listed species and to monitor compliance with the FWCC permit.

(4) Water Quality

74. The proposed pipeline will have no permanent adverse impacts on water quality.

75. The construction of the pipeline may have minor temporary impacts on water quality through increased turbidity in the water bodies crossed by the proposed pipeline.

76. Gulfstream will use turbidity curtains and other barriers to control turbidity and minimize impacts to water quality, and it is required to closely monitor water quality during construction.

77. The proposed permit establishes a turbidity standard - - 29 Nephelometric Turbidity Units (NTUs) above background -- that must be maintained outside of the 150 meter "mixing zone" established by the permit.⁹ The turbidity levels within the "mixing zone" may exceed the 29 NTU standard during construction.

78. The construction methods and turbidity controls used by Gulfstream during construction will ensure that the turbidity standards in the proposed permit are met. These methods were successful in controlling turbidity during the construction of the first two phases of the pipeline.

79. Gulfstream will also undertake other measures to minimize potential water quality impacts. For example, silt fences and hay bales will be used between spoil piles and water bodies, and disturbed areas will be immediately vegetated to limit the potential for sedimentation from erosion.

(5) Archeological and Historic Sites

80. Gulfstream conducted extensive cultural resource assessment surveys as part of the ERP application process. The surveys were conducted in a 300-to-400-foot-wide corridor around the centerline of the entire pipeline route.

81. The purpose of the surveys was to identify "historical resources" and "archaeological resources" in the vicinity of the proposed pipeline. Historical resources include structures and

buildings at or on the ground surface. Archaeological resources are partial or totaled buried cultural resources.

82. Two historical resources were identified in the surveys: the St. Lucie Canal and the Bryant Sugar Mill. The proposed pipeline will cross the St. Lucie Canal, and the land in the vicinity of the Bryant Sugar Mill will be used for parking and temporary storage of pipes.

83. The proposed pipeline will have no adverse impact on these historical sites. The proposed pipeline will be installed under the St. Lucie Canal using the HDD method; and there will be no parking or material storage within 25 feet of the Bryant Sugar Mill buildings, which themselves will not be used.

84. Two archaeological resources were identified in the surveys: the Couse Midden and a site known as JR-1 that is associated with the Belle Glade archaeological period. The sites were described as "basically, trash, refuse areas, possible habitation sites."

85. The proposed pipeline will have no adverse impact on these archaeological sites. The proposed pipeline will be installed approximately 40 feet under the Couse Midden site using the HDD method, and the JR-1 site will be entirely avoided.

86. The Division of Historical Resources -- the state agency responsible for evaluating the potential impacts of

construction projects on cultural resources -- concurred with the assessment of Gulfstream's consultant that the proposed pipeline "will have no adverse affect on any cultural resources listed or eligible for listing in the [National Register of Historic Places]."

87. Gulfstream has developed, and will implement an Unanticipated Finds Plan that includes detailed procedures to be followed in the event that previously unreported and unanticipated historic properties or human remains are found during construction. Among other things, the plan requires construction work in the area of the find to be stopped immediately and not restarted until clearance is granted by the environmental manager and archaeological consultant.

88. Additionally, as noted above, Gulfstream is in the process of acquiring a 3.75-acre parcel within the J.W. Corbett WMA that contains an Indian mound and that will be donated to the State.

(6) Other Issues

89. The proposed pipeline will have no adverse impact on fishing or other recreational activities in the water bodies within the pipeline route.

90. The agricultural ditches are Class IV waters that are not suitable for fishing or recreational activities.

91. The proposed pipeline will be installed under the St. Lucie Canal, the L-8 Canal, and the L-65 Canal, which are the only water bodies that could support fishing or recreational activities. Any impacts on fishing or recreational activities in the canals will be minor and temporary impacts during construction.

92. The proposed pipeline will not have any impact on marine productivity because the water bodies within the proposed pipeline route are freshwater, not marine or estuary.

93. The proposed pipeline will have no permanent adverse impact on navigation. The only navigable waters crossed by the proposed pipeline are the St. Lucie Canal, the L-8 Canal, and the L-65 Canal, and the proposed pipeline will be installed under the canal bottoms.

