

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SRQUS, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 12-2161
)
 CITY OF SARASOTA AND SOUTHWEST)
 FLORIDA WATER MANAGEMENT)
 DISTRICT,)
)
 Respondents,)
)
 and)
)
 SARASOTA COUNTY,)
)
 Intervenor.)
 _____)

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on February 19 and 20, 2013, in Sarasota, Florida.

APPEARANCES

For Petitioner: Erika and Achim M. Ginsberg-Klemmt
Managing Members
SRQUS, LLC
3364 Tanglewood Drive
Sarasota, Florida 34239-6515

For Respondent: Martha A. Moore, Esquire
(District) Southwest Florida Water
Management District
7601 Highway 301 North
Tampa, Florida 33637-6758

For Intervenor: Alan W. Roddy, Esquire
(County) David M. Pearce, Esquire
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, Florida 34236-6808

STATEMENT OF THE ISSUE

The issue is whether reasonable assurance has been provided by Sarasota County (County) for the issuance of Environmental Resource Permit (ERP) No. 44040881.000 authorizing the proposed alteration of a drainage ditch in the City of Sarasota (City), and whether Petitioner, SRQUS, LLC, was entitled to receive notice of the application pursuant to Florida Administrative Code Rule 40D-1.603(9) (a) and (b).

PRELIMINARY STATEMENT

On May 10, 2012, the Southwest Florida Water Management District (District) gave notice of its intent to issue an ERP to the City. After its first petition was dismissed, without prejudice, Petitioner filed with the District its Amended Petition seeking to challenge the proposed agency action. The matter was then referred by the District to DOAH. The County, which will be constructing, operating, and maintaining the ditch pursuant to an interlocal agreement with the City, was authorized to intervene in support of the District's action. The City has not actively participated in the proceeding. The case was later transferred from Administrative Law Judge Bram D.E. Canter to the undersigned.

A Joint Pre-Hearing Stipulation (Stipulation) was filed by the parties. By agreement of the parties, two minor changes to the Stipulation were approved.

At the final hearing, Petitioner, a limited liability corporation represented by its managing members, Erika and Achim Ginsberg-Klemmt, presented the testimony of Erika Ginsburg-Klemmt; Sam Johnston, an environmental scientist with Independent Environmental Consultants, LLC, and accepted as an expert; John A. Poppell, a registered land surveyor and accepted as an expert; Douglas Jeffcoat, a professional engineer with the County Public Works Department; Adnan Javed, a professional engineer with the City and Project Manager; Tasha Bowers, a District Environmental Scientist; Brian Loughrey, Administrative Director for the County Property Appraiser's Office; Teri Owen, a registered land surveyor; Bruce Maloney, a County Environmental Specialist; Steven Lopes, a District professional engineer; Michelle Hopkins, District ERP Bureau Manager; and Alan W. Roddy, Deputy County Attorney. Also, Petitioner's Exhibits 1A through 1I and 1K through 1O, 2A through 2E, 3A through 3O, and 4A through 4J were received in evidence. Late filed Exhibit 5A is also admitted. The District presented the testimony of David Kramer, ERP Evaluation Manager and accepted as an expert; John D. Emery, ERP/WUP Compliance Manager and accepted as an expert; and Michelle Hopkins, District ERP Bureau

Manager. Also, District Exhibits 1-5 were received in evidence. The County presented the testimony of Dr. Anthony J. Janicki, an ecologist with Janicki Environmental, Inc., and accepted as an expert; Arjang Ezazi, a professional engineer with Architecture, Engineering, Consulting, Operations, and Maintenance Technology Corporation and accepted as an expert; George McFarlane, General Manager of Operations for the County Environmental Utilities Department; and Aban Javed, a professional engineer with the City and Project Engineer. Also, County Exhibits 1-32 were received in evidence. Two members of the general public presented testimony in support of the project pursuant to section 120.57(1)(b), Florida Statutes: Philip Dasher and James Magee.

Finally, the undersigned granted (a) the County's request to take official recognition of the case of City of Sarasota and Sarasota County v. SRQUS, LLC, Irish American Management Services Limited I, L.P. and Irish American Management Services Limited, Inc., Case No. 2013-CA-1140-NC (Fla. 12th Cir. Ct., Sarasota Cnty.), a civil action filed on February 6, 2013, to resolve a property dispute between those parties; (b) the District's request to take official recognition of chapter 373, rule chapter 40D-4, and Environmental Resource Permitting Information Manual Part B, Basis of Review (BOR) (December 29, 2011), incorporated by reference in rule 40D-4.091(1); and

(c) Petitioner's request to take official recognition of the Recommended and Final Orders issued in Case No. 00-2522, chapter 403, section 373.016, rule chapters 62-25, 62-160, 62-302, 62-303, 62-345, 62-624, and 62-785, the "ERP Operating Agreement," Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, and the City and County's First Amended Complaint filed in the circuit court action. A dispute over the amount of fees due Petitioner's expert witness, Sam Johnston, who was deposed by the County before hearing, has been resolved by separate order.

