

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALICO WEST FUND, LLC,

Petitioner,

vs.

Case No. 15-0572

MIROMAR LAKES, LLC, AND SOUTH  
FLORIDA WATER MANAGEMENT  
DISTRICT,

Respondents.

---

RECOMMENDED ORDER

On October 5 through 9, 2015, a hearing was held in Fort Myers, Florida, before D. R. Alexander, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kevin S. Hennessy, Esquire  
Matthew B. Taylor, Esquire  
Lewis, Longman and Walker, P.A.  
Suite 620  
101 Riverfront Boulevard  
Bradenton, Florida 34205-8841

For Respondent: Keith L. Williams, Esquire  
(District) South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406-3007

For Respondent: Martin L. Steinberg, Esquire  
(Miromar) David B. Massey, Esquire  
Justin S. Brenner, Esquire  
Hogan Lovells US, LLP  
Suite 2700  
600 Brickell Avenue  
Miami, Florida 33131-3085

Timothy J. Perry, Esquire  
Oertel, Fernandez,  
Bryant & Atkinson, P.A.  
Post Office Box 1110  
Tallahassee, Florida 32302-1110

STATEMENT OF THE ISSUE

The issue is whether to approve an Environmental Resource Permit (ERP) modification for the construction of a surface water management system, to be issued to Respondent, Miromar Lakes, LLC (Miromar), which will serve a 29.08-acre single-family residential development known as The Peninsula Phase IV (Phase IV) located in Lee County, Florida.

PRELIMINARY STATEMENT

On November 25, 2014, Respondent, South Florida Water Management District (District), published notice that it intended to approve an application by Miromar to modify previously-approved ERP Permit No. 36-03568-P, which provided conceptual authorization for residential development in an area known as the Miromar Lakes community. Alico West Fund, LLC (Alico), a competing developer that owns property adjacent to the proposed activity, timely requested a hearing to contest the agency action, and the matter was referred to DOAH to conduct a hearing. After Miromar revised its site plan in June 2015, Alico was authorized to file an Amended Petition.

At the final hearing, Alico presented the live testimony of four witnesses and the deposition testimony of seven witnesses.

Alico Exhibits 43-47, 52, 55-57, 59, 61, 63-65, 83, 88, 89, and 93 were accepted in evidence. Alico also proffered two exhibits. Miromar presented the testimony of one witness. Miromar Exhibits 5-10, 37, 38, 42, 43, and 45 were received in evidence. Miromar Exhibit 64, on which a ruling was reserved, is accepted. Miromar and the District jointly presented the testimony of two witnesses. Joint Exhibits JA1, J1-15, J31-33, J45, J47, J50, J51, J69-J72, J74, J82-84, J87, J93, J101-110, J116-120, J124-127, J141, J145, J149-151, J158, and J160 were accepted in evidence. Joint Exhibit 130, on which a ruling was reserved, is accepted. Eleven written motions filed by Miromar just before, or at the outset of, the final hearing were either ruled on at hearing, or if a ruling was reserved, they are rendered moot by the final disposition of the case. Alico's Motion to Strike Non-Record Materials in Respondents' Proposed Recommended Orders, filed on January 8, 2016, is denied, as those attachments are simply proposed permit conditions based on evidence presented at hearing.

An 11-volume Transcript of the proceeding was filed. The parties submitted proposed recommended orders (PROs), which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

### A. The Parties

1. Miromar is a Florida limited liability corporation that owns property in the Miromar Lakes community in Lee County on which a development known as Phase IV will be constructed.

Miromar is the applicant for the Phase IV permit.

2. The District is a government entity with the power and duty to exercise regulatory jurisdiction over the proposed project pursuant to part IV, chapter 373, Florida Statutes, and title 40E, Florida Administrative Code. In implementing this power and duty, the District has adopted the Applicant's Handbook (AH) to provide standards and guidance to applicants.

3. Alico is a Florida limited liability corporation with its principal place of business in Fort Myers, Florida. It is the owner of property immediately adjacent to and north of Miromar's property. Respondents have stipulated to the facts necessary to establish Alico's standing.

