

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PELICAN ISLAND AUDUBON SOCIETY,
DR. RICHARD BAKER, AND DR. DAVID
COX,

Petitioners,

vs.

Case No. 13-3601

INDIAN RIVER COUNTY AND ST.
JOHNS RIVER WATER MANAGEMENT
DISTRICT,

Respondents.

_____ /

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on June 4-6, 2014, in Vero Beach, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are (1) whether the St. Johns River Water Management District (District) should approve the application of Indian River County (County) for an environmental resource permit (ERP) authorizing the construction and operation of a surface water management system with stormwater treatment for the Oslo Road Boat Ramp Parking Lot; and (2) whether the District should approve the County's request for a variance from Florida Administrative Code Rule 40C-4.302(1)(c) and sections 10.1.1(c), 12.1.1(d), and 12.2.5(c) of the Applicant's Handbook: Management and Storage of Surface Waters (AH) in order to perform other related work.

PRELIMINARY STATEMENT

On August 16, 2013, the District published notice that it intended to issue an ERP authorizing the County to construct a surface water management system adjacent to the Indian River Lagoon (Lagoon). On August 23, 2013, a Final Order was issued approving the County's request for a variance in order to conduct certain related work on the project. Petitioners timely requested a hearing to contest those agency actions, and the matter was referred to DOAH to conduct a hearing. Petitioners were later authorized to file a First Amended Petition (Amended Petition).

At the final hearing, Petitioners jointly presented the testimony of five witnesses; Petitioners Exhibits 1-4, 8, 12, 15, 18, 28, 33, 37, and 42 were received in evidence. The County presented the testimony of three witnesses; County Exhibits 1-55 were received in evidence. The District presented the testimony of five witnesses; District Exhibits 1-3, 5, 6, 16, 20, 32, 34, 37, 38, 41, 42, 47, 48, 52, 56-58, 61, 61A, 62, 63, 63A, 64, 67, 69, 72-75, 77, and 78 were accepted in evidence. Petitioners' Request to Supplement the Record with additional exhibits, filed after Proposed Recommended Orders (PROs) were submitted, is denied. All proposed findings in their PRO that are based on the excluded exhibits have been disregarded. Finally, the undersigned took official recognition of chapters 40C-4 and 40C-42, in effect when the proposed agency action was issued; the Applicant's Handbook: Management and Storage of Surface Waters (Dec. 27, 2010); Applicant's Handbook: Regulation of Stormwater Management Systems (Dec. 27, 2010); and rule 62-302.700.

A five-volume Transcript of the hearing has been prepared. Proposed Recommended Orders were filed by the parties, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. The Pelican Island Audubon Society is a Florida non-profit corporation whose mission is to preserve and protect the animals, plants, and natural communities in the County through advocacy, education, and public awareness. It has more than 25 members that live in the County and has been a chapter of the Audubon Society of Florida since 1964.

2. Dr. Richard Baker resides in the County and engages in water-based recreational activities such as canoeing, bird watching, nature photography, and fishing in the Lagoon near the boat ramp.

3. Dr. David Cox resides in the County and engages in water-based activities such as kayaking and nature observation in the vicinity of the boat ramp.

4. The County is the applicant for an ERP and variance for a project known as the Oslo Road Boat Ramp project.

5. The District is the agency charged with the responsibility of regulating water resources within its geographic boundaries and to administer and enforce chapter 373, Florida Statutes, and the rules promulgated under title 40C.

B. The Existing Oslo Road, Boat Ramp, and Lagoon

6. Oslo Road is a County-owned road that runs in an east-west direction and intersects with U.S. Highway 1 just south of

State Road 60. To the east of U.S. Highway 1, the road is paved for a short distance; the remaining portion of the road (2,460 feet) is a narrow, two-lane dirt road that dead-ends at the boat ramp.

7. Most of the dirt road is bordered to the north and south by a mangrove swamp that extends to the edges of the road. All wetlands have been previously disturbed. The surrounding and abutting jurisdictional wetlands consist primarily of both tidal (north side) and impounded/partially tidal mangrove swamp (south side), which was created years ago by a mosquito control district in order to reduce the salt marsh mosquito population. The boat ramp is bordered to the north by a clump of red mangroves and a sparsely vegetated sandy shoreline and to the south by a dense mangrove fringe.

