STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES AND KIMBERLY JACOBS AND SOLAR SPORTSYSTEMS, INC.,	)	
Petitioners,	)	
vs.	)	Case No. 12-1056
FAR NIENTE II, LLC, POLO FIELD ONE, LLC, AND SOUTH FLORIDA WATER MANAGEMENT DISTRICT,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 8 through 10, 2013, in West Palm Beach, Florida, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent South Florida Water Management District:

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South Florida Water Management District
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For Respondents Far Niente Stables II, LLC and Polo Field One, LLC:

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STATEMENT OF THE ISSUE

The issue to be determined is whether the applicants, Far Niente Stables II, LLC; Polo Field One, LLC; Stadium North, LLC; and Stadium South, LLC, are entitled to issuance of a permit by the South Florida Water Management District (SFWMD or District) for the modification of a surface-water management system to serve the 24.1-acre World Dressage Complex in Wellington, Florida.

PRELIMINARY STATEMENT

On November 22, 2011, the District issued an environmental resource permit, No. 50-00548-S-203 (Permit) to Respondent, Far Niente Stables II, LLC. The Permit authorized the construction of a surface-water management system designed to serve the 20-acre World Dressage Complex (Complex) in Wellington, Florida. The Permit was corrected on January 13, 2012, to add Respondent, Polo Field One, LLC, as a permittee.

On January 27, 2012, Petitioners timely filed their Petition for Administrative Hearing. The District dismissed the Petition with leave to amend. Petitioners filed an Amended

Petition for Formal Administrative Hearing on March 5, 2012. That Amended Petition was referred to the Division of Administrative Hearings on March 20, 2012.

On March 26, 2012, the District issued a proposed modification to Permit No. 50-00548-S-203 that added Stadium North, LLC and Stadium South, LLC as permittees. For purposes of this proceeding, the Respondents, Far Niente Stables II, LLC, and Polo Field One, LLC, along with Stadium North, LLC, and Stadium South, LLC, shall be collectively referred to as the "Applicants," and shall be identified individually only as necessary.

A bifurcated hearing on Petitioners' standing and the timeliness of the petition was scheduled for May 16, 2012, with the final hearing, if necessary, scheduled for September 25-27, 2012. The standing and timeliness hearing was subsequently re-scheduled for June 11-12, 2012, and was held as scheduled.

An Order on Standing and Timeliness was entered on June 29, 2012, in which the undersigned concluded that Petitioners, Charles and Kimberly Jacobs, had demonstrated their standing to bring this proceeding, that Petitioner, Solar Sportsystems, Inc., had not demonstrated its standing and should therefore be dismissed as a party, and that the Petition for Administrative Hearing had been timely filed. The Order on Standing and

Timeliness is hereby adopted and incorporated in this Recommended Order as though restated in its entirety.

At the bifurcated hearing on standing and on the timeliness of the petition, a number of exhibits were received in evidence, and are identified in the Order on Standing and Timeliness. For purposes of the record of this proceeding, each of those exhibits has been identified with an "S" (for Standing), e.g. Joint Exhibit JEx1-S, Petitioners' Exhibit PEx9-S, etc.

On August 22, 2012, the final hearing was continued at Petitioners' request, and rescheduled for November 6-8, 2012. The final hearing was again continued with the concurrence of the parties, and rescheduled for January 8-10, 2013.

Prior to the final hearing, a number of motions were filed and disposed of by separately issued Orders. Those motions, and their disposition, may be determined by reference to the docket in this case.

On January 7, 2013, the District issued a final proposed modification of Permit that incorporated all of the changes made to the Permit since its initial issuance, including proposed changes made in December 2012, and made other conforming and informational changes. That final revision forms the basis for this proceeding.

On January 7, 2013, Respondents filed a Motion in Limine, Motion to Strike, and Renewed Motion to Dismiss. On January 8,

2013, Petitioners filed a Response in Opposition to the three motions. At the final hearing, the undersigned took up each of the motions. The Renewed Motion to Dismiss was denied based on the conclusions regarding standing in the Order on Standing and Timeliness. The Motion in Limine and Motion to Strike were denied, with the admissibility of exhibits to be determined on a case-by-case basis as they were offered in evidence. Evidence of past violations of District rules or permits by one or more of the Applicants, or by entities affiliated with the Applicants, was determined to be admissible as evidence of whether reasonable assurances were provided that District permitting standards will be met, pursuant to Florida Administrative Code Rule 40E-4.302(2).

The final hearing was held on January 8-10, 2013. At the final hearing, Respondents met their prima facie burden of demonstrating entitlement to issuance of the Permit pursuant to section 120.569(6), Florida Statutes, by submitting Joint (Respondents) Exhibits 1 through 4, and 5(a)-(t), which were received in evidence.

In reply to Respondents' prima facie case, Petitioners called as witnesses John R. Hall, a professional engineer, who was tendered and accepted as an expert in issues pertaining to water quantity; and Edward A. Swakon, who was tendered and accepted as an expert in issues pertaining to water quality and

permit administration. Petitioners' Exhibits 2, 8, 10, 12-23, 26, 28, 30-36, 42, 43, 53, 55, 62, 76, 77, 79, and 82-94 were received in evidence. In addition, the following subparts of Exhibit 29 were received in evidence -- 29-6, 29-8, 29-11, 29-14, 29-17, 29-19, 29-22, 29-24, 29-28, 29-30, 29-31, 29-45, 29-46, 29-52, 29-53, 29-55, and 29-59. Petitioners' Exhibit 53 consists of the deposition transcript of Mark Bellissimo, the party representative for the Applicants. Petitioners' Exhibits 55 and 62 consist of the deposition transcripts of Anthony Waterhouse, the party representative for the District.

