STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. OCTAVIO BLANCO, Petitioner, vs. NNP-BEXLEY, LTD., and SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, Respondents.	)	Case No. 08-1972

RECOMMENDED ORDER

Pursuant to notice, the final hearing in the above-captioned matter was heard by J. Lawrence Johnston, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), on September 9 and 10, 2008, in Brooksville, Florida.

APPEARANCES

For Petitioner: Mara Shaughnessy, Esquire
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Lithia, Florida 33547

For Respondent NNP-Bexley, Ltd.:

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Margaret M. Craig, Esquire
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For Respondent Southwest Florida Water Management District:

Jason L. Smith, Esquire
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STATEMENT OF THE ISSUES

There are two main issues in this case. The first is whether Respondent, NNP-Bexley, Ltd. (NNP-Bexley), has provided Respondent, Southwest Florida Water Management District (the District), with reasonable assurances that the activities NNP-Bexley proposes to conduct pursuant to Environmental Resource Permit (ERP) Application No. 43013740.004 (the Permit) meet the conditions for issuance of permits established in Sections 373.413 and 373.414, Florida Statutes (2007), Florida Administrative Code Rules 40D-4.301 and 40D-4.302, and the Environmental Resource Permit Information Manual, Part B, Basis of Review (BOR).[1] The second is whether Petitioner, Dr. Octavio Blanco (Blanco), participated in this proceeding for an improper purpose so as to warrant the imposition of sanctions under Section 120.595(1), Florida Statutes.[2]

PRELIMINARY STATEMENT

On February 22, 2008, District issued notice of its intent to grant Individual ERP Application No. 43013740.004 to NNP-Bexley. Blanco submitted a request for hearing, objecting to

the proposed agency action on March 19, 2008. The District determined that the request for hearing did not meet with the requirements of Rule 28-106.201(2), and dismissed it with leave to amend. On March 25, 2008, the District's Governing Board issued the Permit. However, on April 9, 2008, Blanco filed a timely and sufficient Amended Request for Administrative Hearing, which was referred to DOAH and assigned to the undersigned ALJ.

The case was set for final hearing beginning on September 9, 2008, and an Order of Pre-Hearing Instructions established discovery deadlines, including deadlines for the disclosure of witnesses. Expert witnesses were to be disclosed by August 5, 2008. The Order of Pre-Hearing Instructions stated that failure to comply with the deadlines could result in sanctions, including the exclusion of undisclosed witnesses. Additionally, an Order Compelling Discovery, entered July 17, 2008, directed Blanco to respond to NNP-Bexley's discovery requests, which included requests for information regarding expert witnesses. Blanco also was ordered to pay NNP-Bexley its reasonable expenses of compelling discovery, including its attorney's fees.[3]

On August 8, 2008, NNP-Bexley filed a Motion for Fees and Costs under Sections 57.105, 120.569(2)(e), and 120.595, Florida

Statutes, on the grounds that Petitioner's challenge was brought and maintained for an improper purpose and was not supported by material facts.

Respondents submitted a Joint Pre-Hearing Statement on August 28, 2008, as directed by the Pre-Hearing Order. Petitioner did not file a pre-hearing statement. Petitioner sought a continuance of the final hearing on September 2, 2008, which was opposed by Respondents and was denied on September 4, 2008. At telephonic pre-hearing conference that was held on September 8, 2008, to discuss the status of the case and nature of the final hearing, the ALJ ruled that Blanco could not add a previously undisclosed expert witness, Mr. Patrick Tara; and it was suggested that, in light of the paucity of evidence to be presented by Petitioner, NNP-Bexley could present an abbreviated prima facie case at the final hearing, using the procedure described in Department of Transportation v. JWC Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

The final hearing was bifurcated into: first, the merits of the ERP application; and, second, additional facts relevant to NNP-Bexley's Motion for Fees and Costs. During the final hearing, the District made an ore tenus motion for the District's fees and costs. A hearing on the amount of fees and costs, if awarded, was deferred.

In the first phase of the final hearing, Respondents presented Joint Exhibits 1 through 3, including the ERP application file of record. NNP-Bexley presented the testimony of: Rhonda Brewer, Vice President of Operations at Newland Communities, LLC, who was accepted as an expert in planning and development of large-scale mixed-use projects; Brian Surak, a Professional Engineer licensed by the State of Florida and the engineer of record for this project, who was accepted as an expert in drainage engineering, surface water hydrology, design of surface water management systems, computer modeling, and Environmental Resource Permitting; Steve Godley, an environmental scientist with the environmental consulting firm for this project, accepted as an expert in wetlands, wetland ecology, wetland identification and delineation, wetland mitigation, wildlife ecology and biology, threatened and endangered species management, and Environmental Resource Permitting; Richard Mortensen, a professional engineer licensed by the State of Florida, who was accepted as an expert in geotechnical engineering and hydrogeology; and Marty Sullivan, a professional engineer licensed by the State of Florida, who was accepted as an expert in hydrogeology and computer modeling of ground and surface water. NNP-Bexley had its Exhibits 1 through 17 admitted in evidence.