8. During rain events, the dirt and sediment can wash off the road as erosion. This requires the County to continually maintain the dirt road by grading and adding marl material to bring it back up to grade.

9. The boat ramp has been in existence for more than 50 years and is the nearest public access to the popular South County fishing areas in the Lagoon. Although there are 17 other boat ramps in the County, the closest one is six miles to the north in the City of Vero Beach. The typical users of the boat ramp are fishermen with shallow-draft boats, while the open

shoreline to the north is normally used to launch canoes and kayaks and to access the river by wading fishermen. There are a number of water-based communities in the area, including one directly to the east of the boat ramp. Many boats that do not launch at the boat ramp use the nearby seagrass beds as a fishing destination.

10. The boat ramp has a dirt cul-de-sac, a concrete boat ramp with finger piers, and is surrounded by the Lagoon, the receiving water body for the project and classified as Class III waters. In December 2007, the Department of Environmental Protection (DEP) verified that the Lagoon is an Impaired Water Body of the State, with the impairment being for nutrients in the vicinity of the project.

11. Currently, there are no designated parking areas associated with the boat ramp. Vehicles both with and without trailers park in the cul-de-sac and along the roadside. The only limit to the extent of parking along Oslo Road is the distance somebody is willing to walk. During peak times, the dirt road and cul-de-sac become congested and blocked with cars, trucks, and boat trailers.

12. In 1977, the County obtained a permit from the United States Army Corps of Engineers (USACE) to construct the boat ramp with two appurtenant piers and a riprap groin. During the subsequent years, there was substantial deterioration to the

ramp, bulkhead, and docks. Accordingly, in 2009, using an exemption under rule 40C-4.051(12)(i), the County replaced the concrete portion of the boat ramp within the same footprint and constructed two accessory docks that now define the width of the one-lane boat ramp. During this process, the County removed around 25 cubic yards of muck from the base of the boat ramp.

13. The boat ramp is only 16 feet wide and 40 feet in length and is located in water less than three feet below Mean Low Water (MLW). In contrast, a typical boat ramp in the County is around 76 feet, or twice as long as the Oslo Road boat ramp.

14. The existing boat ramp was designed to be used by motorized vessels. There is a separate launch area for kayak and canoes next to the concrete ramp. The motorized vessels that currently use the boat ramp are small with a draft less than 18 inches. This is partly due to the presence of cap rock beyond the proposed dredging area, which limits the draft size of the boats, and the small size of the single-lane ramp.

15. The only signage at the ramp advises the public that this is a shallow draft vessel launch and that the limits of the draft are 18 inches.

16. The channel leading out of the boat ramp was previously dredged around 1950. During that era, only shallow draft boats would launch at Oslo Road. In February 1977, the United States Fish and Wildlife Service confirmed that an old

channel about 75 feet long and 15 feet wide existed at the boat ramp location. In May 1977, additional maintenance dredging of the old silted channel to a depth of -3.00 Mean Sea Level (MSL) was authorized by the USACE. Although the parties disagree over whether any dredging was ever performed, surveys, aerial photographs, and research suggest that more than likely the project site was dredged in the late 1970s or early 1980s. A portion of the area that the County proposes to dredge falls within the area that was previously permitted by the USACE in 1977.

17. The distance from the boat ramp to the Intracoastal Waterway (ICW) is approximately one-half mile. The channel is delineated by a number of poly vinyl chloride pipes and six sets of permitted navigational channel markers leading to the ICW. The water depths in the area surrounding the boat ramp, including the channel to the ICW, are very shallow.

18. Drainage from the road currently runs down the ramp causing sand and other material to build up in the ramp area. Due primarily to this drainage, at low tide the water at the boat ramp area has been so shallow that boaters have experienced great difficulty when loading; in some cases, launching or retrieving a vessel is almost impossible. After a rain event, turbidity plumes in the Lagoon have been observed extending

100 feet to the north of Oslo Road, 150 feet to the south, and approximately 30 feet to the east.

