**STATE OF FLORIDA**
**DIVISION OF ADMINISTRATIVE HEARINGS**

NED BOWERS,

Petitioner,

VS. CASE NO. 21-0432

ORANGE COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA AND ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on May 10 through 13, 2021, by Zoom conference before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Ned Bowers:

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For Respondent Orange County, Florida:

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For Respondent St. Johns River Water Management District:

Sharon M. Wyskiel, Esquire
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## STATEMENT OF THE ISSUE

The issue to be determined is whether the proposed construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements meets the criteria in Florida Administrative Code Rules 62-330.301(1) and 62-330.302(1), and the Applicant's Handbook ("A.H.") for issuance of an Environmental Resource Permit.

## PRELIMINARY STATEMENT

On December 18, 2020, the St. Johns River Water Management District ("SJRWMD" or "District") entered a notice of its intent to issue Environmental Resource Permit ("ERP") No. 154996-2 ("Permit"), to Respondent, Orange County, Florida ("Orange County"), for the proposed construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive ("Project").

On February 3, 2021, Ned Bowers ("Petitioner" or "Mr. Bowers") filed his Petition for Administrative Hearing Involving Disputed Issues of Material Fact Re: Permit No. 154996-2 ("Petition") challenging the Permit, which was referred to DOAH and assigned as DOAH Case No. 21-0432.

The final hearing was scheduled for May 10 through 14, 2021, by Zoom conference.

Prior to the final hearing, the parties filed a number of Motions in Limine seeking to exclude issues and evidence from consideration by the undersigned, disposition of which are contained in the docket.

On May 5, 2021, Petitioner filed a Motion in Limine to Exclude Engineering Plans or Reports Signed and Sealed by Benjamin Pernezny, P.E., on May 3, 2021 ("Pernezny Motion"). The District filed a Response on May 6, 2021. The basis for the Pernezny Motion was, generally, that engineering plans had been signed by an engineer -- retained by Orange County as the engineer-of-record for the Permit application and as an expert witness in this case -- after the April 30, 2021, deadline for experts to have formulated their opinions. On May 7, 2021, the Pernezny Motion was denied without prejudice to raise issues of admissibility of evidence at the final hearing.

Among the more inflammatory allegations made in the Pernezny Motion was the suggestion by Petitioner that Mr. Pernezny's actions were violative of his professional standards of conduct, which "subjects him to disciplinary action." As a result of that allegation, Brian Bennett, Esquire, made a special appearance on behalf of Mr. Pernezny, and was allowed to participate in the discussion of Mr. Pernezny's participation as a witness in this proceeding.

At the final hearing, evidence was received that the prior engineer-of-record for the Permit application had retired. As a result, the District requested Mr. Pernezny, as the successor engineer, to sign the Permit application, which was done on May 3, 2021. The evidence demonstrated that, but for Mr. Pernezny's signature, the Permit application was

unchanged. The evidence also demonstrated that Petitioner was made aware that Mr. Pernezny was assuming responsibility as engineer-of-record by letter dated April 14, 2021, well prior to Mr. Pernezny's deposition, and that Mr. Pernezny had fully formed his opinions regarding the Project prior to his deposition.

Having heard the evidence and reviewed the relevant provisions of chapter 471, Florida Statutes, including, but not limited to, section 471.025(4), the undersigned finds that Mr. Pernezny's act of signing the Permit application documents did not make either the documents or his testimony unreliable. The act of affixing a signature to plans is not the formation of an "opinion," and so doing did not violate the provisions of the Order of Pre-hearing Instructions regarding expert opinions. Therefore, the Motion in Limine to Exclude Engineering Plans or Reports Signed and Sealed by Benjamin Pernezny, P.E. on May 3, 2021, is denied.

On May 7, 2021, after the initial denial of the Pernezny Motion, Respondent, Orange County, filed a Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., arguing, *inter alia*, that Petitioner made "scandalous and baseless accusations against Orange County's expert witnesses for the purpose of harassing and intimidating the witnesses, which purposes are improper." The undersigned agrees that the language used in the Pernezny Motion was, at best, improvident; however, under the circumstances, which are unusual, it was not unreasonable for Petitioner to conclude that the signing of the Permit application documents violated the Order of Pre-hearing Instructions. Petitioner's unnecessarily inflammatory language notwithstanding, the undersigned does not conclude that the Pernezny Motion was "interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless

increase in the cost of litigation." Thus, Orange County's Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., is denied.

On May 10, 2021, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained two stipulations of fact, which are adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

The final hearing was convened on May 10, 2021, as scheduled.

The Permit was approved under the authority of chapter 373, Florida Statutes, and the modified burden of proof established in section 120.569(2)(p), Florida Statutes, is applicable. Under that burden of proof, an applicant for a permit may establish its prima facie case of entitlement to a permit "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." At that point, the burden of ultimate persuasion is on Petitioner to prove his case in opposition to the permit by a preponderance of the competent and substantial evidence and, thereby, prove that the applicant failed to provide reasonable assurance that the standards for issuance of the permit were met. Thereafter, the applicant and agency may present evidence on rebuttal to demonstrate that the application meets the conditions for issuance.

At the final hearing, Respondent, Orange County, offered Joint Exhibits 1 through 32, consisting of the Permit application and the District's Technical Staff Report ("TSR") and proposed Permit, which were received in evidence, and which established a prima facie case of entitlement for the Permit. Orange County also presented the testimony of Maricela Torres, and rested its initial case in chief.