A Transcript of the hearing (four volumes) has been prepared. Proposed Findings of Fact and Conclusions of Law were timely filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. Parties

1. Petitioner is a Florida limited liability corporation established in 2010 whose only members are Erika and Achim Ginsberg-Klemmt. In 2010, Petitioner purchased parcel 2009-16-0015 in a tax deed sale. The parcel consists primarily of the submerged lands within the marina basin adjacent to the project area. Petitioner contends that the tax deed accords it ownership of the western most 130 feet of the existing ditch and that the County is not authorized to do work on that property.

The City and County dispute this claim and it is now being litigated in circuit court.

2. The City claims ownership or control of all of the project area to be addressed under the permit. The City authorized the County to apply for and construct the improvements authorized by the permit pursuant to an interlocal agreement with the County for consolidation of stormwater management responsibilities.

3. The District is the agency charged with the responsibility of controlling water resources within its geographic boundaries and to administer and enforce chapter 373 and the rules promulgated in rule division 40D.

4. The County submitted the application pursuant to an interlocal agreement with the City and will construct, operate, and maintain the project if the permit is issued.

B. The Project

5. U.S. Highway 41, also known as Tamiami Trail, travels through downtown Sarasota. During rainy months, between Fruitville Road and Second Street, U.S. Highway 41 experiences frequent roadway flooding.

6. At the area where U.S. Highway 41 floods and between the Quay development to the north and the Ritz-Carlton Hotel to the south, is a stormwater ditch that drains west into a marina

basin or bayou adjoining Sarasota Bay. However, it does not directly discharge into Sarasota Bay.

7. The ditch is an upland cut drainage ditch approximately 650 feet in length and has been in existence for decades. The ditch is covered under a National Pollutant Discharge Elimination System (NPDES) Municipal Separate Stormwater Sewer System (MS4) permit issued to the County for the surrounding communities. Contaminants in the stormwater system are addressed under this permit.

8. The ditch provides the only outfall for an approximately 46-acre heavily urbanized drainage basin for which stormwater is collected through the stormwater system. The stormwater is discharged into the drainage ditch through a double concrete box culvert under U.S. Highway 41 and is ultimately conveyed to a marina basin adjoining Sarasota Bay.

9. The ditch is located in what was originally platted as the right-of-way for Eighth Street (now known as Second Street) on the Central Broadway subdivision plat within the City.

10. Pursuant to an earlier exemption determination by the District, in 2004 the County conducted maintenance dredging on the easterly portion of the drainage ditch in an effort to remove the sediments and vegetation that had built up in the ditch over the years and reduced its flow. Since that time, the ditch has again filled in as a result of the significant amounts

of sedimentation from stormwater flows entering and settling in the ditch and significant amounts of vegetation. Also, flooding on U.S. Highway 41 has become more frequent.

11. In its current condition, the ditch is approximately eight to 12 feet wide and eight to 12 inches deep, is poorly drained due to the sedimentation and heavily overgrown mangroves and nuisance vegetation, and is tidally influenced. Accumulated sediments in the ditch are approximately four feet thick at the eastern end and become thinner at the western end of the ditch.

12. In August 2009, staff from the City, County, District, and Florida Department of Transportation met at the site of the ditch to conduct a pre-application meeting and discuss possible ways of addressing flooding problems at this location.

13. Aside from the ditch improvements being proposed by the County, the only other remedy is to pipe the ditch, which is cost-prohibitive and would defeat the County's goal of keeping as much desirable vegetation in place as possible.

14. To address flooding and maintenance concerns, on September 8, 2011, the County submitted an ERP application to the District to seek authorization to dredge and undertake ditch improvements. The application identifies the ditch as being within City right-of-way. Included with the application was a letter from the City authorizing the County to apply for the ERP

on behalf of the City pursuant to their interlocal stormwater agreement.

15. At the time the application was filed, the County Property Appraiser's Office Geographic Information Systems tax parcel map showed the ditch and dredge area as being within the City right-of-way.

16. The proposed project consists of reconstruction of the ditch with a defined channel to be lined with rip rap and geotextile fabric and the addition of two sediment sump boxes. Some of the mangroves and nuisance vegetation will be removed as necessary to construct the ditch improvements. Mangroves will be preserved where not impacted by construction.