19. The seagrass beds adjacent to the boat ramp were described as lush, healthy, and productive. The proposed dredging area contains less than 1.5 percent of seagrass coverage. There is no evidence that the current use of the boat ramp causes prop scarring to the surrounding seagrass.

20. The Lagoon in the vicinity of the boat ramp has been determined to be a high manatee use area, as defined by the County Manatee Protection Plan (MPP). However, this area is not a high watercraft-related manatee mortality area. Since 2002, the waterway in the vicinity of the project site has been regulated by seasonal manatee protection speed zones. Signs have been posted since 2003. The shoreline to the ICW is currently regulated at slow speed between November 1 and April 30 and is unregulated the remainder of the year. The County intends, however, to adopt a new ordinance that makes the slow speed zone effective the entire year, rather than just during the winter months.

C. The Project and Variance

21. In late 2009, the County submitted to the District its ERP application. Since that time, the County has modified its plans seven times and amended the application twice. Notably, the modifications reduce the direct impacts to wetlands from

2.98 acres to 1.41 acres for the improvement of the dirt road and parking lot; they also reduce impacts to ditches that support fisheries habitat and submerged lands. They will result in 0.113 acres of combined direct impacts to seagrass and Lagoon substrate from the proposed dredging. The project will not change the hydroperiod of the surrounding wetlands. The number of trailer parking spaces was reduced from 32 to 12 and the parking space angle changed. A dry retention area on the west side of the project will be installed; a wet detention pond was eliminated; the dock extension reduced; and at Petitioners' request, the project was shifted north to avoid impacting a ditch to the south.

22. The County eliminated and reduced impacts to surface waters by reducing the width of the proposed dredge area so as to not impact seagrass beds to the north and south of the channel. Dredging is limited to a depth of -2.5 feet MLW and will be within the same area that was dredged in the 1950s. It is not expected to contribute to larger vessels launching at the boat ramp.

23. The latest iteration of the project consists of paving the 2,460 feet of dirt road to a width of 26 feet, constructing a surface water management system, and constructing a parking area to accommodate 12 vehicles with boat trailers and

11 vehicles without a trailer. No changes to the size or configuration of the concrete boat ramp will be made.

24. The project will extend the northern accessory dock of the existing one-lane boat ramp by approximately 32 feet to allow more boats to tie off; dredge 4,943 square feet (0.113 acres) of the ingress/egress access way within the Lagoon to a depth of -2.5 MLW; install an additional three sets of channel markers (six in total); install "No Parking" signs to limit vehicle parking to the designated parking area; and install additional signage to warn boaters of the shallow depths in the area and to notify boaters that to launch at this boat ramp, vessel drafts must not exceed 18 inches.

25. The proposed surface water management system consists of roadside conveyance swales, pipes, weirs, and two dry retention areas which will provide water quality treatment for stormwater runoff from basins upstream of the project area and the existing paved portion of Oslo Road. The two proposed dry retention areas will provide water quality treatment in accordance with the design and performance criteria in the District's rules. Currently, these areas drain into existing swales and then east into the Lagoon with no water quality treatment. The system will result in a net improvement to water quality based on a nutrient loading analysis review by the District.

26. The County is proposing off-site mitigation to offset the direct and secondary impacts. It consists of 18 acres of enhancement at Earman Island within the Lost Tree Islands Conservation Area, including 14 acres of wetland enhancement. Earman Island is part of the chain of islands in the Lagoon just north of State Road 60 known as Lost Tree Islands purchased by the County for conservation purposes. The proposed enhancement area is building upon an existing mitigation area on the north end of the island. The proposed mitigation is within the same drainage basin as the area of wetlands and other surface waters to be adversely affected. There are no cumulative impacts associated with the project.

27. The County owns all of the property that will be dredged, filled, or paved, including the submerged lands waterward of the Mean High Water (MHW) line at the boat ramp out approximately 215 feet. This area is not within an Aquatic Preserve or Outstanding Florida Waters, and none of the dredging will occur on sovereign submerged lands. See Jt. Pre-hearing Stip., p. 13, ¶¶ 18-20.