Petitioner presented the testimony of Kimberly Buchheit, R.L.S., who possessed the knowledge, skill, education, training, and experience to offer testimony as an expert in surveying; and Daniel Morris, P.E., who possessed the knowledge, skill, education, training, and experience to offer testimony as an expert in engineering. Petitioner also presented the testimony of David Russell, who possessed a degree of knowledge, skill, education, training, and experience in engineering, though his background was primarily in chemical, industrial, and municipal engineering, with experience in remediation, industrial safety, and wastewater treatment, none of which are pertinent to the issues in this case. He is not a licensed Florida Professional Engineer. His only knowledge of Florida stormwater rules was that gained in conjunction with his preparation for testifying in this hearing. He was not familiar with the A.H. Questioning by Petitioner's counsel and on *voir dire* elicited no indication of any knowledge, skill, education, training, and experience in water quality or stormwater modeling, and he was, by admission, "not a wetlands expert." For those reasons, Mr. Russell's testimony regarding the District's stormwater regulatory standards, water quality, stormwater modeling, and wetlands has been given little weight. Petitioner's Exhibits 1, 37, 38, 47, 48 (minus editorial notations), 50 through 54, 64 (pages 1 through 11), 66 (minus editorial notations), 69 (pages 3 through 6), 71, 91, and 98 were received in evidence. Petitioners' Exhibits 31 through 33, and 43 were proffered, but not received in evidence, and accompany the record.

In rebuttal, Orange County presented the testimony of Benjamin Pernezny, P.E., who was proffered and accepted as an expert in water resources engineering and stormwater management; Julie Bortles, who was proffered and accepted as an expert in water quality testing and analysis; and Brian Mack, P.E., who was proffered and accepted as an expert in water resources engineering, including stormwater modeling and hydrology. Orange County's Exhibits 02-3, 10-1, 10-3 through 10-7, 10-9, 12-1, 12-2, 16-1, 16-2,

18, 19-1, 29-2, 35, 44, 47 (page 2), 62 (which includes Orange County Exhibit 46 as an attachment), and 65 were received in evidence. In addition, Orange County Exhibits 54 and 55 were accepted solely for the purpose of ruling on Orange County's Notice of Improper Purpose under Section 120.569(2)(e), Fla. Stat., discussed above, and not as substantive evidentiary exhibits. Orange County Exhibit 19-2 was proffered, but not received in evidence, and accompanies the record.

In rebuttal, the District presented the testimony of Nicole Martin, who was proffered and accepted as an expert in wetland and wildlife ecology; and Cameron Dewey, P.E., who was proffered and accepted as an expert in water resources engineering. SJRWMD Exhibits 1 through 4 and 12 were received in evidence.

A four-volume Transcript of the final hearing was filed on June 8, 2021. The parties requested 30 days from the filing of the Transcript to file their post-hearing submittals. The District and Orange County timely filed their Proposed Recommended Orders ("PRO") on July 8, 2021, and each has been considered in the preparation of this Recommended Order. On July 12, 2021, Petitioner filed his PRO. No motion for an extension of time to file Petitioner's PRO was filed, either prior to the July 8, 2021, PRO filing date or otherwise, as is required by Florida Administrative Code Rule 28-106.204(4). Nonetheless, Petitioner's PRO has been considered.

The law in effect at the time the District takes final agency action on the Permit 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. Mr. Bowers resides at 7400 Lake Ola Circle, Tangerine, Florida. The property fronts Lake Ola. Petitioner's homesite includes Lots 1 and 2 of Block 8 in the Tangerine Terrace subdivision; the east 30 feet of a vacated street on its western side; and part of a vacated park south of Lots 1 and 2. The Tangerine Terrace subdivision was originally platted in 1926.

2. The District is a special taxing district created by chapter 373, and is authorized by sections 373.413, 373.414, and 373.416 to administer and enforce the ERP requirements for the management and storage of surface waters. The District has implemented these statutes, in pertinent part, through chapter 62-330. The District is the permitting authority in this proceeding and issued the Permit to Orange County.

3. Orange County is a political subdivision of the State of Florida. Orange County is the applicant for the Permit, the activities authorized by which are, except for the rock check dam on Lake Ola Boulevard, to be constructed on a drainage easement in its favor over the eastern 20 feet of Petitioner's property.

### Existing Conditions

4. Lake Ola is a freshwater lake located south of Mount Dora, Florida. Lake Ola is connected to Lake Carlton via a culvert passing underneath Dora Drive. Lake Ola is not designated as an impaired waterbody, an Outstanding Florida Water, or an Outstanding National Resource Water.

5. Tangerine Terrace is a rural residential area on the north side of Lake Ola. The main road serving the subdivision, Lake Ola Boulevard, has been in existence since the 1940s.

6. The stormwater management system that currently drains to the outfall on Mr. Bowers's property serves a catchment area of eight drainage sub-basins with a combined area of approximately 46.3 acres (collectively the "catchment area"). The area is rural-residential in nature, consisting of relatively large residential homesites, and wooded and agricultural areas.

7. The soils in the catchment area consist of Type-A soils as described by the U.S. Department of Agriculture. Such soils are sandy and pervious in nature. Homes, driveways, and roads in the area are impervious.

8. Stormwater from the catchment area generally flows south to Lake Ola Boulevard, where it is intercepted by the Lake Ola Boulevard roadside swales. There is a culvert crossing from the north side to the south side of Lake Ola Boulevard, the Cooper Cross-drain, that was installed at or near the time that the road was first constructed. The evidence was not sufficient to determine whether water flows from the south side of the drain to the north, or from the north side to the south. For purposes of this case, that determination is unnecessary.

9. Stormwater from the upland basins flows along the Lake Ola Boulevard swales to a point at or near the driveway of the Holstrom property, across the road from the western leg of Lake Ola Circle. At that point, stormwater enters into a 15-inch diameter High Density Polyethylene (HDPE) pipe that is 407 feet in length. The best evidence indicates that the pipe was installed by Orange County in 2010.[1] Stormwater then is directed under Lake Ola Boulevard to a ditch (with one driveway culvert) running along the east side of the eastern leg of Lake Ola Circle. From there, a 15-inch diameter HDPE

[1] The permitting status of the pipe is unknown. In any event, there is no evidence that the pipe is the subject of any governmental enforcement or compliance action, and no evidence of a citizen suit for injunctive relief regarding the pipe.

pipe carries stormwater to the northeast corner of Mr. Bowers's property, and the northern end of the drainage easement.

