STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS G. MOSHER AND MATTHEW SCHWARTZ,

Petitioners,

and

PRESERVE OUR PARADISE, INC.,

Intervenor,

vs. Case Nos. 13-4254
13-4920

DAN A. HUGHES COMPANY, L.P., AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

This matter was heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on February 25-27, 2014, in Fort Myers, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether to approve an application by Respondent, Dan R. Hughes Company, L.P. (applicant or Hughes), for an oil well drilling permit authorizing the drilling of an exploratory oil well in Collier County, Florida.

PRELIMINARY STATEMENT

On September 20, 2013, the Department of Environmental Protection (Department) issued Oil & Gas Well Drilling Permit No. 1353H authorizing Hughes to drill an exploratory oil well in the Camp Keais Strand Agricultural Development (Camp Keais) in Collier County. Petitioner Thomas G. Mosher (Mosher) and Intervenor Preserve Our Paradise, Inc. (Preserve), timely filed their Petition for Formal Administrative Hearing & Verified Motion to Intervene challenging the proposed agency action. The matter was referred by the Department to DOAH to conduct a formal hearing and was assigned Case No. 13-4254. After the initial pleading was dismissed, a First Amended Petition for Administrative Hearing & Verified Motion to Intervene was filed.

On November 15, 2013, Petitioner Matthew Schwartz (Schwartz), with the assistance of unnamed counsel, filed his Second Amended Petition for Administrative Hearing with the Department challenging the same agency action.[1] His filing was

referred to DOAH, assigned Case No. 13-4920, and consolidated with the Mosher/Preserve case.

Shortly before the final hearing, Petitioners and Intervenor were authorized to file amended petitions, which added an allegation that the application was not reviewed by the Big Cypress Swamp Advisory Committee (Committee) pursuant to section 377.42(2), Florida Statutes (2013).[2]

Based on the foregoing ruling, at the beginning of the hearing, argument was heard on the Department's request to bifurcate the proceeding, allow the Committee to conduct a meeting at a later date, and if appropriate, allow the parties to supplement the record with exhibits or testimony relative to the Committee's recommendation. The request was granted, and Committee meetings were convened on March 11 and 31, 2014. At the second meeting, by a majority vote, the five-member Committee recommended that the application be denied. On April 14, 2014, a one and one-half page memorandum was issued memorializing that decision. That memorandum has been received in evidence as Joint Exhibit 1. After reviewing the Committee's recommendation, the Department advised that its original proposed agency action would not be modified. Accordingly, except for the admission of the committee report, no further supplementation of the record was determined to be appropriate.

The disposition of numerous pre- and post-hearing discovery and procedural issues is found on the case docket sheet. In the

spirit of cooperation, four separate pre-hearing unilateral statements were filed by the parties.

At the final hearing, Mosher testified on his own behalf and Mosher/Preserve jointly presented the testimony of Donald Loritz, Preserve's registered agent and director; Gabor H. Tischler, an Emergency Management Specialist for the Florida Catholic Conference and Catholic Charities of Florida and accepted as an expert; Dr. Ronald E. Bishop, a certified Chemical Hygiene Officer and accepted as an expert; and Paul Rubin, a hydrogeologist with Hydroquest, an environmental consulting firm, and accepted as an expert. Mosher Exhibit 3 was received in evidence. Schwartz testified on his own behalf and Schwartz Exhibits 10, 11, 13, 14-18, 20-23, 27, 29, 31, 35, 42, 48, 51, 55-59, 66-73, 82, 85, 87, 89, 90-92, 97, 98, 101, 102, 104-114, 118, 119, 122, 129, 132, 134, and 139 were admitted in evidence. Hughes presented the testimony of J. Henry "Hank" Kremers, Chief Operating Officer/Vice-President of Land and accepted as an expert; Jeffrey R. Ilseng, Operations Manager and accepted as an expert; Kenneth C. Passarella, President and Principal Ecologist of Pasarella & Associates, Inc., and accepted as an expert; William R. Cox, Senior Ecologist with Passarella & Associates, Inc., and accepted as an expert; James M. Kerr, Jr., Senior Principal Geologist with Stantec, Inc., and accepted as an expert; and Dr. John Walker, Senior Associate and Senior Project Manager with Stantec, Inc., and accepted as an expert. Hughes

Exhibits 1-3, 5-13, 16, 19-25, 27, and 28 were admitted in evidence. The Department presented the testimony of Stephen M. Spencer, a registered professional geologist and accepted as an expert; and Dr. Owete Owete, a professional engineer and accepted as an expert. Department Exhibits 10, 15-18, 23, 25, and 27 were admitted in evidence. Joint Exhibit 1 was also received. Finally, Mosher's request to take official recognition of two reports issued by the United States Environmental Protection Agency in October 1993 and June 2003 was granted. (These items were pre-marked as Preserve Exhibits 10 and 41).