In their rebuttal, the Applicants called as witnesses Michael Stone, who was accepted as an expert in equestrian operations and facilities; and Michael Sexton, who was accepted as an expert in surface water management engineering, project engineering design for equestrian facilities, and surveying and mapping. Applicants' Exhibits 1 and 3-17 were received in evidence. Applicants' Exhibits 11-13 consist of the deposition transcripts of Edward Swakon, Petitioners' expert witness. Applicants' Exhibits 14 and 15 consist of the deposition Transcripts of John Hall, Petitioners' expert witness. Applicants' Exhibits 16 and 17 consist of the deposition Transcripts of Charles Jacobs and Kimberly Jacobs, respectively, parties to this proceeding.

The District called as its witness, Anthony Waterhouse, the District's assistant director of the regulation division, who was accepted as an expert in water-resource engineering, environmental resource permitting, water quality permitting, and water quantity permitting. District Exhibit 1 was received in evidence. District Exhibit 2 was proffered but, having not been listed in the Joint Prehearing Stipulation, was not received in evidence.

The six-volume Transcript was filed on February 5, 2013. After having requested and received two extensions of time for filing post-hearing submittals, the parties filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioners Charles Jacobs and Kimberly Jacobs are the owners of a residence at 2730 Polo Island Drive, Unit A-104, Wellington, Florida. The residence is used by the Jacobs on an annual basis, generally between October and Easter, which corresponds to the equestrian show season in Florida. Petitioners maintain their permanent address in Massachusetts.

2. The District is a public corporation, existing by virtue of chapter 25270, Laws of Florida 1949. The District is responsible for administering chapter 373, Florida Statutes, and

title 40E, Florida Administrative Code, within its geographic boundaries. The District's statutory duties include the regulation and management of water resources, including water quality and water supply, and the issuance of environmental resource permits.

3. The Applicants, Far Niente Stables II, LLC; Polo Field One, LLC; Stadium North, LLC; and Stadium South, LLC, are Florida limited-liability companies with business operations in Wellington, Florida. The Applicants are the owners of four parcels of property, parts of which comprise the complete 24.1-acre proposed Complex, and upon which the surface-water management facilities that are the subject of the Permit are to be constructed. Contiguous holdings of the four Applicants in the area consist of approximately 35 additional acres, primarily to the north and west of the Complex.

Acme Improvement District

4. The Acme Improvement District was created in the 1950s as a special drainage district. At the time of its creation, the Acme Improvement District encompassed 18,200 acres of land. As a result of additions over the years, the Acme Improvement District currently consists of approximately 20,000 acres of land that constitutes the Village of Wellington, and includes the Complex property.

5. On March 16, 1978, the District issued a Surface Water Management Permit, No. 50-00548-S, for the Acme Improvement District (1978 Acme Permit) that authorized the construction and operation of a surface-water management system, and established design guidelines for subsequent work as development occurred in the Acme Improvement District.

6. The total area covered by the 1978 Acme Permit was divided into basins, with the dividing line being, generally, Pierson Road. Basin A was designed so that its interconnected canals and drainage features would discharge to the north into the C-51 Canal, while Basin B was designed so that its interconnected canals and drainage features would discharge to the south into the C-40 Borrow Canal.

7. Water management activities taking place within the boundaries of the Acme Improvement District are done through modifications to the 1978 Acme Permit. Over the years, there have been literally hundreds of modifications to that permit.

The Property

8. The Complex property is in Basin A of the Acme Improvement District, as is the property owned by Petitioners.

9. Prior to January 1978, the property that is proposed for the Complex consisted of farm fields.

10. At some time between January, 1978 and December 18, 1979, a very narrow body of water was dredged from abandoned

farm fields to create what has been referred to in the course of this proceeding as "Moose Lake." During that same period, Polo Island was created, and property to the east and west of Polo Island was filled and graded to create polo fields. Polo Island is surrounded by Moose Lake.

11. When it was created, Polo Island was filled to a higher elevation than the adjacent polo fields to give the residents a view of the polo matches. Petitioners' residence has a finished floor elevation of 18.38 feet NGVD, which is more than three-quarters of a foot above the 100-year flood elevation of 17.5 feet NGVD established for Basin A.

12. The Complex and Petitioner's residence both front on Moose Lake. There are no physical barriers that separate that part of the Moose Lake fronting Petitioners' residence from that part of Moose Lake into which the Complex's surface-water management system is designed to discharge.

13. Moose Lake discharges into canals that are part of the C-51 Basin drainage system. Discharges occur through an outfall at the south end of Moose Lake that directs water into the C-23 canal, and through an outfall at the east end of Moose Lake that directs water into the C-6 canal.

14. There are no wetlands or surface water bodies located on the Complex property.

2005-2007 Basin Study and 2007 Acme Permit

15. Material changes in the Acme Drainage District since 1978 affected the assumptions upon which the 1978 ACME Permit was issued. The material changes that occurred over the years formed the rationale for a series of detailed basin studies performed from 2005 through 2007.