C. The Property Dispute

17. Petitioner claims ownership of the western 130 feet of the right-of-way in which the ditch is located. As noted above, at the time the permit application was submitted, official property records showed the existing ditch as located within City right-of-way. Therefore, the County and District had no reason to doubt City ownership or control of the ditch area.

18. A recently filed circuit court action seeks to determine ownership of a portion of the right-of-way in which the ditch is located. The circuit court has exclusive jurisdiction over all actions involving the titles and boundaries or right of possession of real property.

19. District rules permit applicants to demonstrate sufficient ownership or legal control of the proposed project area in order to conduct the activities to be permitted. An applicant with eminent domain authority that does not have ownership or control for all property necessary for the proposed project may rely on its eminent domain authority to demonstrate sufficient ownership or legal control of the property necessary to construct the project. The permit will be conditioned to prohibit construction until all ownership or legal control of the property necessary to construct the project is acquired by the permittee. See Fla. Admin. Code R. 40D-4.301(1)(j); BOR § 2.0. The proposed permit contains Specific Condition No. 8 which enforces this requirement.

20. Reasonable assurance of sufficient ownership or legal control of the project area is provided by virtue of the City's and County's eminent domain authority and the fact that the proposed permit prohibits construction until the permittee acquires all necessary ownership or other legal control of the property necessary to construct the project.

D. Notice Requirements

21. Petitioner contends the permit should be denied because it did not receive notice of the application pursuant to rule 40D-1.603(9). That rule provides that when the applicant is an entity with the power of eminent domain that does not have

current ownership or control of the entire project area as described in the application, the applicant shall provide the property owner(s) identified in the application with so-called eminent domain noticing, which consists of (a) written notice of District receipt of the application, and (b) written notice of agency action on the application. Persons entitled to eminent domain noticing are owners of property located within the proposed project area as identified in the county property appraiser's records within 30 days prior to the filing of the application.

22. The purpose of the District's eminent domain noticing provision is to provide notice and an opportunity to be heard to owners of property subject to being condemned or otherwise acquired by the applicant for part of the project area.

23. As originally submitted, the application proposed some activities extending approximately ten feet into the marina basin and beyond the claimed City right-of-way. The permit application did not indicate City ownership or control of submerged lands within the marina basin. Consequently, in its request for additional information (RAI), the District advised that pursuant to rule 40D-1.603(9)(a) and (b), eminent domain notices to affected landowners would be required for any proposed easements over offsite property.

24. As part of the application process, a seagrass study was prepared which showed seagrasses and oyster beds growing in the marina basin just beyond the end of the ditch, where some construction activity was proposed.

25. Because seagrasses were observed growing at the end of the ditch, the County responded to the RAI by scaling back the project to confine activities to the City's right-of-way. With the change in project area, offsite easements were no longer necessary for the project. Thus, the project no longer required eminent domain noticing pursuant to rule 40D-1.603(9).

26. The County and District acknowledge that Petitioner did not receive eminent domain notices. Although not provided notice, Petitioner nevertheless became aware of the permit application during the course of its own application process with the Department of Environmental Protection (DEP) for an ERP to construct a 4,760-square foot, ten-slip docking facility on its adjacent submerged lands in the marina basin.

27. The lack of notice has not prevented Petitioner from challenging the project or has otherwise prejudiced it. Having received actual notice of the permit, Petitioner filed a timely objection and request for hearing in this matter.

28. Petitioner contends that while it does not oppose the ditch dredging, it would have wanted an opportunity to suggest a re-design of the ditch to include a dingy dock and kayak

launching facility. Although it has known of the project since at least May 21, 2012, when it filed its first petition, and probably several months earlier, Petitioner has not provided the County or District with any alternative designs to maximize the potential for recreational use of the drainage canal.

29. There is no requirement for ERP applicants to provide alternative designs to maximize potential public recreational uses. Requiring the County to do so would impose requirements that go beyond the conditions for permit issuance.

E. ERP Permitting Criteria

30. To obtain an ERP, a permit applicant must provide reasonable assurance that the proposed activities will not cause adverse impacts to water quality, water quantity, and other environmental resources. For activities proposed in, on, or over wetlands and other surface waters, reasonable assurance must also be provided that such activities are not contrary to the public interest and do not cause unacceptable cumulative impacts upon wetlands and other surface waters.

31. The conditions for issuance of an ERP are set forth in rules 40D-4.301 and 40D-4.302. The standards and criteria in the BOR are used to determine whether an applicant has met the conditions for issuance in those two rules.

32. The parties have stipulated that the project either complies with the following conditions for issuance or that they

are not applicable: 40D-4.301(1)(b), (c), (g), (h), (j), and (k) and 40D-4.302(1)(a)6. Also, rule 40D-4.302(1)(c) and (d), which concerns projects located in, adjacent to, or in close proximity to certain shellfish harvesting waters or which involve vertical seawalls, is not applicable to this matter.