10. Existing stormwater discharge/outfall facilities on property owned by Petitioner and by the adjoining landowner to the east, Mr. Bloodworth, consist of a portion of the buried 15-inch HDPE pipe which empties into an upland asphalt-lined swale running between the two properties. The asphalt-lined swale has, by appearance, accumulated sufficient sediment to support lawn grasses. Water discharged from the southern terminus of the swale flows overland to Lake Ola.

11. Wetlands, as evidenced by hydric, organic soils, exist near the end of the existing asphalt-lined swale. The wetlands within the Project area have been mowed and maintained as a residential St. Augustine grass lawn. There is some scattered hydrocotyle (dollarweed) that has come up through the St. Augustine grass, though the wetland delineation was determined through the hydric soils, rather than wetland vegetative species. The preponderance of the evidence demonstrates that the wetland delineation was appropriate and consistent with the best evidence, that being wetland soils. There is a wetland scrub community along the shoreline of Lake Ola that is outside of the Project boundary, but within the easement limits.

Proposed Project

12. Orange County proposes to replace a 22-foot segment of the existing buried 15-inch HDPE pipe and the existing asphalt-lined swale, with an underground 18-inch concrete drainage outfall pipe with a shallow surface swale, three ditch bottom inlets, and a baffled endwall. The remaining 15-foot segment of the 15-inch HDPE pipe will connect to the first of the ditch bottom inlets and discharge to the 18-inch culvert.

13. At the point at which it connects to the 15-inch pipe at the first ditch bottom inlet, the 18-inch pipe will be eight feet west of the centerline of the

existing asphalt-lined swale. At its outfall at the baffled endwall, the 18-inch pipe will be 14 feet west of the centerline of the existing asphalt-lined swale.

14. The 18-inch outfall pipe and baffled endwall are to be installed entirely within a drainage easement 20 feet in width along the eastern edge of Mr. Bowers's property. Mr. Bowers owns the underlying servient fee interest. Orange County introduced competent substantial evidence in the form of recorded easements and surveys to establish its prima facie case that it has a sufficient real property interest over the land upon which the activities subject to the Permit application will be conducted. The evidence submitted by Petitioner was not sufficient to establish that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement. However, as will be discussed in the Conclusions of Law, the proposed Permit conveys no title, and affects no real property interests. Disputes over the scope, extent, and rights conferred under the easement are left to a court of competent jurisdiction over conflicting real property claims.

15. Stormwater from the catchment area into the proposed improvements will maintain the current runoff patterns. In simple terms, the Project (exclusive of the upstream rock check dam) entails little more than enclosing the existing asphalt lined swale with an outfall pipe, overlain by a pervious surface swale and inlets.

16. Water flowing from the 15-inch pipe into the 18-inch outfall pipe will decrease in velocity as the conveyance pipe volume is increased. Thus, despite Petitioner's contention that the increase in pipe size is unnecessary, it serves a benefit. In addition, the terminal endwall for the 18-inch concrete pipe will incorporate baffles to further dissipate flows. Water discharged from the baffled endwall will then flow overland to Lake Ola, much as it does now from the end of the asphalt swale. There was no persuasive evidence introduced that water discharged from the Lake Ola discharge portion of the Project will reasonably be expected to result in scour or erosion.

17. The outfall pipe and associated endwall will result in 0.001 acres of permanent wetland impact, limited to the footprint of the baffled endwall, and 0.031 acres of temporary wetland impact from the installation of the pipe waterward of the wetland delineation line. The calculation of temporary wetland impact is restricted to the temporary effects associated with the construction of the outfall structure, and has no relation to the waters to be discharged from the outfall pipe.

18. The Project also includes construction of an upgradient rock check dam to be placed across the roadside swale along Lake Ola Boulevard west of its intersection with Lake Ola Circle. The rock check dam is proposed to be constructed with relatively large pieces of rock to an elevation of six inches above the bottom of the swale. The rock check dam is designed to slow the passage of low velocity stormwater resulting from minor rain events, allowing energy dissipation of the stormwater, and a "small amount" of water being held up behind the dam to infiltrate into the soil, thereby incrementally reducing the volume of stormwater downgradient. The purpose of the rock check dam is not to enhance or promote water quality treatment, or to affect the flow of water in the existing stormwater system during periods of significant rainfall. In higher flow storm events, the rock check dam will have little or no attenuating effect on stormwater moving down the Lake Ola Boulevard swale. In no event will the rock check dam increase the volume or velocity of stormwaters through the Lake Ola Boulevard swale, or affect existing water quality in the overall stormwater management system.

19. The proposed Project will not add to, diminish, or change any existing land use, soil types, or impervious areas in the 48.3-acre catchment area. Except for the rock check dam and the grading of the proposed swale over the proposed 18-inch outlet pipe, the Project will not change the existing topography in the 48.3-acre catchment area.

Stormwater Permitting Standard and Modeling Calculations

20. In permitting stormwater management systems, or elements thereof, the District is guided by the principle that post-development stormwater volume cannot exceed predevelopment stormwater volume.

21. Predevelopment, i.e., existing, stormwater volumes are those conditions that existed when ERP Application No. 154996-2 was submitted in March 2020.

22. Petitioner has argued that predevelopment volumes should be calculated based on conditions in the catchment area that existed as far back as 2010. Petitioner has not, nor could he, provide any authority to support the assertion that existing conditions in an area subject to a permit application are those conditions existing a decade prior. Thus, Petitioner's argument is rejected.