16. The basin studies, undertaken by the District and the Village of Wellington, analyzed and modeled the areas encompassed by the 1978 Acme Permit in light of existing improvements within the Acme Improvement District. The changes to Basin A and Basin B land uses identified by the basin studies became the new baseline conditions upon which the District and the Village of Wellington established criteria for developing and redeveloping property in the Wellington area, and resulted in the development of updated information and assumptions to be used in the ERP program.

17. On November 15, 2007, as a result of the basin studies, the District accepted the new criteria and issued a modification of the standards established by the 1978 Acme Permit (2007 Acme Permit). For purposes relevant to this proceeding, the 2007 Acme Permit approved the implementation of the new Permit Criteria and Best Management Practices Manual for Works in the Village of Wellington.[1/]

18. The language of the 2007 Acme Permit is somewhat ambiguous, and portions could be read in isolation to apply only to land in Basin B of the Acme Improvement District. Mr. Waterhouse testified that the language of the permit tended to focus on Basin B because it contained significant tracts of undeveloped property, the land in Basin A having been essentially built-out. However, he stated that it was the District's intent that the Permit Criteria and Best Management Practices Manual for Works in the Village of Wellington adopted by the 2007 Acme Permit was to apply to all development and redevelopment in the Acme Improvement District, and that the District had applied the permit in that manner since its issuance. Mr. Waterhouse's testimony was credible, reflects the District's intent and application of the permit, and is accepted.

The Proposed Complex

19. The Complex is proposed for construction on the two polo fields to the west of Polo Island, and properties immediately adjacent and contiguous thereto.[2/]

20. The Complex is designed to consist of a large covered arena; several open-air equestrian arenas; four 96-stall stables, with associated covered manure bins and covered horse washing facilities, located between the stables; an event tent; a raised concrete vendor deck for spectators, exhibitors, and

vendors that encircles three or four of the rings; and various paved access roads, parking areas, and support structures. Of the 96 stalls per stable, twenty percent would reasonably be used for storing tack, feed, and similar items.

21. The surface-water management system that is the subject of the application consists of inlets and catch basins, underground drainage structures, dry detention areas, swales for conveying overland flows, and exfiltration trenches for treatment of water prior to its discharge at three outfall points to Moose Lake. The horse-washing facilities are designed to tie into the Village of Wellington's sanitary sewer system, by-passing the surface water management system.

The Permit Application

22. On May 18, 2011, two of the Applicants, Far Niente Stables II, LLC, and Polo Field One, LLC, applied for a modification to the 1978 Acme Improvement District permit to construct a surface-water management system to serve the proposed Complex. At the time of the initial application, the proposed Complex encompassed 20 acres. There were no permitted surface water management facilities within its boundaries.

23. The Complex application included, along with structural elements, the implementation of Best Management Practices (BMPs) for handling manure, horse-wash water, and other equestrian waste on the property.

24. Properties adjacent to the Complex, and under common ownership of one or more of the Applicants, have been routinely used for equestrian events, including temporary support activities for events on the Complex property. For example, properties to the north of the Complex owned by Far Niente Stables II, LLC, and Polo Field One, LLC, have been used for show-jumping events, derby events, and grand prix competitions, as well as parking and warm-up areas for derby events and for dressage events at the Complex. Except for an earthen mound associated with the derby and grand prix field north of the Complex, there has been no development on those adjacent properties, and no requirement for a stormwater management system to serve those properties. Thus, the adjacent properties are not encompassed by the Application.

Permit Issuance

25. On November 22, 2011, Permit No. 50-00548-S-203 was issued by the District to Far Niente Stables II, LLC. Polo Field One, LLC, though an applicant, was not identified as a permittee.

26. On January 13, 2012, the District issued a "Correction to Permit No. 50-00548-S-203." The only change to the Permit issued on November 22, 2011, was the addition of Polo Field One, LLC, as a permittee.

27. On January 25, 2012, the Applicants submitted a request for a letter modification of the Permit to authorize construction of a 1,190-linear foot landscape berm along the eastern property boundary. On February 16, 2012, the District acknowledged the application for the berm modification, and requested additional information regarding an access road and cul-de-sac on the west side of the Complex that extended into property owned by others. On that same date, the Applicants provided additional information, including evidence of ownership, that added Stadium North, LLC and Stadium South, LLC, as permittees. On March 26, 2012, the District issued the proposed modification to Permit No. 50-00548-S-203.

28. On November 15, 2012, the Applicants' engineer prepared a revised set of plans that added 2.85 acres of property to the Complex. The property, referred to as Basin 5, provided an additional dry detention stormwater storage area. On or shortly after December 3, 2012, the Applicants submitted a final Addendum to Surface Water Management Calculations that accounted for the addition of Basin 5 and other changes to the Permit application that increased the size of the Complex from 20 acres to 24.1 acres.

29. On December 18, 2012, the Applicants submitted final revisions to the BMPs in an Updated BMP Plan.

30. On January 7, 2013, the District issued the final proposed modification to the permit. The modification consisted of the addition of Basin 5, the deletion of a provision of special condition 14 that conflicted with elements of the staff report, the Updated BMP Plan, the recognition of an enforcement proceeding for unauthorized construction of the linear berm and other unauthorized works, and changes to the Permit to conform with additional information submitted by the Applicants.

