

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARMEN DIAZ,

Petitioner,

vs.

Case No. 19-5831

NORTHWEST FLORIDA WATER
MANAGEMENT DISTRICT, AND PALAFOX,
LLC,

Respondents.

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on February 19 and 20, 2020, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge of the Division of Administrative Hearings (“the Division”).

APPEARANCES

For Petitioner: Jefferson M. Braswell, Esquire
116 Northeast 3rd Avenue
Gainesville, Florida 32601

For Respondent, Northwest Florida Water Management District:

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Matthew E.W. Bryant, Esquire
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For Respondent, Palafox, LLC:

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STATEMENT OF THE ISSUE

Whether Environmental Resource Permit No. IND-073-288406-1 (the “Permit”) should be issued as proposed in the notice issued by Respondent Northwest Florida Water Management District (the “District”).

PRELIMINARY STATEMENT

On September 12, 2019, the District issued its Notice of Final Agency Action to issue the Permit to Respondent, Palafox, LLC (“Palafox”). Palafox had applied for the Permit from the District for a project known as Market District Housing (the Project”) located at the intersection of Palafox Lane and Martin Hurst Road in unincorporated Leon County. The Permit will authorize the construction of a surface water management system that has been designed to serve the Project.

Petitioner lives in Palafox Preserve Subdivision and timely filed a Petition for Formal Proceedings to challenge the Permit, which was dismissed by the District with leave to amend. Petitioner timely filed an Amended Petition for Formal Proceedings, which the District forwarded to the Division on October 30, 2019, for assignment of an administrative law judge. The Amended Petition challenges the District’s issuance of the Permit on the basis that her property will be adversely affected by the stormwater discharge authorized by the Permit, and that it will result in adverse impacts to an on-site wetland, as well as to wildlife that benefits from the wetland.

This case was originally assigned to Administrative Law Judge Francine Ffolkes, who scheduled the final hearing for February 19 and 20, 2020. This case was transferred to the undersigned on November 15, 2019, following Judge Ffolkes' Order Granting Petitioner's Second Amended Motion for Recusal. Shortly after reassignment of the case to the undersigned, Petitioner filed a Motion to Recuse the undersigned, which was denied, as well as an Amended Motion to Recuse, which was also denied.

The final hearing commenced as scheduled on February 19 and 20, 2020, in Tallahassee, Florida. At the final hearing, Petitioner presented the testimony of Mark Cooper, P.E. and Cheryl Poole, P.E., as fact witnesses; and Andrew Carswell, P.E., who was accepted as an expert in stormwater management. Petitioner offered Petitioner's Composite Exhibit 1A and Exhibits 4, 5, 16 and 31, which were admitted in evidence.

Palafox presented the testimony of Mark Thomasson, P.E., who was accepted as an expert in stormwater engineering and Environmental Resource Permit ("ERP") permitting, and Gary Zins. The District presented the testimony of Andrew Joslyn, the District's agency representative, who was accepted as an expert in environmental permitting.

Respondents introduced Joint Exhibits 1A and 1B (the "Permit File"), which were admitted in evidence. Palafox introduced Palafox Exhibits 2 through 8, which were admitted in evidence. The District introduced District Exhibits 2 and 11, which were admitted in evidence, and presented three Demonstrative Exhibits—12 through 14—which were not admitted in evidence.

Palafox's Motion for Official Recognition of Recommended and Final Orders was granted and Official Recognition was taken of the Recommended

Order in DOAH Case No. 18-2734, the Final Order issued in that case by the Leon County Board of County Commissioners, and the Closing Order in Florida Board of Professional Engineers Case No. 2016052464.

The three-volume Transcript of the final hearing was filed with the Division on March 10, 2020. The undersigned granted an extension of time allowing the parties to file their proposed recommended orders by April 9, 2020. The parties timely submitted Proposed Recommended Orders which have been considered by the undersigned in preparation of this Recommended Order.

FINDINGS OF FACT

Parties

1. Palafox is a Florida limited liability company and is the applicant for the Permit. Palafox owns Lot 1, Block B, of the Palafox Preserve Subdivision, the six-acre property on which the Project is proposed for development. Palafox is the sole member of the Palafox Preserve Commercial Property Owners Association.

