STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAUL STILL,

Petitioner,

VS. CASE NO. 20-0091

SUWANNEE RIVER WATER MANAGEMENT DISTRICT AND BRADFORD COUNTY, FLORIDA,

Respondents.

_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 10 and 11, 2020, by Zoom conference before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Paul Still:

Dr. Paul Edward Still, pro se
14167 Southwest 101st Avenue
Starke, Florida 32091

For Respondent Suwannee River Water Management District:

Frederick T. Reeves, Esquire
Frederick T. Reeves, P.A.
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New Port Richey, Florida 34562

For Respondent Bradford County, Florida:

William Edward Sexton, County Attorney
Bradford County, Florida
945 North Temple Avenue
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STATEMENT OF THE ISSUE

The issue to be determined is whether Bradford County meets the criteria listed in Florida Administrative Code Rule 62-330.051(4)(e) for a road repair exemption.

PRELIMINARY STATEMENT

On December 10, 2019, the Suwannee River Water Management District ("District") entered a notice in Environmental Resource Permit (ERP): Exemption, ERP-007-233697-2 ("Exemption"), by which it determined that activities related to the repair of Southwest 101st Avenue in Bradford County, Florida ("101st Avenue" or the "road") met the criteria to be an exempt activity pursuant to rule 62-330.051(4)(e).

On or about December 23, 2019, Paul Still ("Petitioner" or "Dr. Still") filed a Petition Requesting an Administrative Hearing Review ("Petition") challenging the Exemption, which was referred to DOAH and assigned as DOAH Case No. 20-0091.

On January 13, 2020, the District filed a Motion to Amend Case Caption to Include Exemption Applicant, Bradford County, Florida, as a Party, and Bradford County, Florida ("County") was, thereafter, added as a Respondent.

The final hearing was initially set to be heard on March 23, 2020, in Live Oak, Florida. Upon motion, the hearing was continued and rescheduled for

June 17 and 18, 2020, in Live Oak. A telephonic status conference was held on May 19, 2020, to discuss both the hearing date and the means by which the hearing would be conducted. On May 21, 2020, the parties jointly requested that the hearing be rescheduled for September 10 and 11, 2020, at the District offices in Live Oak, and it was so scheduled. On July 21, 2020, in light of the continuing Covid-19 outbreak, and due to a scheduled travel-limiting medical procedure involving the undersigned, the hearing was rescheduled to be held on September 10 and 11, 2020, by Zoom conference.

On September 4, 2020, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained nine stipulations of fact, each of which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

On September 4, 2020, the County also filed a Motion in Limine objecting to consideration of whether the work performed by the County qualified for an exemption under rule 62-330.051(4)(b) for the maintenance and operation of culverted roadway crossings. Dr. Still filed a response which included a copy of the County's July 2, 2019, Request for Verification of an Exemption, and based thereon, the motion was denied, subject to a determination that the area at issue is a "wholly artificial, non-navigable drainage conveyance."

The final hearing was convened on September 10, 2020, as scheduled.

At the commencement of the final hearing, the issue of whether an exemption for "[c]onstruction, alteration, or maintenance, and operation, of culverted … roadway crossing[ ]" pursuant to rule 62-330.051(4)(b) was sought by the County or granted by the District was taken up again. It was determined from the stipulated Exemption application that, on December 3, 2019, the Exemption request was modified to eliminate the request for

verification of the culverted roadway crossing, and the County was proceeding solely on its application for the road repair exemption in rule 62-330.051(4)(e). That substituted application was the basis for the District's notice of the Exemption. The Order denying the Motion in Limine was reconsidered in light of the additional evidence and granted on the record. Therefore, the hearing proceeded solely on the issue of whether the County met the standards for a road repair exemption under rule 62-330.051(4)(e).

The Exemption was approved under the authority of chapter 403, Florida Statutes. Therefore, the modified burden of proof established in section 120.569(2)(p), Florida Statutes, is applicable. Thus, upon the County and the District entering the complete application files and supporting documentation and the District's notice of the Exemption into evidence, the prima facie case of entitlement for the Exemption was met. Therefore, the burden of ultimate persuasion is on Petitioner to prove his case in opposition to the Exemption by a preponderance of the competent and substantial evidence and, thereby, prove that the County failed to provide reasonable assurance that the standards for issuance of the Exemption were met.

At the final hearing, by agreement of the parties, the witnesses were presented as joint witnesses, with all parties having the opportunity to elicit direct testimony and cross-examination of each witness. The following witnesses were presented: Patrick Welch, R.P.S., who was accepted as an expert in land surveying; Chad Rischar, P.W.S., who was accepted as an expert in wetland science; Jorge Morales, P.E., who was accepted as an expert in civil engineering; Mary Diaz, P.E., who was accepted as an expert in agricultural and biological engineering, environmental resource permitting ("ERP"), and rule-based exemptions to ERP; Leroy Marshall, II, P.E., who was accepted as an expert in civil engineering, ERP, and rule-based exemptions to ERP; and Christina Carr, P.W.S., who was accepted as an

expert in environmental science, ERP, rule-based exemptions to ERP, and soil and water science. Dr. Still testified on his own behalf. District Exhibits 1 through 3, County Exhibits 3 through 6, and Petitioner's Exhibits 1 through 3, 5 through 8, and 10 through 12 were received in evidence.