31. The final permitted surface-water management system consists of inlets and catch basins, underground drainage structures, a 0.64-acre dry detention area, swales for conveying overland flows, and 959-linear feet of exfiltration trench.

32. For purposes of this proceeding, the "Permit" that constitutes the proposed agency action consists of the initial November 22, 2011, Permit; the January 13, 2012, Correction; the March 26, 2012, letter modification; and the January 7, 2013 modification.

Post-Permit Activities at the Complex

33. Work began on the Complex on or about November 28, 2011. Work continued until stopped on April 18, 2012, pursuant to a District issued Consent Order and Cease and Desist. As of the date of the final hearing, the majority of the work had been completed.

34. In late August, 2012, the Wellington area was affected by rains associated with Tropical Storm Isaac that exceeded the rainfall totals of a 100-year storm event. Water ponded in places in the Polo Island subdivision. That ponded water was the result of water falling directly on Polo Island, and may have been exacerbated by blockages of Polo Island drainage structures designed to discharge water from Polo Island to Moose Lake. No residences were flooded as a result of the Tropical Storm Isaac rain event. The only flooding issue related to water elevations in Moose Lake was water overflowing the entrance road, which is at a lower elevation. The road remained passable. Road flooding is generally contemplated in the design of stormwater management systems and does not suggest a failure of the applicable system.

Permitting Standards

35. Standards applicable to the Permit are contained in Florida Administrative Code Rule 40E-4.301(1)(a)-(k), and in the District's Basis of Review for Environmental Resource Permit Applications (BOR), which has been adopted by reference in rule 40E-4.091(1)(a). The parties stipulated that the standards in rules 40E-4.301(1)(d),(g) and (h) are not at issue in this proceeding.

Permitting Standards - Water Quantity

36. Those provisions of rule 40E-4.301 that remain at issue in this proceeding, and that pertain to water quantity, are as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . 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.

37. In addition to the preceding rules, section 6.6 of the BOR, entitled "Flood Plain Encroachment," provides that "[n]o net encroachment into the floodplain, between the average wet season water table and that encompassed by the 100-year event, which will adversely affect the existing rights of others, will be allowed." Section 6.7 of the BOR, entitled "Historic Basin Storage," provides that "[p]rovision must be made to replace or otherwise mitigate the loss of historic basin storage provided by the project site."

38. The purpose of a pre-development versus post-development analysis is to ensure that, after development of a

parcel of property, the property is capable of holding a volume of stormwater on-site that is the same or greater than that held in its pre-development condition. On-site storage includes surface storage and soil storage.

Surface Storage

39. Surface storage is calculated by determining the quantity of water stored on the surface of the site.

40. Mr. Hall found no material errors in the Applicants' calculations regarding surface storage. His concern was that the permitted surface storage, including the dry detention area added to the plans in December 2012, would not provide compensating water storage to account for the deficiencies he found in the soil storage calculations discussed herein.

41. Based on the foregoing, the Applicants' surface storage calculations are found to accurately assess the volume of stormwater that can be stored on the property without discharge to Moose Lake.

Soil Storage

42. Soil storage is water that is held between soil particles. Soil storage calculations take into consideration the soil type(s) and site-specific soil characteristics, including compaction.

43. Soils on the Complex property consist of depressional soils. Such soils are less capable of storage than are sandier

coastal soils. When compacted, the storage capacity of depressional soils is further reduced.

44. The Applicants' calculations indicated post-development storage on the Complex property to be 25.04 acre/feet. Mr. Hall's post-development storage calculation of 25.03 acre/feet was substantively identical.[3/] Thus, the evidence demonstrates the accuracy of Applicants' post-development stormwater storage calculations.

45. The Applicants' calculations showed pre-development combined surface and soil storage capacity on the Property of 24.84 acre/feet. Mr. Hall calculated pre-development combined surface and soil storage, based upon presumed property conditions existing on March 16, 1978, of 35.12 acre/feet.

46. Based on the foregoing, Mr. Hall concluded that the post-development storage capacity of the Complex had a deficit of 10.09 acre/feet of water as compared to the pre-development storage capacity of the Property, which he attributed to a deficiency in soil storage.

47. The gist of Mr. Hall's disagreement centered on the Applicants' failure to consider the Complex's pre-development condition as being farm fields, as they were at the time of issuance of the 1978 Acme Permit, and on the Applicants' application of the 25-percent compaction rate for soils on the former polo fields.

48. As applied to this case, the pre-development condition of the Complex as polo fields was a reasonable assumption for calculating soil storage, rather than the farm fields that existed in January 1978, and is consistent with the existing land uses identified in the 2005-2007 basin studies and 2007 Acme Permit.

49. Given the use of the Complex property as polo fields, with the attendant filling, grading, rolling, mowing, horse traffic, parking, and other activities that occurred on the property over the years, the conclusion that the soils on the polo fields were compacted, and the application of the 25-percent compaction rate, was a reasonable assumption for calculating soil storage.

50. Applying the Applicants' assumptions regarding existing land uses for the Complex property, the greater weight of the evidence demonstrates that the proposed surface water management system will provide a total of 25.04-acre feet of combined soil and surface storage compared to pre-development soil and surface storage of 24.84-acre feet. Thus, the proposed Project will result in an increase of soil and surface storage over pre-development conditions, and will not cause or contribute to flooding or other issues related to water quantity.[4/]

51. Based on the foregoing, the Applicants have provided reasonable assurances that the proposed surface-water management system will meet standards regarding water quantity established in rule 40E-4.301(1)(a), (b), and (c), and sections 6.6 and 6.7 of the BOR.