2. The District is a Florida water management district having the duty and authority to regulate Florida's water resources within its jurisdiction and to administer and enforce Chapter 373, Part IV, and Chapter 403, Florida Statutes, and the rules promulgated and authorized thereunder in Florida Administrative Code Chapter 62-330.

3. Petitioner, Carmen Diaz, is the owner of Lot 18, Block A, of the Palafox Preserve Subdivision, which is west of the Project and separated from the Project by a conservation easement owned by the Palafox Preserve Homeowners' Association (the "HOA").

The Project

4. The Project is a 36-unit multi-family residential development proposed on approximately 2.68 acres of Lot 1, Block B, of the Palafox Preserve

Subdivision. The Project is adjacent to, and immediately west of, Martin Hurst Road, and adjacent to, and immediately south of, Palafox Lane. The remainder of Palafox's Lot 1, Block B, property runs to the west of the Project and south of Palafox Lane, and is located within a larger perpetual conservation easement (the "conservation easement").

5. Petitioner's property is a residential lot located west of, and not adjacent to, Palafox's property. A portion of Petitioner's property is located within the conservation easement. Between Petitioner's property and Palafox's property is a portion of the conservation easement owned by the HOA.

6. The conservation easement covers approximately nine acres, approximately seven of which is wetlands. The conservation easement straddles the boundary between Block A and Block B, with about two-thirds in Block A, owned, for the most part, by the HOA; and one-third in Block B, wholly owned by Palafox.

7. Palafox's property, Petitioner's property, and the conservation easement are all located within the same closed basin. This means that stormwater within the basin will be maintained within the basin in all storm events up to and including a 100-year, 24-hour storm.

8. Existing Palafox Preserve Subdivision stormwater management facilities ("SWMF") Nos. 6 and 7 are constructed in platted drainage easements on Lots 11 through 19 in Block A. SWMFs Nos. 6 and 7 are constructed in a horseshoe shape adjacent to the conservation easement and are designed as detention facilities. Stormwater above the detention volume is discharged to the conservation easement wetlands.

9. The SWMF to be authorized by the Permit, SWMFs Nos. 6 and 7, and the conservation easement containing the wetlands, are within the localized closed basin. There is another SWMF to the west behind the homesites located on Lots 1 through 7 that is numbered SWMF No. 5. SWMF No. 5 is

not within the localized closed basin, and discharges to the Lake Jackson drainage basin.

10. The closed basin also contains an emergency “pop-off” or outfall which allows for water from the wetlands to be discharged to the west if it reaches a certain elevation, which, based on the plans, is 223.57 feet. The outfall was designed to mimic pre-development conditions and only discharges if the 100-year, 24-hour storm is exceeded. If discharged, the water would travel west, through drainage easements to SWMF No. 5, and ultimately to Lake Jackson.

11. The record does not support a finding that waters in the closed basin have ever risen high enough to trigger the pop-off. The only record evidence showed that Tallahassee has never recorded a 100-year, 24-hour storm event.

Petitioner’s Challenges

12. Petitioner maintains the Project will cause adverse water quantity impacts to receiving waters and adjacent lands; adverse flooding to on-site and off-site property; adverse impacts to existing surface water storage and conveyance capabilities; and adversely impact the value and functions provided to fish, wildlife, and listed species, by wetlands and other surface waters, contrary to the governing administrative rules.

13. Further, Petitioner alleges the permit is contrary to state requirements that the permittee own or control the property to which stormwater is discharged, and that the wetland must be properly delineated as a state jurisdictional wetland.

Palafox’s Environmental Resource Permit Application and Modeling Report

14. Palafox submitted its Permit application to the District on August 6, 2019. In support of its application, Palafox submitted, among other things, project drawings, background materials, and a stormwater modeling report, prepared by Blackhawk Engineering, Inc. (“Blackhawk”).

15. The Permit application seeks approval of a SWMF that will consist of a dry detention with filtration stormwater pond that is to be constructed in

the northeast corner of the Project site. The design calls for a side-bank sand filter with a minimum of two-feet of sand, which filters impurities out of the water as it flows through it. The filtered water then travels through two perforated pipes within the side bank filter that sit below the pond and discharge from a concrete retaining wall onto Palafox's property. The sand filter controls the rate of discharge from the pipes. The stormwater pond proposed here is a common pond design in this area of the state.