A four-volume Transcript of the hearing has been prepared. Each party filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. Mosher resides on a three-acre lot at 4695 26th Avenue Southeast, Naples, Florida. His residence is around 2,500 feet west of the proposed wellsite, but Mosher says that the eastern edge of his lot "might be 2,000 feet" from the drilling site. He has not, however, measured the actual distance to confirm this assertion.

2. Preserve is a Florida non-profit corporation whose purpose is to educate the public on issues affecting the preservation and protection of the environment, particularly the environment of south and southwest Florida. It was formed in

response to Hughes' intention to drill for oil in the area. The corporation is not a membership organization; rather, it has around 25 non-member, active volunteers, six member directors, and an unknown number of donors. Excluding Mosher, the other member directors live between three and ten miles away from the proposed wellsite. The record does not show where the 25 volunteers reside. The corporate representative testified that four directors, including Mosher, regularly use the Florida Panther National Wildlife Refuge (Refuge) to observe wildlife and habitat. However, the public access point to the Refuge appears to be at least several miles from the wellsite. Based upon an email survey, he stated that a "substantial number [around 36] of donors and volunteers utilize the panther refuge," but he was unaware of when, or how often, this occurred. About every six weeks, meetings are conducted at Mosher's home, which are attended by some, but not all, of the directors and volunteers.

3. Schwartz's primary residence is in Lake Worth (Palm Beach County) where he serves as the unpaid executive director of the South Florida Wildlands Association.[3] He sometimes provides paid tours in the Everglades and Big Cypress Swamp and has led "numerous" free hikes into panther habitat to look for signs of panthers. These hikes are limited to the hiking trails in the southeast corner of the Refuge, which is the only area that can be accessed by the public. He represented himself as an advocate

for the protection of wildlife habitat in the greater Everglades, with a particular interest in the Florida panther.

4. Hughes is a Texas limited partnership engaged in the business of oil and gas exploration, which is registered to do business in the State of Florida. Hughes has applied for a permit to drill an exploratory well for oil in Collier County. If the well is commercially viable, Hughes must apply for an operating permit at a later time.

5. The Department has jurisdiction to issue permits for the drilling and exploring for, or production of, oil under part I, chapter 377. Pursuant to that authority, the Department reviewed the oil and gas well drilling permit application.

B. The Application and Project

6. After the application was deemed complete by the Department, it was distributed for comment to a number of local, state, and federal agencies. While some commented on the application, no agency had any unresolved concerns at the end of the application process. Hughes met all rule requirements for performance bonds or securities, and it provided all information required by rule.

7. The proposed site is located on the southeast corner of an active farm field in the Big Cypress Swamp watershed, just north of a speedway now used as a test track. Surface holes for oil wells are commonly located on farm land, and farm fields are compatible with oil wells. Based upon a mineral lease between

Hughes and the owner of the land, Collier Land Holdings, Ltd., Hughes has the right to locate and drill the well at the proposed surface hole location.

8. The Refuge was established by Congress in 1989 to protect the Florida panther and its habitat and is located approximately 20 miles east of Naples. Around 98 percent of the Refuge is closed to any public activity. The project is consistent with the comprehensive conservation plan for the Refuge prepared by the United States Fish and Wildlife Service (USFWS), in that the plan recommends "slant drilling" off of the Refuge.

9. Although Mosher and Preserve argue that the drill hole should be moved further east into wetlands, and Schwartz contends that it should be moved further west away from the Refuge, the proposed location of the drilling pad and project site is reasonable with respect to the nature, appearance, and location of the proposed drilling site. Likewise, the location is reasonable with respect to the type, nature, and extent of Hughes' ownership.

10. The proposed activity can best be characterized as a "resource play," where an operator drills toward a known resource. This is distinguished from a wildcat operation, where the operator is drilling in an unproven area. Hughes proposes to target the rubble zone (i.e., the lower zone) within the lower Sunniland formation, a geologic formation thousands of feet below

the ground surface that runs through southwest Florida. Hughes will first drill a vertical pilot hole and then drill horizontally from the hole bottom in a southeast direction toward a formerly drilled oil well known as the Tribal Well. In order to increase the probability of locating commercially available petroleum, Hughes plans to proceed from west to east in order to arrive at a perpendicular direction of existing limestone fractures as the drilling approaches the Tribal Well. When that well was drilled vertically into the rubble zone in the 1970s, oil rose to the ground surface. Thus, the indicated presence of oil is sufficient to warrant and justify the exploration for oil at this location.