23. In order to calculate pre- and post-development volumes, Orange County utilized the Interconnected Channel and Pond Routing (ICPR) model to calculate flows. The preponderance of the evidence established that the ICPR is an accepted and reliable method for determining stormwater flows and volumes.

Scenario 1

24. Ms. Dewey met with Mr. Bowers at his property in June 2020 to discuss the Project. Afterwards, in order to satisfy certain of Mr. Bowers's inquiries, Ms. Dewey asked Orange County to run the ICPR model using reasonably available data to estimate runoff conditions that existed in the area prior to 2010, an exercise dubbed Scenario 1.

25. Ms. Dewey testified convincingly that the Scenario 1 exercise "was really for historical context," and was not an effort to determine "existing conditions" for purposes of the District's pre- and post-development calculations.

26. Much of the testimony and evidence offered by Petitioner concerned disagreements in the model inputs for Scenario 1, particularly as related to

elevations at the Cooper Cross-drain and the Holstrom driveway. Though the disagreements were in inches, differences in inches can affect the direction and volume of stormwater flows.

27. Mr. Morris opined that the outfall pipe at Mr. Bowers's property could not be properly sized without a determination of the full volume of water to be introduced into it. However, Mr. Morris's testimony is predicated on conditions that existed in the area in 2010 and before. It was not based on conditions that currently exist in the area, as is required by the District rules. Furthermore, Petitioner's witnesses did not opine as to a more appropriate size for the discharge pipe because they ran no models of their own.

28. Mr. Morris's testimony was also based on his conclusion that surface elevation inputs at the Cooper Cross-drain and the Holstrom driveway were incorrectly calculated. As his solution, he suggested that "all that needs to be done is for CDM to connect -- correct two points, rerun the model, and we'll see what the real scenario one is." Mr. Morris, however, did not run the model to substantiate his testimony.

29. Mr. Mack testified regarding the elevations disputed by Mr. Morris. His opinions were based on surveys and methods of calculating elevation that were reasonable and reliable, and led him to conclude that the model inputs for Scenario 1 were accurate, and reasonably depicted conditions and elevations that existed in the area in 2010 and before. His testimony is accepted.

30. Mr. Pernezny testified that, even under Scenario 1 conditions, the proposed 18-inch discharge pipe will be able to accommodate the flows for the 10-year and 25-year drainage storm events without exceeding the capacity of the pipe. A smaller pipe, matching the existing 15-inch input, would result in discharges at its terminal end having a higher velocity, and higher erosive potential, while the 18-inch pipe is designed to result in a decreased velocity and reduced erosive potential at the outfall.

31. As indicated, Scenario 1 conditions are not relevant to a determination of whether the Permit meets District permitting standards, because Scenario 1 does not reflect existing or predevelopment conditions in the catchment area or at the discharge structure. Nonetheless, the preponderance of the evidence establishes that the proposed Project, even under Scenario 1, meets the standards for issuance of the ERP.

Scenario 2

32. In order to provide predevelopment and post-development conditions, Orange County ran Scenario 2 to calculate existing conditions, i.e., those conditions that existed in the catchment area at the time the Permit application was filed.

33. The existing conditions were then compared to the conditions that will be expected after the construction of the permitted activities. The only permitted activities consist of the outfall pipe and baffled endwall at Mr. Bowers's property, and the rock check dam.

34. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause adverse water quantity impacts to receiving waters and adjacent lands because the post-development peak rate of discharge will not exceed the predevelopment peak rate of discharge.

35. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause flooding to on-site or off-site property because the peak stages of the discharge will not extend beyond the limits of Orange County's easement.

36. A preponderance of the evidence, including the ICPR modeling results, establish that the Project will not cause adverse impacts to existing water storage and conveyance capabilities because the post-development peak rate of discharge will not exceed that of the predevelopment peak rate of discharge, and the peak stages of discharge during a 25-year, 24-hour storm event will not extend beyond the limits of Orange County's easement.

37. The modeling inputs for Scenario 2 were not disputed by Petitioner's experts. In that regard, Mr. Morris testified that he had "no issue with the input data for Scenario 2." His objection was limited to the characterization of the Scenario 2 data and, in particular, the 407 feet of pipe installed in 2010, as "existing" conditions. Mr. Russell, in addition to the general lack of weight given his testimony, admitted that he looked only "briefly" and "not in great depth" at the Scenario 1 modeling, and not at all at Scenario 2.

Water Quality

38. The Project does not propose a change in drainage patterns, runoff volumes, or land uses that would change the pollutant loading to Lake Ola. Soil types and conditions, and areas that are impervious, are completely unchanged from existing predevelopment conditions to conditions that will exist after completion of the Project. There is no proposed change in runoff from the predevelopment condition to the post-development condition. Water flowing to Lake Ola in the existing condition is the same as the water that will be flowing to Lake Ola after the Proposed Project is constructed. Mr. Pernezny testified that there would be no appreciable difference in the overall hydraulics of the system as a result of the replacement of the asphalt-lined swale with the 18-inch pipe, and that there will be "no change in water quality characteristics between existing and proposed." His testimony is credited. As a result, the preponderance of competent substantial evidence demonstrates that the Project will not cause adverse water quality impacts to Lake Ola.

39. Because the Project is not adding pollutants to the stormwater, water quality treatment is not required. Nonetheless, Orange County proposed construction of a rock check dam upstream, which will help slow down water flow and thereby promote infiltration for smaller storm events. Increased infiltration, even marginally, will result in more stormwater being absorbed into the ground, and fractionally less traveling towards the point of discharge

to Lake Ola. Under no possible circumstance will the rock check dam cause or contribute to any adverse impact to the quality of waters flowing from the catchment area to the point of discharge.

40. Orange County has proposed the deployment of erosion, sediment, and turbidity control measures to be utilized during construction. Thus, there is expected to be no temporary water quality impacts related to the construction or period of stabilization of the proposed Project.