16. The pond is also designed with a 10-foot concrete overflow weir set at an elevation of 228.5 feet. If water rises to this level, it will also discharge through the weir onto Palafox's property.

17. For stormwater ponds utilizing detention with filtration, the District's ERP rules require the pond to be able to treat at least one inch of runoff for the drainage area. This is known as the treatment volume. For this property, the treatment volume is 12,716.33 cubic feet of water.

18. The Project was designed to meet Leon County's more restrictive requirement to treat at least 1.125 inches of runoff from the drainage area. Consequently, the pond has more treatment volume than required by ERP rules, and will hold and treat over 14,000 cubic feet of water under the weir under that runoff scenario. That water can be recovered in 15.84 hours. The ERP criteria requires recovery in less than 36 hours.

19. As part of the application, Palafox submitted a stormwater modeling report prepared by Blackhawk. The report documents the results from a numerical model that represents the amount of runoff in a basin. The modeling program used was Interconnected Channel and Pond Routing ("ICPR"). ICPR is a widely accepted modeling system within both the stormwater engineering profession and the regulatory community.

20. The model calculates the amount of runoff generated by a storm event, then simulates the stormwater management process, including detention of the stormwater within the designed facility, as well as calculating the rate and amount of discharge through pipes and weirs.

21. For the Project, the model compared the pre-development and post-development conditions of the closed basin in storm conditions up to and including a 100-year, 24-hour storm scenario.¹ That comparison shows an increase in discharge of 9,630 cubic feet of water from Lot 1B in a 100-year, 24-hour storm event. The result is an increase of 0.384 inches in the water elevation in the wetlands from pre-development to post-development conditions.

Water Quantity and Flooding Impacts

22. Petitioner alleges the Project will create a flood risk because it will replace an existing stormwater retention facility on Lot 1B, that does not discharge into the wetlands, with a detention facility that does. Petitioner maintains that the additional discharge will significantly increase the amount of water flowing into the wetlands and damage her property, as well as the wetland's value.

23. The existing pond, however, was designed to retain only the additional runoff from Lot 1B generated by construction of the subdivision entrance road, Palafox Lane. The existing pond does not serve the residential portion of the subdivision. Runoff that flowed into the wetlands before construction of the road (i.e., in pre-development conditions) is not retained in the existing pond.

24. The ICPR addresses the effect of replacing the existing pond by comparing pre-development conditions with post-development conditions to document the performance of the new pond. As already noted, the increase in wetland water elevation is negligible. Any rise would be contained within the existing conservation easement.

25. In support of her claims, Petitioner introduced the testimony of Andrew Carswell, who was accepted as an expert in stormwater management. Mr. Carswell testified, that, based on his calculations, the

¹ The 100-year, 24-hour storm scenario is Leon County's standard for environmental permitting.

Project would contribute 505,000 cubic feet of water to the wetland over a period of one year. In Mr. Carswell's opinion, the wetland would be overwhelmed, causing the basin to overflow in the direction of the lowest elevation—Lot 18, owned by Petitioner, and the adjacent Lot 19.

Mr. Carswell explained that the topography of Lots 18 and 19 is very steep, which would cause stormwater to travel faster, scouring and eroding the subject properties.

26. However, Mr. Carswell did not model the stormwater system, or otherwise perform a simulation to determine staging of particular storm events in the basin. Mr. Carswell performed a simple water balance calculation, utilizing average annual rainfall amounts and evapotranspiration rates he found online for Tallahassee. His testimony was unclear whether the calculation included any percolation rate for the wetland area itself. Based on his calculation, Mr. Carswell concluded the basin would collect ten inches of water a year, with none of that water ever leaving the closed basin. Under Mr. Carswell's analysis, the basin would fill up quickly.

27. Mr. Carswell admitted, however, that if he wanted to actually predict the incremental contribution of a stormwater discharge from a project into a closed basin, he would utilize a model similar to the one submitted by Palafox in support of this Project. He has never used only his water balance calculation in support of a stormwater pond in a permitting context.