### B. The Conceptual Permit

4. This case concerns Miromar's application to modify a conceptual permit issued by the District more than 15 years ago. On June 10, 1999, the District issued ERP Permit No. 36-03568-P, a conceptual approval permit for the development of a large, mixed-use residential development with a golf course, known as Miromar Lakes, that lies east of Interstate 75 (I-75), south of

Alico Road, and north of Florida Gulf Coast University. The permit also approved a surface water management system designed to serve a 1481.1-acre mixed-use development within Miromar Lakes. Alico asserts that the permit is so vague in future development details that it is impossible to determine whether Phase IV is consistent with its terms and conditions. However, the 1999 permit was not contested, and any attempt in this proceeding to challenge that permit, or subsequent modifications to the permit that are now final, is untimely.

5. A conceptual permit is available to applicants who wish to have their design concept approved for a master plan or future plan. So long as the future phases are consistent with the conceptual permit and there are no changes to applicable state water quality standards or special basin criteria, the applicant does not need to reapply under the current rules for subsequent phases. Instead, it allows an applicant to take advantage of the rules in effect at the time of the original permit issuance.

6. A conceptual permit typically leaves construction details to future development decisions. As District witness Waterhouse explained, this is "the nature of a conceptual permit." Because the landowner does not know the precise manner in which the property will be developed years down the road, "it doesn't make sense to force the landowner to pretend that they

do because it's a pretty good bet that those things are going to change to some extent in the future." By way of example, Waterhouse noted that "[a]s long as it's single family proposed then and it's proposed now, I would characterize that as sufficient detail." It is not surprising, then, that the 1999 permit contains very little detail regarding the existence, location, or development of roads, lots, a stormwater management system, or grading, and that the construction permit for Phase IV has far more detail than the conceptual permit. Even Alico's expert agreed that there is no requirement that a conceptual permit include the details of each subsequent construction phase. A fair inference to draw is that the District intended for the developer to have considerable latitude in developing the large tract of undeveloped land, phase by phase, over the life of the conceptual permit.

7. The 1999 permit has been modified over 60 times since its issuance, and to date, significant portions of Miromar Lakes have been constructed. Except for the current, on-going feud between Miromar and Alico over several recent or pending applications (see Case Nos. 15-1050, 15-3937, and 15-5621), none of these modifications were contested.

C. The Property at Issue

8. Phase IV is a 29.08-acre subdivision within an area of the Miromar Lakes community known as the Peninsula. Located

within Basin 6, Phase IV is the last phase of development approved by the conceptual permit for residential development in the Peninsula. All prior Peninsula phases have been permitted and developed, or are in the process of development. Prior phases were permitted based on their consistency with the conceptual permit, and none were challenged by third parties.

9. The area under Miromar's requested permit in the instant case was conceptually authorized for single-family residential development. This is confirmed by language in the 1999 permit, which describes the conceptual proposal for Basin 6 as "includ[ing] 639.7 acres of residential, golf course, and mixed-used [sic] development." Jt. Ex. 3, p. 275. The permit also provides that each of the four sub-basins in Basin 6 should "have a water quality structure that provides treatment for the first one inch of stormwater runoff from the sub-basin . . . and that attenuation for Basin 6 is achieved onsite via the proposed sub-basin lakes and also by an existing 244.2-acre borrow lake." Id. While the 1999 permit establishes standards for flood control elevations, minimum lot elevations, and discharge rates, more specific development guidance is not provided.

10. When the conceptual permit was issued, Basin 6 contained one former mining pit dredged from uplands to be used as a man-made lake for recreational purposes. A second mining pit, later converted to a lake, continued mining operations

until 2006. The following year, the District authorized the two borrow lakes to be connected by a series of channels and canals, forming a privately-owned, 660-acre waterbody now known as Lake 5/6. Alico's property includes Lake 5, which makes up the northern portion of Lake 5/6, while Lake 6 to the south, owned by the Miromar Lakes Community Development District, is surrounded by Miromar's development. Alico has an easement over portions of Lake 6 for recreational uses under a Lake Use Agreement. Because the two connected lakes are to be used only for recreation and attenuation purposes, Lake 5/6 is designated as Class III waters and cannot be used for stormwater treatment. It is not classified as an Outstanding Florida Water (OFW) or an Impaired Florida Waterbody.