94. There will be minor temporary impacts on the navigability of the L-8 and L-65 Canals because those canals will effectively be blocked while the pipeline is installed under those canals using the sheet pile wet open cut method. The impacts will last no more than 48 hours, which is the maximum amount of time that it will take to complete the crossings.

95. The proposed pipeline will not cause harmful erosion. The vegetation on the banks of the water bodies will not be removed until the time of pipe installation, and the area will

be immediately re-vegetated after construction. Other erosion control measures will also be implemented, as reflected in the Upland Erosion Control, Revegetation, and Maintenance Plan included as part of the ERP application.

96. The proposed pipeline will not cause harmful shoaling. The agriculture ditches are not flowing water bodies so they are not subject to shoaling, and the construction in the L-8 and L-65 Canals will occur during the drier months when there is low flow in the canals. After construction is complete, the proposed pipeline will not impede the flow of water so as to cause shoaling because it will be buried under the bottom of the canal.

97. Gulfstream has developed, and will implement a Spill Prevention, Control, and Countermeasure Plan in order to reduce the chance for accidental spills during construction. The plan also includes procedures to be followed in the event of a spill.

98. The easement agreement between Gulfstream and SFWMD requires Gulfstream to pay any additional cost that SFWMD incurs in the installation, repair, or replacement of culverts within the proposed pipeline route as a result of the pipeline being located above an existing or future culvert. The agreement also requires Gulfstream, at its expense, to promptly repair and restore any damage to berms, levees, or other SFWMD improvements

that is caused by the construction or operation of the proposed pipeline.

99. The proposed pipeline will not have any material secondary impacts on wetlands or water resources. To the extent that the WCEC project can be considered to be a secondary impact of the proposed pipeline, its impacts on wetlands and water resources were considered as part of the certification proceeding for that project under the Power Plant Siting Act.¹⁰

100. The Department did not specifically evaluate whether the proposed pipeline will impact the Comprehensive Everglades Restoration Project (CERP). Its failure to do so is not unreasonable or inappropriate because the proposed pipeline is not located within the Everglades National Park or Loxahatchee National Refuge areas, and no concerns related to CERP were brought to the Department's attention by the agencies that provided comments on the ERP application. Moreover, the commenting agencies included SWFMD, which is actively involved in CERP and upon whose property the proposed pipeline will be located.

101. Petitioners expressed concerns regarding the impact of the proposed pipeline on the Everglades and CERP. However, they did not present any persuasive evidence in support of these concerns.

102. The proposed permit includes a specific condition that prohibits Gulfstream from installing the proposed pipeline on property that it does not own without prior written approval of the property owner. This condition may prohibit the installation of the pipeline across the J.W. Corbett WMA unless Gulfstream obtains the approval of the Board of Trustees of the Internal Improvement Trust Fund under the "linear facility policy."

D. Safety Concerns

103. Petitioners expressed concerns regarding the safety of the proposed pipeline and the potential adverse impacts to the environment and the public if the pipeline were to explode.

104. There is a potential for significant damage if the proposed pipeline were to explode.

105. It is impossible to eliminate all risk of the pipeline exploding.

106. The risk of an explosion has been minimized to the greatest extent practicable through the measures described above that reduce the risk of leaks in the proposed pipeline through corrosion or damage from external forces.

107. The pipe wall thickness was increased in areas adjacent to PBA's blasting operations even though the conservative blast mitigation analysis prepared by Gulfstream's expert shows that the normal pipe wall thickness is more than

adequate to withstand the vibrations caused by PBA's current permitted and reasonably foreseeable blasting operations.

108. The location of the pipeline -- underground and in existing canal and utility rights-of-way -- also serves to minimize the risk of accidental damage to the pipeline from construction and development activities and hurricanes or other natural disasters.

109. Pressure, temperature, and flow in the proposed pipeline will be continuously monitored at a 24-hour control center, and the pipeline right-of-way will be visually inspected at least once every two weeks.

110. The proposed pipeline includes "test leads" approximately every mile that are used to assess the cathodic protection on the pipeline.