33. Based on the parties' Stipulation, at issue is whether reasonable assurance has been provided that the proposed activities will not cause adverse water quantity impacts to receiving waters and adjacent lands (40D-4.301(1)(a)); will not adversely impact the value of functions provided to fish and wildlife by wetlands and other surface waters (40D-4.301(1)(d)); will not adversely affect the quality of receiving waters such that applicable state water quality standards will be violated (40D-4.301(1)(e)); and will not cause adverse secondary impacts to the water resources (40D-4.301(1)(f)). Petitioner also contends that the County has failed to give reasonable assurance that the project is not contrary to the public interest and that it will not cause unacceptable cumulative impacts, as required by rule 40D-4.302(1)(a) and (b).

a. Water Quantity Impacts

34. Rule 40D-4.301(1)(a) requires reasonable assurance be provided that the project will not cause adverse water quantity impacts to receiving waters and adjacent lands. Existing and post-construction flows were modeled by the County using the

accepted Inter-Connected Pond Routing model. Drainage calculations demonstrate that for the 25-year storm, the flood stage will be reduced by 1.94 feet, and for the 100-year storm event, by 1.75 feet, which will provide flood relief. Modeling results demonstrate a reduction in flood stages not just for U.S. Highway 41 but for other adjoining properties.

35. The evidence establishes that while the project is not designed to eliminate all potential flooding, flooding during normal events will be reduced. Specifically, no adverse water quantity impacts were demonstrated with respect to Petitioner's adjacent submerged lands.

36. Improvements proposed to the ditch will increase its storage capacity and allow water to flow more efficiently. By increasing the storage and hydraulic efficiency of the ditch without generating any additional runoff volume, the proposed activities will not cause adverse water quantity impacts and will have no adverse water quantity impacts on the receiving waters.

37. Reasonable assurance has been demonstrated that the project will not cause adverse water quantity impacts to receiving waters or adjacent lands and will not cause adverse flooding to on-site or off-site property, including adjacent submerged lands owned by Petitioner.

b. Impact on Value of Functions

38. Rule 40D-4.301(1)(d) requires that reasonable assurance be provided that project activities "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."

39. The existing ditch provides limited ecological functions for fish and wildlife, as it contains significant levels of exotics and nuisance vegetation that provide little in the way of habitat. The removal of the nuisance vegetation, improved water circulation, and decreased sediments will be an improvement. The proposed ditch reconstruction and replanting with other vegetation will provide a more suitable habitat for younger life stages of fish such as sea trout, red fish, and hog chokers, which are species typically found in tidally influenced drainage systems. Overall, the proposed project will result in an improved habitat available for fish and wildlife. The project will retain as many of the existing mangroves as possible, thereby retaining the ecology of the mangrove wetlands.

40. Reasonable assurance has been provided that the project will not adversely impact the value of functions being

provided to fish and wildlife and will actually improve the ecological functions provided by the ditch.

c. Quality of Receiving Waters

41. Rule 40D-4.301(1)(e) requires that reasonable assurance be provided that the proposed ditch alterations will not adversely affect the quality of receiving waters such that water quality standards will be violated. The parties have stipulated that the project will not violate water quality standards set forth in rule chapters 62-522 and 62-550. Petitioner contends, however, that reasonable assurance has not been provided concerning possible impacts relating to surface water quality standards in rule chapter 62-302, the anti-degradation provisions of rule chapter 62-4, or the groundwater permitting and monitoring requirements of rule chapter 62-522.

42. No evidence was presented by Petitioner that the activities will adversely affect the groundwater protection provisions of rule chapter 62-522. The proposed ditch alterations do not involve activities relating to these state water quality standards.

43. Under BOR section 3.2.4, reasonable assurance must be provided for the short term and the long term that water quality standards are not violated. As to potential construction or short-term impacts, the proposed construction work involves the removal of sediments accumulated in the ditch, reconstruction of

the ditch to be wider and deeper and within a more defined course, the addition of rip rap and geotextile fabric on the ditch bottom, and replanting of the ditch banks with salt-tolerant grasses and other vegetation to provide soil stabilization and erosion control. The proposed permit addresses the potential for turbidity during construction activities to cause short-term water quality violations by authorizing a temporary mixing zone and by requiring the installation of turbidity barriers and ongoing turbidity monitoring during construction. To further minimize the potential for any water quality violation during construction activities, construction methods will include the use of cofferdams or similar techniques to provide a barrier between the open water of the marina basin and the work being constructed within the ditch, which will be undertaken in segments starting at the eastern outfall at U.S. Highway 41. These provisions adequately address the potential for any short-term water quality impacts and are consistent with BOR provisions relating to short-term water quality.