11. Lake 5/6 discharges over a control weir into an unchanneled slough system known as the Stewart Cypress Slough. The water travels several miles through the slough system, passes several intervening properties that also discharge waters into the slough, and then runs underneath I-75. It eventually reaches the Estero River, an OFW and Impaired Florida Waterbody, which flows into the Estero Bay, an OFW. There is no direct discharge of waters from Lake 5/6 to the Estero River. The evidence shows that the project will not increase the overall discharge rate from the control weir for Lake 5/6.



12. In February 2013, the District approved another Miromar application, known as Phase III, which authorized the third phase of development within the same peninsula where the Phase IV project will be located. That development contains two wet detention structures (Lakes 1 and 3) that will also service the Phase IV project. The Phase III permit was issued using the 1999 rules and regulations and was not contested.

D. The Application

i. The Original Application

13. On November 25, 2014, the District issued its notice of intent to issue Miromar a permit authorizing the construction and operation of a stormwater system serving 29.08 acres of residential development that included multi-family residences, single-family residences, 49 boat slips, and road construction. Phase IV is a very small portion of the 1,481-acre development approved in the conceptual permit.

14. The project is located on Via Salerno Way and Via Cassina Court within Basin 6. Construction was originally proposed in Sub-Basins 1 and 3. There is an approved Master Plan for stormwater management facilities within the project area. The site was previously cleared and filled and no wetlands are located on the site.

15. The original construction in Sub-Basin 1 consisted of a roadway, 22 single-family residential lots, and stormwater

conveyance facilities. Also included were shoreline contour shaping, placement of rip-rap on portions of the Lake 5/6 shoreline to enhance stability, enhanced littoral zones, and boat docks. Stormwater within that Sub-Basin flows via sheet flow and interconnected inlets to the existing wet detention area (Lake 1) located in Phase III north of the site. The wet detention area provides the required water quality treatment volume for the project prior to discharge to Lake 5/6.

16. The original proposed construction in Sub-Basin 3 consisted of a roadway, 11 single-family residential lots, and 16 multi-family buildings with associated internal roadway, parking areas, and stormwater treatment, storage, and conveyance facilities. Also included within the original plans were shoreline contour shaping, placement of rip-rap on portions of Lake 5/6 shoreline to enhance stability, enhanced littoral zones, and boat docks.

17. Stormwater runoff within Sub-Basin 3 flows via sheet flow and interconnected inlets to the existing wet detention area (Lake 3) located in Phase III north of the site. The original application included a request to increase the surface area of Lake 3 by approximately 0.1 acre and to construct three dry detention areas within the multi-family development area. The wet and dry detention areas provide the required water

quality treatment for the project prior to discharge to Lake 5/6.

ii. The Revised Project

18. After the case was referred to DOAH, by letter dated June 8, 2015, Miromar's project engineer provided the District with proposed changes to the site plan, to be used at the final hearing then scheduled to begin on June 24, 2015, which include the replacement of 16 multi-family buildings and driveways on Via Cassina Court with 23 single-family residential lots; removal of the 16 multi-family boat docks located at the southern end of Via Cassina Court; reducing the number of boat docks to 45 single-family docks; relocation of the three dry detention areas shown on the proposed site plan; and clarification of the lot grading cross-section to ensure that stormwater runoff from the development will be directed to the stormwater management system and not Lake 5/6. Updated plans, drawings, and specifications, and new water quality calculations accompanied the letter and were intended to replace original Exhibits 2.0 and 2.3 of the permit. See Jt. Ex. JA-1, pp. 244-257. The changes resulted in a continuance of the final hearing and Alico's filing of an Amended Petition. By amendment at final hearing, Miromar removed the 45 single-family docks.

19. The June 8 letter states that the changes will not increase pollution or reduce the efficiency of the stormwater

management system. Miromar acknowledges that some of these changes were to resolve concerns raised by Alico. Miromar now seeks approval of the Phase IV permit, incorporating the changes proposed by the June 8 letter and those agreed to at the final hearing.