11. The proposed depth of the pilot hole is 13,900 feet measured depth (MD/13,900 feet true vertical depth (TVD)), which will allow assessment of the upper Sunniland, lower Sunniland, and Pumpkin Bay Formations. If the evaluation determines that the well will likely be commercially productive, Hughes will complete a 4,100-foot horizontal leg in the lower Sunniland rubble zone with a landing depth at 12,500 feet MD/12,064 TVD and a total depth of 16,600 feet MD/12,064 feet TVD.

12. The footprint for the drilling pad will be 225 feet by 295 feet, or 2.6 acres, with a two-foot earthen berm around the perimeter of the operating area to contain all water on the site. A secondary containment area within the perimeter of the site will be covered by high-density polyethylene to contain and

collect any accidental spills. A drilling rig, generators, and other drilling equipment will be on the pad during drilling operations. A maximum of 20 persons will be at the site, and then only for one day of operations. At all other times, Hughes anticipates there will be a five-person drill crew plus support personnel on site. After drilling, Hughes will remove its equipment.

13. Once the access road is built and the equipment put in place, the drilling activities will take place 24 hours per day, seven days per week, and will be completed in approximately 60 to 70 days. The on-site diesel generators will run simultaneously 24 hours per day while drilling is taking place. The pad will be illuminated at night with lights on the drilling derrick and throughout the pad. Construction of the drilling pad will require trucking around 12,000 to 14,000 cubic yards of fill to the drilling location. Additional traffic for bringing in fill, piping, and related equipment will occur, but the exact amount of traffic is unknown.

14. The South Florida Water Management District (SFWMD) previously approved an environmental resource permit (ERP) to allow the construction and operation of a surface water management system on Camp Keais. The United States Army Corps of Engineers (USACE) also permitted the same system under the Clean Water Act. The latter permit requires mitigation for wetlands and Florida panther habitat compensation. Based on the proposed

wellsite, the SFWMD modified the ERP to allow a culvert and access to the proposed wellsite. In addition to the oil drilling permit application, Hughes has applied for two water well drilling permits from the SFWMD, and an injection well drilling permit.

C. Petitioners and Intervenor's Objections

15. The challengers have raised a number of objections that they assert require denial of the application. Conflicting testimony was presented on these issues, which has been resolved in Respondents' favor as being the more credible and persuasive testimony.

a. Mosher and Preserve

16. Mosher and Preserve raise two broad objections. First, they contend that hydrogen sulfide gas (H2S) is likely to be encountered in the drilling of the proposed well. They further contend that the H2S contingency plan submitted by Hughes is not sufficient to evacuate the public in the event of an incident where H2S is uncontrollably released under pressure. Second, they contend that the Committee did not review the application under the process contemplated by section 377.42(2). Except for these two objections, they agree that no other issues remain. See TR., Vol. I, p. 33.

17. Within the petroleum industry, drilling operators create H2S plans when there is reason to believe that the operator may encounter H2S while drilling. This practice is

codified in Florida Administrative Code Rule 62C-27.001(7), which requires a contingency plan only when H2S is "likely" to be encountered while drilling. The plan must "meet generally accepted industry standards and practices," and it must contain measures "for notifying authorities and evacuating civilians in the event of an accident." Id. See also rule 62C-26.003(3), which requires a contingency plan "if appropriate." The plan is prepared for two main users: the personnel working at the drilling site; and local emergency management officials, who must plan and train for the implementation of emergency activities.

18. The parties agree that the "generally accepted industry standards and practices" for the oil and natural gas industry are found in the operating standards and recommended practices adopted by The American Petroleum Institute (API), a trade association for the oil and natural gas industry. Recommended Practice 49 (API 49) is the generally accepted industry standard for oil and gas drilling operations likely to encounter H2S and was relied upon by all parties throughout the hearing. The standard includes guidance on personnel protection measures, personnel training, personnel protection equipment, and community contingency planning. API 49 recommends the use of a community warning and protection plan when atmospheric H2S exposures beyond the well site could exceed potentially harmful exposure levels and could affect the general public.

19. Mosher/Preserve's expert opined that H2S might be encountered at levels as high as 21 percent (210,000 parts per million (ppm)) in southwest Florida, and that "it's quite likely" H2S would be encountered at the proposed wellsite. At the same time, however, he agreed with the assessment of Respondents' experts that the likelihood of encountering H2S at this site was merely "possible," "sporadic," and "unlikely," and that there was "zero" potential of a severe H2S release under high pressure.

20. Florida has two major oil producing areas: the Sunniland Trend in southwest Florida and the Smackover formation near Jay, Florida, in the northwest part of the state. Unlike the Smackover formation which has higher temperatures and pressures and a high concentration of H2S, the Sunniland Trend has normal temperatures and pressures and a sporadic presence of H2S. Less than two percent of wells in southwest Florida have been reported to contain H2S, and those reports relate to production wells where bacteria (biological contamination) was likely introduced into the formation during production. Of over 300 oil wells drilled in southwest Florida, only six were reported to have encountered H2S. Notably, the Tribal Well, located 1.5 miles to the southeast of the proposed site, encountered relatively low pressure during drilling and had no H2S, and another well located 12 miles to the north likewise had no high pressure or H2S. It is unlikely that Hughes will encounter high pressure or H2S if it drills at the proposed site.

