

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TRACY KOCHMANN,

Petitioner,

vs.

Case No. 20-2993

KELLY ENDRES, IFRAIN LIMA, AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

SHELLEY MEIER,

Petitioner,

vs.

Case No. 20-2994

KELLY ENDRES, IFRAIN LIMA, AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

BRIAN HACKER,

Petitioner,

vs.

Case No. 20-2995

KELLY ENDRES, IFRAIN LIMA, AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held before Francine M. Ffolkes, the assigned Administrative Law Judge of the Division of Administrative Hearings (DOAH), on September 17, 2020, in Tallahassee, Florida, via Zoom video conference.

APPEARANCES

Petitioners: Tracy L. Kochmann, Pro se
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Brain Hacker, Pro se
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For Respondent Department of Environmental Protection:

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For Respondents Kelly Endres and Ifrain Lima:

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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondents, Kelly Endres and Ifrain Lima (Endres/Lima), are entitled to an Environmental Resource Permit (ERP) that would allow use of 0.535 acres of previously impacted

wetlands for the construction of a single-family residence and associated structures, a 30' x 30' private dock with a 4' access walkway, and a 12' wide boat ramp (Project) at 160 Long Acres Lane, Oviedo, Florida (Property).

PRELIMINARY STATEMENT

On August 22, 2019, Respondents Endres/Lima submitted an application for the ERP. On February 7, 2020, Respondent, Department of Environmental Protection (Department), issued a notice of intent to issue the ERP (NOI) for the Project.

On May 26, 2020, Petitioner, Shelley Meier (Meier), timely filed a petition for hearing with the Department. On June 11, 2020, Petitioner, Brian Hacker (Hacker), and Petitioner, Tracy Kochmann (Kochmann), separately, timely filed petitions for hearing with the Department. On July 1, 2020, the Department referred the three petitions to DOAH. DOAH consolidated the petitions on July 7, 2020.

The parties filed their Joint Pre-Hearing Stipulation on September 8, 2020, and an Amended Joint Pre-Hearing Stipulation on September 14, 2020. Respondents Endres/Lima filed a Motion to Strike Witness David Mahnken (Mahnken) and Petitioner Kochmann filed an objection to the motion on September 16, 2020. The Department filed a Motion in Limine also on September 16, 2020. On September 17, 2020, the Department's motion was granted, in part, as it related to matters concerning the City of Oviedo's enforcement action; and was denied as to the previous dredge and fill violation on the Property. Respondents Endres/Lima's motion to strike was denied at the final hearing.

At the final hearing, Joint Exhibits J-1 through J-6 were admitted into evidence. Respondents Endres/Lima presented the expert and fact

testimonies of John Herbert (Herbert), who was accepted as an expert in civil engineering; and Gary Exner (Exner), who was accepted as an expert in biology. Respondents Endres/Lima's Exhibits R-1, R-5, and R-6 were admitted into evidence.

The Department presented the fact testimony of Megan Warr (Warr), Environmental Specialist III; and Jason Seyfert, Environmental Manager. The Department's Exhibits D-1 through D-3 were admitted into evidence.

Petitioners presented the fact testimony of Nicholas Lenssen and Mr. Hacker; and the expert testimony of Mr. Mahnken, an environmental scientist. Petitioners' Exhibits P-1, P-8, and P-22 were admitted into evidence. The Petitioners proffered exhibits P-2, P-13, and P-21, which were denied admission into evidence.

The three-volume Transcript of the hearing was filed with DOAH on October 16, 2020. The parties timely filed their proposed recommended orders on November 6, 2020.

References to Florida Statutes are to the 2019 version, unless otherwise stated.

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties and the evidence adduced at the final hearing.

The Parties

1. The Department is the administrative agency of the state statutorily charged with, among other things, protecting Florida's air and water resources. The Department administers and enforces certain provisions of chapter 373, part IV, Florida Statutes, and the rules promulgated,

thereunder, in the Florida Administrative Code. Under that authority, the Department determines whether to issue or deny applications for ERPs.

2. Respondents Endres/Lima own the Property and are the applicants for the ERP at issue in this consolidated proceeding.

3. Petitioner Meier is a neighboring property owner to the south of the Property. Petitioner Meier's property includes a single-family residence with accessory structures and is located on Long Lake. Petitioner Meier is concerned that the NOI provides inadequate environmental protections and that there will be flooding on adjacent properties from the Project.