20. Because there was no requirement to provide a site-specific nutrient loading analysis when the 1999 permit was issued -- this analysis was not yet formally developed -- the District did not require, and Miromar did not submit, such an analysis with its application.

21. Under the conceptual permit, Miromar was required to provide treatment for one inch of stormwater runoff in Basin 6. Relying on this condition, Miromar applied that treatment to the Phase IV permit. This results in the treatment of 7.09 acre-feet of stormwater for the basin. After the construction shown in the permit, the stormwater management system will treat 9.21 acre-feet, or more than is required under the 1999 permit.

22. The District established that new flood routing calculations for the project were not necessary because Miromar has set elevations for the water control structures in Lakes 1 and 3 at the same level as the road elevations, and the project connects to an existing surface water treatment system. This provides reasonable assurance that the project will not cause flooding despite having no calculations from the applicant.

E. Alico's Objections

23. Although couched in different terms, Alico's concerns can be generally summarized as follows. First, it contends the application should be treated as a major modification of the conceptual permit and that Miromar must satisfy current rules and regulations, and not those in effect in 1999. Second, it contends both the original and revised applications are inconsistent with the conceptual permit and must be treated as a new design, subject to all current rules and regulations. Third, even though Miromar agreed at hearing to revise its permit to address certain errors/deficiencies identified by Alico's experts, Alico contends no revisions can be made at this stage of the proceeding, and that a new application must be filed with the District and the review process started anew.

i. Is the Application a Major or Minor Modification?

24. If the modification is minor, Miromar is required only to satisfy applicable rules for issuance of a permit when the conceptual permit was issued. Rule 62-330.315 and AH section 6.2.1 provide guidance in resolving this issue.

25. Rule 62-330.315(2)(g) defines a minor modification as one "that do[es] not substantially alter the permit authorization, increase permitted off-site discharge, increase the environmental impact of the project, decrease required

retention, decrease required detention, decrease required flood control elevations, or decrease pollution removal efficiency."

26. The rule also provides that the "factors that will be considered in determining whether a change is minor are described in section 6.2.1 of Volume I [of the Applicant's Handbook]." Section 6.2.1(d) lists a series of 14 factors to be considered in determining whether a modification will cause more than minor changes under rule 62-330.315(2). None of the factors is dispositive alone, and the presence of any single one of the factors does not necessarily mean that a modification is major. All 14 factors are considered together in determining whether a modification is major.

27. Using the factors set forth in rule 62-330.315(2), in conjunction with section 6.2.1, the District reviewed the application to determine whether it was a minor modification. Based on these criteria, the District determined that the application qualified as a minor modification of a conceptual permit and that it satisfied applicable rules for issuance of a permit for this subsequent phase of the project. Alico contends that the initial review by a District staffer was only cursory and was in no way a meaningful assessment. Even if this is true, subsequent reviews by District staff, including witness Waterhouse, who supervises the ERP Bureau, was a signatory on the 1999 permit, and has reviewed thousands of ERP applications,

confirmed that the application, as revised on June 8 and at final hearing, meets the criteria for a minor modification. The testimony of District witnesses Waterhouse and Waters has been accepted as being the most credible on this issue.

28. In its review of the original application, the District considered the inclusion of boat docks as the only aspect of the application that made the project a major modification. In all other respects, the District determined that the modification would not cause more than minor changes. With the removal of the boat docks, the District concluded that the application did not substantially alter the design of the activities or the conditions of the conceptual approval permit.

29. Alico's expert, who has never performed a similar consistency analysis on any project, testified that several of the 14 factors in section 6.2.1(d) might be affected. But he opined with certitude that factor 2 is implicated by the Phase IV permit. Factor 2 comes into play when there is an "[i]ncrease in proposed impervious and semi-impervious surfaces more than 10 percent or 0.5 acres, whichever is less, unless the activities were permitted with stormwater treatment and flood attenuation capability sufficient to meet the permitting requirements for the proposed modification." By citing only one factor, the expert implicitly conceded that the other 13 factors are not present, thus weighing towards a finding of consistency.