44. As to possible long-term water quality impacts, the evidence establishes that the proposed activities will not add any additional pollutants or new pollutant source to the receiving waters and will not cause or contribute to any violation of water quality standards. To the contrary, by

removing existing stormwater sediments, which are known to contain pollutants, controlling sedimentation through collection of sediments in sediment sumps, and armoring the ditch channel to prevent erosion, water quality is expected to improve.

45. The proposed sediment sumps to be added as a best management practice are appropriately sized to handle the approximately 5,600 pounds of sediments that accumulate annually in the ditch, as determined by annual pollutant load calculations provided by the County. The sumps will be located most efficiently at the outfall where the ditch begins. Preventing sediments from entering the receiving waters is one of the best things that can be done to improve water quality in nearby Sarasota Bay.

46. Improvements in water quality are also expected to occur as a result of the addition of rip rap that will dissipate the flow energy, thereby allowing any remaining sediments to settle down, and the geotextile fabric that will keep soil in place and not allow it to float up. The sodding and replanting of the ditch embankments will also prevent side erosion from occurring, which erosion could add sediments in the ditch.

47. Once constructed, the ditch will be regularly maintained by the County, with sediments to be cleaned out of the sump on a quarterly schedule. Any sediments settling on the

rip rap and on plant vegetation would be cleaned out as needed, as determined by regular inspections.

48. Petitioner contends that reasonable assurance has not been provided to show that water quality standards in rule chapter 62-302, and the anti-degradation provisions of rule chapter 62-4, will not be violated by the proposed activities. Its expert opined that the impact of the proposed activity on state water quality standards cannot be determined because no sampling of the receiving water was conducted, the permit does not require compliance monitoring, and the existing ditch sediments were not sufficiently analyzed.

49. The evidence establishes that it can be reasonably presumed, without compliance monitoring or sampling, that the water flowing from the 46-acre urbanized watershed served by the ditch contains sediments and other pollutants typically associated with urban runoff. Most of the expected pollutants are contained within, or settle into the sediments that are deposited into, the ditch. By removing sediments through the use of adequately sized sediment sumps, slowing the water down to allow suspended solids to settle out within the ditch, adding geotextile fabric and rip rap covering the ditch bottom, establishing vegetation on the ditch sidebanks to prevent erosion, and implementing periodic maintenance through vacuum removal of collected sediments, the proposed activities will

remove pollutants from the water flowing into the ditch and discharging into the marina basin and ultimately entering Sarasota Bay. Thus, it is reasonable to expect without sampling or monitoring that the proposed activities will improve water quality.

50. In addition to identifying the positive benefits of the proposed activities, the evidence established that the proposed activities will not add a pollutant source to the receiving waters. This was not credibly disputed by Petitioner.

51. Because the project does not generate pollutants, the proposed activities will not cause or contribute to a violation of state water quality standards. There is no reason to require pre-construction or baseline sampling to compare with post-construction sampling, as no pollutants will be generated. The removal of sediments and ongoing ditch maintenance will result in an improvement in water quality. Therefore, it can be reasonably assured without requiring sampling or monitoring that the activities will not result in any violations of state water quality standards.

d. Secondary Impacts

52. Rule 40D-4.301(1)(f) and BOR section 3.2.7 require that an applicant provide reasonable assurance that a regulated activity will not cause adverse secondary impacts to the water resource. As originally proposed, the project included

activities extending beyond the end of the ditch and into the marina basin, where seagrasses and oyster beds are present. By avoiding impacts to these resources, the project also avoids any secondary impacts to manatees that may frequent Sarasota Bay. Turbidity control measures to be used during construction will also avoid secondary impacts to these resources. Petitioner provided no evidence that secondary impacts would occur as a result of the project. Reasonable assurance has been provided that the proposed activities will not result in any secondary impacts to the water resources.

e. Public Interest Test

53. Rule 40D-4.302(1)(a) requires an applicant to provide reasonable assurance that activities to be located in, on, or over wetlands and other surface waters will not be contrary to the public interest, as determined by balancing certain criteria, or if such activity significantly degrades or is within an Outstanding Florida Water (OFW), that the activity will be clearly in the public interest.

54. The proposed activities are not located within Sarasota Bay, a designated OFW. Petitioner provided no evidence that the proposed activities would significantly degrade that body of water. Therefore, the County need only demonstrate that the proposed activities are not contrary to the public interest.

55. The parties have stipulated that rule 40D-4.302(1)(a)6., which governs historical and archaeological resources, is not applicable to this matter. The remaining criteria at issue are whether the activity will adversely affect the public health, safety, or welfare or the property of others; whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats; whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling; whether the activity will adversely affect the fishing or recreational values of marine productivity in the vicinity of the activity; whether the activity will be of a temporary or permanent nature; and the current condition and relative value of functions being performed by areas affected by the proposed activity.