A two-volume Transcript of the final hearing was filed on October 7, 2020. The parties requested 20 days from the filing of the Transcript to file their post-hearing submittals. On October 22, 2020, the County moved for an extension of time to file proposed recommended orders ("PRO"). The motion was granted, and the date for filing was extended to November 3, 2020. On October 28, 2020, the District moved for an extension of time to file PROs. The motion was granted, and the date for filing was extended to November 9, 2020. Dr. Still and the District filed their PROs by 5:00 p.m. on November 9, 2020. The County's PRO was received by DOAH through the e-filing system at 5:09 p.m. on November 9, 2020, and it was, therefore, entered on the docket as being filed on November 10, 2020, in accordance with Florida Administrative Code Rule 28-106.104(3). Nonetheless, each of the PROs has been considered in the preparation of this Recommended Order.

On September 3, 2020, the County filed a Motion for Attorney's Fees and Costs Pursuant to Section 120.595, Florida Statutes, Against Petitioner, Paul Still. Mr. Still filed a response on October 6, 2020. The motion is addressed at the conclusion of this Recommended Order.

The law in effect at the time the District takes final agency action on the application being operative, references to statutes are to their current versions, unless otherwise noted. *Lavernia v. Dep't of Prof'l Reg.*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

Based upon the demeanor and credibility of the witnesses, the stipulations of the parties, and the evidentiary record of this proceeding, the following Findings of Fact are made:

The Parties

1. Dr. Still resides at 14167 Southwest 101st Avenue, Starke, Florida. That property abuts work that was performed pursuant to the Exemption.

2. The District is a water management district created by section 373.069(1), Florida Statutes. It has the responsibility to conserve, protect, manage, and control the water resources within its geographic boundaries. *See* § 373.069(2)(a), Fla. Stat. The District, in concert with the Department of Environmental Protection, is authorized to administer and enforce chapter 373, and rules promulgated thereunder in chapter 62-330, regarding activities in surface waters of the state. The District is the permitting authority in this proceeding and issued the Exemption to the County.

3. The County is a political subdivision of the State of Florida. The County is responsible for keeping county roads and structures within its boundary in good repair and for establishing the width and grade of such roads and structures. §§ 334.03(8) and 336.02(1)(a), Fla. Stat.

4. 101st Avenue, a dirt road, was constructed decades ago and runs in a general north/south direction for several miles. It was in existence, publicly used, and under County maintenance long before January 1, 2002. Dr. Still acknowledged that when he purchased his property in 1996, the road was publicly used and was being maintained by the County.

5. The centerline of 101st Avenue has existed in its current position as long as Mr. Welch, the Bradford County surveyor, has been familiar with the property, since at least 1996. The County owns and is allowed to use a 60-foot right-of-way ("ROW") extending 30 feet to either side of the centerline. The

driving surface of 101st Avenue has consistently been from 20 to 22 feet in width, with drainage structures extending further into the ROW.

6. The evidence was convincing that 101st Avenue was regularly maintained or repaired by the County for more than seven years prior to the Exemption. The evidence was equally convincing that, during that period, the width of the road that actually has been maintained or repaired is substantially -- if not identically -- the same as the width of 101st Avenue after the road repairs under the Exemption were completed.

7. 101st Avenue was, prior to the exempt road repair work, "very wet" during rainy periods, and cars and trucks would routinely get stuck in the mud. Mr. Welch testified credibly that 101st Avenue was "a mess" even before the events that led to the work covered by the Exemption.

8. It is reasonable to conclude that the driving surface of 101st Avenue may have shifted by a matter of feet in either direction over the years prior to the exempt road repairs, which would have generally been the result of persons driving off of the driving surface to escape impassable areas, and of the imprecision inherent in grading a dirt road with a large motor grader. The evidence established that the County has maintained 101st Avenue at a location as close to the established centerline as possible, and has not intentionally moved or realigned 101st Avenue from its historic location.

9. Mr. Welch was very familiar with 101st Avenue, having used it numerous times, including during the period leading up to the events that precipitated the road repair work at issue. He testified to two surveys he performed of the area, first in 1996, and again in the vicinity of the Still property in May 2017. He testified that 101st Avenue was under County ownership and maintenance prior to his first survey in 1996.

10. Photographic evidence offered by Dr. Still showed 101st Avenue to be significantly degraded near his property for several years leading up to 2017. Turbidity of the waters passing alongside and under 101st Avenue was "a long ongoing issue with this road," dating back to at least 2015.