30. Alico's expert focused only on the first part of factor 2 by calculating the impervious area of the project, as he did not believe the conceptual permit approved a master stormwater management system capable of sufficiently meeting the treatment and attenuation requirements for the Phase IV project. However, the more persuasive evidence is that the Master Plan in the 1999 permit is capable of meeting the treatment and attenuation requirements for the project. Therefore, factor 2 is not implicated by the Phase IV permit. Even if the factor were present, it would be insufficient to outweigh the other 13 factors and render the project a major modification of the 1999 permit.

31. The preponderance of the evidence supports a finding that the District may consider as minor the revised application.

ii. Consistency with the Conceptual Permit

32. A consistency analysis is conducted under two related rules. First, rule 62-330.315 identifies when a subsequent permit is either a major or minor modification of a prior conceptual permit. As found in the previous section of this Recommended Order, the modification is minor. Second, rule 62-330.056 provides a rebuttable presumption that subsequent consistent development phases are likely to meet the applicable rules and regulations if the factors listed in subsections (7) (a) through (7) (d) are met. The primary factors for



consistency comparison are identified in subsection (7) (a) as "the size, location and extent of the activities proposed, the type and nature of the activities, percent imperviousness, allowable discharge and points of discharge, location and extent of wetland and other surface water impacts, mitigation plans implemented or proposed, control elevations, extent of stormwater reuse, detention and retention volumes, and the extent of flood elevations." Subsections (7) (b) and (c) provide that in order to have consistency, there can be no changes to state water quality standards, in this case the standards for Lake 5/6, or special basin criteria. There is no evidence that applicable state water quality standards or special basin criteria have changed. Finally, subsection (7) (d) requires that there can be no substantive changes to the site characteristics. Except for the conceptual permit, there is no requirement that the District compare the Phase IV permit with any other permit.

33. The District views the location and the land use type of the project as the two most important criteria for determining consistency. As required by the rule, the District also compares the environmental impacts of the modification to the conceptual permit, control elevations, and discharge rates. The District credibly determined there is no inconsistency.

34. While some site characteristics in Basin 6 have obviously changed over the last 16 years, the District's review

found no substantive changes that would affect whether the design concepts approved in the conceptual approval permit can continue to be reasonably expected to meet the conditions for authorizing construction of future phases. The District credibly determined that the activities in Phase IV, as revised, were similar to or less intensive than those authorized in the conceptual approval permit and may actually provide a net benefit to Lake 5/6.

35. Alico contends that a meaningful consistency analysis was not conducted by the District staffer who reviewed the original application. But subsequent reviews by witnesses Waterhouse and Waters confirmed that Phase IV, as revised, is consistent with the conceptual permit based upon the rule and AH criteria.

36. Besides the District's review, Miromar's expert testified that Phase IV is consistent in land use as a single-family residential development. He also testified that the Phase IV permit was consistent with the 1999 permit in size and location; it maintained the same allowable rate of stormwater discharge; and it maintained required flood control elevations. He further testified that the Phase IV permit did not change the mitigation plans, permitted stormwater reuse, flood routings, or storm stages provided by the 1999 permit. This testimony has been credited in resolving the issue.

37. The preponderance of the evidence supports a finding that the Phase IV land uses are the same as contemplated in the conceptual permit and the already-approved prior phases of Miromar Lakes, and the new permit is consistent with the conceptual permit. Therefore, Miromar is entitled to a rebuttable presumption that it meets the applicable rules and standards in place when the 1999 permit was issued. Alico failed to rebut this presumption.

iii. Revisions and Amendments at the Final Hearing

38. During the final hearing, Alico's experts identified several errors and/or deficiencies in the design of Miromar's project, described below, that should be addressed before a permit can be issued. Miromar agrees with some of these concerns and asks that they be addressed through revisions incorporated into its permit. The District also concurs with these changes. The record shows that they are appropriate, minor in nature, and do not change the character of the permit. There is no evidence that Alico is prejudiced by allowing these revisions.

39. Alico's expert testified that the Phase IV permit does not provide sufficient information regarding the soils on the Phase IV site. At hearing, Miromar agreed that any unsuitable soils discovered during construction would be excavated and removed and correctly disposed of in a landfill or other

uplands. This is the common method of dealing with soils in Lee County, where it is not unusual to find unsuitable soils during construction. A special condition to this effect should be included in the final permit to ensure clarity.