28. Palafox introduced the testimony of Mark Thomasson, its environmental consultant on the Project, who also assisted the project engineer in developing the Permit application. Mr. Thomasson was accepted as an expert in stormwater engineering and ERP permitting.

29. In Mr. Thomasson's opinion, Mr. Carswell's calculation is not a reliable way to determine whether the Project will create a flood risk in the subdivision. He opined that the water balance calculation is too simplistic—simply adding an entire year's worth of rainfall into a closed basin. It is a method of approximating average runoff rates, atypical in the regulatory

flood setting. As Mr. Thomasson explained, a stormwater engineer can use simple math for the initial abstraction—how much rainfall the ground will soak up before it will runoff—but must rely upon a continuous simulation model, such as the ICPR, for calculating stormwater behavior after initial rainfall and absorption.

30. Next, Petitioner introduced evidence aimed at undermining Palafox's stormwater modeling in support of the Project. Mr. Carswell testified that, when modeling in a closed basin, the seasonal high-water mark must be used as the starting water elevation, and that Palafox erred in not doing so.

31. However, Mr. Carswell admitted that not all closed basin analyses he has performed used the seasonal high-water mark. Mr. Thomasson made clear that consideration of the high-water mark is not necessary when analyzing a pre-versus-post condition in a closed basin, because the relevant standard is the delta—the difference in surface water elevation.

Mr. Thomasson further explained that starting with the lower elevation is the more conservative approach because a closed basin is like a bowl, narrower at the bottom, so adding water at a lower elevation will actually lead to a higher delta.

32. Mr. Thomasson's testimony was more credible and reliable than Mr. Carswell's on the issue of the professionally-acceptable method for determining whether the Project meets the standards for an ERP.

33. As to Petitioner's concern with adverse flooding of her property, the evidence demonstrated that Petitioner's house is at an elevation over 224 feet—nearly two feet above the 100-year high water elevation established by the Poole Engineering report that shows where such a storm would rise to in the basin. That 224-foot elevation is also higher than the emergency pop-off, which is at 223.57 feet. As previously noted, there was no evidence that water has ever risen that high in the closed basin, or that Tallahassee has recorded a 100-year, 24-hour storm event. Furthermore, Mr. Carswell's opinion that the Project would result in flooding of Lots 18 and 19 assumed

conditions in which the emergency pop-off drain was clogged, or otherwise ceasing to function properly.

34. Petitioner's property currently contains a designed stormwater pond that connects by way of a drainage easement in her backyard. Under current conditions, Petitioner can expect to see water standing in that pond after a sufficient rain event, before the water eventually filters and drains into the wetland. The evidence does not support a finding that the post-development condition would result in adverse flooding to Petitioner's property.

Wetlands and Environmental Impacts

35. Petitioner maintains that Palafox does not have the legal right to discharge water onto Petitioner's property. The evidence, however, showed that Palafox will be discharging onto its own property, albeit a narrow strip thereof. If there is a significant enough storm event, treated stormwater will make its way downhill and commingle with water in the shared wetlands. There was no evidence, however, that Palafox will discharge directly onto any other landowner's property, or that any discharge from Palafox's pond will directly impact Petitioner's property, which also discharges into the wetlands.

36. Assuming, *arguendo*, that the facility for which Palafox seeks permit approval did discharge directly into the wetland, Section 2.5 of Applicant's Handbook, Volume II, would govern said discharge. That section specifically authorizes discharge of stormwater by an applicant to "waters of the state," which includes wetlands. It also authorizes discharge of stormwater to multiple-owned properties.

37. Water flowing off of the HOA's property and Petitioner's property is captured by the wetland as well. The wetland is owned in part by Palafox, in part by the HOA, and in part by Petitioner. The small portion of the wetland on Petitioner's property is contained wholly within a conservation easement.

However, the entire wetland is “waters of the state,” whether it is on Palafox’s property, the HOA’s property, or Petitioner’s property.²

38. The wetland is within a closed basin and the ICPR provided to the District by Palafox demonstrates that the wetland is capable of holding all of the discharge from the 100-year, 24-hour storm while increasing the water level in the wetland by only 0.384 inches.

