

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

INDIAN RIVER FARMS WATER CONTROL  
DISTRICT,

Petitioner,

vs.

Case No. 16-6165

ALL ABOARD FLORIDA - OPERATIONS,  
LLC; RAM LAND HOLDINGS, LLC;  
J. ACQUISITIONS BREVARD, LLC;  
AND ST. JOHNS RIVER WATER  
MANAGEMENT DISTRICT,

Respondents.

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RECOMMENDED ORDER

The final hearing in this case was held on January 20, 2017,  
by video teleconference at sites in Sebastian and Tallahassee,  
Florida, before Bram D.E. Canter, an Administrative Law Judge of  
the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether All Aboard Florida - Operations, LLC ("the Applicant"); Ram Land Holdings, LLC ("RLH"); and J. Acquisitions Brevard, LLC ("JAB"),

are entitled to the Environmental Resource Permit ("ERP") issued by the St. Johns River Water Management District ("SJRWMD") for construction and operation of certain railway facilities within the portion of the Florida East Coast Railway corridor known as Segment D08 (the "Project").

PRELIMINARY STATEMENT

On August 26, 2016, SJRWMD gave notice of its intent to issue ERP No. 135214-2 to the Applicant, RLH, and JAB, pursuant to chapter 373, Florida Statutes (2016). The Applicant is developing an express passenger rail service between Miami and Orlando, known as the All Aboard Florida Project. RLH and JAB own conservation parcels, which will be used for mitigation of wetland and surface water impacts associated with the Project.

On or about August 29, 2016, the Petitioner, Indian River Farms Water Control District, filed a petition challenging the ERP, because the proposed new bridges for the Project had not been approved by Indian River Farms' engineer. SJRWMD dismissed the petition and, on September 26, 2016, the Petitioner filed an amended petition.

SJRWMD referred the amended petition to DOAH and filed a motion to dismiss, in which the Applicant joined. The motion argued that the amended petition raised issues that were not cognizable in this proceeding. The motion to dismiss was granted, but leave was granted to file an amended petition

containing relevant factual allegations and citations to relevant statutes and rules.

On November 3, 2016, the Petitioner filed a second amended petition, which the Applicant and SJRWMD again moved to dismiss. An Order was entered striking all claims in the second amended petition arising under chapter 298, but otherwise denying the motion. The Order limited the issues in the case to Petitioner's claims that (1) the lowest horizontal beams of the proposed bridges would be constructed below flood elevations, which would cause flooding, and (2) the proposed bridges would cause sand bars to form in the Petitioner's canals, which would interfere with canal functions.

Official recognition was taken of Florida Administrative Code Chapters 40C-4 and 62-330, as well as the ERP Applicant's Handbook Volume I ("A.H., Vol. I"), and the SJRWMD Permit Information Manual ("A.H., Vol. II").

At the final hearing, the Applicant presented the testimony of its Executive Vice President of Rail Infrastructure, Adrian Share, P.E.; Matthew Neddeff, P.E., who was accepted as an expert in hydrologic and hydraulic engineering and modeling; and Jeffrey PeQueen, P.E., who was accepted as an expert in hydrologic and hydraulic engineering and modeling. The Applicant's Exhibits 1-25 were admitted into evidence.

The Petitioner presented the testimony of its Superintendent, Secretary, and Treasurer, David E. Gunter; and George A. Simons, P.E., who was accepted as an expert in civil engineering. The Petitioner's Exhibit 2 was admitted into evidence.

SJRWMD presented the testimony of its Supervising Professional Engineer, Fariborz Zanganeh, P.E., who was accepted as an expert in water resource engineering; and its Chief Engineer for the Environmental Resource Regulation Program, Cameron Dewey, P.E., who was accepted as an expert in water resource engineering. SJRWMD's Exhibit 23 was admitted into evidence.

The one-volume Transcript of the final hearing was filed with DOAH. The Petitioner, the Applicant, and SJRWMD each submitted proposed recommended orders which were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

##### The Parties

1. The Petitioner is a water control district organized under chapters 189 and 298, Florida Statutes. It owns and maintains the North, Main, and South Canals in Indian River County.