21. Even though it is unlikely that high pressure or H2S will be encountered during the drilling of this proposed well, Hughes still submitted an H2S contingency plan as part of the drilling application. The Department determined the plan provided an effective design to detect, evaluate, and control any hazardous release of H2S. In response to public concerns, in January 2014 Hughes revised its plan to provide more protections. The revised plan exceeds the guidance provided in API 49.

22. The revised plan clarifies and adds multiple protections, including implementing the plan at a vertical depth of 9,000 feet, which is 2,700 feet before the zone that Mosher claims could contain H2S; clarifying that an H2S alarm notification at 15 ppm would result in an instant well shut-in (i.e., closure of the well) to prevent the escape of H2S; instituting a reverse 911 call system to allow local officials to notify the public by telephone of any incident; creating an air dispersion model to understand the likelihood of public exposure; and adding H2S scavengers to the drilling mud.

23. Adding H2S scavengers in the mud is a protective measure. Specifically, the zinc oxide scavengers will react with H2S to create benign zinc sulfide and water. Even if H2S is present in the formation, the H2S scavengers will neutralize the H2S before it could reach the surface. The H2S scavengers will effectively eliminate the likelihood of H2S escaping from the well during drilling operations.

24. The drilling plan requires the Trinity C formation (which Hughes estimated will begin at a depth of around 11,850 feet) to be cemented off and sealed once drilled. This formation will not be encountered in the first 15 or 20 days of drilling. Once encountered, the formation will be exposed for only four to six days. Even if H2S were encountered during this short exposed duration, all of the protections included in the revised plan would be in place, including overbalanced drilling mud, H2S scavengers, blowout preventers, H2S monitors, and alarms.

25. When wells are drilled, there are numerous personnel monitoring the drilling fluid, or mud, which is designed not only to carry cuttings to the surface, but more importantly to act as a barrier to keep fluids or gasses in the geologic formation. The mud is weighted with additives to combat reservoir pressures. Drill operators want the same amount of mud pumped into the hole as the amount flowing back up. If more fluid is flowing back up, then the mud is not heavy enough to hold back the fluids or gasses encountered. If this imbalance occurs, the well is shut-in immediately and the mud weight is adjusted. A shut-in can be accomplished in just a few seconds. Anything in a shut-in well will stay in the well. Hughes' normal drilling plan is to slightly overbalance the mud weight. This ensures that nothing unintentionally escapes from the reservoir.

26. Mosher and Preserve contend that if H2S is encountered, dangerous concentrations of H2S would leave the wellsite. In

response to this type of concern, as part of the revised plan, Hughes conducted an air dispersion model using the methodology provided by API 49. The API 49 model is a Gaussian model with default values reflecting the worst-case exposures. The peer-reviewed and conservative model calculated by Dr. Walker looked at H2S concentrations of 10, 15, and 100 ppm. At the extreme case, a 100-ppm release at the well would be reduced below 10 ppm within about 20 feet from the well and further reduced to one ppm within 60 feet from the well. Although H2S is unlikely to escape the well, 100 ppm was selected as a precautionary level because this level is an immediate danger to human life and health. Reaching 100 ppm is highly unlikely because at an instantaneous reading of 15 ppm, the well is immediately shut-in.

27. The air dispersion model results demonstrate that atmospheric H2S exposures beyond the wellsite could not exceed potentially harmful exposure levels nor could exposures affect the general public. Thus, even though the plan includes a community warning and protection provision, it is not required under API 49.

28. In an abundance of caution, however, the plan provides for a public notification zone of 2,000 feet in case of an H2S release. This zone is two orders of magnitude beyond the 20-foot, 10 ppm distance dispersion of H2S based on the modeled worse case release and exceeds any required notification zones in other states. The notification boundary is conservative, as

compared with industry standards. While Mosher's expert recommended more stringent standards than API 49, he knew of no contingency plan for an oil drilling permit in the United States that included his recommended standards.

29. Mosher's expert testified that based on his review of literature, the lowest observable adverse effect from H2S was at concentrations of 2.1 ppm. Based on a worst case scenario release of 100 ppm of H2S, the gas would disperse to a concentration of 2.1 ppm in less than 40 feet from the well. The property boundary abutting the neighborhood to the west is over 800 feet from the well.