11. 101st Avenue "was in pretty poor shape" in January 2017. Cars would routinely go around wet areas on the driving surface and possibly onto Dr. Still's property. That gave the appearance of a change in the eastern ROW. Over a period of years prior to the Exemption work, the ROW may have crept eastward as the road was graded, ditches were maintained, and residential traffic diverted around impassable areas. The shift could have been as much as 10 to 15 feet, but the evidence establishing such was neither precise nor compelling. However, even if the ROW shifted over time, the movement was not the result of intentional operation and maintenance by County staff, but was a gradual, unintentional movement over time. Such a gradual shift is common with dirt and limerock roads. Furthermore, the alignment of the travel surface was stable, and was always within the 60-foot ROW, although the stormwater structures may have gone beyond the ROW.

12. In August 2017, a series of storm events caused 101st Avenue to be flooded. Dr. Still testified that the existing road and ditches and most of the areas adjacent to his property were "destroyed" by continued public use after the August 2017 rain event. He believed there was no way to ascertain the alignment of 101st Avenue.

13. Around September 10, 2017, Hurricane Irma impacted the County, causing substantial flooding and damaging numerous dirt and limerock roads in the County, including 101st Avenue. 101st Avenue was partially damaged from flooded conditions, and rendered completely impassable at places along its path, which led motorists to drive off of the established roadway onto adjacent properties to get through. The diversion of traffic off of the road surface was due to the personal decisions of the public using the road, and was not the result of any direction, operation, or maintenance by County staff.

14 After Hurricane Irma, Governor Scott issued emergency orders that allowed local governments to undertake necessary repairs to roadways. The County issued similar emergency orders.[1]

15. In November 2017, Mr. Welch performed a survey to establish the alignment of the road. 101st Avenue was partially repaired consistent with the survey and pursuant to the emergency orders, with the work beginning in December 2017.

16. As the work to repair 101st Avenue was proceeding, Dr. Still asserted that the ROW encroached onto his property. He and Mr. Welch walked the property line, noted that the ROW appeared to extend across a fence installed on the west side of 101st Avenue, and staked the disputed area. Though the County believed it was working within its ROW, it decided, more as a matter of convenience to avoid the time and expense of litigation, to purchase the disputed area. Thereafter, on January 5, 2018, the County purchased 1.78 acres of property from Dr. Still, which was incorporated into the County ROW.[2] The purchase of the property, and establishment of the undisputed ROW, was completed well before the December 23, 2019, filing of the Petition.

17. The travel surface of the road remained within the prescriptive and historical ROW. The "footprint" of 101st Avenue was the same before and after the road repair work. Dr. Still admitted that the road had not "physically moved." However, he believes that the County's use of the

[1] Since the Exemption work was largely (and lawfully) performed under the emergency orders, the County's Exemption application was filed after the repair work had begun on 101st Avenue, and is considered an after-the-fact application. The application for the Exemption was originally filed pursuant to rules 62-330.051(4)(b) and (e). The County thereafter withdrew its request for an exemption pursuant to rule 62-330.051(4)(b), and limited its Exemption to rule 62-330.051(4)(e), which establishes the standards at issue in this proceeding. The District's December 10, 2019, proposed agency action granted the Exemption for resurfacing the entirety of the length of 101st Avenue.

[2] The evidence was not sufficient to establish that the ROW actually encroached onto Dr. Still's property. It is equally plausible that the fence encroached into the 101st Avenue ROW. Nonetheless, the issue was -- or should have been -- resolved when the County agreed to pay Dr. Still to extinguish any plausible claim to the property in dispute.

1.78 acres of purchased property for the ROW constitutes a realignment of 101st Avenue.

18. From an engineering perspective, as long as a road surface is within an established ROW, and there has been no intentional change in its direction or trajectory, the road is not "realigned." The evidence established that 101st Avenue remained within its established ROW, and there was no intentional change in its direction or trajectory from the repair work.

19. The work performed under the exemption involved grading 101st Avenue along its entire length, and applying asphalt millings and a sealant to stabilize the travel surface. The asphalt millings placed on the 101st Avenue travel surface were applied on top of the "as-is" existing limerock. The millings provided structure and stability to the travel lanes, and eliminated erosion and the large muddy bogs that were a feature of the road during the rainy season and after storms. There was no persuasive evidence that the millings materially raised the height of the road travel surface.

20. Mr. Rischar testified that 101st Avenue, after the road repair work, is now in good condition and intact. The asphalt millings are not "loose" but are bound together. The work stabilized the roadbed, provided structural integrity, and improved water quality as compared to a simple graded road. His testimony is accepted.

21. Dr. Still produced several photographs depicting a small pile of dirt near a roadside ditch near the drainage culvert under 101st Avenue. The pile pre-dated the Exemption work. Ms. Diaz testified that the mounds had been "taken care of," and they do not appear in any post-Exemption photographs. There was no evidence of any excavated material having been deposited at or near the Still property from the exempt road repair work.

22. As part of the Exemption work, drainage structures were incorporated to receive and convey stormwater from the road surface. Rule 62-330.051(4)(e)5. requires that work performed under a road repair exemption

incorporate "[r]oadside swales or other effective means of stormwater treatment."