2. The Petitioner manages drainage works for approximately 55,000 acres within Indian River County situated west of the

Indian River Lagoon between U.S. 1 and I-95, including portions of the City of Vero Beach.

3. The Applicant, All Aboard Florida - Operations, LLC, is a Delaware limited liability company headquartered in Miami, Florida, formed for the principal purpose of developing and operating express passenger rail service connecting the four largest urban population centers in Southern and Central Florida--Miami, Fort Lauderdale, West Palm Beach, and Orlando. This project is known as the All Aboard Florida Project.

4. Respondents, RAM Land Holdings, LLC, and J. Acquisitions Brevard, LLC, are third-party mitigation providers. The parties stipulated that RLH and JAB are not necessary parties to this proceeding.

5. SJRWMD is an independent special district created by chapter 373, charged with the duty to prevent harm to the water resources of the District and to administer and enforce chapter 373 and the rules promulgated thereunder. The proposed project is within the boundaries of the District.

#### The Proposed Project

6. Most of the Applicant's passenger service route, including the portion which will pass through Indian River County, will use an existing railroad right-of-way established in the late 1800s by Henry Flagler, the founder of the Florida East Coast Railway ("FECR").

7. The FECR rail corridor runs along Florida's east coast from Miami to Jacksonville. It was designed to support passenger and freight operations on shared double mainline tracks and was in use from 1895 to 1968. The passenger service was then terminated and portions of the double track and certain bridge structures were removed. The freight service continued and remains in operation today.

8. The Project would restore the passenger service that once existed on the FECR rail corridor. The passenger service route will utilize the FECR right-of-way from Miami to Cocoa Beach and then continue along a new segment to be constructed along a limited-access highway system which runs inland from Cocoa Beach to Orlando.

9. The Applicant is proposing to upgrade the portion of the FECR right-of-way between Miami and Cocoa Beach by, among other things, replacing existing railroad ties and tracks and reinstalling double tracks.

10. This proceeding involves only Segment D08 of the proposed Project. Segment D08 runs from the southern edge of Indian River County to Cocoa Beach in Brevard County.

11. In Segment D08, the existing FECR railway includes bridges which cross the North Canal, Main Canal, and South Canal owned and maintained by the Petitioner. The bridges are referred to as the North Canal Bridge, the Main Canal Bridge,

and the South Canal Bridge. Each bridge supports a single track.

12. The Project calls for adding new bridges alongside the three existing bridges over the canals so that the crossings will again accommodate two tracks.

13. The Petitioner's objections to the proposed permit are confined to the proposed bridges at the North Canal and South Canal.

14. The new bridge at the North Canal would be constructed along the west side of the existing bridge. The new bridge at the South Canal would be constructed along the east side of the existing bridge.

#### Obstruction of Water Flow

15. The Petitioner's main objection to the proposed project is that the proposed new bridges over the North Canal and South Canal are too low to allow clearance during a 100-year storm event, which would cause water flow to be obstructed. The Petitioner believes floating debris is likely to be blocked and accumulate at the bridges, causing water to back up and flood lands upstream of the bridges.

16. The Petitioner's Superintendent, David Gunter, testified that there were "a couple of events where debris backed up either at a bridge or a culvert." However, he said



none of the Petitioner's ratepayers ever had a flooding event that was attributable to the FECR bridges.

17. The new bridges would be constructed with the same low chord/beam elevations (lowest part of the bridge) as the existing bridges that would remain. For the existing bridge and the proposed new bridge over the North Canal, the low beam elevation is 13.1 feet NAVD88 (North American Vertical Datum 1988). For the existing bridge and the proposed new bridge at the South Canal, the low beam elevation is 8.5 feet NAVD88.

18. Because the proposed new bridges would be at the same height above the canals as the existing bridges, the potential problem the Petitioner is concerned about--floating debris being trapped by the bridges--is already a potential problem. The Petitioner did not claim or present evidence to show that the new bridges would increase the probability that floating debris would be trapped, over and above the current probability for such an event.