56. The evidence establishes that the project will reduce flooding during normal stages and remove sediments. By reducing the potential for roadway flooding and improving water quality through sediment reduction, the project will have a beneficial impact on public health, safety, and welfare, and will not adversely affect the property of others.

57. Efforts were made to reduce or eliminate impacts to wetlands and other surface waters in the design of the project. Proposed activities will involve the removal of some of the

existing mangroves. Based upon an analysis conducted pursuant to the Uniform Mitigation Assessment Manual, the unavoidable impacts to wetlands and other surface waters will result in a functional loss score of 0.08. Unavoidable wetland and other surface water impacts anticipated from the project will be appropriately mitigated through the use of a 0.08 credit from the Curry Creek Regional Offsite Mitigation Area (ROMA). The evidence demonstrates that the project will not adversely affect the value of functions provided by wetlands and other surface waters to conservation of fish and wildlife, including any endangered or threatened species, or their habitats and will actually result in an improvement in wetland and other surface water functions and habitat.

58. The evidence establishes that the proposed activities will not adversely impact navigation or the flow of water and will not cause erosion or shoaling. The ditch reconstruction will prevent the possibility of shoaling at the downstream end of the ditch adjoining Petitioner's submerged lands by increasing the width of the ditch, slowing the water down, removing sedimentation along the ditch bottom, and reducing erosion through the planting of salt-tolerant sod and other vegetation along the ditch side banks. Petitioner presented no contrary evidence.

59. No adverse impacts are expected to occur with respect to fishing or recreational values or marine productivity in the vicinity of the proposed activity. By removing sediments, the project will provide an improvement to fishing and recreational activities in the marina basin and Sarasota Bay.

60. Petitioner raised concerns regarding the amount of floatable material that will be discharged from the ditch as a result of removal of mangroves. As provided in the permit plans, significant portions of the mangroves will remain undisturbed. Under current conditions, the ditch and mangroves do not prevent or trap all trash and floatables entering the ditch. On-site observations of existing conditions confirmed there is not a large amount of trash and floatables currently being retained by existing mangroves. Any temporarily retained floatables within the ditch area ultimately float out to Sarasota Bay with the tide. The evidence establishes that even with the removal of some mangroves, the project is not expected to result in an easier flow or increased amount of floatables entering the marina basin. Finally, because the project activities do not add floatable materials to the ditch, requiring the County to implement design changes to remove floatables would exceed what is necessary to meet the conditions for permit issuance.

61. Petitioner also raised concerns regarding the levels of fecal coliform and the possibility of illicit connections to the stormwater collection outfalls to the ditch. The ditch is part of a MS4 permit that is regulated pursuant to NPDES Permit No. FLS000004 issued to the County. The NPDES permit governs stormwater discharges within the unincorporated portions of the County, the municipalities within the County, and that part of Longboat Key that is in Manatee County. The primary function of the MS4 permit is to address issues of water quality as they relate to stormwater discharges. The MS4 permit requirements would be the appropriate regulatory framework to address elevated fecal coliform, illicit connections, or other water quality concerns in the stormwater emanating from the drainage basin served by the ditch, and not the ERP regulatory program.

62. Having weighed and balanced the six applicable criteria, and based upon the evidence presented, the County has provided reasonable assurance that the proposed activities will not be contrary to the public interest.

f. Cumulative Impacts

63. Rule 40D-4.302(1)(b) requires an applicant to demonstrate that the proposed activities will not cause unacceptable cumulative impacts on wetlands and other surface waters, as further described in BOR sections 3.2.8 through 3.2.8.2.

64. BOR section 3.2.8 provides that if an applicant proposes to mitigate any adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets those impacts, then the regulated activity is considered to have no unacceptable cumulative impacts upon wetlands and other surface waters. Mitigation for unavoidable wetland impacts upon wetlands will be provided through the use of the 0.08 credit from the Curry Creek ROMA. The evidence establishes that the proposed mitigation fully offsets the impacts and is within the same drainage basin as the proposed impacts. No adverse cumulative impacts will occur with the project. Petitioner presented no contrary evidence of adverse cumulative impacts.

g. Impaired Receiving Waters

65. Petitioner contends that the project does not comply with the requirements of rule 40D-4.301(2) and related BOR section 3.2.4.5, which are applicable when existing ambient water quality does not meet state water quality standards.