Wetland Impacts

41. The Project footprint contains a total of 0.167 acres within an existing drainage easement. The wetlands are defined as such due solely to the presence of hydric soils. The area within the Project boundaries have been mowed and maintained as a single-family residential lawn dominated by St. Augustine grass, thus, effectively eliminating any beneficial wetland function or value. Although the area in which construction is to occur includes sparse emergence of scattered dollarweed, it is not defined as a wetland due to the dominance of any wetland plant species.

42. The existing asphalt-lined swale provides no significant value to functions provided to fish and wildlife and their habitat.

43. Given the lack of existing wetland values in the Project area, the 0.001 acres of permanent impacts and 0.031 acres of temporary impacts are not adverse. Thus, Orange County was not required to eliminate or reduce the impacts. Since the Project will not cause adverse impacts and the area has no significant ecological value, mitigation is not required.

Secondary Impacts

44. Rule 62-330.301(1)(f) and A.H. Volume I, section 10.1.1,[2] provide that "[a] regulated activity will not cause adverse secondary impacts to the water

[2] The Environmental Resource Permit Applicant's Handbook has been adopted as a rule for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-

resources." As set forth in the Findings of Fact herein, the Project "will not cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters." There was no competent substantial evidence offered that the Project will "adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species." The Project will not affect significant historical and archaeological resources. Finally, there is no indication that future phases or activities closely linked or causally related to the Project will result in water quality violations or adverse impacts to wetlands or other surface waters.

45. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not cause adverse secondary impacts to wetlands and other surface waters as defined in A.H. Volume I, section 10.2.7.

Public Interest Test

46. Rule 62-330.302(1)(a), as supplemented by A.H. Volume I, section 10.2.3, requires that projects:

> Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I.

What follows are seven listed criteria. Lake Ola is not an Outstanding Florida Water. Thus, the standard applicable to those elements of the Project that are to be constructed in, on, or over wetlands or other surface waters is that they not be contrary to the public interest.

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330.010(4). The A.H. was developed "to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. Vol. I, § 1.0.

47. The first public interest factor is whether the Project "will adversely affect the public health, safety, or welfare or the property of others." The part of the Project located in, on, or over wetlands or other surface waters is within a mowed and maintained residential lawn. The Project will not cause an environmental hazard to public health or safety; is not located in a shellfish harvesting area; and will not cause flooding or environmental impacts to the property of others. A preponderance of the competent substantial evidence established that the Project will meet all water quantity standards, and that the Project will cause no increase in water volume or velocity from existing predevelopment conditions. The prima facie case established by Orange County established, for purposes of this proceeding, that the proposed drainage pipe and outfall will be contained entirely within Orange County's easement. Nonetheless, as set forth previously, and as will be discussed in the Conclusions of Law, disputes over the scope, extent, and rights under the easement are left to a court of competent jurisdiction.

48. The second public interest factor is whether the Project "will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats." There was nothing received in evidence to support a finding that the Project area is utilized by wildlife, or that it supports nesting or denning.

49. The third public interest factor is whether the Project "will adversely affect navigation or the flow of water or cause harmful erosion or shoaling." The Project is located landward of the waters of Lake Ola and, therefore, will not impede navigability. A preponderance of the competent substantial evidence established that neither the discharge from the pipe and endwall structure, nor the effects of the rock check dam, will cause erosion or shoaling.

50. The fourth public interest factor is whether the Project "will adversely affect the fishing or recreational values of marine productivity in the vicinity of the project." A preponderance of the competent substantial evidence

established that there will be no impacts to fisheries, boating, or swimming activities on Lake Ola.

51. The fifth public interest factor is whether the Project "will be of a temporary or permanent nature." The Project will result in 0.001 acres of permanent impacts and 0.031 acres of temporary impacts associated with construction of the outfall structure. A.H. Volume I, section 10.2.3.5 establishes that "[t]emporary impacts will be considered less harmful than permanent impacts of the same nature and extent." Given that Petitioner has maintained the hydric-soil wetlands as a residential St. Augustine grass covered lawn, there is no significant ecological value to the wetlands. Once the installation of the drainage pipe is complete and stabilized, it will have no impact on the residential lawn. The ecological effect of the 0.001 acres of permanent impact is, given the nature of the affected wetland, insignificant.

52. The sixth public interest factor is whether the Project "will adversely affect or will enhance significant historical and archaeological resources." A preponderance of the competent substantial evidence established that there are no known historical or archaeological resources in the area. The proposed Permit also contains a condition for Orange County to cease activities and contact the Division of Historical Resources if any artifacts are encountered during construction.

53. The seventh public interest factor is the "current condition and relative value of functions being performed by areas affected by the proposed activities." As set forth herein, the area affected by the Project has no wetland value due to its conversion to use as Petitioner's residential lawn.

54. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not be contrary to the public interest as defined in A.H. Volume I, section 10.2.3.

Cumulative Impacts

55. Rule 62-330.302(1)(b), as supplemented by A.H. Volume I, section 10.2.8, establish that an applicant must provide reasonable assurance that a project "will not cause unacceptable cumulative impacts to wetlands and other surface waters" within the same drainage basin. The impacts on wetlands and surface waters are reviewed by evaluating the impacts to water quality wetland functions. As set forth herein, the Project will have no effect on water quality, and the affected hydric-soil wetlands have no functional wetland value due to their conversion to a mowed and maintained residential grass lawn.

56. A preponderance of the competent substantial evidence received in this case establishes that Orange County provided reasonable assurance that the Project will not cause unacceptable cumulative impacts to wetlands and other surface waters as defined in A.H. Volume I, section 10.2.8.

Special Basins

57. Petitioner argues that the Project does not meet the applicable special basin criteria for the Ocklawaha River Hydrologic Basin or the special basin criteria for the Wekiva Recharge Protection Area due to the perceived errors in the ICPR model inputs and results. The argument is largely based on the assumption that existing predevelopment conditions for the Permit should be based on those existing in 2010, rather than those existing at the time of the Permit application. As set forth herein, that argument is rejected.