23. The evidence was not sufficient to demonstrate that the stormwater structures incorporated along 101st Avenue met the stringent criteria for "swales" as set forth in the Applicant's Handbook, Volume II, §§ 5.5.1 and 5.5.2. However, the testimony was convincing that the drainage work incorporated into the road repairs was an "other effective means of stormwater treatment." Dr. Still's testimony as a "citizen scientist" was not sufficient to overcome the expert testimony offered by the County and the District.

24. During the initial phases of the work, when the County was acting under the post-Irma emergency orders, the County had not installed silt fences. Dr. Still complained to the County, and silt fences and turbidity curtains were installed. Dr. Still admitted that they "functioned fairly well." The silt fences and turbidity curtains were installed prior to the December 23, 2019, filing of the Petition.

25. The turbidity curtains and silt screens met best management practices ("BMPs"). BMPs are generally construction-related practices, and are not designed for the "operation" of a facility after conditions have stabilized. Compliance with BMPs is intended to demonstrate compliance with water quality standards. Ms. Carr directed the County to remove the turbidity control curtains prior to her last inspection since the area had stabilized.

26. While photographic evidence depicted differences in the appearance of water in the roadside ditches from that flowing under the road from forested areas to the west, the photographs were not sufficient to establish violations of state water quality standards for turbidity. A turbidity violation is, by definition, a reading of 29 Nephelometric Turbidity Units (NTUs) over background as measured by a meter. Fla. Admin. Code R. 62-302.530(69). Ms. Carr testified credibly that one cannot gauge water quality from a picture, and that the photographs she took on her December 20, 2018, site

visit did not depict the conditions "in real life." District employees who visited the area, including Ms. Carr, saw nothing that raised water quality concerns. The appearance of the water in photographs is not sufficient to demonstrate that the County failed to control turbidity, sedimentation, and erosion during and after construction to prevent violations of state water quality standards due to construction-related activities.

27. Dr. Still was critical of the District inspectors for failing to take turbidity samples using calibrated meters. However, he did not take such samples himself, and was not able to offer proof of any violation of water quality standards due to the exempt road repairs.

28. Rule 62-330.050(9)(b)5., read in conjunction with rule 62-330.051(4)(e)8., provides that the "construction, alteration, and operation" of exempt road repair work shall not "[c]ause or contribute to a violation of state water quality standards," and that "[t]urbidity, sedimentation, and erosion shall be controlled during and after construction to prevent violations of state water quality standards." The rules establish that the standards and conditions apply to the exempt work being performed, and not to conditions in the area that may have existed prior to the exempt work.

29. The issue of turbidity, though discussed at length during the hearing, was resolved conclusively when Dr. Still admitted that turbidity was not made worse by the road repairs. Furthermore, a preponderance of the evidence established that the structure and stability provided to the travel lanes improved the turbidity and sedimentation that pre-dated the road repair, and reduced erosion of the road, not only by the repair of the road itself, but by eliminating the need to drive off of the road surface to avoid and bypass impassable areas.

30. The Exemption work included the replacement of a culvert under 101st Avenue. At some time between January 8, 2018, and January 19, 2018, an existing 30-inch culvert was removed and replaced with two 24-inch culverts. Dr. Still complained that the 24-inch culverts were resulting in

flooding of his property. Therefore, on or about December 17, 2019, prior to the December 23, 2019, filing of the Petition, the 24-inch culverts were removed, and a 30-inch culvert was installed to match the size and capacity of the previously existing culvert, and return the area to its pre-existing condition.

31. There was no evidence that the current 30-inch culvert has resulted in any flooding. Since the 30-inch culvert reestablished the pre-Exemption condition, a strong inference is drawn that the exempt work will not "cause adverse water quantity or flooding impacts to receiving water and adjacent lands." Rather, the evidence establishes that water quantity impacts, if any, were in existence prior to the exempt road repairs.[3]

32. The work was not related to the alteration or maintenance of a "culverted roadway crossing," despite the culvert work. Thus, the previous inclusion of rule 62-330.051(4)(b) as a basis for the County's Exemption request was withdrawn. The District accepted that withdrawal, and its notice of Exemption did not include any reference to the culvert. As indicated in the Preliminary Statement and the amended disposition of the Motion in Limine, the road repair Exemption does not explicitly address culvert replacement. Therefore, any allegation that the replacement of the culvert was a violation of District permitting standards must be taken up with the District as an exercise of its enforcement discretion, and is not an issue in this proceeding.

33. Dr. Still produced photographs that were described as depicting "sediment" that was deposited along a "canal" on his property between 101st Avenue and a cleared utility easement. To the extent the photographs depicted sediment as described, which was not visually apparent, they were not sufficient to prove when any such sediment was deposited, or whether the sediment was related to the road repairs performed under the Exemption.

[3] Again, simplistically, work performed under the road repair exemption is not designed to make pre-existing water quality and water quantity issues better, it just cannot make those conditions worse.