The District presented the testimony of: Monte Ritter, a Professional Engineer licensed by the State of Florida, recognized as an expert in the areas of surface water management systems, surface water modeling, and Environmental Resource Permitting; and Alex Aycrigg, recognized as an expert in wetland assessment, wetland ecology, wetland mitigation, wetland delineation and Environmental Resource Permitting. The District also had its Exhibits 1 and 2 admitted into evidence.

Petitioner presented only his own testimony, and offered no exhibits into evidence. Petitioner renewed his request to present expert testimony from Mr. Tara, which was denied. Petitioner was granted permission to proffer the proposed testimony of Mr. Tara by post-hearing affidavit.

In the second phase of the final hearing, NNP-Bexley presented additional testimony from Rhonda Brewer, Brian Surak and, Dr. Douglas Weiland. Blanco again presented his own testimony, as well as the testimony of his mother, Olga Blanco. Blanco was granted permission to file post-hearing affidavits from Dr. Mark Stewart and Dr. Mark Rains in support of Blanco's basis for filing his challenge in this case. Respondents were provided the opportunity to review the affidavits and depose the affiants.

A Transcript of the final hearing was ordered, and the parties were given ten days from the filing of the Transcript or the close of evidence, whichever was later, in which to file proposed recommended orders (PROs). The affidavits of Dr. Rains, Dr. Stewart, and Mr. Tara were filed on September 19, 22, and 24, 2008, respectively. Depositions were conducted on September 29, 2008, and the deposition transcripts were filed on October 1, 2008. The final hearing Transcript (in three volumes) was filed October 9, 2008. NNP-Bexley and the District each filed a timely PRO. Blanco did not file a PRO.

FINDINGS OF FACT

1. Blanco is a resident of Pasco County, Florida. Blanco is a trustee and beneficiary of an unrecorded Land Trust Agreement, dated December 19, 1996, known as Trust Number 99. The Trust holds title to real property (the Blanco Property) located to the south of the NNP-Bexley property.

2. The Blanco property is approximately 100 acres and primarily agricultural. It has a narrow frontage along State Road (SR) 54, and is directly east of the Suncoast Parkway. A wetland known as Wetland A3 is partially located on the northern portion of the Blanco property.

3. NNP-Bexley is a Florida limited partnership between the Bexley family and NNP-Tampa, LLC, and is the applicant for the

ERP at issue in this case. Newland Communities, LLC, is the project manager for NNP-Bexley under a project management agreement.

4. The ERP at issue in this case would authorize construction of a new surface water management system to serve Phase I of the Bexley Ranch Development of Regional Impact (DRI), which is a 6,900-acre mixed use, residential community. Phase one consists of a 1,717-acre residential subdivision in Sections 7, 8, and 16-20, Township 26 South, Range 18 East, Pasco County, Florida (the Subject Property), with 735 residential units, both single and multi-family, and associated improvements, including widening SR 54 and constructing Sun Lake Boulevard and Tower Road (collectively, the Project).

5. The Subject Property is located North of the Blanco property. Like the rest of the land subject to the Bexley Ranch DRI, the Subject Property is predominantly agricultural land used for raising cattle, sod farming, and tree farming. There is little native vegetation and limited habitat value for wildlife in the uplands.

6. The Subject Property is composed of approximately 654 acres of wetlands and 1063 acres of uplands. Most of the wetlands will be preserved, including many as part of a wildlife

corridor along the Anclote River that is proposed to be dedicated to Pasco county.

7. The Bexley Ranch DRI has been extensively reviewed. Including the DRI approval, it has received 23 separate development approvals to date. A Site Conditions Assessment Permit (SCAP) issued by the District established existing conditions on the NNP-Bexley Property for ERP permitting purposes, including wetland delineations, wetland hydroperiods, pre-development flows, drainage flow patterns, and the pre-development flood plain. The SCAP was not challenged and is not subject to challenge in this proceeding.

Surface Water Management System

8. The Subject Property accepts off-site drainage flows from the east and from the south. All drainage exits the Subject Property to the west, into property owned by the District. There is a culvert under an abandoned railroad crossing between the Subject Property and the Blanco property that directs surface water flows into the Subject Property. That culvert controls water elevations on the Blanco property.

9. The surface water management system consists of a series of wet detention facilities, wetland creation areas, and floodplain mitigation designed to control water quality, quantity, and floodplain elevations. The design of the surface

water management system was optimized and environmental impacts were reduced by using created wetlands for floodplain attenuation.

10. Information from the SCAP was used to create pre-development and post-development Inter-connected Pond Routing (ICPR) computer models of drainage relevant to the Subject Property. The ICPR models were used to design a surface water management system that will avoid adverse on-site or off-site impacts and provide required water quality treatment.

11. The ICPR models showed that the in-flows and out-flows to and from the Project site will not be adversely impacted by the proposed activities. The proposed surface water management system will not cause adverse water quantity impacts to receiving waters or to adjacent land, including Dr. Blanco's property.

12. The Phase I project will not cause adverse impacts to existing surface water storage and conveyance capabilities and will not adversely affect the quality of receiving waters such that state water quality standards will be violated.