4. Petitioner Hacker is the neighboring property owner adjacent to the south of the Property. Petitioner Hacker's property includes a single-family residence with accessory structures and is located on Long Lake. He is concerned with the completeness of the application for the Project, the calculation of wetland impacts, that reasonable assurances were provided, and that the Department's NOI ignores willful negligence and allows disparate treatment of Respondents Endres/Lima.

5. Petitioner Kochmann is a property owner with a single-family residence and accessory structures located on Long Lake. She is concerned that the NOI is based on a misleading application and provides no evidence that the Respondents Endres/Lima made reasonable efforts to eliminate and reduce impacts detrimental to the environment.

History of the Project and Application

6. On April 12, 2018, Respondents Endres/Lima applied for an ERP for proposed wetland impacts associated with a planned single-family home on the Property. This was the first ERP application for the Property. The Department sent a Request for Additional Information (RAI) on April 24, 2018, and a second RAI on November 2, 2018.

7. Respondents Endres/Lima provided a Mitigation Service Area Rule Analysis for "As If In-Basin" for the Lake X Mitigation Bank for the St. Johns River Water Management District Basins to the Department via email on

May 10, 2018. Respondents Endres/Lima submitted revised plans to the Department on September 19, and October 30, 2018.

8. On January 7, 2019, the Department denied the ERP application. The Department and Respondents Endres/Lima, on July 18, 2019, entered into a Consent Order (CO). The Department found, and Respondents Endres/Lima admitted, that approximately 0.80 acres of jurisdictional wetlands were dredged and filled without a valid ERP from the Department; and was done with improperly installed erosion and sedimentation controls.

9. On August 22, 2019, Respondents Endres/Lima submitted a second ERP application. The Department sent an RAI on September 20, 2019, to which Respondents Endres/Lima responded on December 19, 2019. In addition, Respondents Endres/Lima reserved 0.60 of forested Uniform Mitigation Assessment Method (UMAM) wetland credits from the Lake X Mitigation Bank and provided the Department with an updated site plan and Lake X Mitigation Bank credit reservation letter.

10. The Department issued an NOI on February 7, 2020, which was timely published in the *Sanford Herald* on February 9, 2020. Respondents Endres/Lima provided timely proof of publication to the Department on February 13, 2020.

Consent Order and Compliance

11. A warning letter was issued to Respondents Endres/Lima on January 30, 2019, for the dredging and filling of approximately 0.80 acres of forested wetlands and improper installation of erosion and sedimentation control.

12. The CO, executed on July 18, 2019, required Respondents Endres/Lima to cease any dredging, filling, or construction activities on the Property, submit an application for an Individual ERP within 30 days, and pay \$5,599.00 in penalties and the Department's costs and expenses. After the issuance of an ERP, Respondents Endres/Lima were also required to implement the restoration actions outlined in the CO.

13. Respondents' Endres/Lima's application, dated August 19, 2020, was submitted to the Department on August 22, 2020. Respondents Endres/Lima paid the CO's penalties and costs, and had multiple meetings with the Department to complete the requirements of the CO.

14. Respondents Endres/Lima's expert, Mr. Exner, testified that he began working on a restoration plan for the Property, which will be provided to the Department once an ERP is issued.

Permitting Criteria

15. The Department reviewed the complete application and determined that it satisfied the conditions for issuance under Florida Administrative Code Rule 62-330.301, and the applicable sections of the ERP Applicant's Handbook Volume I (AH Vol. I).

16. The Department also considered the seven criteria in rule 62-330.302 and section 373.414(1)(a), and determined that implementing the Project would not be contrary to the public interest.

Water Quantity, Flooding, Surface Water Storage and Conveyance

17. Respondents' Endres/Lima's civil engineering expert, Mr. Herbert, testified that according to the drainage design, the Property would have swales on either side of the proposed residence to slope water away from the residence. There would also be a conveyance swale on the north property boundary to convey water from the street area and front yard toward the restoration and wetland areas with ultimate discharge to Long Lake.

18. He stated that the elevation of the road at the front of the Property would be at 47.4 feet, and the elevation at the terminus of the swale would be at 45 feet. This would allow a 2.4-foot vertical fall for the swales to convey water to the lake. The design would preserve pre-development surface water flow over the Property to Long Lake, which is the lowest elevation in the area, and will ensure that storm water does not flood adjacent properties.

19. Mr. Herbert also testified that the Project design would maintain pre-development water storage capacity. The imported fill that is currently

on the Property in the flood plain would be removed and reshaped so that the lake elevation would be maintained and water can flow correctly.