40. Through a series of treatment ponds, Miromar proposes to treat nearly all stormwater that falls on-site prior to its discharge to off-site properties. Alico's expert testified that the lot grading detail drawings inaccurately reflect the elevations of certain portions of the lots and can result in runoff from some lots being routed to Lake 5/6, instead of Lakes 1 and 3. Miromar agrees with this concern and represented that the intent of the June 8 letter is that drainage for all lots, except for the portion of lots within the 20-foot Lake Maintenance Easement (LME), which surrounds the project on three sides, be directed to the front of the lots toward the street, and then to the treatment ponds. Water that falls naturally within the LME will be treated by attenuation in Lake 5/6 prior to off-site discharge. Miromar also agrees to submit new Tabular Lot Grading Revisions and a new Typical Lot Grading Detail and to update its June 8 plans to reflect proposed lot grading elevations consistent with the lot detail. Alico's expert acknowledged that roof gutters are an additional solution, and they should be installed on all roofs in order to direct runoff to the front yards and then to the stormwater

system. Finally, to ensure proper lot drainage, Miromar agrees that the secondary drainage pipes to convey runoff from roofs, gutters, and grassed areas will have a minimum size of six inches. The District agrees that these changes will improve water quality and ensure that all stormwater is properly captured and directed into the stormwater system. A special condition requiring these revisions should be included in the final permit to ensure clarity.

41. Alico's expert also testified that the plans should include a requirement that Miromar follow best management practices (BMPs) for the replacement of a control structure in Lake 3, which serves as a stormwater treatment pond. General Condition 3 already addresses this issue by requiring Miromar to use BMPs that prevent adverse impacts to the water resources and adjacent lands. In addition, the June 8 letter provides plans for BMPs for work at the site, including Lake 3. Although the District found that reasonable assurances were provided by General Condition 3 and the June 8 letter, to ensure clarity, a special condition should be included in the final permit that requires the use of BMPs for all construction, including the replacement of an old boat ramp and the control structure in Lake 3. Miromar and the District agree that this revision is appropriate.

42. Alico's expert opined that control structures CS-1 (Lake 1) and WQS-1.3 (Lake 3), which have a circular bleeder orifice with a four-inch diameter, should be limited to a bleeder orifice of 3.7 inches in diameter. Although the District found reasonable assurances existed with four-inch bleeder orifices, Special Condition 3 should be modified to reflect a 3.7-inch bleeder for these control structures. This will ensure that before being discharged, the water leaving the two control structures receives the appropriate amount of water quality treatment. Both Miromar and the District agree that this revision is appropriate.

43. With the removal of all docks and an old boat ramp, Special Conditions 2, 10, 11, and 13 through 17 require modification, or deletion if necessary, to eliminate obsolete language relating to the docks and ramp and to add language to provide that construction and operation of the docks shown on the plans, specifications, and drawings are not authorized. Miromar and the District agree to these revisions.

iv. Other Concerns

44. Alico's expert contended that under current District rules, Miromar is required to provide stormwater treatment equal to the greater of (a) one inch multiplied by the total project acreage, and (b) 2.5 inches multiplied by the project's impervious area. However, Alico did not pursue this issue in

its PRO, probably because its expert agrees that the current design of the project meets District rule criteria for one inch of water quality treatment.

45. Alico's expert also contends that Miromar is required to provide an additional 50 percent of stormwater treatment above the one-inch requirement. This is contrary to the conceptual permit, which does not require additional stormwater treatment. Also, the requirement does not apply when there is no direct discharge of stormwater into an OFW. Even so, Miromar voluntarily agreed to increase the stormwater treatment capacity for Phase IV, which results in excess treatment in Basin 6 greater than 50 percent above the treatment required for the Phase IV area. Alico argues that the additional treatment is illusory, as it relies on additional treatment from an adjoining phase, and not Phase IV. Even if this is true, Alico's expert admits that the current one inch treatment meets the requirements of the rule for issuance of a permit.