Permitting Standards - Water Quality

52. Those provisions of rule 40E-4.301 that remain at issue in this proceeding, and that pertain to water quality, are as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:
>
> * * *
>
> (e) Will not adversely affect the quality of receiving waters such that the water quality standards . . . will be violated;
>
> (f) Will not cause adverse secondary impacts to the water resources.

53. Section 373.4142, entitled "[w]ater quality within stormwater treatment systems," provides, in pertinent part, that:

> State surface water quality standards applicable to waters of the state . . . shall not apply within a stormwater management system which is designed, constructed, operated, and maintained for stormwater treatment . . . . Such

> inapplicability of state water quality standards shall be limited to that part of the stormwater management system located upstream of a manmade water control structure permitted, or approved under a noticed exemption, to retain or detain stormwater runoff in order to provide treatment of the stormwater . . . .

54. Moose Lake is a component of a stormwater-management system that is located upstream of a manmade water control structure.

55. The Permit application did not include a water quality monitoring plan, nor did the Permit require the Applicants to report on the water quality of Moose Lake.

56. During October and November, 2012, Petitioners performed water quality sampling in Moose Lake in accordance with procedures that were sufficient to demonstrate the accuracy of the results. The sampling showed phosphorus levels in Moose Lake of greater than 50 parts per billion (ppb).[5/] That figure, though not a numeric standard applicable to surface waters, was determined to be significant by Petitioners because phosphorus may not exceed 50 ppb at the point at which the C-51 Canal discharges from the Acme Improvement District into the Everglades system.

57. Notwithstanding the levels of phosphorus in Moose Lake, Mr. Swakon admitted that "the calculations that are in the application for water quality treatment are, in fact, met.

They've satisfied the criteria that are in the book." In response to the question of whether "[t]he water quality requirements in the Basis of Review . . . the half inch or one inch of runoff, the dry versus wet detention . . . complied with those water quality requirements," he further testified "[i]t did."

58. Mr. Swakon expressed his belief that, despite Applicants' compliance with the standards established for water quality treatment, a stricter standard should apply because the pollutant-loading potential of the Complex, particularly phosphorus and nitrogen from animal waste, is significantly different than a standard project, e.g., a parking lot. No authority for requiring such additional non-rule standards was provided.

59. The evidence demonstrates that the Applicants provided reasonable assurances that all applicable stormwater management system standards that pertain to water treatment and water quality were met.

Permitting Standards - Design Features and BMPs

60. Provisions of rule 40E-4.301 that remain at issue in this proceeding, and that constitute more general concerns regarding the design of the Complex, are as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . an applicant must

> provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:
>
> * * *
>
> (i) Will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed.

61. Petitioners alleged that certain deficiencies in the Complex design and BMPs compromise the ability of the stormwater management system to be operated and function as proposed.

Design Features

62. Petitioners expressed concern that the manure bin, though roofed, had walls that did not extend to the roofline, thus allowing rain to enter. Photographs received in evidence suggest that the walls extend to a height of approximately six feet, with an opening of approximately two feet to the roof line. The plan detail sheet shows a roof overhang, though it was not scaled. Regardless, the slab is graded to the center so that it will collect any water that does enter through the openings. Based on the foregoing, the Applicants have provided reasonable assurances that the manure bins are sufficient to prevent uncontrolled releases of animal waste to the stormwater management system or Moose Lake.

63. Petitioners suggested that the horse-washing facilities, which discharge to a sanitary sewer system rather

than to the stormwater management facility, are inadequate for the number of horses expected to use the wash facilities. Petitioners opined that the inadequacy of the wash facilities would lead to washing being done outside of the facilities, and to the resulting waste and wash water entering the stormwater management system. Petitioners provided no basis for the supposition other than speculation. Mr. Stone testified that the horse-washing facilities are adequate to handle the horses boarded at the stables and those horses that would reasonably be expected to use the facility during events. His testimony in that regard was credible and is accepted. Based on the foregoing, the Applicants have provided reasonable assurances that the horse-washing facilities are adequate to prevent the release of wash water to the stormwater management system or Moose Lake.

64. Petitioners expressed further concerns that horse washing outside of the horse-washing facilities would be facilitated due to the location of hose bibs along the exterior stable walls. However, Mr. Swakon testified that those concerns would be minimized if the hose bibs could be disabled to prevent the attachment of hoses. The December 2012 Updated BMP Plan requires such disabling, and Mr. Stone testified that the threads have been removed. Based on the foregoing, the Applicants have provided reasonable assurances that the presence

of hose bibs on the exterior stable walls will not result in conditions that would allow for the release of wash water to the stormwater management system or Moose Lake.

Best Management Practices

65. The Updated BMP Plan for the Complex includes practices that are more advanced than the minimum requirements of the Village of Wellington, and more stringent than BMPs approved for other equestrian facilities in Wellington.