28. In summary, the purpose of the project is seven-fold: provide water quality treatment for the runoff water; limit the number of parking spaces available for users of the boat ramp; decrease the need for the County to maintain the 2,460 feet of dirt road; create a safe place for boaters to moor while waiting

to retrieve their boats from the Lagoon; allow boaters to safely launch and retrieve their boats from the Lagoon at low tide; create a clear channel for boaters to get from the base of the boat ramp to the ICW; and decrease turbidity in and around the mouth of the boat ramp.

29. The portion of the project that expands the accessory dock and dredges the channel will be located in Class III waters classified by DEP as restricted for shellfish harvesting.

30. Rule 40C-4.302(1)(c) places additional requirements on regulated activities that are proposed in Class III waters restricted for shellfish harvesting. These requirements are set forth in the AH. Without a variance from the rule and AH, the District would be required to deny the ERP. Therefore, the County must qualify for and obtain a variance from rule 40C-4.302(1)(c) and AH sections 10.1.1(c), 12.1.1(d), and 12.2.5(c).

D. Petitioners' Concerns

31. The essence of Petitioners' objections is that once Oslo Road and the parking lot are paved, and the channel dredged, the boat ramp will attract a tremendous number of fishermen from throughout the area who will use larger and deeper draft boats to access the Lagoon. Petitioners contend that more and larger boats, along with the proposed activities, will result in the environmental impacts described in their Amended Petition.

32. The conditions for issuance of an ERP are set forth in rules 40C-4.301 and 40C-4.302. The standards and criteria in the AH are used to determine whether an applicant has met the conditions for issuance in the two rules. Rule 40C-1.1002 establishes the requirements for obtaining a variance.

33. The parties have stipulated that the project either complies with the following conditions for issuance of a permit or that they are not applicable: rules 40C-4.301(1)(a), (b), (c), (e), (g), (h), (i), (j), and (k); and 40C-4.302(1)(a)3., 5., and 6.

34. Remaining at issue is whether reasonable assurance has been provided to demonstrate that the proposed activities will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters (40C-4.301(1)(d)); that the proposed activities will not cause adverse secondary impacts (40C-4.301(1)(f)); and that the portion of the project located in wetlands or the Lagoon is not contrary to the public interest (rules 40C-4.302(1)(a)1., 2., 4., and 7. and 40C-4.302(1)(b)). As a part of these claims, Petitioners also contend that the County failed to implement all practicable design modifications to reduce or eliminate the adverse impacts to wetland and surface water functions; the proposed mitigation fails to offset the adverse effects of the project; and the District did not consider the impacts of

increased boat usage when reviewing secondary impacts generated by the project. Finally, Petitioners contend that the County has not shown that it meets the conditions in rule 40C-1.1002 for a variance. These contentions are addressed separately below.

a. Rule 40C-4.301(1) (d)

35. Pursuant to this rule, and related AH provisions, the County must give reasonable assurance that the proposed activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

36. To meet this requirement, the County has implemented, to the extent practicable, design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. The original application submitted in 2009 proposed impacts to 2.98 acres of wetlands and surface waters. Since that time, the County has reduced or eliminated its proposed wetland impacts by more than 50 percent. This was done by incorporating design modifications that eliminated the construction of a stormwater pond in wetlands and adding compensating stormwater treatment; shifting impacts out of critical fisheries and open water habitat within the southern impoundment to upland areas; installing a retaining wall along the trailer parking area to

limit the fill slope impacts; and making minor modifications to reduce the project footprint in several locations.

37. The County also eliminated and reduced adverse impacts to surface waters by reducing the width of the proposed dredge area so as to not impact the seagrass beds to the north and south of the channel and limiting the dredging to -2.5 MLW. That depth is consistent with the existing limitations adjacent to the dredge area and will not allow deeper draft vessels to use the boat ramp. The addition of a permit condition that requires the placement of "No Parking" signs along Oslo Road and limiting the parking of boat trailers to the 12 designated parking spaces will prevent an increase in boat traffic from the existing boat ramp. The installation of signage at the boat ramp advising boaters of the boat motor draft restriction and the year-round manatee slow speed zone will also reduce impacts. Finally, three sets of channel markers will also be installed to keep boaters within the designated channel. As discussed below, after these design modifications are implemented, the remaining impacts are sufficiently offset by mitigation proposed by the County.