58. The applicable special criterion for the Ocklawaha River Hydrologic Basin provides that "[t]he system shall meet applicable discharge criteria for 10-year and 25-year frequency storms." Competent substantial evidence established that Orange County applied those discharge criteria in its ICPR modeling, and that the data demonstrated that the post-development peak rate of discharge to Lake Ola will not exceed the predevelopment or existing condition peak rate of discharge for 10-year and 25-year frequency storms.

59. The applicable special criterion for the Wekiva Recharge Protection Area requires retention storage of three inches of runoff "from all impervious areas proposed to be constructed on soils defined as Type 'A' soils." The Project proposed no construction of impervious surfaces on Type A soils.

60. A preponderance of the competent substantial evidence received in this case establishes that the proposed Project does not violate special basin criteria for the Ocklawaha River Hydrologic Basin or the Wekiva Recharge Protection Area pursuant to A.H. Volume II (SJRWMD), sections 13.2 and 13.3.

Plan Certification

61. Petitioner argues that Orange County failed to provide signed and sealed plans and calculations in support of its Permit application as required by A.H. Volume II (SJRWMD), section 2.3. The evidence in this case established that the original professional engineer assigned to the Permit retired. Mr. Pernezny, as the successor engineer, was asked by the District to sign the Permit application, which was done on May 3, 2021. But for Mr. Pernezny's signature, the Permit application was unchanged. Petitioner was aware that Mr. Pernezny was assuming responsibility as engineer-of-record well prior to the final hearing in this case.

62. This proceeding, being de novo in nature, is intended to formulate final agency action and not to review action taken earlier and preliminarily. The documents received in evidence at the final hearing were signed, sealed, and dated as required, and are sufficient to provide reasonable assurance that the project meets District permitting standards.

Legal Authorization

63. Rule 62-330.060(3), entitled Content of Applications for Individual and Conceptual Approval Permits, provides, in pertinent part, that:

> The applicant must certify that it has sufficient real property interest over the land upon which the activities subject to the application will be conducted, as required in Section A of Form 62-330.060(1) and Section 4.2.3(d) of the Applicant's Handbook Volume I.

64. Similarly, A.H. Volume I, section 4.2.3 provides, in pertinent part, that an application for an ERP include:

> (d) Documentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted. Interests in real property typically are evidenced by:
>
> * * *
>
> 2. The applicant being the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.

65. A.H. Volume II (SJRWMD), section 2.5, entitled Legal Authorization, further provides that:

> Applicants which propose to utilize offsite areas not under their control to satisfy the criteria for evaluation listed in section 2.0 must obtain sufficient legal authorization prior to permit issuance to use the area. For example, an applicant who proposes to locate the outfall pipe from the stormwater basin to the receiving water on an adjacent property owner's land must obtain a drainage easement or other appropriate legal authorization from the adjacent owner. A copy of the legal authorization must be submitted with the permit application.

66. Neither the rule nor the A.H. require proof as would be necessary to adjudicate disputes in property rights and boundaries in circuit court. Rather, they require a good faith certification. That certification was provided by Orange County in the Permit application.

67. Orange County also submitted, along with its certification, documentation, including copies of the drainage easement and survey, sufficient to meet the criteria in the rule and the A.H., that it has sufficient real property interest over the land upon which the Project is to be conducted. That documentation, on its face, established Orange County's prima facie right to use the recorded drainage easement and, thus, entitlement to the Permit. The evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was proposing to construct the drainage improvements outside of the boundary of the easement.

68. Rule 62-330.350(1)(i), which has been incorporated verbatim as Condition 9 of the Permit, provides that, as a general condition:

> This permit does not:
>
> a. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;
>
> b. Convey to the permittee or create in the permittee any interest in real property;
>
> c. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or
>
> d. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

69. As set forth in the Conclusions of Law, disputes as to property boundaries and rights are to be resolved outside of the context of this proceeding.

Ultimate Findings of Fact

70. The greater weight of the competent substantial evidence establishes that neither the rock check dam nor the 0.167-acre outfall drainage improvement at Lake Ola Circle are reasonably expected to 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.

71. The greater weight of the competent substantial evidence establishes that neither the rock check dam nor the 0.167-acre outfall drainage improvement at Lake Ola Circle are reasonably expected to cause or contribute to a violation of state water quality standards. Evidence to the contrary was not persuasive.

72. The greater weight of the competent substantial evidence establishes that the rock check dam and the 0.167-acre outfall drainage improvement at Lake Ola Circle meet all applicable permitting criteria for issuance of the Permit. Petitioner did not meet his burden of demonstrating that the Permit should not be issued. Evidence to the contrary was not persuasive.

## CONCLUSIONS OF LAW

Jurisdiction

73. 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

74. 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."

75. 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.

76. *Agrico* was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action; rather, "[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties' substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings." *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing *Gregory v. Indian River Cty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

77. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest could reasonably be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

> Standing is "a forward-looking concept" and "cannot 'disappear' based on the ultimate outcome of the proceeding.". . . When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests "could reasonably be affected by . . . [the] proposed activities."

*Palm Beach Cty. Envtl. Coal. v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cty. Bd. of Cty. Comm'rs v. Dep't of Envtl. Reg.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also, St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) ("Ultimately, the ALJ's conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.").

78. Mr. Bowers alleged standing based on his ownership of the property encumbered by the drainage easement. This proceeding is designed to protect property owners from potential pollution, water quality and quantity violations, and other adverse impacts caused by permitted activities, impacts that are the subject of chapter 373 and the rules adopted thereunder. Mr. Bowers's status as the owner of the underlying fee over which Orange County holds its easement, and that the permitted activities will cause or contribute to flooding of his land; impacts to physical structures on his land; deposits of excessive sediments on his land and shoreline; water quality violations in Lake Ola; algal blooms on Lake Ola; adverse effects on wildlife; impairment of boating, fishing, and recreational interests; and an imbalance of flora and fauna, including the rapid growth of invasive plant species that impair the Lake Ola shoreline and its scenic views, meet the second prong of the *Agrico* test.