30. API 49 expressly provides that wellsite personnel should be provided protection devices if concentrations of H2S exceed 10 ppm for an eight-hour time-weighted average. The revised plan requires wellsite personnel to don a self-contained breathing apparatus if the monitors encounter an instantaneous reading of 10 ppm H2S. Instantaneous readings are more protective of human health than the time-weighted averages proposed by Mosher's expert. Using an instantaneous trigger is another area where the revised plan exceeds the recommendation of API 49.

31. The greater weight of evidence demonstrates that the H2S contingency plan meets or exceeds guidance of API 49. The revised plan requires hands-on training for public officials and fire/rescue staff before reaching the depth of 9,000 feet. The

revised plan further requires hands-on training and drills related to the procedures for use, and location of, all self-contained breathing apparatus and evacuation procedures. The plan is a complete and accurate contingency plan that will assist operators and local emergency management in the unlikely event of an H2S escape. It exceeds the degree of caution typically employed in industry standards.

32. Mosher and Preserve contend that the plan fails to include specific instructions and training for nearby residents in the event of an emergency. However, emergency plans are designed for use by operators at the facility and the local emergency management officials rather than nearby residents. Thus, the Department did not require the applicant to provide specific instructions for those residents.

33. Mosher and Preserve also contend that the plan fails to adequately describe the evacuation routes in the event of an emergency. However, evacuation routes and the potential closure of roads are normally in the domain of local governments, as the operator and Department have no control over this action.

34. Mosher and Preserve contend that the plan does not include complete and accurate information for all property owners in the area. This is understandable since some property owners either failed to respond to inquiries by Hughes when it assembled the information for the plan or were reluctant to provide any personal information. Recognizing this problem, the Department

reviewed the website of the Collier County property appraiser to complete the information. To the extent information on certain parcels may not be complete, Hughes can update that aspect of the plan on an on-going basis before operations begin. If a permit is issued, the Department will continue to coordinate with Collier County and other local emergency management officials for the purpose of planning to implement the contingency plan.

35. Based on the foregoing, the evidence establishes that the probability of a dangerous release of H2S beyond the wellsite is highly remote and speculative in nature. The revised contingency plan is consistent with industry standards and satisfies the requirements of the rule.

b. Schwartz

36. Like Mosher and Preserve, Schwartz agreed that except for the concerns expressed in his amended pleading, no other issues remain. Schwartz first contends that Hughes did not demonstrate sufficient efforts to select a proposed location for drilling to minimize impacts as required by rule 62C-30.005. Subparagraph (2)(b)1. requires that drilling sites be located "to minimize impacts on the vegetation and wildlife, including rare and endangered species, and the surface water resources." In particular, Schwartz is concerned about the potential impact on the Florida panther, an endangered species.

37. Hughes selected the proposed site primarily because of its proximity to the Tribal Well, which had a significant show of

oil. In order to increase the chances for commercial production, the horizontal segment of the well needs to be perpendicular to the natural fractures in the limestone. In this location, Hughes must drill horizontally from west to east in the direction of the Tribal Well.

38. Hughes was unable to locate the well on the automotive test track directly south of the agricultural field and west of the Tribal Well because of objections by Harley-Davidson, then the owner of the track. A second proposed location just east of the test track was considered but Harley-Davidson would not grant access from the track to the upland sites on the adjacent location. A third option was to construct a lengthy access road from the north to one of the upland sites just east of the test track. However, this alternative would have resulted in significant impacts to wetlands and native vegetation.

39. The proposed site offers the least amount of environmental impact. It is 1.5 miles from the Tribal Well. It has no federal or jurisdictional wetlands on the site, and groundwater modeling submitted with an application for a water use permit demonstrated that the proposed use of water will not adversely affect surrounding wetlands.

40. The proposed access road and drilling pad will not impact any cypress-mixed forest swamps, hardwood hammocks, mangrove forests, archeological sites, or native ceremonial grounds. Nor will they adversely affect known red-cockaded

woodpecker colonies, rookeries, alligator holes, research sites, or pine uplands.

41. The evidence establishes that Hughes chose a site that minimized environmental impacts.

42. Schwartz also contends that the wellsite activities will directly decrease the recovery chances of the Florida panther. According to Schwartz, this decrease will occur because the activities involve creating an access road, truck traffic, noise, lights, and vibrations. He also asserts that the proposed wellsite will result in a small amount of direct habitat loss when the cattle field is converted to a drilling pad.

43. The USFWS has developed a panther scientific habitat assessment methodology. It relies upon peer-reviewed studies that found that panthers will select land cover types while avoiding others. The methodology ranks the value of land cover types from zero to ten based on the potential for panther selection.

44. Applying the USFWS' scoring to the proposed wellsite, an improved pasture area has a value of 5.2, which means the land cover is neither actively selected nor avoided by panthers. The areas to the south and east of the proposed wellsite are forested wetlands and forested uplands, which have substantially higher values that range from 9.2 to 9.5. If converted to an open water reservoir under the Camp Keais ERP, the site value would be zero,

the land cover type most avoided by panthers. The underlying USACE permit specifically required panther habitat compensation.