39. The District introduced the testimony of Andrew Joslyn, its agency representative, who was accepted as an expert in environmental permitting. He opined that, because the treated stormwater is discharged directly onto Palafox’s property and then flows to a wetland, which is both a water of the state and a multiple-owned property, no additional authorization is required by ERP rules to allow the treated stormwater to flow toward, and ultimately end up in, the wetland.

40. Section 10.2.7 of Applicant’s Handbook, Volume I, addresses secondary, not direct, impacts to wetlands. It states that activities will not be considered adverse to wetlands if buffers, with a minimum width of 15 feet and an average width of 25 feet, are provided abutting those wetlands that will remain under the permitted design. In August 2019, District staff performed a “ground truth” inspection on Palafox’s property prior to the District’s notice of intent to issue the Permit. The District verified, on site, the drawing of the 2001 wetland limits supplied by Palafox.

41. During that ground truth inspection of the wetland, District staff, accompanied by Mr. Thomasson, made the determination that Palafox’s proposed upland development was outside of the wetland, there was no direct

² ERP permitting rules developed under the authority of chapter 373 provide that “[t]erms used in [chapter 62-330] are defined in section 2.0 of Volume I and section 2.1 of Volume II” of the Environmental Resource Permit Applicant’s Handbook. Fla. Admin. Code R. 62-330.021. The Applicant’s Handbook, section 2.0(a)116, establishes that “Waters of the state” shall be as defined in Section 403.031(13), F.S.” Section 403.031(13) provides that “Waters” include, but are not limited to, rivers, lakes, streams, springs, impoundments, wetlands, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or underground waters. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water.”

impact to the wetland, and the development was an average distance of greater than 25 feet, and at no point was closer than 15 feet to the wetland. Based on those measurements, the District determined that the secondary impact rule was not at issue.

42. Petitioner argues that the District's determination is in error because Palafox relied upon a wetland delineation conducted in 2001, which has expired pursuant to statutory provisions. Petitioner argues that the wetland boundaries have expanded since the 2001 delineation, thus the "ground-truthed" determination of the boundary is insufficient to determine that the secondary impact rule does not apply.

43. Mr. Joslyn testified that a formal delineation of a precise boundary of the wetland is not required to identify or classify an area as a "wetland" or "water of the state." Wetlands are within the state's jurisdiction regardless of whether the Florida Department of Environmental Protection or a water management district has formally delineated or asserted jurisdiction.

44. Moreover, ERP evaluation and approval criteria does not necessarily require a buffer between upland development and a nearby wetland. The buffer is only required to avoid a secondary impact-to-wetland analysis or, stated differently, a secondary impact-to-wetland analysis is only required if the appropriate buffer between upland and wetland is not maintained. Although not required, in order to avoid a secondary impact analysis, the appropriate buffer is a minimum width of 15 feet and an average of 25 feet.

45. In support of her claim that there was not a proper wetland buffer, Petitioner presented a transcript of testimony from Kevin Songer given in a different proceeding challenging Leon County's approval of the environmental permit for the Palafox subdivision. Petitioner presented the former testimony to support her position that Mr. Songer's 2001 wetland delineation line has moved to a new line as set by Mr. Songer in 2015. The 2015 wetland delineation line purported to show that the wetland had expanded somewhat.

46. Mr. Songer’s 2015 wetland delineation work was neither checked by independent peer review nor confirmed by any state or local environmental regulatory agency.³ In addition, Mr. Songer provided no testimony that the Project would cause any adverse impacts to the wetlands. He noted that there had been changes to the wetlands between the two times he was on site, 2001 and 2015. He did not assess what, if any, impact—adverse or otherwise—the Project would have on the wetland, or whether such change had any material effect on the relevant ERP standards. His only relevant testimony was directed towards an alleged change to the wetland boundary.

47. Nonetheless, Mr. Thomasson reviewed Mr. Songer’s testimony and a survey of Mr. Songer’s proposed 2015 wetland line. Mr. Thomasson prepared a document showing Mr. Songer’s proposed 2015 wetland line overlaid on the existing conditions plan (i.e. pre-development) of Palafox’s property. Mr. Thomasson also prepared a document showing Mr. Songer’s proposed 2015 wetland line overlaid on the proposed conditions plan (i.e. post-development) of Palafox’s property.