79. "[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, 681 (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)). Mr. Bowers's allegations that the activities are expected to result in the adverse impacts described above are sufficient to meet the standard of an "injury in fact which is of sufficient immediacy to entitle [him] to a section 120.57 hearing."

80. Orange County has standing as the applicant for the Permit. *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, Inc. v. Dep't of Transp.*, 791 So. 2d 491, 492 (Fla. 1st DCA 2001).

Nature of the Proceeding

81. 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

82. 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.

83. The Permit was issued pursuant to rules promulgated under chapter 373. Therefore, the Permit is subject to the abbreviated presentation and burden-shifting described in section 120.569(2)(p).

84. Orange County and the District made the prima facie case of entitlement to the Permit by entering into evidence the application file and supporting documentation, and the District's TSR and proposed Permit.

85. As to the issue of the hearsay nature of the engineering plans and reports, the nature of evidence that is sufficient to establish prima facie entitlement to an ERP was discussed in *Last Stand, Inc., and George Halloran v. Fury Management, Inc., and Department of Environmental Protection*, DOAH Case No. 12-2574 (Fla. DOAH Dec. 31, 2012; Fla. DEP Feb. 7, 2013), in which Judge Bram D.E. Canter stated:

> 90. When an agency's intent to issue a permit has been challenged, the procedure and burden of proof established in section 120.569(2)(p) provides for a logical and efficient proceeding. The permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory when it is admitted into evidence at the final hearing, and it does not lose that status unless the challenger proves that specific

aspects of the application are unsatisfactory.

> 91. It follows that the permit application and supporting material submitted to the agency may be received into evidence for the truth of the matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted except through witnesses with personal knowledge and requisite expertise as to all statements contained within the documents, one of the primary purposes of the statute would be destroyed.

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

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

88. "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

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

90. 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).

Real Property Interest

91. A.H. Volume I, section 4.2.3(d) provides that:

> The submitted application must contain one original mailed or an electronic submittal of the materials requested in the applicable sections of the form, and such other information as is necessary to provide reasonable assurance that the activities proposed in the application meet the conditions for issuance under Rule 62-330.301, F.A.C., the additional conditions for issuance under Rule 62-330.302, F.A.C., and the applicable provisions of the Applicant's Handbook. Those materials include:
>
> * * *
>
> (d) Documentation of the applicant's real property interest over the land upon which the activities subject to the application will be conducted. Interests in real property typically are evidenced by:
>
> * * *
>
> 2. The applicant being the holder of a recorded easement conveying the right to utilize the property for a purpose consistent with the authorization requested in the permit application.

92. Orange County submitted documentation that, on its face, and in accordance with section 120.569(2)(p), established its prima facie entitlement to the Permit. The evidence submitted by Petitioner was not sufficient, even if accepted as true, to demonstrate that Orange County was proposing to construct the drainage improvements on Mr. Bowers's property outside of the boundary of the easement.

93. The issue for determination in this proceeding is simply whether Orange County provided prima facie evidence to establish a right to use the

property on which it intends to construct its drainage outfall. Unlike substantive issues of environmental impacts and public interest over which DOAH has substantive jurisdiction, the issue of property control is simply a matter of whether the applicant provided facially sufficient documentation of its real property interest over the land upon which the activities subject to the application will be conducted. Orange County submitted such facially sufficient evidence.[3]

94. A regulatory agency with jurisdiction over environmental matters, as is the District, does not have jurisdiction to determine issues:

> outside an environmental context in light of the jurisdiction to adjudicate all actions involving the title and boundaries of real property conferred upon circuit courts by section 26.012(2), Florida Statutes. And, as noted by appellee, agencies would not, by their nature, ordinarily have jurisdiction to decide issues of law inherent in evaluation of private property impacts.

*Miller v. Dep't of Envtl. Reg.*, 504 So. 2d 1325, 1327-28 (Fla. 1st DCA 1987); *see also Buckley v. Dep't of HRS*, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987) (An administrative hearing is not the appropriate forum for a property dispute and that a "court of competent jurisdiction is more appropriate"). The permit in this case, if issued, conveys no title, and affects no real property interests. Thus, once prima facie evidence of a sufficient real property interest is provided, disputes over the scope, extent, and rights conferred are

[3] Obviously, if the evidence submitted does not, on its face, relate to a proposed project area, e.g., a survey for subdivision Lot A instead of subdivision Lot F, there is nothing to prevent a finding that, on its face, the documentation of an applicant's real property interest is insufficient. That is not the case here. It is undisputed that Mr. Bowers owns Lots 1 and 2 of Block 8 in the Tangerine Terrace subdivision, and that Orange County holds an easement over the eastern 20 feet of the property. The dispute is over subtle differences in the angle of the northeast corner of the property amounting to less than 1.5 degrees. Accepting Petitioner's evidence of the property/easement boundary, the dispute would, on its face, result in a potential difference at the end of the project area of little more than 5 feet in width, with the Project area remaining within the uncontested limits of the easement. (Petitioner's Exhibit 38). However, a definitive determination of the line remains within the province of the circuit court.

to be left to a court with jurisdiction over any conflicting property claims. § 26.012(2)(g), Fla. Stat. ("Circuit courts shall have exclusive original jurisdiction: (g) In all actions involving the title and boundaries of real property."); *Cope v. City of Gulf Breeze and Dep't. of Envtl. Prot.*, Case No. 10-8893, R.O. para. 50 (Fla. DOAH Apr. 20, 2011; DEP June 6, 2011)("Because a dispute over the exact boundary lines of Lot 37 exists, this issue must be resolved in the appropriate circuit court.").