19. The Petitioner argued that "two wrongs don't make a right," and the new bridges should not be approved even though they are at the same height as the existing bridges. Obviously, the Petitioner wants the existing bridges raised, too.

20. Based on the FEMA Flood Insurance Rate Maps used by the Applicant, the 100-year flood elevation at the North Canal bridge is 11.5 feet NAVD88, or 1.6 feet below the low beam

elevation of the North Canal Bridge. The 100-year flood elevation at the South Canal Bridge is 9.3 feet NAVD88, or 0.8 feet below the low beam elevation of the North Canal Bridge.<sup>1/</sup>

21. The Applicant's consultants performed hydrologic and hydraulic analyses for the proposed new bridges using a HEC-RAS model which was adapted to local site-specific conditions and incorporated FEMA flood level data. They determined that in a 100-year storm event, the new bridge at the North Canal would cause no more than a 0.04-foot (0.48 inches) increase in water levels immediately upstream (within 500 feet) of the bridge, and the new bridge at the South Canal would result in no more than a 0.07-foot (0.84 inches) increase in water levels immediately upstream. These were considered insignificant impacts that would not cause flooding to upstream properties.

22. The Petitioner disputes the Applicant's determination that there is a 1.6-foot clearance at the North Canal Bridge and a 0.8-foot clearance at the South Canal Bridge. The Petitioner asserts that the FEMA elevations used by the Applicant are not based on the best available data, and the best available data show the 100-year flood elevations are higher.

23. The Petitioner calculated higher 100-year flood elevations using SJRWMD flood stage gages in the canal near the North bridge and the Petitioner's own hydrologic model. The Petitioner determined that the low beam at the North Canal

bridge is 0.6 feet below the 100-year flood level, and the low beam at the South Canal bridge is 1.5 feet below the 100-year flood level.<sup>2/</sup> In other words, the Petitioner contends there is no clearance.

24. The Petitioner's witness, Simons, testified about why he thought FEMA did not use the Petitioner's water level data and analysis in determining 100-year flood elevations for the FEMA flood maps, but the testimony was largely hearsay.

25. SJRWMD's Applicant's Handbook refers to the use of FEMA flood level data for these kinds of analyses, but it also refers to the use of "detailed information" possessed by SJRWMD. See Section 3.3.4, A.H., Vol II. Information possessed by SJRWMD would likely include data from their own water level gages.

26. The Petitioner did not present sufficient evidence to prove their data and modeling was more accurate or reliable than FEMA data and the Applicant's modeling. FEMA flood insurance rate maps are a standard reference in the industry. The HEC-RAS model is a generally accepted tool used by engineers for this kind of analysis.

27. None of the parties presented evidence to make clear what is the usual or industry protocol for choosing between conflicting data of this kind in the permitting process.

28. The Petitioner has the burden of proof on disputed issues of fact and failed to carry its burden on this disputed issue. It is found, therefore, that the Applicant's use of FEMA data and the HEC-RAS model was reasonable.

29. The Petitioner admitted that the 100-year flood elevation in the canals has been increasing over time because of the conversion of land uses in the area from agricultural to urban. Because the Petitioner regulates discharges to its canals, it has some responsibility for the rising water levels in its canals.

30. The Petitioner claimed that reduced clearance was due in part to the bridges from "age, use, lack of maintenance, frugality or causes other than design." However, the Petitioner presented no supporting evidence for this allegation in the record.

31. In its regulatory role, the Petitioner requires a minimum clearance of one foot between a bridge's lowest horizontal beam and the 100-year flood elevation to avoid obstruction of water flow through the canals.

32. SJRWMD rules do not specify that bridges be designed to have a minimum clearance above the 100-year flood elevation.

33. The applicable design standards for flood protection in the Applicant's Handbook are set forth in Section 3.3.2(b), A.H., Vol. II, which provides in pertinent part as follows:

Floodways and floodplains, and levels of flood flows or velocities of adjacent streams, impoundments or other water courses must not be altered so as to adversely impact the off-site storage and conveyance capabilities of the water resource. It is presumed a system will meet this criterion if the following are met:

\* \* \*

(b) A system may not cause a net reduction in the flood conveyance capabilities provided by a floodway except for structures elevated on pilings or traversing works. Such works, or other structures shall cause no more than a one-foot increase in the 100-year flood elevation immediately upstream and no more than one tenth of a foot increase in the 100-year flood elevation 500 feet upstream.