45. Hughes' expert established that the proposed site minimizes impacts on wildlife by avoiding habitat selected by panthers such as wetlands, forested uplands, saw palmetto thickets, fresh water marshes, prairies, and native habitats. Based on a dozen visits to the site for the purpose of conducting vegetation mapping and wildlife surveys, the expert concluded there are no panthers currently known to be living, breeding, or denning on the site.

46. A home range for a panther is the area providing shelter, water, food, and the chance for breeding. The typical home range for a male panther is 209 square miles, and female home ranges average around 113 square miles. The evidence establishes the proposed drilling activity will not interfere with the panthers' use of the site. Approval of the permit will not remove or push any panthers out of their home range.

47. Hughes' expert opined that the four male panthers, which historically traversed the area within a mile of the proposed wellsite, would only likely move through the area every 15 or 20 months or longer. The temporary nature of the drilling activities means the panthers may not even be near the location during that time. If a panther is near the location and frightened by any activities, it will avoid the area, but will eventually return. Based on the large home range of the panther,

the temporary activities will not increase the likelihood of intraspecies aggression or decrease panther survivability.

48. The more persuasive evidence is that panthers are adaptable. They are habituated to the drilling operations in southwest Florida based on over a hundred thousand telemetry data points taken near 93 oil wells in the primary zone. Panthers are not threatened by the presence of humans. In fact, they live and den in and around residential communities and active agricultural operations.

49. Panthers need prey, water, and shelter. The drilling activities will not adversely affect prey availability or impact water resources. The proposed wellsite's location within a disturbed agricultural field will not impact the panther's ability to shelter.

50. During the permit review process, the Department requested input from the USFWS, the Florida Fish and Wildlife Conservation Commission (FFWCC), and other interested parties regarding the proposed drilling permit. No formal comments were offered by the USFWS, and its biologist for conservation planning indicated informally that the surface impacts from an oil well are "very minor." Likewise, the FFWCC offered no formal comments on the application.

51. The evidence supports a finding that the proposed permit activities will not affect the panther's use of, or travel to and from, the Refuge. The activities will not affect the

panthers' availability of prey or increase panther competition for food or home range territory. The drilling will not adversely affect the panther's breeding, survivability, or the recovery of the species.

52. The only other threatened or endangered species found in the vicinity of the proposed site was an eastern indigo snake, which was located two and one-half miles away and would not travel to the proposed wellsite, as its home range is up to a maximum of 450 acres.

53. Schwartz further contends that section 377.242 requires that the permit be denied because the proposed wellsite is within one mile from the seaward (western) boundary of the Refuge. The Refuge is located entirely inland and does not have a seaward boundary, as contemplated by section 377.242(1)(a)3. Therefore, no drilling will be located within one mile of the seaward boundary of any state, local, or federal park, aquatic preserve, or wildlife preserve. This is consistent with the Department's routine and long-standing interpretation of the statute.

D. Big Cypress Swamp Advisory Committee

54. Petitioners and Intervenor initially contended that the permit should be denied because a meeting of the Committee was never convened pursuant to section 377.42. The Committee, however, met on March 11 and 31, 2014. Although a majority of the Committee voted to recommend that the Department deny the permit on various grounds, the recommendation of the Committee is

not binding on the Department, and after consideration, was rejected. In their Proposed Recommended Orders, the opponents now contend that the permit should be denied because the Committee did not meet before the Department issued its proposed agency action. For the reasons stated in the Conclusions of Law, this contention is rejected.

CONCLUSIONS OF LAW

E. Standing

55. Respondents have not stipulated to the facts necessary to establish standing for the challengers. On this issue, the record shows that the opponents' substantial interests could reasonably be expected to be affected by the issuance of a permit. See, e.g., St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 52 So. 3d 1051, 1054 (Fla. 5th DCA 2011). Therefore, they have standing to challenge the permit.

F. Burden of Proof

56. The general rule is that, absent a statutory directive, the burden of proof is on the party asserting the affirmative of the issue. Therefore, Hughes has the burden of proving by a preponderance of the evidence that under the general permitting criteria in section 377.241, the Department should issue a permit.

G. Statutory Criteria

57. The Department issues permits under chapter 377 to persons with a lawful right to drill. See § 377.241, Fla. Stat.

When enacted by the Legislature in 1961, the overall purpose of the statute was to institute a permit process in order to protect landowners from undue burdens from mineral leases. See Fla. Wildlife Fed., Inc. v. Dep't of Envtl. Prot., Case Nos. 96-4222 and 96-5038, 1998 Fla. ENV LEXIS 136 at *10 (Fla. DOAH April 8, 1998; Fla. DEP May 22, 1998). However, this case does not concern a dispute between Collier Land Holdings, Ltd., the legal interests of the fee simple owner of the property, and Hughes, the mineral rights owner.