38. The District also considered the condition of the wetlands and surface waters to be impacted; their hydrologic connection; their uniqueness; location; and fish and wildlife utilization, and then evaluated the proposed mitigation. The

more persuasive evidence supports a finding that the mitigation is sufficient to offset the proposed impacts.

39. As required by the AH, the District provided a copy of the County's application to the Florida Fish and Wildlife Conservation Commission (FFWCC). Among other things, the FFWCC is the agency responsible for reviewing the County's MPP. The FFWCC indicated that the project is consistent with the County's MPP. It also recommended certain measures to be taken by the County, which are now included as conditions in the proposed permit.

40. Petitioners assert that the National Marine Fisheries Service, a federal agency, considers the entire Lagoon, and the ditches extending into it, to be an essential fish habitat (EFH) that provides habitat required for the various life cycles of many types of fish. Petitioners contend that the project will result in impacts to the EFH adjacent to the proposed dredging areas, and that this type of impact cannot be mitigated. For the following reasons, this contention is rejected.

41. First, the more persuasive evidence is that the area to be dredged contains less than 1.5 percent seagrass coverage, and channel markers will be used to keep boaters within the designated channels. Only around 200 square feet (0.005 acres) of seagrass will be affected, and not the much larger area that Petitioners assert will be impacted. No other impacts to

seagrass are expected to result from the project, other than those identified and mitigated for during the application review. Second, the District considered the actual Lagoon impact area and determined that the same functions now being provided in that area will be provided by the proposed mitigation. Third, if one accepts Petitioners' assertion that EFH can never be mitigated, no permit could ever be issued for any project that would impact the Lagoon or any ditches connecting to it. Finally, based on the District's Uniform Mitigation Assessment Method (UMAM) evaluation, the functional loss, including direct and secondary impacts, was scored at 1.212 while the functional gain was 1.281. See Fla. Admin. Code Ch. 62-345. With 1.5 acres of direct impacts, one acre of secondary impacts, and 18 acres of mitigation, there are approximately 0.07 excess units of functional mitigation. The UMAM review was not credibly refuted.

42. Petitioners failed to prove that the requirements of rule 40C-4.301(1)(d) have not been met.

b. Rule 40C-4.301(1)(f)

43. Rule 40C-4.301(1)(f) requires an applicant to provide reasonable assurance that a regulated activity will not cause adverse secondary impacts to the water resources. Petitioners contend that the project will increase the number and size of

boats that use the boat ramp and therefore cause secondary impacts to seagrasses, manatees, and water quality.

44. Secondary impacts occur outside the direct footprint of the project but are very closely linked and causally related to the activity to be permitted. De minimis or remotely related secondary impacts are not considered.

45. To assess secondary impacts, the District evaluates the impacts to wetlands and surface water functions; upland habitat for aquatic or wetland dependent species; and historical and archaeological resources.

46. The project will result in 0.86 acres of secondary impacts to the remaining wetlands adjacent to the road paving and parking area and 0.14 acres of secondary impacts associated with sloughing and boat wake-related impacts.

47. The County has proposed mitigation that will adequately offset the expected secondary impacts. In combination with dredging to only -2.5 MLW and reducing parking space for boat trailers, the mitigation will prevent additional secondary impacts. Also, the boat ramp is significantly smaller than the average boat ramp in the County and is designed specifically for small vessels. Thus, the ramp itself limits the size of the vessel that can launch at the site.

48. Through the use of additional channel markers, signage, and a year-round slow speed zone, there should not be

an increased threat of boat collisions with manatees, propping of seagrass beds, or turbidity. Also, the removal of the muck from the channel will be beneficial and reduce turbidity in the nearby waters.

49. Petitioners have stipulated that no wetland dependent listed species on site that use uplands for nesting or denning are at issue.

50. There are no additional phases for this project. Speculation of a future interchange at Interstate 95 and Oslo Road, located many miles to the west of the boat ramp, and any impacts that might occur if one was ever built, was not considered under the District's secondary impact rule.

51. Petitioners failed to prove that the requirements of the rule have not been met.

c. Rule 40C-4.302 - Public Interest Test

52. The public interest test for this type of project requires that the County 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 seven criteria in subparagraphs 1.-7. of the rule. The test takes into account the positive, negative, and neutral effects of the activity. The parties have stipulated that subparagraphs 3. and 6. are not at issue. They govern navigation, shoaling, and erosion, and historical and

archaeological resources. The navigation factor is positive and the archaeological resource factor is neutral.