13. The proposed water quality treatment system utilizes ponds for treatment and attenuation. Flow will be controlled by outlet structures. During construction, best management practices will be used to control sediment run-off.

14. The surface water management system provides adequate water quantity and quality treatment and is designed to meet the criteria in Section 5.2 and BOR Section 6.

Wetlands and Associated Impacts

15. The wetlands within the Subject Property consist primarily of moderate-quality forested wetlands that have been selectively logged in the past. Previously isolated wetlands have been connected by surface water ditches.

16. Through multiple iterations of design, direct wetland impacts from the Project were reduced from 86 to approximately 24 of the 654 acres of wetlands on the Subject Property. Of those 24 acres, almost half are man-made surface water ditches. There will be direct impacts to 13.6 acres of wetlands that will require mitigation, which is approximately two percent of the total wetlands on the Subject Property. Most of the direct wetland impacts are the result of required transportation improvements such as roadway crossings.

17. Secondary impacts also were considered. However, the proposed ERP requires a minimum of 15 feet and an average of 65 feet of buffer around wetlands on the Subject Property. The uplands have been converted into improved pasture or silviculture that lack native vegetation and have limited habitat value. According to the evidence, given buffers that

exceed the District's criteria of a minimum 15 feet and average 25 feet, no "additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat"; and any secondary impacts from the expected residential development on a large percentage of the uplands on the Subject Property and subsequent phases of the Bexley DRI are not considered to be adverse. See BOR Section 3.2.7.

18. Extensive wildlife surveys were conducted throughout the breeding season at all relevant times for sand hill cranes, wading birds, and all listed species. No colonies of listed bird species, such as wood storks, herons, egrets, or ibises, were found on the Project site; and no listed species was found to utilize the site for nesting.

Mitigation

19. Under the proposed ERP for the Project, approximately 80 acres of wetlands are to be created for floodplain attenuation and mitigation to offset unavoidable wetland impacts. The proposed mitigation areas are to be excavated to relatively shallow depths and planted. All the mitigation is on the Subject Property.

20. The State's mandated Uniform Mitigation Assessment Method (UMAM) was used in this case to determine the amount of

mitigation "needed to offset adverse impacts to wetlands and other surface waters." Fla. Admin. Code R. 62-345.100(1). Generally, UMAM compares functional loss to wetlands and other surface waters to functional gains through mitigation.

21. In applying UMAM in this case, it does not appear that NNP-Bexley considered any functional loss to wetlands and other surface waters from the use of a large percentage of the uplands on the Subject Property and subsequent phases of the Bexley DRI for residential development. Apparently, impacts resulting in any such functional loss to wetlands and other surface waters were treated as secondary impacts that were not considered to be adverse because they were adequately buffered. See Finding 17, supra. In addition, "the amount and type of mitigation required to offset . . . [s]econdary impacts to aquatic or wetland dependent listed animal species caused by impacts to uplands used by such species for nesting or denning" are evaluated and determined by means other than "implementation of Rules 62-345.400 through 62-345.600, F.A.C." Fla. Admin. Code R. 62-345.100(5)(b). In any event, the undisputed evidence was that the uplands have been converted into improved pasture or silviculture that lack native vegetation and have limited habitat value, and there was ample evidence that UMAM was used properly in this case to determine the amount of mitigation

"needed to offset adverse impacts to wetlands and other surface waters." Id. Without any evidence to the contrary, the evidence in the record is accepted.

22. Based on the accepted UMAM evidence, wetland impacts resulted in 6.36 units of functional loss. The functional gain of the proposed mitigation calculated using UMAM is 18.19 units, more than offsetting Project impacts to wetlands on the Subject Property.

Proposed Excavations for Ponds and Wetland Creation

23. Blanco's expressed concerns focus on a 30-acre wetland to be created in the southwest corner of the Subject Property for mitigation with a secondary benefit of floodplain compensation credit. Referred to as M-10, this wetland is proposed to be created by excavating uplands to a depth of approximately two and one half feet, which is approximately half a foot below the seasonal high water line (SHWL).

24. Because it is controlled by the railroad culvert near the property boundary, Wetland A3 will not be negatively impacted by M-10. It will not lose water to M-10 or any of the proposed excavations except in periods of relatively high rainfall, when those outflows would benefit Wetland A3. In addition, the existing Tampa Bay Water pipeline and the proposed Tower Road, located between the Blanco Property and the Subject

Property, would restrict any drawdown effects from impacting Wetland A3.

25. Mr. Marty Sullivan, a geotechnical engineer, performed an integrated ground and surface water modeling study to evaluate the potential for impacts to Wetland A3 from the excavation of a large-sized pond on the adjacent Ashley Glen property as part of a project that also was the subject of an ERP administrative challenge by Petitioner. Petitioner's challenge concerned impacts to Wetland A3 from excavation of an adjacent pond, known as P11.

26. Mr. Sullivan's modeling demonstrated that there would be no adverse impacts to the hydrology of Wetland A3 from the Ashley Glen excavation although P-11 was larger and deeper than M-10, and much closer to Wetland A3. The bottom of P-11 came within 2 feet of limerock, in contrast to the minimum 10 foot separation in M-10.