66. Petitioners identified several issues related to the Updated BMP Plan that allegedly compromised the ability of the Complex to meet and maintain standards. Those issues included: the lack of a requirement that the Applicant provide the District with a copy of the contract with a Village of Wellington-approved manure hauler; the failure to require that BMP Officers be independent of the Applicants; the failure to require that the names and telephone numbers of the BMP Officers be listed in the permit; and the failure of the District to require that violations by tenants be reported to the District, rather than being maintained on-site as required. Mr. Stone testified that the BMP conditions included in the Updated BMP Plan were sufficient to assure compliance. His testimony is credited. Based on the foregoing, the Applicants have provided reasonable assurances that the terms and conditions of the Updated BMP Plan are capable of being implemented and enforced.

Permitting Standards - Applicant Capabilities

67. Provisions of rule 40E-4.301 that remain at issue in this proceeding, and that are based on the capabilities of the Applicants to implement the Permit, are as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:
>
> * * *
>
> (j) Will be conducted by an entity with the sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued.

68. As the owners of the Complex property, the Applicants have the legal authority to ensure that their tenants, licensees, invitees, and agents exercise their rights to the property in a manner that does not violate applicable laws, rules, and conditions.

69. Regarding the financial capability of the Applicants to ensure the successful and compliant operation of the Complex, Mr. Stone testified that the entity that owns the Applicants, Wellington Equestrian Partners, has considerable financial resources backing the Complex venture. Furthermore, the

Applicants own the property on and adjacent to the Complex which is itself valuable.

70. As to the administrative capabilities of the Applicants to ensure that the activities on the site will comply with relevant standards, Mr. Stone testified that an experienced and financially responsible related entity, Equestrian Sport Productions, by agreement with the Applicants, is charged with organizing and operating events at the Complex, and that the Applicants' BMP Officers have sufficient authority to monitor activities and ensure compliance with the BMPs by tenants and invitees.

71. Mr. Stone's testimony that the Applicants have the financial and administrative capability to ensure that events and other operations will be conducted in a manner to ensure that the stormwater management system conditions, including BMPs, will be performed was persuasive and is accepted. The fact that the Applicants are financially and administratively backed by related parent and sibling entities does not diminish the reasonable assurances provided by the Applicants that the construction, operation, and maintenance of the Complex will be undertaken in accordance with the Permit.

72. Petitioners assert that many of the events to be held at the Complex are sanctioned by international equestrian organizations, and that their event rules and requirements --

which include restrictions on the ability to remove competition teams from the grounds -- limit the Applicants' ability to enforce the BMPs. Thus, the Petitioners suggest that reasonable assurances cannot be provided as a result of the restrictions imposed by those sanctioning bodies. The international event rules applicable to horses and riders are not so limiting as to diminish the reasonable assurances that have been provided by the Applicants.

73. Based on the foregoing, the Applicants have provided reasonable assurances that construction and operation of the stormwater management system will be conducted by entities with sufficient financial, legal, and administrative capability to ensure compliance with the terms and conditions of the permit.

74. As a related matter, Petitioners assert the Applicants failed to disclose all of their contiguous land holdings, thus making it impossible for the District to calculate the actual impact of the Complex. Although the application was, for a number of items, an evolving document, the evidence demonstrates that the Applicants advised the District of their complete 59+- acre holdings, and that the Permit was based on a complete disclosure. The circumstances of the disclosure of the Applicant's property interests in the area adjacent to the Complex was not a violation of applicable standards, and is not a basis for denial of the Complex permit.

Permitting Standards - C-51 Basin Rule

75. The final provision of rule 40E-4.301 that is at issue in this proceeding is as follows:

> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:
>
> * * *
>
> (k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40E-41, F.A.C.

76. Mr. Hall testified the Complex violated permitting standards partly because it failed to comply with the C-51 Basin rule, Florida Administrative Code Rule 40E-041, Part III, pertaining to on-site compensation for reductions in soil storage volume.

77. Mr. Waterhouse testified that the C-51 Basin rule does not apply to the lands encompassed by the Acme Improvement District permits, including the Complex property. The C-51 Basin rule was promulgated in 1987, after the issuance of the original Acme Improvement District permit. The District does not apply new regulatory standards to properties that are the subject of a valid permit or its modifications. Therefore, the area encompassed by the 1978 Acme Permit, and activities

permitted in that area as a modification to the 1978 Acme Permit, are not subject to the C-51 rule.

78. The Joint Prehearing Stipulation provides that "Chapter 373, Fla. Stat., Chapter 40E-4, Fla. Admin. Code, and the Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District (July 4, 2010) are the applicable substantive provisions at issue in this proceeding." The Stipulation did not identify chapter 40E-41 as being applicable in this proceeding.

79. Given the testimony of Mr. Waterhouse, which correctly applies standards regarding the application of subsequently promulgated rules to existing permits, and the stipulation of the parties, the C-51 Basin rule, Florida Administrative Code Rule 40-E-041, Part III, does not apply to the permit that is the subject of this proceeding. Therefore, the stormwater management system does not violate rule 40E-4.301(1)(k).

Consideration of Violations

80. Florida Administrative Code Rule 40E-4.302(2), provides, in pertinent part, that:

> When determining whether the applicant has provided reasonable assurances that District permitting standards will be met, the District shall take into consideration a permit applicant's violation of any . . . District rules adopted pursuant to Part IV, Chapter 373, F.S., relating to any other project or activity and efforts taken by the applicant to resolve these violations. . . .