53. Subparagraph 1. requires the District to determine whether the activity will adversely affect the public health, safety, or welfare or the property of others. The more persuasive evidence supports a finding that the activities will not adversely affect the public health, safety, or welfare of the property of others. Presently, it is difficult to launch and load boats at the ramp due to the area being silted down. This can result in serious safety issues. By dredging this area, public safety will be enhanced. The installation of navigational channel markers and signage will also be beneficial to the public health, welfare, and safety, as will the year-round slow speed zone. This factor is positive.

54. Subparagraph 2. requires the District to determine whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. The evidence supports a finding that the proposed mitigation is appropriate and more than offsets the proposed impacts. The County eliminated and reduced impacts by more than one-half. The proposed dredging area contains less than 1.5 percent seagrass coverage. The project will not result in adverse impacts to manatee. Finally, the County is proposing 18 acres of mitigation, including the creation of an open

water/tidal creek feature which will provide the same functions as the areas being impacted. This factor is positive.

55. Subparagraph 4. requires the District to determine whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project. The evidence supports a finding that the 18 acres of mitigation will improve marine productivity by providing a substantial amount of both mangrove and salt marsh vegetation along the sides of the tidal creek and open water component of fisheries. Also, the County has eliminated and reduced impacts to seagrasses by limiting the dredging area to an area with less than 1.5 percent seagrass coverage. Finally, it has removed the stormwater system from the southern impoundment to avoid a critical fisheries open water habitat. This factor is positive.

56. Subparagraph 5. requires the District to determine whether the activity will be of a temporary or permanent nature. Because the mitigation offsets the adverse impacts, and the mitigation and dredging areas are both permanent in nature, the temporary or permanent factor is neutral.

57. Subparagraph 7. requires an evaluation of the current condition and relative value of the functions being performed by areas affected by the proposed activity. The current condition and relative functions being performed by the areas affected by the project are high functioning. The evidence shows that the

project will not change this high functioning aspect of the area. The District also conducted a UMAM review, which considered the relative value of plant communities, hydrology, and other factors, and demonstrated that the mitigation more than offsets the impacts. Finally, the County established that the mitigation area provides the same functions as the impact areas. Therefore, this factor is positive.

58. The District's determination that the project will not be contrary to the public interest is supported by a preponderance of the evidence.

E. Variance

59. Because a portion of the project will be within Class III waters classified by DEP as restricted for shellfish harvesting, the County must qualify for and obtain a variance. A variance may be granted when an applicant demonstrates that it would suffer a hardship, not self-imposed, if the variance is denied. See Fla. Admin. Code R. 40C-1.1002. In determining whether a variance should be approved, the District balances the social, economic, and environmental impacts on the applicant, the residents of the area, and on the State with those same impacts if the variance is denied.

60. The County has demonstrated that the application of rule 40C-4.302(1)(c) and AH sections 10.1.1(c), 12.1.1(d), and 12.2.5(c) would create a hardship in this case by precluding the

construction of the proposed accessory dock extension and the dredging of an existing ingress/egress way within the Lagoon that will improve public safety and enhance recreational opportunities for the citizens of the area. There are no viable alternatives that would address the functionality and safety of the existing boat ramp.

61. The hardship is not self-imposed in that the normal processes of erosion, wind, and tides contribute to the accumulation of sand and muck within the ingress/egress access way, which over time has impeded the process of launching and loading vessels at the boat ramp. The narrow channel is bordered on the north and south by productive seagrass beds. The extension of the accessory dock and dredging of the access channel will expedite the loading process and reduce the need for boat operators to circle in the shallow waters waiting their turn to access the ramp.

62. The environmental impact of the project is positive. There will be no harm to the water quality of Class III waters and the shellfish beds. The Department of Agriculture and Consumer Affairs reviewed the project and concluded that it would not result in a reclassification of shellfish harvesting waters. The stormwater treatment on the uplands will result in a reduction of nutrient loading to the Lagoon, which is now designated by DEP as impaired by nutrients. The extension of

the accessory dock, along with making the area a year-round slow speed zone, will reduce potential impacts to manatees.