66. Rule 40D-4.301(2) provides that if an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the applicant shall meet the requirements of BOR section 3.2.4.5 and related sections cited in that provision. Together, these provisions require that where existing ambient water quality does not meet

standards, the applicant must demonstrate that for the parameters that do not meet water quality standards, the proposed activity will not contribute to the existing violation. If it does contribute to the existing violation, mitigation measures will be required that result in a net improvement of the water quality in the receiving waters for the parameter that does not meet standards.

67. The marina basin that is the receiving waters for the ditch has been identified by DEP as impaired due to levels of mercury in fish tissue. The evidence demonstrates that the project will not contribute to this water quality violation.

68. Although not required to implement mitigation measures that will cause a net improvement of the levels of mercury in fish tissue, the evidence establishes that to the extent existing sediments contain mercury deposits, removal of the sediments reduce a source of mercury that can be ingested by fish in the receiving waters.

F. Water Quality Certification

69. Petitioner contends that Specific Condition No. 9 of the proposed permit, which expressly waives certification of compliance with state water quality standards, is contrary to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, and inconsistent with the legislative declaration of policy set forth in section 373.016(3)(f) and (j).

70. As explained by unrefuted testimony of the District, the water quality certification provisions of Section 401 allow states an opportunity to address the water resource impacts of federally issued permits and licenses. Under Section 401, a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the United States unless the affected state has granted or waived Section 401 certification. A state may grant, deny, or waive certification. Granting certification allows the federal permit or license to be issued. Denying certification prohibits the federal permit or license from being issued. Waiving certification allows the permit or license to be issued without state comment.

71. Pursuant to rule 40D-4.101(4), an application for an ERP shall also constitute an application for certification of compliance with state water quality standards where necessary pursuant to Section 401. Issuance of the permit constitutes certification of compliance with water quality standards unless the permit is issued pursuant to the net improvement provision of section 373.414(1), or the permit specifically states otherwise.

72. By letter dated February 2, 1998, to the United States Environmental Protection Agency, DEP has delegated to the state's five water management districts the authority to issue, deny, or waive water quality certifications under Section 401.

DEP has also established categories of activities for which water quality certification will be considered waived. Under the DEP delegation, water management districts may waive water quality certification for four situations, one of which is when the permit or authorization expressly so provides. This is still current DEP direction.

73. The types of permitting decisions which constitute the granting of water quality certification and the types of activities for which water quality certification could be considered waived are also addressed in the current Operating Agreement between the United States Army Corps of Engineers (USACE), DEP, and the five water management districts. According to both DEP guidance and the water management district agreement with the USACE, water quality certification will be considered waived when the permit or authorization expressly so states. The District most often expressly waives water quality certification for permits issued pursuant to the net improvement provisions and for projects that discharge into impaired waters.

74. Proposed Specific Condition No. 9 of the permit expressly waives water quality certification due to the fact that the receiving waters are listed by DEP as impaired. Conditioning of the permit in this manner is consistent with DEP guidance and District practice under these circumstances.

75. Although water quality certification for federal permitting review purposes is waived, the project must still comply with water quality requirements by demonstrating that the proposed activities do not cause or contribute to a violation of state water quality standards or if the activities contribute to an existing violation, that a net benefit is provided. The evidence establishes that the project will not cause or contribute to a violation of water quality standards and is not expected to contribute to the receiving water impairment of elevated mercury levels in fish tissue. While not required, the project is nevertheless expected to have a positive benefit on overall water quality and likely will reduce mercury levels in fish tissue by removing the sediments that contain metals such as mercury.

76. The District's waiver of water quality certification is consistent with Section 401, the legislative declaration of policy set forth in section 373.016(3)(f) and (j), and applicable regulatory practices for Clean Water Act water quality certification.

CONCLUSIONS OF LAW

77. The District and County have not disputed that Petitioner presented sufficient evidence to establish that its substantial interests could reasonably be affected by the issuance of a permit.

78. Section 120.569(2)(p) is applicable to this case. It establishes a new order of presentation and burden of proof in permit challenge cases such as this. Permit challenge cases under chapter 373 now proceed in three phases: Phase I is the submittal by the applicant and the agency of the application, notice of intent to approve the permit, and other relevant material submitted to the agency which constitute a prima facie case demonstrating entitlement to the proposed permit; Phase II is the submittal by the challenger of evidence supporting the challenge of the proposed permit; and Phase III is the submittal by the applicant and agency of any rebuttal evidence demonstrating that the application meets the conditions of permit issuance. See FINR II, Inc. v. CF Indus., Inc., Case No. 11-6495, 2012 Fla. ENV LEXIS 49 at *48-49 (Fla. DOAH April 30, 2012), adopted, OGC Case No. 11-1756, 2012 Fla. ENV LEXIS 50 (Fla. DEP June 6, 2012).

79. The burden of proof in permit challenge cases is now upon the challenger, who has the "burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the permit by competent and substantial evidence." § 120.569(2)(p), Fla. Stat.