27. The Bexley and Ashley Glen sites are substantially similar in other respects, and the Ashley Glen modeling is strong evidence that M-10 would not adversely impact Wetland A3 or the wetlands on the Subject Property.

28. Approximately 50 test borings were conducted throughout the 6,900-acre DRI site. The borings were done after considering the locations of wetlands and proposed activities.

Test borings in Phase I were performed on the west side of the Subject Property.

29. The findings from the test borings indicate that there is an inconsistent semi-confining layer that overlies the DRI site. Limestone varies in depth from 15 feet to 50 feet below the surface.

30. Based upon the findings from the test borings, excavations for stormwater ponds are a minimum of 10 feet above the top of the limestone layer, meaning the semi-confining unit materials that cover the limestone will not be encountered or breached.

31. Given the excavation depths of the various ponds, no adverse draw-downs are expected that would cause the groundwater table to be lowered due to downward leakance.

32. While initially water would be expected to flow or move through the ground from existing wetlands on the Subject Property to the new M-10 wetland, water levels will stabilize, and there will be enough water for the existing wetlands and for M-10. There will be more water in the southwestern corner of the Subject Property for a longer period of time than in pre-development conditions.

33. NNP-Bexley provided reasonable assurance that there will be no adverse impacts to Wetland A3 or the existing

wetlands on the Subject Property from M-10 or any of the proposed excavations.

Other Conditions for Permit Issuance

34. The Project was evaluated under the public interest test found in Rule 40D-4.302. The evidence was that the public interest criteria have been satisfied.

35. The Project is capable, based on generally accepted engineering and scientific principles, of being effectively performed and of functioning as proposed.

36. The applicant has provided reasonable assurance that the construction, operation, and maintenance of the system will meet the conditions for permit issuance in Rule 40D-4.301 and 40D4.302.

Improper Purpose

37. Blanco has a history of opposing projects near his property, with mixed results.

38. In this case, after Blanco learned of NNP-Bexley's application for an ERP, he met with Ms. Brewer on April 20, 2006, to discuss it. At the time, specifics were not discussed, but Blanco let Ms. Brewer know that his successful opposition to an earlier project by Westfield Homes resulted in significant expenditures by the developer and eventually the abandonment of the project by that developer. Blanco warned Ms. Brewer that,

if NNP-Bexley did not deal with him to his satisfaction, and he challenged NNP-Bexley's application, NNP-Bexley would risk a similar fate.

39. In August 2006, Blanco arranged a meeting at the University of South Florida (USF) with Ms. Brewer, NNP-Bexley's consultants, Blanco, and USF hydrologists, Drs. Mark Stewart and Mark Rains. At the time, Blanco's expressed concern was the impact of the NNP-Bexley project on Wetland A3. As a result of the meeting, it was agreed that there would be no impact on Wetland A3, primarily because it was upstream and its water elevations were controlled by the downstream culvert to the south of the Bexley property. Nonetheless, Ms. Brewer agreed to limit excavations in the southwest corner near the Blanco property and Wetland A3 to a depth of no more than two and a half feet, instead of the 12 feet being proposed at the time. NNP-Bexley made the agreed changes to the application and proceeded towards obtaining approval by the District.

40. When Blanco learned that the NNP-Bexley project was on the agenda for approval by the District Board at its meeting in March 2008, Blanco took the position that NNP-Bexley had reneged on an agreement to keep him informed and insisted on an urgent meeting. At this third meeting with Ms. Brewer and some of her consultants, Blanco was told that the only change to the

application was the one agreed to at the meeting at USF in August 2006. Not satisfied, Blanco asked that the application documentation be forwarded to Dr. Stewart for his evaluation. He mentioned for the first time that he was concerned about an increased risk to the Blanco property and Wetland A3 from wildfires starting on the Bexley property, spreading south, and utilizing dry muck resulting from the dewatering of wetlands in the southwest corner of the Bexley property as fuel. Blanco requested that the approval item be removed from the Board's agenda to give Dr. Stewart time to evaluate the documentation and advise Blanco. Blanco stated that, if forced to challenge Board approval, he would raise numerous issues arising from the entirety of the application, not just the muck fire issue and not just issues arising from activities in the southwest corner of the Bexley property. Ms. Brewer refused to delay Board approval for the reasons given by Blanco.

41. When told that the item would not be removed from the agenda, Blanco stated that he would not challenge an approval that limited the excavations to the SHWL. NNP-Bexley refused because it was necessary to dig the pond to a half foot below the SHWL in order to create a mitigation wetland. At that point, Blanco proposed that he would not challenge a Board approval if: vegetation was removed from the mitigation areas

to reduce the risk of wildfires; a fire break was constructed along Tower Road and mowed periodically; NNP-Bexley agreed in writing to never deepen the mitigation pond M-1 in the southwest corner of the Bexley property; and NNP-Bexley paid Blanco $50,000 for him to install a well for use in fighting any wildfire that might approach the Blanco property and Wetland A3 from the north. Ms. Brewer agreed to all of Blanco's demands except for the $50,000 payment. Instead, she offered to pay for construction of the well, which she believed would cost significantly less than $50,000. At that point, the negotiations broke down, and Blanco filed a request for a hearing.