63. The dredging and extension of the dock will be a convenience to the boating public and may enhance public safety during periods of inclement weather or other exigent circumstances.

64. Petitioners failed to prove that all requirements for a variance have not been met.

CONCLUSIONS OF LAW

65. The parties have stipulated to the facts necessary to establish that Petitioners have standing to contest the permit and variance.

66. The parties agree that the District's rules in effect on August 23, 2013, contain the criteria applicable to the permit that is the subject of this proceeding.

67. Section 120.569(2)(p), Florida Statutes (2013), is applicable to this case. It establishes the order of presentation and burden of proof in a permit challenge case under chapter 373. Because Petitioners have challenged a permit issued under chapter 373, they have the "burden of ultimate persuasion and the burden of going forward to prove the case in opposition to the [permit] by competent and substantial evidence." Id.

68. There are no reported cases that address the issue of whether section 120.569(2)(p) applies to a person challenging the approval of a variance. The issue was not directly addressed by the parties in their Joint Pre-hearing Stipulation or PROs. The District defers to the criteria in section 403.201(1) to determine whether an application for a variance should be approved. See § 373.414(17), Fla. Stat. After a written application (petition) is filed and reviewed, the District renders a written final order stating whether an exemption has been approved. In this case, a 15-page Final Order was issued on August 22, 2013. The District's written approval of a variance is a "form of authorization" or a "license" under chapter 373 and is therefore subject to the requirements of section 120.569(2)(p). Cf. Pirtle v. Voss, Case No. 13-0515, 2013 Fla. ENV LEXIS 113 at *7-8 (Fla. DOAH Sept. 27, 2013), adopted, OGC Case No. 12-1837, 2013 Fla. ENV LEXIS 114 at *20-21 (Fla. DEP Dec. 26, 2013) (DEP's written determination of exemption from permitting requirements is a license subject to section 120.569(2)(p)); Spinrad v. Guerrero, Case No. 13-2254 (Fla. DOAH Jul. 25, 2014) (same). It is concluded that Petitioners have the burden of ultimate persuasion to prove that the County is not entitled to a variance.

69. Because this is a de novo proceeding, and not merely a review of the prior agency action, the parties may present additional evidence not included in the permit application and other documents previously submitted to the District during the permit application review process. See, e.g., Hamilton Cnty. Bd. of Cnty. Comm'rs v. State Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991).

70. District rules and statutory provisions require that an applicant give reasonable assurance that the conditions for issuance of a permit have been met. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). This does not require an absolute guarantee of compliance with environmental standards. See, e.g., Save Our Suwannee, Inc. v. Dep't of Env'tl. Prot., Case Nos. 95-3899 and 95-3900, 1996 Fla. ENV LEXIS 37 at *17-18 (Fla. DOAH Dec. 22, 1995; Fla. DEP Feb. 5, 1996). Simply raising concerns or even informed speculation about what might occur is not enough to carry the Petitioners' burden. See Chipola Basin Prot. Grp., Inc. v. Fla. Dep't of Env'tl. Reg., Case No. 88-3355, 1988 Fla. ENV LEXIS 112 at *17-18 (Fla. DOAH Nov. 14, 1988; Fla. DER Dec. 30, 1988).

71. As previously found, the County has provided reasonable assurances that the proposed activity will not

adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters pursuant to rule 40C-4.301(1)(d).

72. As previously found, the County has provided reasonable assurances that the proposed activity will not cause adverse secondary impacts to the water resources pursuant to rule 40C-4.301(1)(f).

73. As previously found, five of the public interest test factors to be balanced were positive and two were neutral. Therefore, the County has established that the project will not be contrary to the public interest, as required by rule 40C-4.302(1).

74. The County has established its entitlement to a variance by demonstrating that without one, it has a hardship and a particular need for the improvement to enhance public safety.

75. In summary, Petitioners have failed to meet their burden of proving that the permit should not be issued and a variance not approved.

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order granting the County's applications for an ERP and a variance.

DONE AND ENTERED this 5th day of August, 2014, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 5th day of August, 2014.

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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.