111. The proposed pipeline includes two valves (at MP 0.00 and MP 14.87) that can be used to shut off the flow in the pipeline if necessary. The "valve setting" at MP 14.87 is the only above-ground component of the proposed pipeline other than the valve settings at the start and end of the pipeline. The area around the valve setting will be enclosed by an eight-foot-high fence and covered with gravel.

112. The location of the proposed pipeline will be marked at line-of-sight-intervals and at other key points. The markers will clearly indicate the presence of the pipeline and provide

contact information in case of emergency or in the event of excavation in the area of the pipeline by a third party.

113. Gulfstream has procedures in place to respond to any emergency that may arise in the operation of the pipeline, as required by federal law.

114. Gulfstream meets face-to-face with local emergency responders on at least an annual basis to discuss emergency response procedures. It also engages in public education and outreach efforts to address potential concerns regarding the safety of the pipeline.

CONCLUSIONS OF LAW

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

116. Gulfstream and the Department did not contest Petitioners' standing to challenge the proposed permit in the Prehearing Stipulation, but they argue in their PROs that the Brooks and PBCEC do not have standing. It is not necessary to address this issue because Gulfstream and the Department concede in their PROs (at paragraphs 58 and 64, respectively) that Mr. Tsoikas, Ms. Larson, and Mr. Shulz proved their standing.

117. Gulfstream has the burden to prove by a preponderance of the evidence that its permit application should be approved.

See Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

118. This is a de novo proceeding, and no presumption of correctness attaches to the Department's preliminary approval of the proposed permit; however, 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 [ALJ], in the absence of evidence showing its inaccuracy or unreliability.

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

119. Thus, if Gulfstream makes a preliminary showing of its entitlement to the proposed permit through "credible and credited evidence," the ALJ may not recommend denial of the permit "unless contrary evidence of equivalent quality is presented by the opponent of the permit." Id.

120. An applicant for an ERP must provide reasonable assurances that the proposed activity will not cause or contribute to a violation of state water quality standards and that it is not contrary to the public interest. See § 373.414(1), Fla. Stat.; Fla. Admin. Code R. 40E-4.301, 40E-4.302; BOR §§ 4.1.1, et seq.

121. Petitioners contend that Gulfstream has not provided the requisite reasonable assurances and that the proposed permit should be denied.¹¹ See Prehearing Stipulation, at 4.

Gulfstream and the Department contend that reasonable assurances have been provided and that the proposed permit should be approved. Id.

122. The "reasonable assurance" standard does not require Gulfstream to provide absolute guarantees, nor does it require Gulfstream to eliminate all speculation concerning what might occur if the project is developed as proposed; Gulfstream 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); Save Our Suwanee v. Dept. of Environmental Protection, 18 F.A.L.R. 1467, 1472 (DEP 1996).

123. In evaluating whether reasonable assurances have been provided, it is appropriate to look at the totality of the circumstances surrounding the proposed activity. See Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So. 2d 10, 13 (Fla. 1st DCA 1986). Permit conditions requiring mitigation and monitoring of future impacts may be considered in determining whether reasonable assurances have been provided. See Metropolitan Dade County, 609 So. 2d at 648.

124. Gulfstream provided reasonable assurances that the proposed pipeline will not cause or contribute to a violation of any applicable water quality standard, as required by Section 373.414(1), Florida Statutes, Florida Administrative Code Rule 40E-4.301(1)(e), and BOR Sections 4.1.1(c) and 4.2.4, et seq.

125. The potential impacts to water quality are limited to temporary impacts during construction. The operation of the pipeline will have no adverse impact on water quality.

126. The construction methods for the proposed pipeline will minimize the potential for adverse water quality impacts from turbidity and sedimentation during construction, and measures will be implemented to prevent and address accidental leaks of contaminants during construction.

127. Gulfstream provided reasonable assurances that the proposed pipeline will not be contrary to the public interest, as required by Section 373.414(1), Florida Statutes, Florida Administrative Code Rule 40E-4.302(1)(a), and BOR Sections 4.2.3, et seq.

128. The "public interest" test requires a balanced consideration of the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;^[12]

2. Whether the activity will adversely affect the conservation of fish and

wildlife, including endangered or threatened species, or their habitats;

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

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

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

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources . . . ;

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

§ 373.414(1)(a), Fla. Stat.