Elimination or Reduction of Impacts and Mitigation

20. Respondents Endres/Lima provided the Department with design modifications to reduce impacts associated with the Project. These included a 15-foot restoration buffer along the lake front's northern shoreline, an elevated access walkway five feet above the wetland restoration area to the proposed dock, limiting the width of the access walk to four feet, and limiting the boat ramp width to a single-lane.

21. In June 2015, an informal wetlands determination was conducted for the Property. The informal determination concluded that the entirety of the Property were wetlands. However, this was an informal determination and was not binding. In October 2016, before the first permit application was submitted, Mr. Exner did a wetlands delineation flagging prior to the Property being cleared or disturbed.

22. Mr. Exner testified that, in his opinion, the Property was not all wetlands because large pines near the road had no high water marks, adventitious growth around the bases, or evidence of pine borer beetles along with other indicators of upland habitat. This wetland delineation was part of the permit submittal, was shown on the plans, was accepted by the Department, and was used for the preparation of the UMAM scoring. Mr. Exner's wetland delineation line was used by the Department to help determine and map the wetland impacts identified in the CO.

23. The direct impact area was assessed at 0.54 acres with a secondary impact area of 0.02 acres for a total impact of 0.56 acres, and a functional loss score of 0.364. Respondents Endres/Lima reserved 0.6 forested UMAM mitigation credits, almost double the amount of functional loss under the UMAM assessment, agreed to purchase 0.46 credits. The excess mitigation bank credits implement part of a plan that provides regional ecological value

and greater long-term ecological value than the area of wetland adversely affected.

Secondary and Cumulative Impacts

24. The Project's UMAM analysis assessed 0.02 acres, or 870 square feet, of secondary impacts. These impacts would be fully offset by the mitigation proposed for the Project.

25. Petitioners' expert, Mr. Mahnken, noted three areas where he thought the application was incomplete. The first was that the site plan did not call out the location of the secondary impacts. However, Part III: Plans of Section B of the application, does not require that the site plan show the location of the secondary impacts. The application requirements for "plans" requires only the boundaries and size of the wetlands on the Property and provide the acreages of the upland areas, wetland impact areas, and the remaining untouched area.

26. Second, Mr. Mahnken questioned the calculation performed to determine the secondary impact acreage. However, Mr. Mahnken read the information incorrectly and stated that the secondary impact area was 0.002 acres, or 87 square feet, when the UMAM score sheet clearly showed that the secondary impact area is 0.02 acres, or 870 square feet.

27. In addition, the Department's witness, Ms. Warr, testified that even if the Department were to use Mr. Mahnken's analysis, the result would have been the same, i.e., the requirement to purchase 0.46 mitigation credits. Thus, Petitioners failed to support their claim that the Project would have adverse secondary impacts.

28. Third, Mr. Mahnken asserted that cumulative impacts were not adequately addressed. He testified that the assessment for the Property using spill over benefits, in his opinion, was not enough to fully offset the impacts of the Project. Mr. Mahnken acknowledged, however, that his opinion was open to debate, and that he had not conducted any rigorous hydrologic evaluation in reaching his opinion.

29. Respondents Endres/Lima had submitted a report prepared by Breedlove, Dennis & Associates (BDA Report) with their application in order to demonstrate compliance with section 10.2.8, ERP AH Vol. I, regarding cumulative impacts.

30. The BDA Report utilized peer-reviewed hydrologic data that was reviewed and approved by the South Florida Water Management District, and was accepted by the Department pursuant to section 373.4136(6)(c). This was consistent with the Property's location within the mitigation service area for the Lake X Mitigation Bank.

31. The Project is located within the Econlockhatchee River drainage basin, which is a nested basin within the larger St. Johns River [Canaveral Marshes to Wekiva] drainage basin. The Lake X Mitigation Bank is located outside of the Econlockhatchee River drainage basin, but the Project is located within the Lake X Mitigation Bank service area.

32. The BDA report determined that:

In summary, the Lake X Mitigation Bank is a regionally significant mitigation bank site that has direct hydrological and ecological connections to the SJRWMD basins, to include the cumulative impacts basin in which the subject property is located (i.e., SJRWMD Basin 19). The size, biodiversity, and proximity of the mitigation bank site to the SJRWMD basins, and the regionally significant hydrological connection between the mitigation bank site and the contiguous SJRWMD mitigation basins, supports the use of this mitigation bank site "as if in basin" mitigation for the Lima/Endres Wetland Fill Project. Additionally, the evaluation of factors, to include connectivity of waters, hydrology, habitat range of affected species, and water quality, demonstrates the spillover benefits that the Lake X Mitigation Bank has on the St. Johns River (Canaveral Marshes to Wekiva) mitigation basin, which includes the Econlockhatchee River Nested basin, and demonstrated that the proposed mitigation will fully offset the impacts proposed as part of the