46. Alico's expert contended that the Phase IV permit allows the bulkhead to be developed on more than 40 percent of total shorelines, in contravention of AH section 5.4.2, Volume II, which restricts a bulkhead to no more than 40 percent of the lake perimeter. However, Miromar's expert established that the Phase IV hardened shorelines would comprise less than 40 percent of the total shoreline in the Phase IV area and

therefore comply with this requirement. His testimony was not credibly refuted.

47. Even though there is no direct discharge from the project into the Estero River or Estero Bay, and the project will not result in higher discharge rates from the overall system outfall from Lake 5/6, based on water samples taken in August 2015, Alico's expert opined that the project will cause a discharge of excess nutrients into an OFW. The evidence shows, however, that these water samples were taken after heavy rains when the expert observed water flowing upstream from the slough into Lake 5/6, rather than downstream. The expert also admitted he had done no testing, analysis, or modeling demonstrating that any pollutant would even reach the Estero River. He failed to take a baseline sample of water quality for any nutrients for which the slough, Estero River, or Estero Bay may be impaired, and he conceded that it was possible that there was no net discharge from Lake 5/6 into the slough during the time of his testing. There is insufficient evidence to sustain this allegation.

48. Other alleged deficiencies or errors in the application, as revised, that are not addressed in this Recommended Order have been considered and found to be without merit.



F. ERP and Public Interest Criteria

49. The criteria the District uses when reviewing an ERP application are contained in the AH and rules 62-330.301 and 62-330.302. In addition, an applicant must provide reasonable assurance that a proposed project is not contrary to the public interest. § 373.414, Fla. Stat.; AH § 10.2.3.

50. Alico failed to prove by a preponderance of the evidence that Miromar has not provided reasonable assurance that the activities authorized by the ERP comply with all applicable ERP permitting criteria.

51. Alico failed to prove by a preponderance of the evidence that Miromar has not provided reasonable assurance that the proposed project is not contrary to the public interest.

CONCLUSIONS OF LAW

52. The parties have stipulated to the facts necessary to establish that Alico has standing to contest the permit.

53. Section 120.569(2)(p) is applicable to this case. It establishes the order of presentation and burden of proof in a permit challenge case under chapter 373. Once Miromar has introduced evidence sufficient to constitute a prima facie case, as it did here, Alico has 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.

54. The standard of proof is by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat.

55. 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). "Any additional information necessary to provide reasonable assurance that the proposed [project] would comply with the applicable . . . standards could be properly provided at the hearing." Id. See also Key Biscayne Council v. State, Dep't of Nat. Res., 579 So. 2d 293, 294-95 (Fla. 4th DCA 1991) (absent a showing of prejudice, it is an abuse of discretion to deny a request to amend, even if made on the day of the hearing); Fla. Bd. of Med. v. Fla. Acad. of Cosmetic Surgery, Inc., 808 So. 2d 243, 255 (Fla. 1st DCA 2002) (a party is not precluded from amending its application during the hearing if there is no showing of prejudice to the opposing party). The additional information provided at hearing is necessary to provide reasonable assurances that the proposed activity will comply with applicable standards. There is no evidence that Alico will be prejudiced by the amendments or revisions.

56. There is ample authority for approving permits with new conditions, if changes are supported by the evidence at the final hearing. See, e.g., Heine v. Alico West Fund, LLC, Case No. 15-1049 (Fla. DOAH Nov. 3, 2015; SFWMD Dec. 16, 2015); Jacobs & Solar Sportsystems, Inc. v. Far Niente, II, LLC, Case No. 12-1056 (Fla. DOAH Apr. 26, 2013; SFWMD May 20, 2013); Bussing v. Gainesville Renewable Energy Ctr., LLC, Case No. 10-7281 (Fla. DOAH Dec. 7, 2010; Fla. DEP Dec. 27, 2010); Peace River/Manasota Reg. Water Supply Auth. v. IMC Phosphates Co., Case No. 03-0791 (Fla. DOAH May 9, 2005; Fla. DEP July 31, 2006); Billie v. St. Johns River Water Mgmt. Dist., Case No. 00-2230 (Fla. DOAH Apr. 9, 2001; SJRWMD June 13, 2001); Sauls v. McAllister, Case No. 79-2030 (Fla. DOAH Feb. 12, 1980; Fla. DER Mar. 13, 1980); Long v. Okaloosa Cnty., Case No. 79-0876 (Fla. DOAH Mar. 28, 1980; Fla. DER May 15, 1980). See also Manatee Cnty. v. State, Dep't of Env'tl. Reg., 429 So. 2d 360, 363 (Fla. 1st DCA 1983); Hopwood v. State, Dep't of Env'tl. Reg., 402 So. 2d 1296, 1299 (Fla. 1st DCA 1981). While they are rather large in number, the permit revisions agreed to by Miromar are supported by the evidence and may be incorporated into the permit.