58. The statutory criteria for issuance of a permit for oil exploration are found in section 377.241. The statute reads in relevant part as follows:

> The [Department], in the exercise of its authority to issue permits as hereinafter provided, shall give consideration to and be guided by the following criteria:
>
> (1) The nature, character and location of the lands involved; whether rural, such as farms, groves, or ranches, or urban property vacant or presently developed for residential or business purposes or are in such a location or of such a nature as to make such improvements and developments a probability in the near future.
>
> (2) The nature, type and extent of ownership of the applicant, including such matters as the length of time the applicant has owned the rights claimed without having performed any of the exploratory operations so granted or authorized.
>
> (3) The proven or indicated likelihood of the presence of oil, gas or related minerals in such quantities as to warrant the

> exploration and extraction of such products on a commercially profitable basis.

59. The three criteria do not constitute a pass-fail checklist for an applicant or require a determination that they have been met; rather, they are guidelines for balancing interests. The statute should be interpreted as calling for a weighing process where each criterion is evaluated and then weighed against the other factors. Id. at *9. This approach was approved by the court in Coastal Petroleum Company v. Florida Wildlife Federation, Inc., 766 So. 2d 226, 228 (Fla. 1st DCA 1999).

60. Although not defined, the term "lands involved" in subsection (1) includes some area beyond the immediate footprint of the drilling pad that would be potentially impacted by pollution. Fla. Wildlife Fed. at *14. Besides balancing the interests of the property owner and Hughes, this means that potential risks to nearby off-site owners, such as Mosher, or potentially sensitive environmental lands, like the Refuge, must also be considered. Within this broad statutory charge, several rules cited by the opponents come into play. First, rule 62C-30.005(2)(b)4. requires that applicants for drilling permits within the Big Cypress watershed make "every effort" to locate their projects in areas covered by grazing, farming, or cleared lands. Rule 62C-27.001(7) requires that if H2S is likely to be encountered during the drilling operations, a contingency plan

that comports with API 49 must be filed. Finally, rule 62C-30.005(1)(a) requires that the drilling activity not cause any "permanent adverse impact on the water resources and sheet flow of the area, or on the vegetation or the wildlife of the area, with special emphasis on rare and endangered species."

61. Subsections (2) and (3) address the interests of the owner of the mineral rights. More specifically, subsection (2) directs the Department to consider the "nature, type and extent of ownership of the applicant," a consideration not in dispute, as Hughes has legally-secured mineral rights on the parcel. Subsection (3) requires the Department to consider whether the target of exploration is likely to provide commercially-viable oil production. In other words, is there evidence to show a proven or indicated likelihood of the presence of oil, or simply mere speculation that oil exists.

62. The greater weight of evidence shows that the permit requires the drilling pad to be located in the most environmentally sensible location. The evidence also demonstrates that the project will not harm any Florida panther habitat or the Florida panther as a species. With respect to the potential human risks of a H2S release, Mosher and Preserve were unable to present any persuasive evidence that would support the theory that the permitted operations would cause a discharge of H2S to any off-site locations at any dangerous concentrations, even in a worst case scenario. As to subsection (2), there is no

dispute that Collier Land Holdings, Ltd., has leased the mineral rights on the property to Hughes with the understanding that an exploratory well will be drilled. Finally, subsection (3) requires that there is a reasonable indicated likelihood, rather than a guarantee, that the site is commercially viable. Based on earlier drilling results at the nearby Tribal Well, there is a reasonable indicated likelihood that the site will be commercially productive.

63. Given the above considerations, there are no countervailing factors that would outweigh the interests of the applicant in pursuing its mineral rights. Therefore, a balancing of the three factors supports the issuance of the permit.

H. The Big Cypress Swamp Advisory Committee

64. Section 377.42 creates a five-member Committee and describes its duties. The relevant portion of the statute reads as follows:

> (2) The Big Cypress Swamp Advisory Committee is hereby created in the Department of Environmental Protection. The Big Cypress Swamp Advisory Committee shall be appointed by and serve at the pleasure of the Secretary of [the Department of] Environmental Protection. To ensure compliance with all requirements for obtaining a permit to explore for hydrocarbons in the Big Cypress Swamp area, each application for such permit shall be reviewed by the Big Cypress Swamp Advisory Committee. The committee shall have no final authority on approval or denial of permits but shall make recommendations to the department. The committee shall meet at the call of the chair to evaluate a pending application for a permit to drill in the Big

> Cypress watershed and may make other evaluations requested by the department. The membership of the committee shall be as follows:
>
> (a) The State Geologist, who shall serve as chair.
> (b) A representative from the oil industry.
> (c) A representative from an organized conservation group.
> (d) A botanist.
> (e) A hydrologist.
>
> (3) The committee shall administer this section pursuant to the laws of the state, and the rules and orders of the department which apply generally to oil and gas. If site-specific conditions require, the committee may recommend that additional procedures, safeguards, or conditions which are necessary to protect the integrity of the Big Cypress area be required as a condition to the issuance of a permit to drill and produce. (Emphasis added.)