Lima/Endres Wetland Fill Project “as if in-basin” mitigation. The Lake X Mitigation Bank will protect and maintain the headwaters of two regionally significant drainage basins [i.e., the Northern Everglades Kissimmee River Watershed and the Upper St. Johns River Watershed (to include the nested Econlockhatchee River basin)], and will provide resource protection to both river systems (SFWMD Technical Staff Report, November 29, 2016). Furthermore, the permanent protection and management of the Lake X Mitigation Bank will provide spillover benefits to the SJRWMD basins located within the permitted MSA.

33. Mr. Mahnken stated that his review of the Project did not include a hydrologic study and only looked at basic flow patterns for Long Lake. By contrast, the BDA Report included an extensive hydrologic study, looked at all required factors in section 10.2.8(b), ERP AH, Vol. I, and determined that the Project would be fully offset with the proposed mitigation. Thus, Respondents Endres/Lima provided reasonable assurance that the Project will not cause unacceptable cumulative impacts.

Water Quality

34. Rule 62-330.302(1)(e) requires that Respondents Endres/Lima provide reasonable assurance that the Project will not adversely affect the quality of receiving waters such that the state water quality standards will be violated.

35. The conditions of the ERP would require the use of best management practices including a floating turbidity curtain/barrier, soil stabilization with grass seed or sod, and a silt fence.

36. Respondent Endres/Lima's experts, Mr. Herbert and Mr. Exner, testified that there is an existing turbidity barrier in the lake around the property and a silt fence around the east half of the Property. While these items are not required by the Department until construction of the Project, part of the silt fence and the turbidity barrier are already installed on the

Property and will be required to be repaired and properly maintained in accordance with the conditions of the ERP and Site Plan SP-2.

37. Mr. Herbert testified that the Property will be graded in a manner that will result in a gentle sloping of the lake bank in the littoral zone, which would allow revegetation of the lake bank. Outside of the restoration area and the undisturbed wetlands, the backyard would be covered with grass to prevent migration of sand and soil discharging into the lake.

38. Mr. Exner testified that the grass swales proposed for the Project would provide a considerable amount of nutrient uptake and filtration of surface water on the Property. Also, in the restoration area next to the lake, the restoration plan includes a dense planting plan with native species that have good nutrient uptake capability.

Impacts to Fish and Wildlife

39. Rule 62-330.301(1)(d) requires that Respondents Endres/Lima provide reasonable assurance that the Project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Mr. Exner testified that, in his review of the Property, he did not identify any critical wildlife habitat. He visited the Property multiple times and he did not see any osprey nests, deer tracks, animal scat, gopher tortoises, or sand hill cranes.

40. The Department's Ms. Warr testified that the Florida Fish and Wildlife Conservation Commission database was reviewed, and did not show any listed species in the area.

Publication of Notice

41. Petitioners argued that the notice published in the *Sanford Herald* on February 9, 2020, did not meet the requirements of section 373.413(4). Despite the notice having no effect on their ability to timely challenge the proposed ERP, Petitioners argued that the published notice was insufficient because the notice itself did not provide the name of the applicants or the address of the Project, only a link to the Department's permit file.

42. Unlike the notice required in section 373.413(3), where a person has filed a written request for notification of any pending application affecting a particular designated area, section 373.413(4) does not specify the contents of the published notice. Section 373.413(4) does not require the published notice to include the name and address of the applicant; a brief description of the proposed activity, including any mitigation; the location of the proposed activity, including whether it is located within an Outstanding Florida Water or aquatic preserve; a map identifying the location of the proposed activity subject to the application; a depiction of the proposed activity subject to the application; or a name or number identifying the application and the office where the application can be inspected.

43. In response to the published notice, the Department received approximately ten petitions challenging the NOI, including the petitions timely filed by Petitioners. Therefore, Petitioners were not harmed by any information alleged to have been left out of the published notice.

Ultimate Findings

44. Respondents Endres/Lima provided reasonable assurance that the Project will not cause adverse water quantity impacts to receiving waters and adjacent lands; will not cause adverse flooding to on-site or off-site property; and will not cause adverse impacts to existing surface water storage and conveyance capabilities.

45. Respondents Endres/Lima provided reasonable assurance that the Project complied with elimination and reduction of impacts, and proposed more than adequate mitigation.