57. 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 (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 challenger's burden. See Chipola Basin Prot. Grp., Inc. v. Fla. Dep't of Env'tl. Reg., Case No. 88-3355 (Fla. DOAH Nov. 14, 1988; Fla. DER Dec. 30, 1988).

58. As previously found, by a preponderance of the evidence, Miromar has provided reasonable assurance that the proposed activity, as revised, will satisfy all ERP criteria and will not be contrary to the public interest.

59. As previously found, the Phase IV project, as revised, is a minor modification to the conceptual permit and is consistent with all applicable terms and conditions.

60. In summary, Alico has failed to meet its burden of proving that the permit should not be issued, as revised.

#### RECOMMENDATION

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

RECOMMENDED that the South Florida Water Management District enter a final order approving Miromar's application, as revised, for a permit modification, subject to the following additional conditions:

1. That the plans, drawings, and specifications submitted with the June 8 letter that appear in Joint Exhibit JA-1, pages 244-53, be used as Exhibit 2.0 of the permit.

2. That the water quality calculations submitted with the June 8 letter that appear in Joint Exhibit JA-1, pages 254-57, be used as Exhibit 2.3 of the permit.

3. That Special Conditions 2, 10, 11, and 13 through 17 be revised or eliminated to remove obsolete language relating to the removal of the boat docks and boat ramp.

4. That Special Condition 10 be revised to require that all construction, including the removal of the boat ramp and replacement of Control Structure No. 3, be conducted using BMPs.

5. That a new special condition be added to reflect that the construction and operation of docks will not be authorized by the permit.

6. That a new special condition be added with new Tabular Lot Grading Revisions and a revised Typical Lot Grading Detail and address the following: the project shall be constructed to ensure that stormwater from the project, except stormwater from within the LME, is routed to the stormwater treatment system

prior to discharge to Lake 5/6; the lot grading on all lots shall be in accordance with the revised lot grading to reflect the high point of the lots located adjacent to the LME to ensure that runoff from the lots is directed to Lakes 1 and 3; that the revised lot grading require the installation of six-inch secondary drainage pipes; and that roof gutters be installed on all roofs to ensure that runoff from the residential lots is directed to the stormwater treatment system.

7. That a new special condition be added to address unsuitable soils encountered during construction and to ensure that they are removed and disposed of in an appropriate manner.

8. That Special Condition 3, relating to discharge facilities, be revised to reflect that a 3.7-inch circular orifice will be installed in Sub-Basins 1 and 3, rather than a four-inch orifice shown in the existing plans.

DONE AND ENTERED this 27th day of January, 2016, 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](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 27th day of January, 2016.

COPIES FURNISHED:

Peter Antonacci, Executive Director  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406-3007  
(eServed)

Kevin S. Hennessy, Esquire  
Lewis Longman & Walker, P.A.  
Suite 620  
101 Riverfront Boulevard  
Bradenton, Florida 34205-8841  
(eServed)

Brian J. Accardo, General Counsel  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406-3007  
(eServed)

Keith L. Williams, Esquire  
South Florida Water Management District  
3301 Gun Club Road  
West Palm Beach, Florida 33406-3007  
(eServed)

Martin L. Steinberg, Esquire  
Hogan Lovells US, LLP  
Suite 2700  
600 Brickell Avenue  
Miami, Florida 33131-3085  
(eServed)

Timothy J. Perry, Esquire  
Oertel, Fernandez,  
Bryant & Atkinson, P.A.  
Post Office Box 1110  
Tallahassee, Florida 32302-1110  
(eServed)

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.