34. Mr. Rischar testified convincingly that there was no scientific data to support a determination that there are water quality issues, including turbidity, at the roadway.

35. Dr. Still produced photographs of the post-Exemption condition of 101st Avenue with several comparatively tiny depressions that, if never maintained, would presumably develop into potholes. Despite the nascent depressions, the road appeared to be vastly improved from its condition prior to the repairs, as evidenced by Dr. Still's pre-Irma photographs. Mr. Rischar testified credibly that any roadway, from the least developed dirt road to the most highly developed interstate highway can, and does, develop holes in the travel surface over time. For that reason, governmental bodies, including the County, maintain roads, including 101st Avenue. The photographs provide no support for a finding that the exempt road repairs have resulted in any violation of a standard in either rule 62-330.051(4)(e)8. or rule 62-330.050(9)(b)5.

36. The evidence established that 101st Avenue was regularly maintained and repaired by the County for more than seven years prior to the Exemption, and that the road repairs did not realign, expand the number of traffic lanes, or alter the width of the existing road.

37. The evidence established that the work performed under the Exemption did not realign 101st Avenue. The repairs to 101st Avenue included work reasonably necessary to repair and stabilize the road using generally accepted roadway design standards.

38. The evidence demonstrates that no excavated material related to the work under the Exemption was placed at or near Dr. Still's property or, for that matter, anywhere along 101st Avenue.

39. The evidence established that the repairs to 101st Avenue did not adversely impound or obstruct existing water flow, cause adverse impacts to existing surface water storage and conveyance capabilities, or otherwise

cause adverse water quantity or flooding impacts to receiving waters and adjacent lands.

40. The evidence was not sufficient to establish that the road repair work caused or contributed to a violation of state water quality standards.

Ultimate Findings of Fact

41. The greater weight of the competent substantial evidence establishes that 101st Avenue was in existence long before January 1, 2002, has been publicly used since that time, and has been regularly maintained and repaired by the County for more than seven years prior to the Exemption. Evidence to the contrary was not persuasive.

42. The greater weight of the competent substantial evidence establishes that during its relevant period of existence, the width of 101st Avenue that actually has been maintained or repaired is substantially -- if not identically -- the same as the width of 101st Avenue after the road repairs under the Exemption were completed. The work performed under the Exemption did not realign or expand the number of traffic lanes of 101st Avenue. The repairs to 101st Avenue included work reasonably necessary to repair and stabilize the road using generally accepted roadway design standards. Evidence to the contrary was not persuasive.

43. The greater weight of the competent substantial evidence establishes that no excavated material related to the work under the Exemption was placed at or near Dr. Still's property or, for that matter, anywhere along 101st Avenue. Evidence to the contrary was not persuasive.

44. The greater weight of the competent substantial evidence establishes that the repairs to 101st Avenue did not adversely impound or obstruct existing water flow, cause adverse impacts to existing surface water storage and conveyance capabilities, or otherwise cause adverse water quantity or flooding impacts to receiving waters and adjacent lands. Evidence to the contrary was not persuasive.

45. The greater weight of the competent substantial evidence establishes that the road repair work incorporated effective means of stormwater treatment, and did not cause or contribute to a violation of state water quality standards. Evidence to the contrary was not persuasive.

46. The greater weight of the competent substantial evidence establishes that turbidity, sedimentation, and erosion were controlled during and after construction, and continue to be controlled, to prevent violations of state water quality standards. Erosion and sediment control BMPs were installed and maintained in accordance with applicable guidelines and specifications. Evidence to the contrary was not persuasive.

CONCLUSIONS OF LAW

Jurisdiction

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

Standing

48. Section 120.52(13) defines a "party," in pertinent part, as a person "whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." Section 120.569(1) provides, in pertinent part, that "[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency."

49. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Corporation v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

> We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to

> entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482; *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006).

50. Dr. Still alleged standing based on the impact that the road repair had on his property. The allegations of turbid runoff and sediment entering onto his property, as well as flooding of his property, meet the second prong of the *Agrico* test. This proceeding is designed to protect adjacent property owners from potential pollution, water quality and quantity violations, and other adverse impacts caused by the road repairs, impacts that are the subject of chapter 403 and rule 62-330.051 adopted thereunder.

51. The question for determination as to the first prong of the *Agrico* test is whether Dr. Still alleged injuries in fact of sufficient immediacy as to entitle him to a section 120.57 hearing. "[T]he injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and '[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical.'" *S. Broward Hosp. Dist. v. Ag. for Health Care Admin.*, 141 So. 3d 678, 683 (Fla. 1st DCA 2014)(citing *Vill. Park Mobile Home Ass'n v. Dep't of Bus. Reg.*, 506 So. 2d 426, 433 (Fla. 1st DCA 1987)).

52. Dr. Still alleged, inter alia, that the activities caused turbid runoff and sediment to enter onto his property, as well as flooding of his property, which is sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle [him] to a section 120.57 hearing."