48. In neither instance was there a distance less than 15 feet between Palafox’s proposed development and Mr. Songer’s proposed 2015 wetland line. In both instances, there was always an average distance greater than 25 feet between Palafox’s proposed development and Mr. Songer’s proposed 2015 wetland line.

³ Palafox urged the undersigned to find that Mr. Songer’s 2015 wetland delineation does not represent a recognized wetland jurisdictional line, based on Administrative Law Judge Francine Ffolkes’ finding in *Braswell v. Palafox*, Case No. 18-2734 (Fla. DOAH Aug. 31, 2018; Fla. Leon Cty. Sept. 24, 2018). The undersigned granted Palafox’s request for official recognition of the Recommended Order in that case, but official recognition cannot be used to admit hearsay statements in court files. *See Dufor v. State*, 69 So. 3d 235, 253 (Fla. 2011) (“[W]hile the court may take judicial notice of documents in a court file ... this notice would not make the contents of the documents admissible if they ... constituted hearsay.”). Further, “courts generally cannot take notice of findings of fact from other proceedings for the truth of the matter asserted therein because these finding are disputable and usually are disputed.” *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F3d 1074, 1082 n.6 (7th Cir.1997). Whether Mr. Songer’s 2015 wetland delineation is a recognized jurisdictional wetland line is a matter in dispute in the instant proceeding.

49. Accordingly, even if Mr. Songer's 2015 proposed wetland line is used, Palafox has satisfied the buffer requirements found in Section 10.2.7 of Applicant's Handbook, Volume I, and no secondary impact analysis is required.

50. Other than Mr. Songer's former testimony, Petitioner presented no evidence regarding adverse impacts on the wetlands. Petitioner's one expert witness, Mr. Carswell, admitted he is not qualified to opine on whether the Project would have an adverse impact on the function of wetlands. Mr. Carswell did testify that the discharge of stormwater from the Applicant's project would *not* affect fish and wildlife. Mr. Thomasson expressed the opinion that the Project will not result in any change, adverse or otherwise, to the function of the wetland.

CONCLUSIONS OF LAW

51. The Division has jurisdiction over the parties to, and the subject matter of, this proceeding. *See* § 120.569, Fla. Stat.

52. The standard of review of the District's intention to issue the Permit as a final agency action is *de novo*. *See* § 120.57(1)(k), Fla. Stat.; *Capeci v. Dep't of Gen. Servs.*, 432 So. 2d 1359 (Fla. 1st DCA 1983).

53. The ERP is a license issued pursuant to chapter 373 and, therefore, Petitioner has the burden of ultimate persuasion to prove its case in opposition to the Permit. *See* § 120.569(2)(p), Fla. Stat.; *Martin Cty. v. S. Fla. Water Mgmt. Dist.*, Case No. 16-5718 (Fla. DOAH Sept. 29, 2017; SFWMD Nov. 16, 2017).

54. Petitioner cannot meet her burden of ultimate persuasion merely by showing that the applicant's information does not preclude the possibility of contrary physical factors or effects. She must prove by competent and substantial evidence that reasonable assurance has not been provided. *Id.*

55. The standard of proof for a finding of fact is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

56. Section 373.413 requires that a person proposing to construct a stormwater management system comply with the applicable rules and prove the project “will not be harmful to the water resources of the [D]istrict.” For an applicant to be entitled to an ERP, it must provide reasonable assurance that the proposed activities meet the conditions for issuance set forth in rules 62-330.301 and 62-330.302, and the applicable provisions within the Applicant’s Handbook, Volumes I and II.

57. Reasonable assurance requires Palafox to demonstrate the substantial likelihood that the Project will be successfully implemented and the substantial likelihood that it will not cause adverse impacts in contravention of chapter 62-330. Reasonable assurance does not require an absolute guarantee that the project will not violate applicable requirements under any and all circumstances. Reasonable assurance does not require Palafox to eliminate all contrary possibilities, no matter how remote, or to address impacts that are theoretical or not reasonably likely to occur. *See City of Jacksonville v. James Point Workboats, LLC*, Case No. 18-5246 (Fla. DOAH Mar. 1, 2019; Fla. DEP Apr. 12, 2019).