42. The District denied Blanco's first request for a hearing and gave him leave to amend. In the interim, the Board voted to approve NNP-Bexley's application, and Blanco timely-filed an amended request for a hearing. The amended request for a hearing did not mention fire risk. Instead, it resurrected the issue of dewatering Wetland A3, as well as wetlands on the Bexley property, caused by the excavation in the southwest corner of the Bexley property, which would "result in destruction of functions provided by those wetlands that are not accounted for by the District." The amended request for a hearing also raised numerous other issues.

43. After Blanco's former attorney-of-record withdrew without objection, Blanco's present counsel-of-record appeared on his behalf and requested a continuance to give Blanco time to determine whether either Dr. Stewart or Dr. Rains would be willing to testify for him if the hearing were re-scheduled. That request was denied.

44. During a telephonic prehearing conference on September 8, 2008, Blanco asked to add Mr. Patrick Tara, a professional engineer, to his witness list. This request was denied as untimely. Mr. Tara was available but was not permitted to testify at the final hearing; instead, Blanco was allowed to file an affidavit of Mr. Tara as a proffer. Blanco's request to present expert evidence on fire hazards from muck fires in dry conditions was denied as irrelevant under the District's ERP conditions of issuance. Essentially, Blanco presented no evidence to support any of the allegations in his amended request for a hearing.

45. Blanco maintained in his testimony that he filed and persisted in this challenge on the advice of his experts, Drs. Stewart and Rains, and after September 8, 2008, also on the opinions of Mr. Tara. For that reason, Blanco was given the opportunity to file affidavits from Drs. Stewart and Rains, in addition to the affidavit of Mr. Tara, in support of his

expressed basis for litigating this case. Respondents were given the opportunity to depose Drs. Stewart and Rains if desired.

46. Drs. Stewart and Rains, as well as Mr. Tara, all told Blanco essentially that the excavation proposed in NNP-Bexley's plans for development probably would have adverse impacts on the surrounding wetlands. However, none of them told Blanco that there would be adverse impacts on Wetland A3; Drs. Stewart and Rains clearly told Blanco that there would be no adverse impacts on Wetland A3. It does not appear from his affidavit that Mr. Tara focused on Wetland A3, and there is no reason to believe that he disagreed with Drs. Stewart and Rains with regard to Wetland A3. As to the wetlands on the Bexley property surrounding the excavation in the southwest corner of the property, any potential impacts from excavation that Drs. Stewart and Rains might have discussed with Blanco prior to the USF meeting in August 2006 were reduced after NNP-Bexley agreed to limit the depth of the excavation to two and a half feet. When asked about the revised excavations again in February or March of 2008, Dr. Stewart essentially told Blanco that even the shallower excavations would make the surrounding wetlands on the Subject Property drier during dry conditions and that any such impacts could be eliminated or minimized by either limiting the

excavation to the SHWL or by maintaining a buffer of undisturbed land around the excavation. Dr. Rains agreed with Dr. Stewart's assessment. Contrary to Blanco's testimony at the final hearing, there is no evidence that Dr. Stewart, Dr. Rains, or Mr. Tara ever advised Blanco to file and persist in this challenge. In their depositions, Drs. Stewart and Rains specifically denied ever giving Dr. Blanco such advice. Likewise, there is no evidence that any of them had any opinions to give Blanco about risk of fire hazards. In their depositions, Drs. Stewart and Rains specifically denied ever giving Blanco such opinions.

47. There are additional discrepancies between Blanco's testimony and the deposition testimony of Drs. Stewart and Rains. Blanco swore that Dr. Stewart was unable for health reasons to testify for him. In his deposition, Dr. Stewart denied that his health entered into his decision. He told Blanco from the outset that he would not be willing to testify as Blanco's expert. Dr. Stewart only cursorily examined the materials Blanco had delivered to him and only responded to Blanco's questions in generalities. Most of their conversations consisted of Blanco bringing Dr. Stewart up-to-date on what was happening in the case. Blanco swore that Dr. Rains planned to testify for him at the scheduled final hearing until unexpected

events made it impossible. In his deposition, Dr. Rains testified that he never agreed to testify as Dr. Blanco's expert and that his unavailability to testify at the final hearing was made known to Blanco when he was first asked to testify at the scheduled final hearing. He never even opened the box of materials Blanco had delivered to him and barely spoke to Blanco at all about hydrology. Most of Dr. Rains' communications with Blanco had to do with Dr. Rains' unavailability to participate.

48. Based on all of the evidence, it is found that Blanco's participation in this proceeding was for an improper purpose--i.e., "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity." His more recent dealings with Drs. Stewart and Rains and Mr. Tara seem more designed to obtain or infer statements for Blanco to use to avoid sanctions than to obtain actual evidence to support a valid administrative challenge.