128. With respect to the first criterion in the public interest test, the more persuasive evidence establishes that the proposed pipeline will not adversely affect the public health, safety, or welfare. The proposed pipeline has been sited to avoid impacting any wetlands, and it will be located in existing canal and utility rights-of-way and across previously disturbed agricultural areas. Additionally, the proposed pipeline has been designed to meet or exceed all minimum safety standards, and Petitioners' speculative concerns regarding an explosion of the pipeline were not supported by the evidence, particularly in

light of the blast mitigation analysis that shows that PBA's blasting activities pose no risk to the pipeline.

129. With respect to the second criterion of the public interest test, the more persuasive evidence establishes that the proposed pipeline will not adversely affect fish and wildlife, including listed species, or their habitat. The proposed pipeline route consists of disturbed areas that provide low-quality habitat, and any impacts to wildlife will be temporary in nature related to the construction of the pipeline. Moreover, the impacts will be minimized through the wildlife surveys that will be conducted during construction and the gopher tortoise relocation authorized by the FWCC permit.

130. With respect to the third criterion of the public interest test, the more persuasive evidence establishes that construction of the pipeline will impact navigation of the L-8 and L-65 Canals, but that the impacts will be minor and temporary (i.e., no more than 48 hours); that the flow of water in the canals will be maintained during construction through the use of the HDD method and the sheet pile wet open cut method for the canal crossings; that the proposed pipeline will not cause any harmful erosion or shoaling during or after construction; and that after the pipeline is constructed, there will be no impacts to navigation or the flow of water because the pipelines will be located under the bottoms of the canals.

131. With respect to the fourth criterion of the public interest test, the more persuasive evidence establishes that any impacts to the fishing and recreational activities in the canals will be temporary during construction of the crossings; and that there will be no impact on marine productivity because the canals and other water bodies in the proposed pipeline route are freshwater, not marine or estuary.

132. With respect to the fifth criterion of the public interest test, the more persuasive evidence establishes that the proposed pipeline will be permanent in nature, but that its impacts will be minor and temporary in nature. The operation of the proposed pipeline will have no environmental impacts because it will be underground.

133. With respect to the sixth criterion of the public interest test, the more persuasive evidence establishes that the proposed pipeline will not adversely affect significant historical or archaeological resources. The HDD method will be used to install the pipeline 40 feet under the Couse Midden archaeological site, and an adequate buffer has been provided between the proposed pipeline and the Bryant Sugar Mill historic site. Additionally, Gulfstream is in the process of acquiring the last remaining Indian mound in private ownership within the J.W. Corbett WMA for donation to the State.

134. With respect to the seventh criterion of the public interest test, the more persuasive evidence establishes that the areas directly affected by the proposed pipeline -- agricultural fields, canal rights-of-way, and transmission line right-of-way -- are in a disturbed condition and are of relatively low environmental value, and that the proposed pipeline will not have any direct, indirect, or secondary impacts on the WMAs adjacent to the proposed pipeline route.

135. The Department is also required to consider the "cumulative impacts" of the proposed activity under the ERP program. See § 373.414(8)(a), Fla. Stat.; Fla. Admin. Code R. 40E-4.302(1)(b); BOR §§ 4.2.8 through 4.2.8.2.

136. If the applicant "proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets these adverse impacts, the . . . department shall consider the regulated activity to meet the cumulative impact requirements" § 373.414(8)(b), Fla. Stat.

137. The mitigation proposed by Gulfstream -- removal of exotic species within the pipeline route -- offsets the potential adverse impacts caused by the construction of the pipeline and will occur in the same drainage basin as the pipeline. Therefore, pursuant to Section 373.414(8)(b), Florida Statutes, the pipeline meets the cumulative impact requirements.

138. In sum, Gulfstream met its burden to provide reasonable assurances that the proposed pipeline meets the applicable regulatory criteria. The evidence presented by Petitioners in opposition to the proposed pipeline was, on balance, considerably less persuasive than the evidence presented by Gulfstream and the Department in support of the pipeline.

RECOMMENDATION

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

RECOMMENDED that the Department issue a final order approving ERP No. 50-0269698-002.

DONE AND ENTERED this 8th day of February, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2008.