Standards

95. Rule 62-330.020(2) provides, in pertinent part, that:

> a permit is required prior to the construction, alteration, operation, maintenance, removal, or abandonment of any project that, by itself or in combination with an activity conducted after October 1, 2013, cumulatively results in any of the following: (a) Any project in, on, or over wetlands or other surface waters; ... or (j) Any modification or alteration of a project previously permitted under part IV of chapter 373, F.S.

96. Petitioner argues that other "threshold" elements of rule 62-330.020(2) apply in this case, which would require that the Permit include swales, pipes, and impervious and semi-impervious areas installed or constructed in 2010. Petitioner's argument requires that conditions existing in 2010 be accepted as constituting "existing" or "predevelopment" conditions on the March 2020 date of the Permit application. They are not.

97. A.H. Volume 1, section 2.0(b) provides, in pertinent part, that "[d]efinitions and terms that are not defined above ... will be defined using published, generally accepted dictionaries." The generally accepted definition of "existing" is "in existence or operation at the time under consideration; current." Lexico - Powered by Oxford, *available at* https://www.lexico.com/en/definition/existing (last visited July 12, 2021). The

existing, or current, predevelopment conditions are those that existed when ERP Application No. 154996-2 was submitted in March 2020.

98. Rule 62-330.301(1) provides, in pertinent part, that:

> (1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:
>
> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
>
> (b) Will not cause adverse flooding to on-site or off-site property;
>
> (c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;
>
> (d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
>
> (e) Will not adversely affect the quality of receiving waters such that the state water quality standards set forth in chapters 62-4, 62-302, 62-520, and 62-550, F.A.C., including the antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), F.A.C., subsections 62-4.242(2) and (3), F.A.C., and rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;
>
> (f) Will not cause adverse secondary impacts to the water resources. In addition to the criteria in this subsection and in subsection 62-330.301(2), F.A.C., in accordance with section 373.4132, F.S., an applicant proposing the construction, alteration, operation, maintenance, abandonment, or removal of a dry storage facility for 10 or more vessels that is functionally associated with a boat launching area must also provide reasonable assurance that the facility, taking into consideration any secondary

impacts, will meet the provisions of paragraph 62-330.302(1)(a), F.A.C., including the potential adverse impacts to manatees;
(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to section 373.042, F.S.;

(h) Will not cause adverse impacts to a Work of the District established pursuant to section 373.086, F.S.;

(i) Will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed;

(j) Will be conducted by a person with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued; and

(k) Will comply with any applicable special basin or geographic area criteria

99. Rule 62-330.302(1) provides, in pertinent part, that:

(1) In addition to the conditions in rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) Located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I:

1. Whether the activities will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activities will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activities will be of a temporary or permanent nature;

6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, F.S.; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.

Entitlement to the Permit

100. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse water quantity impacts to receiving waters and adjacent lands. Thus, the Project meets the standards established in rule 62-330.301(1)(a).

101. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse flooding to on-site or off-site

property. Thus, the Project meets the standards established in rule 62-330.301(1)(b).

102. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse impacts to existing surface water storage and conveyance capabilities. Thus, the Project meets the standards established in rule 62-330.301(1)(c).

103. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Thus, the Project meets the standards established in rule 62-330.301(1)(d) and A.H. Volume I, section 10.1.1(a).

104. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not adversely affect the quality of receiving waters such that the state water quality standards will be violated. Thus, the Project meets the standards established in rule 62-330.301(1)(e) and A.H. Volume I, section 10.1.1(c).

105. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause adverse secondary impacts to the water resources. Thus, the Project meets the standards established in rule 62-330.301(1)(f) and A.H. Volume I, sections 10.1.1(f) and 10.2.7.

106. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed. Thus, the Project meets the standards established in rule 62-330.301(1)(i).

107. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will be conducted by a person with the financial, legal, and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued. Thus, the Project meets the standards established in rule 62-330.301(1)(j), subject to a determination as to any disputes regarding the boundary to or rights conferred under the easement by a court of competent jurisdiction.

108. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will comply with applicable special basin or geographic area criteria. Thus, the Project meets the standards established in rule 62-330.301(1)(k) and A.H. Volume II (SJRWMD), sections 13.2 and 13.3.

109. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not be contrary to the public interest. Thus, the Project meets the standards established in rule 62-330.302(1)(a) and A.H. Volume I, section 10.2.3.

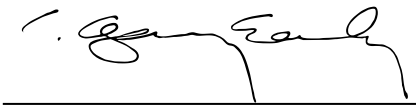
110. A preponderance of the competent substantial evidence presented in this proceeding, as set forth in the Findings of Fact herein, establishes that the Project, as designed, will not cause unacceptable cumulative impacts upon wetlands and other surface waters. Thus, the Project meets the standards established in rule 62-330.302(1)(b) and A.H. Volume I, sections 10.1.1(g) and 10.2.8.

111. As established in the Findings of Fact, reasonable assurance was provided that Orange County complied with all applicable standards for the Permit established by rules 62-330.301 and 62-330.302, and the A.H., and that Orange County is entitled to issuance of the Permit.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the St. Johns River Water Management District enter a final order issuing Environmental Resource Permit No. 154996-2, as proposed, to Respondent, Orange County, Florida, for the construction and operation of an outfall drainage improvement project for a 0.167-acre project known as Lake Ola Circle Outfall Drainage Improvements, and the related construction of an upgradient rock check dam in a swale along the north side of Lake Ola Drive.

DONE AND ENTERED this 19th day of July, 2021, in Tallahassee, Leon County, Florida.



E. GARY EARLY
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2021.

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Management District
4049 Reid Street (32177)
Post Office Box 1429
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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.