34. The bridges would not cause more than a one-foot increase in the 100-year flood elevation immediately upstream or more than one tenth of a foot increase in the 100-year flood elevation 500 feet upstream.

35. Therefore, the Applicant is presumed to have provided reasonable assurance that the Project would not cause adverse flooding to on-site or off-site property, or adversely impact the existing surface water storage and conveyance capabilities of the North Canal or South Canal.

36. The Petitioner argues that the SJRWMD criteria fail to account for floating debris. The Petitioner claims that bridge designers are obliged to follow basic design guidelines published by FDOT and other government agencies and provide

clearance for floating debris, but Petitioner did not offer into evidence these "basic design standards" or prove their industry-wide acceptance.<sup>3/</sup>

37. SJRWMD's engineer, Fariborz Zanganeh, stated that the potential for floating debris to be blocked by a bridge or any other traversing work is considered by SJRWMD to be an operation and maintenance issue, not a design issue.

38. The Petitioner referred to some road bridges in the area that, upon reconstruction, were raised by county, state, or federal governments to comply with the Petitioner's clearance requirement. First, it is noted that the Applicant does not propose to reconstruct the existing North Canal Bridge and South Canal Bridge. Second, there is a substantial difference between the effort and cost of raising a road and raising a railroad track.

39. Raising the proposed bridges would require elevating the railroad bed for a considerable distance in each direction so that slopes comply with railway safety criteria.

40. The Petitioner failed to prove the Project does not comply with SJRWMD flood control criteria.

#### The Sand Bar

41. The Petitioner also objects to the proposed bridge at the North Canal because the Petitioner contends the existing bridge pilings have caused a sand bar to form, and shoaling and

erosion would likely increase with construction of additional pilings. The Petitioner believes the problem is caused by the fact that the existing and proposed pilings, which would have the same alignment, are not parallel to water flow in the canal.

42. There are sand bars upstream of the bridge which cannot have been caused by the bridge pilings.

43. The North Canal, which runs downstream almost due east makes a turn to the northeast under the North Canal Bridge. The record evidence, as well as generally known facts of which the Administrative Law Judge may take official recognition, establish that a change in the direction of water flow in a channel creates non-uniform flow, which can cause erosion and shoaling.

44. The Petitioner did not present evidence to distinguish between shoaling and erosion that could be caused by the pilings and shoaling and erosion that could be caused by the turn in the canal. The Petitioner did not call a witness for this subject who had special knowledge of the science of hydraulics and no study was done by the Petitioner to confirm its theory of the cause.

45. The Petitioner has the burden of proof on disputed issues of fact and failed to carry its burden on this disputed issue.

46. The Applicant asserts that the conditions of the proposed permit provide for maintenance that would include "the removal of any buildup of siltation that might occur over time and potentially cause the North Canal Bridge structure to cease operating as designed." However, whether the bridge is operating as designed would not address whether the canal is operating as designed because of shoaling.

47. There is no condition in the proposed permit that imposes on the Applicant the duty to remove built-up sediment beneath the North Canal Bridge. It is unlikely that such a requirement can be imposed on the Applicant because it does not own or control the canal.

48. The Petitioner claims the railroad authority denied the Petitioner access to the right-of-way when it sought permission in the past to remove the sandbar at the North Canal Bridge. Unfortunately, a permit condition that requires the Applicant to cooperate with the Indian River Water Control District in performing canal maintenance at the bridges is probably not enforceable.

#### CONCLUSIONS OF LAW

##### Jurisdiction

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



### Standing

50. For a petitioner to have standing, it must show that it has a substantial interest that would be affected by the proposed agency action. See § 120.52(13)(b), Fla. Stat.