53. Bradford County has standing as the applicant for the Exemption. *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Reg.*, 53 So. 3d 1158, 1162 (Fla. 1st DCA 2011); *Maverick Media Group v. Dep't of Transp.*, 791 So. 2d 491, 492 (Fla. 1st DCA 2001).

Nature of the Proceeding

54. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. § 120.57(1)(k), Fla. Stat; *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

55. Section 120.569(2)(p) provides that:

> For any proceeding arising under chapter 373, chapter 378, or chapter 403, if a nonapplicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency's staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicant's prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or

> conceptual approval through the presentation of competent and substantial evidence.

56. The Exemption required notice to the District pursuant to rule 62-330.051(4)(e)7. and section 4.2.1 of the Applicant's Handbook, Volume I. Review by the District and a notice of agency action were required pursuant to sections 5.2 and 5.4 of the Applicant's Handbook, Volume I. The Exemption meets the definition of a license in section 120.52(10) because it is an authorization required by law. The Exemption verification was issued pursuant to rules promulgated under chapter 403. Therefore, the Exemption is subject to the abbreviated presentation and burden-shifting described in section 120.569(2)(p). *Spinrad v. Guerrero and Dep't of Envtl. Prot.*, Case No. 13-2254, RO ¶ 116 (Fla. DOAH July 25, 2014; Fla. DEP Sept. 8, 2014); *Pirtle v. Voss and Dep't of Envtl. Prot.*, Case No. 13-0515, RO ¶ 30 (Fla. DOAH Sept. 27, 2013, Fla. DEP Dec. 26, 2013).

57. The County and the District made the prima facie case of entitlement to the Exemption by entering into evidence the application file and supporting documentation and the District's notice of Exemption. In addition, they presented the testimony of expert witnesses in support of the road repair Exemption.

58. With the County having made its prima facie case for the Exemption, the burden of ultimate persuasion was on Dr. Still to prove his case in opposition to the Exemption by a preponderance of the competent and substantial evidence, and thereby prove that the County failed to provide reasonable assurance that the standards for issuance of the Exemption were met.

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

60. "Surmise, conjecture or speculation have been held not to be substantial evidence." *Dep't of High. Saf. & Motor Veh. v. Trimble*, 821 So. 2d

1084, 1087 (Fla. 1st DCA 2002) (*citing Fla. Rate Conf. v. Fla. R.R. & Pub. Utils. Comm'n*, 108 So. 2d 601, 607 (Fla. 1959)).

Reasonable Assurance

61. Approval of the Exemption is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

62. Reasonable assurance means "a substantial likelihood that the project will be successfully implemented." *Metro. Dade Cty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

Standards

63. Rule 62-330.051 provides that:

> (4) Bridges, Driveways, and Roadways –
>
> (e) Repair, stabilization, paving, or repaving of existing roads, and the repair or replacement of vehicular bridges that are part of the road, where:
>
> 1. They were in existence on or before January 1, 2002, and have:
>
> a. Been publicly-used and under county or municipal ownership and maintenance thereafter, including when they have been presumed to be dedicated in accordance with section 95.361, F.S.;
>
> b. Subsequently become county or municipally-owned and maintained; or

c. Subsequently become perpetually maintained by the county or municipality through such means as being accepted by the county or municipality as part of a Municipal Service Taxing Unit or Municipal Service Benefit Unit; and

2. The work does not realign the road or expand the number of traffic lanes of the existing road, but may include safety shoulders, clearing vegetation, and other work reasonably necessary to repair, stabilize, pave, or repave the road, provided that the work is constructed using generally accepted roadway design standards;

* * *

8. All work is conducted in compliance with subsection 62-330.050(9), F.A.C.[4]

64. Rule 62-330.050(9)(b) provides, in pertinent part, that:

(9) The following apply when specified in an exemption in rule 62-330.051, F.A.C.:

(b) Construction, alteration, and operation shall not:

1. Adversely impound or obstruct existing water flow, cause adverse impacts to existing surface water storage and conveyance capabilities, or otherwise cause adverse water quantity or flooding impacts to receiving water and adjacent lands;

* * *

5. Cause or contribute to a violation of state water quality standards. Turbidity, sedimentation, and erosion shall be controlled during and after construction to prevent violations of state water quality standards, … due to construction-related activities. Erosion and sediment control best

[4] As stipulated by the parties, rule 62-330.051(4)(e) 3., 4., and 6. are not at issue. In addition, although a notice of intent to use the Exemption was not provided to the District 30 days before performing the work, that requirement was resolved through a variance that was granted, published, and became final. Thus, rule 62-330.051(4)(e)7. is not at issue.