58. Speculation or subjective beliefs are not sufficient to carry the burden of proving a lack of reasonable assurance necessary to demonstrate that the Permit should not be issued. *See Goldberg v. City of Port St. Lucie*, Case No. 16-1018 (Fla. DOAH Nov. 8, 2016; SFWMD Dec. 23, 2016).

59. What constitutes an adverse impact can vary based upon site-specific factors and the District has discretion to determine what is adverse for a specific site. The determination allows the District to exercise its professional judgment. *See S.W. Fla. Water Mgmt. Dist. v. Charlotte Cty.*, 774 So. 2d 903 (Fla. 2d DCA 2001).

60. Petitioner alleged that the Project violates the first four conditions for issuance of the Permit found in rule 62-330.301(1)(a)-(d), namely that Palafox has not provided reasonable assurance that the Project will not: (a) cause adverse water quantity impacts to receiving waters and adjacent lands; (b)

cause adverse flooding to on-site or off-site property; (c) cause adverse impacts to existing surface water storage and conveyance capabilities; and (d) adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. *See Fla. Admin. Code R. 62-330.301(1)(a)-(d).*

61. All of Petitioner's various other issues and arguments are related or redundant to the four conditions of issuance described above.

62. For the conditions of issuance found in rule 62-330.301(1)(a)-(c), the District found that Palafox provided reasonable assurance that the Project will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impact to existing surface water storage and conveyance capabilities.

63. The addition of 0.384 inches in water elevation in the wetland during the 100-year, 24-hour storm from Palafox's Project is *de minimus* and does not represent an adverse impact to water quantity of receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impact to existing surface water storage and conveyance capabilities. Palafox has provided reasonable assurance that these conditions of issuance have been met.

64. Respondents' evidence regarding the water quantity, flooding, and surface water storage impacts from the development were more credible and reliable than Petitioner's evidence on those issues. Petitioner has not met her burden of ultimate persuasion that the above conditions have not been satisfied.

65. For the condition of issuance found at rule 62-330.301(1)(d), the District found that Palafox provided reasonable assurance that its Project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Respondents presented competent, substantial evidence that the Project is well outside of the wetland boundary and will not adversely impact the wetlands.

66. Petitioner did not present any competent, substantial evidence in support of her position and has not met her burden of ultimate persuasion that Palafox is without legal right to discharge stormwater from the Project. Palafox is entitled to discharge its stormwater onto its own property and to have its stormwater eventually flow to the wetlands beginning on its property, which are waters of the state and multiple-owned.

ATTORNEY'S FEES

67. On April 13, 2020, the District, joined by Palafox, filed a Motion for Attorney's Fees and Sanctions against Petitioner pursuant to sections 120.569 and 120.595, Florida Statutes.

68. Petitioner requested an extension of time to file her response to the Motion, which was granted. Petitioner's Response to the Motion was filed on April 27, 2020.

69. Pursuant to section 120.595(1), fees may be awarded if the undersigned determines that the non-prevailing adverse party participated in the proceedings for an improper purpose. Such determination may be made only after issuance of a final order in this case.

70. The District's plea for fees and sanctions pursuant to section 120.569 does not require a determination of which party is the prevailing party, but, in the interest of judicial economy, the Motion will be disposed of as a whole, rather than in bifurcated proceedings.

71. The undersigned reserves ruling on the Motion following entry of the final order in this case, provided that a renewed motion is filed within 30 days of entry of the final order.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Northwest Florida Water Management District enter a final order approving the issuance of Environmental Resource Permit

No. IND-073-288406-1 to Palafox, LLC, on the terms and conditions set forth in the District's Notice of Final Agency Action. Jurisdiction is reserved to determine whether the District and Palafox are entitled to attorney's fees and sanctions against Petitioner and her counsel under sections 120.595(1) and 120.569(2)(e), Florida Statutes.

DONE AND ENTERED this 18th day of May, 2020, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of May, 2020.

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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.