CONCLUSIONS OF LAW

49. As the applicant, NNP-Bexley has the burden of proving, by a preponderance of the evidence, that it is entitled to the ERP. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

50. Under Section 373.413(1), Florida Statutes, the District shall "require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system . . . will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district."

51. Section 373.414(1), Florida Statutes, provides that:

> [a]s part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board . . . shall require the applicant to provide reasonable assurance that the state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands . . . is not contrary to the public interest. . . .

52. Section 373.414(1)(a), Florida Statutes, describes the public-interest test:

> (a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:
>
> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

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

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

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

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

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

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

53. Section 373.414(1)(b), Florida Statutes, identifies the kinds of permissible mitigation:

> 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.

54. Florida Administrative Code Rule 40D-4.301(1) requires:

In order to obtain a general, individual, or conceptual permit under this chapter or Chapter 40D-40, F.A.C., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:

(a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife, and listed species including aquatic and wetland dependent species, by wetlands, other surface waters and other water related resources of the District;

(e) Will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., . . .;

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

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

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

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

(j) Will be conducted by an entity with financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the

terms and conditions of the permit, if issued; and

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

55. Secondary impacts are impacts caused, not by direct wetland impacts of the regulated activity, but by "other relevant activities very closely linked or causally related to the construction of the project." Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1143 (Fla. 2nd DCA 2001); Florida Power Corp., Inc. v. Department of Environmental Regulation, 605 So. 2d 149, 152 (Fla. 1st DCA 1992); and Conservancy, Inc. v. A. Vernon Allen Builder, Inc., 580 So. 2d 772, 777 (Fla. 1st DCA 1991).

56. As relevant to this case, Florida Administrative Code 40D-4.302 adds the requirement that an applicant provide reasonable assurance that the proposed activities will not be contrary to the public interest.[4]

57. Rule 40D-4.301(3) incorporates the BOR and states that its "standards and criteria . . . shall determine whether the reasonable assurances required by subsection 40D-4.301(1) and Rule 40D-4.302 have been provided."

58. BOR Section 3.2.1 identifies the following factors in the determination of whether the District will approve an ERP application:

> The degree of impact to wetland and other surface water functions caused by a proposed system, whether the impact to these functions can be mitigated and the practicability of design modifications for the site, as well as alignment alternatives for a proposed linear system, which could eliminate or reduce impacts to these functions . . ..

59. BOR Section 3.2.1 requires a two-step analysis of an wetlands impacts and mitigation:

> Design modifications to reduce or eliminate adverse impacts must be explored as described in 3.2.1.1. Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation as described in subsections 3.3 through 3.3.8. An applicant may propose mitigation, or the District may suggest mitigation, to offset the adverse impacts which would cause the system to fail to meet the conditions for issuance. To receive District approval, a system can not cause a net adverse impact on wetland functions and other surface water functions which is not offset by mitigation.

60. The first step is to determine if the applicant has implemented practicable design modifications to reduce or eliminate adverse impacts to wetland functions. BOR Section 3.2.1.1 states:

> Except as provided in 3.2.1.2, if the proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of sections 3.2.2 through 3.2.3.7, then the District in determining whether to grant or deny a permit shall consider whether the applicant

> has implemented practicable design modifications to reduce or eliminate such adverse impacts.
>
> The term "modification" shall not be construed as including the alternative of not implementing the system in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value in order to be considered not "practicable." Conversely, a modification need not provide the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable, consideration shall be given to the cost of the modification compared to the environmental benefit it achieves.

61. BOR Section 3.2.2.3 provides that the assessment of impacts expected from proposed activities on the value of functions of the wetland proposed to be adversely impacted includes the condition of the wetland, its hydrologic connection, its uniqueness, its location, and the fish and wildlife use of the wetland.

62. Under BOR Sections 1.7.32 and 1.7.38, the "regulated activity" is the "construction, alteration, operation, maintenance, abandonment or removal" of the surface water management "system which is designed and constructed or implemented to control discharges which are necessitated by

rainfall events, incorporating methods to collect, convey, store, absorb, inhibit, treat, use, or reuse water to prevent or reduce flooding, overdrainage, environmental degradation, and water pollution or otherwise affect the quantity and quality of discharges from the system." Reasonable assurance must be provided that there will not be unmitigated secondary impacts "from construction, alteration, and intended or reasonably expected uses of a proposed system." BOR Section 3.2.7(a)-(b). "An applicant must provide reasonable assurance that . . . additional phases or expansion of the proposed system for which plans have been submitted to the District or other governmental agencies . . . and [other regulated] on-site and off-site activities . . . , that are very closely linked and causally related to the proposed system, will not result in water quality violations or adverse impacts to the functions of wetlands and other surface waters as described in section 3.2.2." BOR Section 3.2.7(d). "As part of this review, the District will also consider the impacts of the intended or reasonably expected uses of the future activities on water quality and wetland and other surface water functions." Id.

63. BOR Section 3.2.7 provides in part: "Secondary impacts to habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if

buffers, with a minimum width of 15' and an average width of 25' are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat." The proposed ERP exceeds the minimum buffers, and the evidence was that no "additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat." As a result, secondary impacts from proposed residential development on a large percentage of the uplands on the Subject Property and subsequent phases of the Bexley DRI are not considered to be adverse under BOR Section 3.2.7.