> management practices shall be installed and maintained in accordance with the guidelines and specifications described in the State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Transportation and Florida Department of Environmental Protection, June 2007), …, and the Florida Stormwater Erosion and Sedimentation Control Inspector's Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008), …; nor
>
> 6. Allow excavated or dredged material to be placed in a location other than a self-contained upland disposal site, except as expressly allowed in an exemption in rule 62-330.051, F.A.C.[5]

65. Section 95.361(2), Florida Statutes, provides, in pertinent part, that:

> In those instances where a road has been constructed by a nongovernmental entity, or where the road was not constructed by the entity currently maintaining or repairing it, or where it cannot be determined who constructed the road, and when such road has been regularly maintained or repaired for the immediate past 7 years by a county, … such road shall be deemed to be dedicated to the public to the extent of the width that actually has been maintained or repaired for the prescribed period, whether or not the road has been formally established as a public highway. … The dedication shall vest all rights, title, easement, and appurtenances in and to the road in:
>
> (a) The county, if it is a county road; ... whether or not there is a record of conveyance, dedication, or appropriation to the public use.

[5] Rule 62-330.050(9)(a) and (c) are not applicable. Rule 62-330.050(9)(b)2. through 4. are not applicable, which was not disputed.

Entitlement to the Exemption

66. The use of the disjunctive "or" after rule 62-330.051(4)(e)1.b. means that, in order to meet the Exemption criteria, the road must have been in existence before January 1, 2002, and then meet *one* of the criteria in rule 62-330.051(4)(e)1.a, 1.b., or 1.c. The road does not have to meet *all* of the three "ownership" criteria in rule 62-330.051(4)(e)1.a, 1.b., and 1.c. *See Fla. Pulp and Paper Ass'n Envtl. Affairs, Inc. v. Dep't of Envtl. Prot.*, 223 So. 3d 417, 420 (Fla. 1st DCA 2017)("... the points of entry listed in section 120.56(2)(a) are separated by the disjunctive conjunction 'or,' which indicates that they are mutually exclusive alternatives."); *see also Ellenwood v. Bd. of Arch. and Int. Design*, 835 So. 2d 1269, 1270 (Fla. 2003); *Osceola Cty. Sch. Bd. v. Arace*, 884 So. 2d 1003, 1005 (Fla. 1st DCA 2004); *Dep't of Bus. Reg. v. Salvation Ltd., Inc.,* 452 So. 2d 65, 67 (Fla. 1st DCA 1984).

67. The evidence establishes that 101st Avenue was in existence before January 1, 2002, and has been publicly used since that time. The evidence establishes that 101st Avenue has been regularly maintained and repaired by the County for more than seven years prior to the Exemption. Thus, the road repairs meet the standards established in section 95.361 and rule 62-330.051(4)(e)1.a.

68. The evidence establishes that the work performed under the Exemption did not realign 101st Avenue or expand the number of traffic lanes of 101st Avenue. Furthermore, the repairs to 101st Avenue included work reasonably necessary to repair and stabilize the road using generally accepted roadway design standards. Thus, the road repairs meet the standards established in rule 62-330.051(4)(e)2.

69. The evidence establishes that the work performed under the Exemption incorporated effective means of stormwater treatment. Thus, the road repairs meet the standards established in rule 62-330.051(4)(e)5.

70. The evidence establishes that the repairs to 101st Avenue did not adversely impound or obstruct existing water flow, cause adverse impacts to

existing surface water storage and conveyance capabilities, or otherwise cause adverse water quantity or flooding impacts to receiving waters and adjacent lands. Thus, the road repairs meet the standards established in rule 62-330.051(4)(e)8. and rule 62-330.050(9)(b)1.

71. The greater weight of the competent substantial evidence establishes that the road repair work did not cause or contribute to a violation of state water quality standards, and that turbidity, sedimentation, and erosion were controlled during and after construction, and continue to be controlled, to prevent violations of state water quality standards. Erosion and sediment control BMPs were installed and maintained in accordance with applicable guidelines and specifications. Any issues with turbidity are not the result of the repairs to 101st Avenue, but are issues endemic to dirt and limerock roads that long pre-dated the repairs. The evidence establishes that the repairs reduced turbidity, sedimentation, and erosion from previous levels. Thus, the road repairs meet the standards established in rule 62-330.051(4)(e)8. and rule 62-330.050(9)(b)5.

72. The evidence establishes that no excavated material related to the work under the Exemption was placed at or near Dr. Still's property or, for that matter, anywhere along 101st Avenue. Thus, the road repairs meet the standards established in rule 62-330.051(4)(e)8. and rule 62-330.050(9)(b)6.

73. As established in the Findings of Fact, reasonable assurance was provided that the County complied with all applicable standards for the Exemption established by rule 62-330.051(4)(e) and rule 62-330.050(9)(b), and that the County is entitled to use the Exemption.