51. The Petitioner presented evidence demonstrating that its interest could be affected, which is sufficient to establish standing in this proceeding. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

### Burden and Standard of Proof

52. The ERP was issued under chapter 373. After the applicant for a chapter 373 permit has presented its prima facie case for entitlement to the permit by entering into evidence the application, relevant materials supporting the application, and the agency staff report or notice of intent to issue the permit, the challenger has the burden of ultimate persuasion to show the applicant is not entitled to the permit. See § 120.569(2)(p), Fla. Stat. The Applicant and SJRWMD presented a prima facie case for entitlement to the ERP. Therefore, the burden of ultimate persuasion was on the Petitioner to prove their case in opposition to the permit.

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

54. Issuance of an ERP requires a demonstration of reasonable assurance from the applicant that the activities authorized will meet the applicable criteria contained in Florida Administrative Code Rules 62-330.301 and 62-330.302, and related provisions in the Applicant's Handbook, Vol. I and II.

55. The term "reasonable assurance" means a demonstration that there is a substantial likelihood of compliance with standards. See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not mean absolute guarantees.

#### Applicable Laws and Rules

56. The parties stipulated that the Project complies with the conditions for issuance in rules 62-330.301(1)(a), (d), (e), (f), (g), (h), (i), (j), and (k) and 62-330.302. Based on the parties' stipulation, what remains at issue is whether the Applicant has provided reasonable assurance that the construction, operation, and maintenance of the North Canal Bridge and South Canal Bridge meet the conditions for issuance in rule 62-330.301(1)(b) and (c).

57. This is not a rule challenge proceeding. Therefore, whether these rules should be amended to better accomplish the regulatory objectives are not questions which can be considered.

58. Rule 62-330.301 provides in relevant part:

To obtain an individual or conceptual approval permit an applicant must provide reasonable assurance that the construction, alteration, operation, and maintenance removal, or abandonment of the projects regulated under this chapter:

\* \* \*

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities; . . . .

59. The Petitioner argues that the Project violates rule 62-330.301(1)(b) and (c) because the Project would cause adverse flooding to offsite properties and adverse impacts to existing surface water storage and conveyance capacities. The Petitioner failed to prove that the Project would violate these rules.

60. The Project complies with the design standards for flood protection in the Applicant's Handbook. The only hydraulic analyses offered into evidence show the addition of the proposed new bridges would have no impacts on upstream and downstream properties and only de minimis impacts on the conveyance capacity of the canals.

61. The Petitioner argues that the bridge designs show defects "on their face" because of the lack of adequate clearance between the low beam of the bridges and the water elevation in the canals during a 100-year flood event. By this

argument, the Petitioner is suggesting that its own one-foot clearance requirement should be an inferred design criterion and must be imposed by SJRWMD. That argument is inconsistent with the prohibition against non-rule policy. See § 120.56(4), Fla. Stat. There is no SJRWMD rule like the Petitioner's rule that imposes a minimum clearance.

62. Furthermore, the Petitioner did not demonstrate that the new bridges would cause flooding that would not already occur during a 100-year storm because of the height of the existing bridges.

#### 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 approving the issuance of Environmental Resource Permit No. 135214-2, with the conditions set forth in the Technical Staff Report dated August 26, 2016.

DONE AND ENTERED this 30th day of March, 2017, in  
Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of March, 2017.

ENDNOTES

<sup>1/</sup> In its proposed recommended order, the Applicant describes the FEMA 100-year flood elevations as "11.5 to 12.0 ft. NAVD88" (North Canal bridge) and "9.0 to 10.0 ft. NAVD88" (South Canal bridge), but there was no explanation why the elevations would be expressed in ranges, rather than as single points. The application documents show single numbers, 11.5 feet and 9.3 feet, respectively. See AAF Ex. 12, p. 4, and AAF Ex. 14, p. 5.

<sup>2/</sup> Petitioner did not challenge the proposed new bridge over the Main Canal, presumably because there is a clearance of 4.1 feet between the lowest horizontal beam and the FEMA 100-year flood elevation.

<sup>3/</sup> Because the Petitioner contends there is no clearance when the water in the canals is at the 100-year flood elevation, it is unclear why floating debris was Petitioner's focus at the final hearing, rather than the obstruction of flow caused by the bridges themselves.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.