65. The opponents contend that the statute contemplates that a meeting be conducted before the Department makes its preliminary determination on the merits of the application. They assert that they were prejudiced because the new information, witnesses, and recommendations generated by the Committee were not available for them to use during the de novo hearing. As noted earlier, the Committee did not meet until after the proposed agency action was issued and a de novo hearing conducted.

66. The purpose of a Committee meeting is not to gather information to assist third parties who challenge permits; rather, the Committee convenes meetings to evaluate "pending

application[s] for a permit to drill in the Big Cypress watershed" and, as appropriate, to submit non-binding recommendations to the Department. These recommendations may be accepted or rejected by the Department. While the convening of a meeting early on the process would promote the most efficient use of resources and a speedier determination of the case, the requirements of the statute were satisfied when the Committee met in March 2014 to evaluate Hughes' pending application and then submitted its recommendation to the Department.

67. Notably, the only statutory criteria by which the Department shall consider issuing permits under chapter 377 are found in section 377.241. None of the operative criteria require the Department to consider an evaluation that may be proffered by the Committee. Therefore, even assuming arguendo that the timing of the Committee meeting is a procedural oversight, it is irrelevant to the substantive criteria the Department is bound to follow within the four corners of section 377.241.

68. Finally, while unnecessary to a disposition of this case, the Committee recommendations appear to be beyond the jurisdiction of the Department or inconsistent with long-standing Department precedent. For example, concerns over truck traffic are typically addressed by local land use authorities, and there is no rule or statute mandating the preparation of a spill plan for an exploratory well. Likewise, the Department does not require an absolute assurance or guarantee on the part of a

permit applicant, as suggested by the Committee majority. See, e.g., Putnam Cnty. Envtl. Council v. Dep't of Envtl. Prot., Case No. 01-2442, 2002 Fla. ENV LEXIS 197 (Fla. DOAH July 23, 2002; Fla. DEP Aug. 6, 2002).

I. Setback Requirement

69. Schwartz contends that because the drilling pad is within one mile from the seaward (western) boundary of the Refuge, the permit violates section 377.242(1)(a)3. That provision reads as follows:

> No structure intended for the drilling for, or production of, oil, gas, or other petroleum products may be permitted or constructed within 1 mile of the seaward boundary of any state, local, or federal park or aquatic or wildlife preserve or on the surface of a freshwater lake, river, or stream.

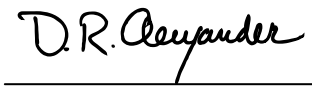
70. Under the Department's long-standing, routine interpretation of the statute, the Refuge is located entirely inland and therefore has no seaward boundary. However, Schwartz argues that the boundary closest to the ocean should be deemed a seaward boundary. Were this interpretation accepted, it would lead to an absurd result. See, e.g., Louzon v. State, 78 So. 3d 678, 681 (Fla. 5th DCA 2012)(a statute should not be construed so as to achieve an absurd result). The Department's interpretation of the statute is far more reasonable than the one advocated by Schwartz, and the contention that the project violates the setback requirement is rejected.

RECOMMENDATION

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

RECOMMENDED that the Department enter a final order issuing Permit No. 1353H, without further modifications.

DONE AND ENTERED this 3rd day of June, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of June, 2014.

ENDNOTES

[1] Although Schwartz represented himself at hearing, all papers filed by him in this proceeding, including his Proposed Recommended Order, have been prepared by unnamed counsel.

[2] Both Mosher (before hiring counsel in October 2013) and Schwartz (through one of his attorneys) knew well before the proposed agency action was issued in September 2013 that a meeting of the Committee had not been convened. However, they did not raise the issue until shortly before the final hearing in late February 2014.

[3] On May 27, 2014, or three months after the final hearing, Schwartz filed a Motion to Supplement the Record Regarding Location of Residence (Motion), together with an affidavit. The Motion is opposed by Respondents. The Motion represents that while Schwartz continues to receive mail at a post office box in

Fort Lauderdale, he no longer resides in Lake Worth and has moved to Estero in southern Lee County. The Motion further represents that its purpose is "to assist the appellate court(s) should an issue arise regarding the appropriate venue for any appeal that may be filed by one or more of the parties." If the appellate court requires assistance regarding the appropriate venue, the matter may be presented to the court. The Motion is denied.

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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.