ATTORNEYS' FEES

74. The County has moved for an award of attorneys' fees, expenses, and costs pursuant to section 120.595.

75. Section 120.595(1) provides that:

> (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—
>
> * * *
>
> (c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.
>
> * * *
>
> (e) For the purpose of this subsection:
>
> 1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.
>
> * * *
>
> 3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. …

76. An objective test is used to determine whether a party challenged the agency action for an "improper purpose." *See Friends of Nassau Cty, Inc. v. Nassau Cty*, 752 So. 2d 42, 51 (Fla. 1st DCA 2000). As established in *Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services*, 690 So. 2d 603 (Fla. 1st DCA 1997):

> The use of an objective standard creates a requirement to make reasonable inquiry regarding pertinent facts and applicable law. In the absence of "direct evidence of the party's and counsel's state of mind, we must examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim."

Id. at 608 n. 9.

77. Whether a party has participated in a proceeding for an improper purpose is a question of fact, and even absent direct evidence of intent, "[i]n determining a party's intent, the finder of fact is entitled to rely upon permissible inferences from all the facts and circumstances of the case and the proceedings before him." *Burke v. Harbor Estates Associates, Inc.*, 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991). In that regard, a reviewing judge may look not only at direct evidence of intent, but may also "examine the circumstantial evidence at hand and ask, objectively, whether an ordinary person standing in the party's or counsel's shoes would have prosecuted the claim." *Friends of Nassau Cty, Inc. v. Nassau Cty*., 752 So. 2d 42, 51 (Fla. 1st DCA 2000).

78. There was no evidence to suggest that Dr. Still has participated in two or more other proceedings involving the County and the repair of 101st Avenue. Thus, the presumption of an improper purpose is not applicable.

79. The second criterion by which to measure "improper purpose" is whether the action was taken primarily to harass or to cause unnecessary delay, for frivolous purpose, or to needlessly increase the cost of securing the Exemption.

80. 101st Avenue had been, in Dr. Still's words, "wiped out" after the August 2017 rains, a condition worsened as a result of Hurricane Irma. The publicly-used road clearly had to be repaired.

81. It became clear at the hearing that Dr. Still's primary concerns were related to concerns with turbidity and water quality, which Dr. Still admitted pre-dated the road repairs performed under the Exemption, and were *not* worsened due to the exempt road repairs. (Tr. Vol. 2, 346:6-14; 355:23-356:3).

82. Dr. Still admitted that 101st Avenue had not been altered in its course due to the exempt road repairs. (Tr. Vol. 2, 339:17-24). He did dispute whether the ROW had shifted from its original course in the years *before* the exempt road repair work.

83. Though he disputed ownership of the 101st Avenue ROW, Dr. Still admitted that he had no evidence that the County does not own the ROW. (Tr. Vol. 2, 352:25-353:10). He further admitted that he did not review section 95.361. (Tr. Vol. 2, 338:4-16).

84. Dr. Still's dispute as to the extent of the ROW seemingly should have been, and in fact was, resolved by his agreement to sell 1.78 acres of land to the County for the purpose of eliminating possible encroachment onto his property. That sale was commenced and completed as the work under the declared emergency was ongoing. There was no persuasive evidence to establish that the disputed 1.78 acres was actually outside of what was understood by the County to be the historic ROW, but its purchase definitively resolved the issue without the time and expense of litigation. It is difficult to craft an argument that the volitional sale of property to facilitate road repairs in an undisputed ROW, particularly when the travel surface of the road is unchanged, should then become a basis for denial of authorization to perform those road repairs.

85. Dr. Still appeared to have a concern with the initial replacement of an existing 30-inch culvert with two 24-inch culverts under 101st Avenue. Those 24-inch culverts appear in most of the photographs depicting the conditions

in the area. However, when those culverts were then replaced (prior to the filing of the Petition) with one 30-inch culvert, matching the size of the preexisting culvert, any issues that existing water flow from the upgradient side of 101st Avenue was adversely impounded or obstructed, that the road repairs caused adverse impacts to existing surface water storage and conveyance capabilities, or that the road repairs caused adverse water quantity or flooding impacts to receiving waters and adjacent lands were eliminated. There was no evidence offered that the flow of water through the new 30-inch culvert was changed at all as a result of the completed road repairs. (Tr. Vol. 2, 308:18-21). Dr. Still provided no calculations of water flow or velocity to suggest that the road repairs will result in adverse water quantity or flooding impacts to receiving waters and adjacent lands.

86. The only conclusion that can be objectively drawn, given the facts of this case, is that the action challenging the Exemption was taken primarily to harass the County and the District, for frivolous purpose, or to needlessly increase the cost of securing the Exemption.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Suwannee River Water Management District enter a final order:

a. Approving the December 10, 2019, Environmental Resource Permit (ERP): Exemption, ERP-007-233697-2, determining that activities related to the repair of Southwest 101st Avenue in Bradford County, Florida, met the criteria to be an exempt activity pursuant to rule 62-330.051(4)(e); and

b. Taking such action pursuant to section 120.595(1) as it deems appropriate.

c. The undersigned retains jurisdiction to determine the award of costs and attorneys' fees pursuant to section 120.595(1)(d), if the final order makes

such an award and the case is remanded by the Suwannee River Water Management District to DOAH for that purpose.

DONE AND ENTERED this 19th day of November, 2020, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 19th day of November, 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.