46. Respondents Endres/Lima provided reasonable assurance that the Project will not cause adverse secondary impacts to water resources; and unacceptable cumulative impacts to wetlands and other surface waters within the same drainage basin.

47. Respondents Endres/Lima provided reasonable assurance that the Project will not cause adverse water quality impacts to receiving water bodies.

48. Respondents Endres/Lima provided reasonable assurance that the Project will not adversely impact the value of functions provided to fish and wildlife, and listed species by wetlands, or other surface waters.

49. Petitioners failed to prove lack of reasonable assurance by a preponderance of the competent substantial evidence.

CONCLUSIONS OF LAW

Nature of the Proceeding

50. This is a de novo proceeding, designed to formulate final agency action, and not to review action taken preliminarily. *See Capeletti Bros. v. Dep't of Gen. Servs.*, 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983).

51. The standard of proof for this proceeding is a preponderance of the evidence. *See* § 120.57(1)(j), Fla. Stat.

Burden of Proof

52. Petitioners' challenge to the ERP is governed by section 120.569(2)(p), Florida Statutes. This section requires that the applicant present a prima facie case demonstrating entitlement to the permit. Thereafter, a third party challenging the issuance of the permit has the burden "of ultimate persuasion" and the burden "of going forward to prove the case in opposition to the . . . permit." If the third party fails to carry its burden, the applicant prevails by virtue of its prima facie case. *See* § 120.569(2)(p), Fla. Stat.

53. Section 120.569(2)(p) "clearly contemplates an abbreviated presentation of the applicant's prima facie case." *Last Stand, Inc., v. Fury Mgmt., Inc.*, Case No. 12-2574, RO ¶89 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013). The abbreviated presentation occurs because the statute outlines the information that may constitute the applicant's prima facie case, which includes the application, and supporting materials, on which the

agency concluded that the applicant provided reasonable assurances of compliance with applicable ERP criteria.

54. Respondents Endres/Lima established a prima facie case of entitlement to the ERP by entering into evidence the complete application, supporting documentation and testimony, and the Department's NOI and draft permit. Petitioners did not carry their burden of ultimate persuasion to prove their case in opposition to the ERP by a preponderance of the competent and substantial evidence. *See Washington Cty. v. Bay Cty. & NW Fla. Water Mgmt. Dist.*, Case Nos. 10-2983, 10-2984, 10-10100 (Fla. DOAH July 26, 2012; Fla. NFWFMD Sep. 27, 2012).

Permitting Standard

55. Issuance of the ERP is dependent on there being reasonable assurances that the Project would meet applicable statutory and regulatory standards. *See* §§ 373.413, 373.4136, and 373.414, Fla. Stat.; Fla. Admin. Code R. 62-330; Sections 10.2 and 10.3, ERP AH, Vol. I.

56. "Reasonable assurance" means "a substantial likelihood that the project will be successfully implemented." *See 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. Further, 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. *See FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012), *aff'd* 118 So. 3d 809 (Fla. 1st DCA 2013).

Public Interest

57. Section 373.414(1)(a) requires a determination that a proposed project is not contrary to the public interest or is clearly in the public interest. The Department "shall consider and balance" seven factors. All seven factors are collectively considered to determine whether, on balance, a proposed project

satisfies the public interest test. *See 1800 Atlantic Developers v. Dep't of Envtl. Reg.*, 552 So. 2d 946, 953, 957 (Fla. 1st DCA 1989), *rev. den.*, 562 So. 2d 345 (Fla. 1990); *Last Stand, Inc. v. Fury Mgmt., Inc.*, Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013).

58. Respondents Endres/Lima demonstrated that the Project is not contrary to the public interest pursuant to section 373.414(1)(a). They proved that the Project will not adversely affect the public health, safety, and welfare; the conservation of fish or wildlife or their habitats; the navigation or flow of water in Long Lake; fishing or recreational value of Long Lake; or significant historical resources. The current condition, and value of functions being performed by areas affected by the Project, will not be adversely affected. Mr. Exner persuasively testified that the quality of the wetlands on the Property pre-clearing were of moderate condition and had been degraded due to other developments along Long Lake resulting in a loss of continuity.

59. Petitioners opposed the ERP, but did not show any contrary evidence of equivalent quality to prove that the Project is contrary to the public interest. *See Fla. Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a Final Order granting Respondents' Endres/Lima's ERP application.

DONE AND ENTERED this 1st day of December, 2020, in Tallahassee, Leon County, Florida.



FRANCINE M. FOLKES
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of December, 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.