80. Because this is a de novo proceeding, the parties are not limited to the permit file and may present additional evidence not included in the permit application. See, e.g.,

Hamilton Cnty. Bd. of Cnty. Comm. v. State Dep't of Env'tl. Reg.,
587 So. 2d 1378, 1387 (Fla. 1st DCA 1991).

81. In order to provide reasonable assurance that the proposed activity will not be harmful to water resources of the District, an applicant must satisfy the conditions for issuance set forth in rules 40D-4.301 and 40D-4.302 and the BOR incorporated by reference in rule 40D-4.091(1).

82. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3rd DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of the permit have been satisfied. See, e.g., Crystal Springs Recreational Pres., Inc. v. Sw. Fla. Water Mgmt. Dist., Case No. 99-1415, 2000 Fla. ENV LEXIS 41 at *98 (Fla. DOAH Jan. 27, 2000; SWFWMD Feb. 23, 2000).

83. An ERP must be based solely on compliance with the applicable permitting criteria. Petitioner's assertion that voluntary recreational uses or prevention of upstream floatables should be included in the design of the County's project is not based upon compliance with the applicable permitting criteria and is rejected.

84. The District's interpretation and implementation of rule and statutory provisions relating to requirements

addressing water quality standards, impaired water quality, net improvements, and waiver of water quality certification under Section 401 of the Clean Water Act are supported by competent substantial evidence.

85. Petitioner seeks denial of the permit on the ground that it did not receive notices consistent with rule 40D-1.603(9)(a) and (b). The evidence establishes that while Petitioner may have been entitled to notice of District receipt of the application when submitted, due to its ownership of submerged lands located beyond the ditch, it was not entitled to notice of agency action, given the reduction in project area to City right-of-way. At the time the application was submitted, property appraiser records showed the entire ditch and dredge area as being within City right-of-way. Although not provided eminent domain noticing, Petitioner nevertheless had actual notice of the agency action.

86. Petitioner has not established that the failure to provide it with eminent domain notices has prejudiced it in any way in its ability to timely request a hearing on the application or to assert its claims in this proceeding, or that such lack of notice has otherwise impaired either the fairness of the proceedings or the correctness of the action. Thus, any failure to comply with the noticing requirements of rule 40D-1.603(9) is at most harmless error and does not provide a basis

for permit denial. See, e.g., Carter v. Dep't of Prof'l Reg., 633 So. 2d 3, 6 (Fla. 1994); Stuart Yacht Club & Marina, Inc. v. State Dep't of Natural Res., 625 So. 2d 1263, 1269 (Fla. 4th DCA 1993).

87. District rules require applicants to demonstrate sufficient ownership or other legal control of the property that contains the proposed project area. When the applicant is an entity with eminent domain authority, a lack of ownership or control of a property located within a portion of the proposed project area is not a bar to permit issuance. Instead, the rules require that the permit be conditioned to prohibit construction activities until ownership or other legal control of all real property within the project area is obtained. Consistent with this requirement, the permit is conditioned to prohibit any construction until such time as the City or the County obtains needed ownership or other control on which the ditch is located. The permit term of five years allows the permittee to obtain any needed property ownership or legal control and to construct the project.

88. As to disputed issues of property ownership, neither the District nor DOAH has jurisdiction over real property disputes. See § 26.012(2)(g), Fla. Stat. Therefore, Petitioner's claim of ownership of a portion of the ditch is not addressed in this Recommended Order.

89. Petitioner has failed to meet its burden of showing that the permit should not be issued. See § 120.569(2) (p), Fla. Stat. To the contrary, the preponderance of the evidence demonstrates that reasonable assurance has been provided that all applicable permitting criteria have been met.

RECOMMENDATION

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

RECOMMENDED that the Southwest Florida Water Management District enter a final order approving the issuance of ERP No. 44040881.000 to the City and County, as joint permittees.

DONE AND ENTERED this 7th day of May, 2013, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of May 2013.

COPIES FURNISHED:

Blake C. Guillery, Executive Director
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

Erika Ginsberg-Klemmt
SRQUS, LLC
3364 Tanglewood Drive
Sarasota, Florida 34239-6515

Achim Ginsberg-Klemmt
SRQUS, LLC
3364 Tanglewood Drive
Sarasota, Florida 34239-6515

Martha A. Moore, Esquire
Southwest Florida Water Management District
7601 Highway 301 North
Tampa, Florida 33637-6758

Alan W. Roddy, Esquire
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, Florida 34236-6808

Michael A. Connolly, Esquire
Fournier, Connolly, Warren & Shamsey, P.A.
One South School Avenue, Suite 700
Sarasota, Florida 34237-6014

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.