ENDNOTES

^{1/} Ms. Larson was represented by Mr. Silver up to the final hearing, but she discharged Mr. Silver at the outset of the final hearing and represented herself from that point forward. See Transcript, at 26-29.

^{2/} The December 5 Order excluded "[e]vidence and argument relating to the potential impacts of Florida Power and Light's West Coast Energy Center project that were considered and determined in the site certification proceeding or that are not cognizable under part IV of Chapter 373, Florida Statutes, and its implementing rules." The December 27 Order excluded "[e]vidence and argument relating to potential impacts of greenhouse gas emissions from the West Coast Energy Center project on global climate change."

^{3/} Petitioners filed an emergency motion to continue the final hearing on January 7, 2008. Gulfstream filed a response in opposition to the motion on that same date. The motion was denied at the outset of the final hearing. See Transcript, at 21. Several ore tenus motions for continuance made by Ms. Larson at the final hearing were also denied. See Transcript, at 31, 349-50.

^{4/} All statutory references in this Recommended Order are to the 2007 version of the Florida Statutes.

^{5/} See Fla. Admin. Code R. 62-330.200(4).

^{6/} Mr. Tsoikas and the other Petitioners also have a number of concerns regarding the impacts of the power plant that will served by the proposed pipeline, but those issues were determined to be beyond the scope of this proceeding. See Endnote 2.

^{7/} The parties did not identify the citation for the "linear facility policy," but it appears to be Florida Administrative Code Rule 18-2.018(2)(i), which provides that "[e]quitable compensation shall be required when the use of uplands will generate income or revenue for a private user or will limit or preempt use by the general public."

^{8/} Mr. Schuette provided "draft" comments to the Department on or about November 9, 2007. See Petitioner's Exhibit 2. The letter raised concerns about gopher tortoises and other listed species, and it also raised concerns that are clearly outside of

FWCC's jurisdiction, such as concerns regarding the WCEC project. The "official" FWCC comment letter, dated December 10, 2007, was much more focused. See Petitioner's Exhibit 1. The Department did not consider FWCC's comments in its review of the revised permit application because the letters were received outside of the applicable 30-day comment period. See § 373.4141(1), Fla. Stat. That said, Mr. Schuette testified at the final hearing that all of the concerns raised in the official FWCC letter have been addressed, except for the concern regarding the "the integrity of the L-8 levee." Mr. Scheutte acknowledged in his testimony that the proposed pipeline is adjacent to the L-8 levee, not in the levee, and he conceded that the operation and maintenance of the levee is the responsibility of SFWMD, not FWCC. Moreover, the easement agreement between Gulfstream and the District adequately addresses this issue. See Exhibit AT-3 (paragraph 1 of easement agreement).

^{9/} The 150-meter mixing zone in the proposed permit is within the standard range for projects of this type. See Fla. Admin. Code R. 62-4.244(5)(c); BOR § 4.2.4.4.

^{10/} See In re Florida Power & Light Co. West County Energy Center Power Plant Siting Application No. PA05-47, Case No. 05-1493EPP (DOAH Oct. 24, 2006; Siting Board Dec. 26, 2006).

^{11/} Petitioners argue in their "Proposed Final Order" that the proposed permit should also be denied because the pipeline did not go through the permitting process under the Natural Gas Transmission Pipeline Siting Act (NGTPSA), Part VIII of Chapter 403, Florida Statutes. This issue will not be considered because it was not raised in Petitioners' petition challenging the proposed permit or in the Prehearing Stipulation. That said, it is noteworthy that the application (Exhibit JT-1, at page 4-3) indicates that Gulfstream has applied for a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission (FERC). If that certificate is issued, the proposed pipeline will be exempt from the NGTPSA. See § 403.9405(2)(c), Fla. Stat. Indeed, although not part of the record of this proceeding, it appears that the certificate has been issued by FERC. See Gulfstream Natural Gas System, LLC 119 F.E.R.C. P61,250; 2007 FERC LEXIS 1048 (FERC June 7, 2007).

^{12/} The BOR clarifies that this criterion refers to environmental concerns, not general public health, safety, and

welfare concerns, as argued by Petitioners at the final hearing.
See BOR § 4.2.3.1(a).

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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.