64. After the applicant has demonstrated that it has implemented practicable design modifications to eliminate or reduce adverse impacts to wetland functions, the second step is to determine if the applicant has mitigated any remaining adverse impacts. BOR Section 3.3 provides:

> Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features. Mitigation will be approved only after the applicant has complied with the requirements of subsection 3.2.1 regarding practicable modifications to reduce or eliminate adverse impacts. . . .

65. BOR Section 3.3.1 states:

> Mitigation usually consists of restoration, enhancement, creation, or preservation of wetlands, other surface waters or uplands. In some cases, a combination of mitigation types is the best approach to offset adverse impacts resulting from the regulated activity.

66. BOR Section 3.3.1.2 provides:

> In general, mitigation is best accomplished when located on-site or in close proximity to the area being impacted.

In this case, the undisputed evidence was that all mitigation is on the Subject Property (i.e., in the same drainage basin as the impacts.)

67. BOR Section 3.3.2 adopts the Uniform Mitigation Assessment Method (UMAM) set out in Rule 62-345.100, et seq., to analyze wetland impacts and mitigation. UMAM is used to determine the amount of mitigation "needed to offset adverse impacts to wetlands and other surface waters." Fla. Admin. Code R. 62-345.100(1).

68. In this case, the undisputed evidence was that UMAM was used properly and that all wetland impacts are offset by mitigation.

69. It must be assumed that UMAM, as a valid and unchallenged rule, properly assesses all adverse impacts to wetlands, including the use of a large percentage of all uplands

adjacent to the surface water management system for residential development.

70. NNP-Bexley met its burden of proof by presenting "credible and credited evidence of [its] entitlement to the permit." In response, Dr. Blanco did not present any "contrary evidence of equivalent quality." Department of Transportation v. J.W.C. Company, Inc., supra, at 789.

Improper Purpose

71. NNP-Bexley sought sanctions under Sections 57.105, 120.569(2)(e), and 120.595(1), Florida Statutes. The District made an ore tenus motion for sanctions under Section 120.595(1), Florida Statutes. Only Section 120.595(1), Florida Statutes, requires treatment in this Recommended Order. See Endnote 2, infra.

72. Section 120.595, Florida Statutes, provides:

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).
>
> (a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.
>
> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have

> substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

The rebuttable presumption in paragraph (d) of the statute does not apply in this case.

73. Case law holds that an objective standard is used to determine whether a party has participated in an administrative proceeding for an improper purpose under Section 120.569(2)(e) and predecessor statutes. As stated in Friends of Nassau County, Inc. v. Nassau County, 752 So. 2d 42, 49-51 (Fla. 1st DCA 2000):

> In the same vein, we stated in Procaccci Commerical Realty, Inc. v. Department of Health and Rehabilitative Services, 690 So. 2d 603 (Fla. 1st DCA 1997): The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's stated of mind, we must examine the circumstantial evidence at hand and ask, standing in the party's or counsel's shoes would have prosecuted the claim." Id. at

> 608 n. 9 (quoting Pelletier v. Zweifel, 921 F.2d 1465, 1515 (11th Cir. 1991)). See In re Sargent, 136 F.3d 349, 352 (4th Cir. 1998) ("Put differently a legal position violates Rule 11 if it 'has "absolutely no chance of success under the existing precedent."') Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991)(quoting Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 988 (4th Cir. 1987))."
>
> * * *
>
> Whether [predecessor to Section 120.569(2)(e)] section 120.57(1)(b)5., Florida Statutes (1995), authorizes sanctions for an initial petition in an environmental case turns . . . on the question whether the signer could reasonably have concluded that a justiciable controversy existed under pertinent statutes and regulations. If, after reasonable inquiry, a person who reads, then signs, a pleading had "reasonably clear legal justification" to proceed, sanctions are inappropriate. Procacci, 690 So. 2d at 608 n. 9; Mercedes, 560 So. 2d at 278.

74. In addition, it was held in Mercedes Lighting and Electric Supply, Inc. v. Dept. of General Services, 560 So. 2d 272, 276 (Fla. 1st DCA 1990), that the case law construing Rule 11 of the Federal Rules of Civil Procedure was useful in applying a predecessor statute to Section 120.569(2)(e). The court went on to state:

> The rule's proscription of filing papers for an improper purpose is designed to discourage dilatory or abusive tactics and to streamline the litigation process. The rule is aimed at deterrence, not fee shifting or compensating the prevailing

party. In short, the key to invoking rule 11 is the nature of the conduct of counsel and the parties, not the outcome. Schwarzer, "Sanctions Under the New Federal Rule 11--A Closer Look," 104 F.R.D, 181, 185 (1985). A party seeking sanctions under rule 11 should give notice to the court and the offending party promptly upon discovering a basis to do so. Advisory Committee Note to Rule 11. If it may be fairly accomplished, the court should then promptly punish the transgression. In re Yagman, 796 F.2d 1165, 1183 (9th Cir. 1986). See also, Ortho Pharmaceutical v. Sona Distributors, Inc., 117 F.R.D. 170, 173 (S.D. Fla. 1986). If an obvious and recognizable offending pleading is filed, the court at the very least should provide notice to the attorney or party that rule 11 sanctions will be assessed at the end of the trial if appropriate. The purpose of the rule--deterring subsequent abuses--is not well served if an offending pleading is fully litigated and the offender is not punished until the trial is at an end. See In re Yagman, 796 F. 2d at 1184-6; and Ortho Pharmaceutical, 117 F.R.D. at 173. One of the basic tenets of rule 11 enforcement appears to be, not surprisingly, that a party is required to take action to mitigate the amount of resources expended in defense of the offending pleading or motion. In his article, Schwarzer comments: "Normally, although not necessarily always, a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition either in the process of narrowing issues under Rule 16 or by motion. Only in the rare case will the offending party succeed in delaying exposure of the baseless character of its claim or defense until trial. Permitting or encouraging the opposing party to litigate a baseless action or defense past the point at which it could have been disposed of tends to perpetuate the waste and delay which the rule is

> intended to eliminate. It also undermines the mitigation principle which should apply in the imposition of sanctions, limiting recovery to those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, 104 F.R.D. at 198.

Id. at 276-277.

75. Although there is no appellate decision explicitly extending the objective standard to Section 120.595(1), there does not appear to be any reason why the objective standard should not be used to determine whether Blanco's participation in this case was for an improper purpose.

76. In another appellate decision, decided under a predecessor to Section 120.569(2)(e) before the objective standard was enunciated for cases under that statute and its predecessor statutes, the court in Burke v. Harbor Estates Ass'n, 591 So. 2d 1034, 1036-1037 (Fla. 1st DCA 1991), held:

> The statute is intended to shift the cost of participation in a Section 120.57(1) proceeding to the nonprevailing party if the nonprevailing party participated in the proceeding for an improper purpose. A party participates in the proceeding for an improper purpose if the party's primary intent in participating is any of four reasons, viz: to harass, to cause unnecessary delay, for any frivolous purpose, [FN1] or to needlessly increase the prevailing party's cost of securing a license or securing agency approval of an activity.
> Whether a party intended to participate in a Section 120.57(1) proceeding for an improper

> purpose is an issue of fact. See Howard Johnson Company v. Kilpatrick, 501 So.2d 59, 61 (Fla. 1st DCA 1987) (existence of discriminatory intent is a factual issue); School Board of Leon County v. Hargis, 400 So.2d 103, 107 (Fla. 1st DCA 1981) (questions of credibility, motivation, and purpose are ordinarily questions of fact). The absence of direct evidence of a party's intent does not convert the issue to a question of law. Indeed, direct evidence of intent may seldom be available. In determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him.
>
> > FN1. A frivolous purpose is one which is of little significance or importance in the context of the goal of administrative proceedings. Mercedes Lighting & Electrical Supply, Inc. v. Department of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990).

77. Based on all the evidence in this case, it is concluded that Blanco participated in this case for an improper purpose.

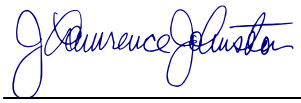
78. Section 120.595(1), Florida Statutes, provides that, if a party participated in the proceeding for an improper purpose, "the recommended order shall so designate and shall determine the award of costs and attorney's fees." § 120.595(1)(d), Fla. Stat. However, the parties agreed to defer a hearing on the amount of fees and costs, if awarded.

RECOMMENDATION

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

RECOMMENDED that the District enter a final order issuing ERP No. 43013740.004 to NNP-Bexley. Jurisdiction is reserved to determine the appropriate amount of attorney's fees and costs to be awarded under Section 120.595(1), Florida Statutes, in further proceedings consolidated with NNP-Bexley's requests for Sections 57.105 and 120.569(2)(e), Florida Statutes.

DONE AND ENTERED this 17th day of November, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of November, 2008.

ENDNOTES

[1]/ Unless otherwise noted, statutes refer to the 2007 codification of the Florida Statutes; and all rules and BOR sections refer to the Florida Administrative Code rules and BOR sections in effect at the time of the final hearing.

[2]/ NNP-Bexley also requested sanctions under Sections 57.105 and 120.569(2)(e), Florida Statutes, but those statutes do not require that findings be made in this Recommended Order. Sanction issues under those statutes will be treated in a separate Order on Sanctions.

[3]/ Blanco did not show cause, as ordered, why this award should not be made. The parties were to try any remaining issue as to the appropriate amount of the attorney's fee award for this discovery violation at the final hearing, but this was not done.

[4]/ This Rule also requires reasonable assurance that proposed activities will not result in "unacceptable cumulative impacts upon wetlands and other surface waters," as set forth in BOR Sections 3.2.8 through 3.2.8.2. However, cumulative impacts are not relevant in this case, as a matter of law, because all mitigation is in the same drainage basin as the direct and secondary impacts. See BOR Section 3.2.8 and BOR Appendix 6 (identifying the basins).

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.