81. Petitioners have identified several violations of District rules on or adjacent to the Complex property during the course of construction, and violations of District rules associated with the Palm Beach International Equestrian Center (PBIEC), the owner of which shares common managers and officers with the Applicants, for consideration in determining whether reasonable assurances have been provided.

Violations on or Adjacent to the Complex

82. On March 22, 2012, the District performed an inspection of the Complex property. The inspection revealed that the Applicants had constructed the linear berm along the eastern side of the Property that was the subject of the January 25, 2012, application for modification of the Permit. The construction was performed before a permit modification was issued, and was therefore unauthorized. A Notice of Violation was issued to Far Niente Stables II, LLC, on March 22, 2012, that instructed Far Niente Stables II, LLC, to cease all work on the Complex. Several draft consent orders were provided to Far Niente Stables II, LLC, each of which instructed Far Niente Stables II, LLC, to cease and desist from further construction. Construction was not stopped until April 18, 2012. The matter was settled through the entry of a Consent Order on May 10, 2012 that called for payment of costs and civil penalties. The berm was authorized as part of the March 26, 2012 Complex permit

modification. All compliance items were ultimately completed to the satisfaction of the District

83. During inspections of the Complex by the parties to this proceeding, it was discovered that yard drains had been constructed between the stables and connected to the stormwater management system, and that a bathroom/utility room had been constructed at the north end of the horse-washing facility. The structures were not depicted in any plans submitted to the District, and were not authorized by the Permit. The yard drains had the potential to allow for animal waste to enter Moose Lake. The Applicants, under instruction from the District, have capped the yard drains. No other official compliance action has been taken by the District. A permit condition to ensure that the yard drains remain capped is appropriate and warranted.

84. At some time during or before 2010, a mound of fill material was placed on the derby and grand prix field to the north of the Complex to be used as an event obstacle. Although there was a suggestion that a permit should have been obtained prior to the fill being placed, the District has taken no enforcement action regarding the earthen mound.

85. Petitioners noted that the Complex is being operated, despite the fact that no notice of completion has been provided, and no conversion from the construction phase to the operation

phase has been performed as required by General Condition Nos. 6 and 7 of the Complex permit. Such operations constitute a violation of the permit and, as such, a violation of District rules. However, the District has taken no official action to prohibit or restrict the operation of the Complex pending completion and certification of the permitted work and conversion of the permit to its operation phase.

86. The construction of the berm, yard drains, and bathroom/utility room, and the operation of the Complex, causes concern regarding the willingness of the Applicants to work within the regulatory parameters designed to ensure protection of Florida's resources. However, given the scope of the Complex as a whole, and given that the violations were resolved to the satisfaction of the District, the violations, though considered, do not demonstrate a lack of reasonable assurances that District permitting standards will be met.

Violations related to the PBIEC

87. At some time prior to February 13, 2008, one or more entities affiliated with Mark Bellissimo assumed control and operation of the PBIEC. When the facility was acquired, the show grounds were in poor condition, there were regulatory violations, it had no BMPs of consequence, there were no covered horse-wash racks, and the wash water was not discharged to a sanitary sewer system.

88. After its acquisition by entities associated with Mr. Bellissimo, the PBIEC was substantially redesigned and rebuilt, and BMPs that met or exceeded the requirements of the Village of Wellington were implemented. The PBIEC currently has 12 arenas that include facilities for show jumping events, and nine horse-wash racks. The PBIEC has the capacity to handle approximately 1,700 horses.

89. On March 14, 2008, the District issued a Notice of Violation to Far Niente Stables V, LLC, related to filling and grading of an existing stormwater management system and lake system at the PBIEC; the failure to maintain erosion and turbidity controls to prevent water quality violations in adjacent waters; the failure to maintain manure and equestrian waste BMPs; and the failure to transfer the PBIEC stormwater management permit to the current owner. On October 9, 2008, Far Niente Stables V, LLC, and the District entered into a Consent Order that resolved the violations at the PBIEC, required that improvements be made, required the implementation of advanced BMPs, and required payment of costs and civil penalties. On January 12, 2011, a notice was issued that identified deficiencies in the engineer's construction completion certification for the stormwater management system improvements, horse-wash facility connections, and other activities on the PBIEC. Although completion of all items required by the Consent

Order took longer -- in some instances significantly longer -- than the time frames set forth in the Consent Order,[6/] all compliance items were ultimately completed to the satisfaction of the District.

90. On January 7, 2011, the District issued a Notice of Violation and short-form Consent Order to Far Niente Stables, LLC, which set forth violations that related to the failure to obtain an environmental resource permit related to "Tract D and Equestrian Club Drive Realignment." The short-form Consent Order was signed by Far Niente Stables, LLC, and the compliance items were ultimately completed to the satisfaction of the District.

91. Based on the foregoing, the violations at the PBIEC, though considered, do not demonstrate a lack of reasonable assurances that District permitting standards will be met for the Complex Permit.

CONCLUSIONS OF LAW

Jurisdiction

92. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

93. Petitioners, Charles and Kimberly Jacobs, have demonstrated the requisite standing to initiate and maintain

this proceeding as established in the Order on Standing and Timeliness entered on June 29, 2012.

Burden of Proof

94. The permit at issue in this proceeding is an environmental resource permit issued under chapter 373, Part IV. Section 120.569(2)(p) provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

95. Applicants made their prima facie case of entitlement to the Permit and, therefore, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the

permit by a preponderance of the competent and substantial evidence.

96. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833 (Fla. 1993); Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Envtl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); McDonald v. Dep't of Banking & Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Therefore, the final January 7, 2013, iteration of the Permit is properly at issue.

Reasonable Assurance

97. Issuance of the Permit is dependent upon there being reasonable assurance that the activities authorized by the Permit will meet applicable statutory and regulatory standards. § 373.413, Fla. Stat.; Fla. Admin. Code R. 40E-4.301 and 40E-4.302.

98. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." See Metropolitan Dade Co. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable

assurance necessary to demonstrate that a permit should not be issued. FINR II, Inc. v. CF Industries, Inc., Case No. 11-6495 (DOAH Apr. 30, 2012; DEP June 8, 2012), see also Menorah Manor, Inc. v. Ag. for Health Care Admin., 908 So. 2d 1100, 1104 (Fla. 1st DCA 2005). As to evidence of things that could happen at a facility based on vagaries of human conduct, an applicant "must provide reasonable assurances which take into account contingencies that might reasonably be expected, but an applicant is not required to eliminate all contrary possibilities, however remote, or to address impacts which are only theoretical and not reasonably likely." Charlotte Cnty. v. IMC-Phosphates Co., Case No. 02-4134 (DOAH Aug. 1, 2003; DEP Sept. 15, 2003).

99. Section 1.3 of the Basis of Review provides, in pertinent part, that:

> The criteria contained herein were established with the primary goal of meeting District water resource objectives as set forth in Chapter 373, F.S. Performance criteria are used where possible . . . . Compliance with the criteria herein constitutes a presumption that the project proposal is in conformance with the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302, F.A.C.

100. Applying the standards of reasonable assurance to the Findings of Fact in this case, it is concluded that reasonable assurances have been provided by the Applicants that the Complex

as designed will meet the applicable standards applied by the District, including Florida Administrative Code Rule 40E-4.301(1) and the Basis of Review, and that the Environmental Resource Standard Permit No. 50-00548-S-203 should therefore be issued.

101. Petitioners did not meet their burden of ultimate persuasion that the Applicants are not entitled to issuance of Environmental Resource Standard Permit No. 50-00548-S-203. However, it is evident that the efforts of Petitioners have resulted in a careful reexamination of the Complex project, the addition of water detention areas and other elements that have improved the water storage and treatment capabilities of the stormwater management system,[7/] and the discovery and correction of non-compliant features that could have impaired the ability of the Complex to meet the permitted standards. While Petitioners have not "prevailed" in this case, they were clearly justified in taking what have been proven to be meritorious and commendable steps to ensure that the Applicants took seriously their responsibilities to their neighbors and the environment of designing and operating the Complex in compliance with the standards required by law.

RECOMMENDATION

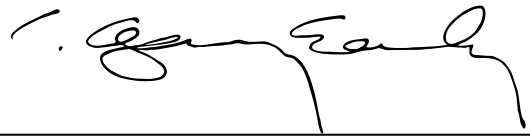
Based on the foregoing Findings of Fact and Conclusions of Law set forth herein it is RECOMMENDED that the South Florida Water Management District enter a final order:

1. Incorporating the June 29, 2012, Order of Standing and Timeliness;

2. Approving the issuance of Surface Water Management System Permit No. 50-00548-S-203 to Far Niente Stables II, LLC; Polo Field One, LLC; Stadium North, LLC; and Stadium South, LLC.; and

3. Imposing, as an additional condition, a requirement that the unpermitted yard drains constructed between the stables be permanently capped, and the area graded, to prevent the unauthorized introduction of equine waste from the area to the stormwater management system.

DONE AND ENTERED this 26th day of April, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of April, 2013.

ENDNOTES

[1/] The November 15, 2007, permit referenced an April 12, 2006, permit modification pursuant to which Basin B stormwater was redirected into Basin A, improvements were made to the Basin A stormwater management system to handle the combined volume along with future development, and the combined volume of stormwater was pumped into the C-51 canal at the northwest corner of the Acme Improvement District boundary.

[2/] The undersigned recognizes that construction of the Complex has been substantially completed. However, since a petition for hearing was timely filed, the Permit issued by the District remains proposed agency action, subject to the imposition of additional conditions or denial. Thus, the Permit will continue to be characterized as "proposed."

[3/] Mr. Hall's post-development storage calculation of 25.03 acre/feet included the final amendment to the application that added the additional Basin 5 dry detention area.

[4/] The calculations that demonstrated compliance with the rules and Basis of Review provisions regarding water quantity and storage were generated after the Applicants added additional dry retention and exfiltration trench capacity in December 2012.

[5/] Although the sampling results were reliable, there was no testimony tying those levels to any activities undertaken by the Applicants.

[6/] The connection of the horse-wash racks to the Village of Wellington sanitary sewer was delayed, in part, due to negotiations with the Village regarding the waste stream, especially measures to prevent the introduction of horse hair to the system. The resolution of the issues allowed for the inclusion of similar facilities in the Complex permit application.

[7/] Without the addition of the Basin 5 dry detention area and other additions to the Complex made after the filing of the Petition, the evidence suggests that post-development water

storage would have fallen short of pre-development storage, thus potentially resulting in denial of the Permit.

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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.