5.27.05

St. Johns River Water Management District

Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director

4049 Reid Street • P.O. Box 1429 • Palatka, FL 32178-1429 • (386) 329-4500
On the Internet at *www.sjrwmd.com*.

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July 14, 2005

AP

Division of Administrative Hearings
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

RSC
Closed

Re: Barbara Ash, et al. v. SJRWMD and City of Deltona;
DOAH Consolidated Case Nos. 04-2399 through 04-2401;
04-2403 through 04-2406; 04-2408 through 04-2409;
04-2411 through 04-2412; 04-3048;
SJRWMD F.O.R. 2004-27

Dear Sir or Madam,

Pursuant to Section 120.57(1)(m), Florida Statutes, this agency is providing a copy of its final order to the Division of Administrative Hearings within 15 days of the final order having been filed with the agency clerk. The recommended order was submitted to the agency on May 27, 2005, and the final order was filed on July 13, 2005, after the Governing Board's action on July 12.

If you have any questions, please call me at (386) 329-4448.

Sincerely,

Tara E. Boonstra
Assistant General Counsel
Office of General Counsel

TEB:kp

SJR 2005-60

FILED
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CLERK
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT
GENERAL COUNSEL'S OFFICE
PALATKA, FLORIDA

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BARBARA ASH, et al.,	F.O.R. No.	2004-27
	DOAH Case Nos.	04-2399
Petitioners,		04-2400
		04-2401
vs.		04-2403
		04-2404
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and CITY OF DELTONA,		04-2405
		04-2406
		04-2408
		04-2409
		04-2411
Respondents.		04-2412
		04-3048

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Robert S. Cohen, held a formal administrative hearing in the above-styled case on March 30 and 31, 2005, in Deltona, Florida.

A. APPEARANCES

For Petitioners, BARBARA ASH, FRANCELL FREI, BERNARD J. and VIRGINIA T. PATTERSON and TED AND CAROL SULLIVAN	Barbara Ash, Qualified Representative 943 S. Dean Circle Deltona, Florida 32738
For Petitioner, DIANA E. BAUER	Diana E. Bauer (pro se) 1324 Tartan Avenue, Deltona, Florida 32738
For Petitioners, HOWARD EHMER AND NINA EHMER	Howard and Nina Ehmer (pro se) 1081 Anza Court Deltona, Florida 32738
For Petitioner, PHILLIP LOTT	Phillip Lott (pro se) 948 N. Watt Circle Deltona, Florida 32738

For Petitioner, GLORIA BENOIT	Gloria Benoit (pro se) (appeared first day only) 1300 Tartan Avenue Deltona, Florida 32738
For Petitioner, GARY JENSEN	Gary Jensen (pro se) (appeared first day only) 1298 Tartan Avenue Deltona, Florida 32738
For Petitioners, STEPHEN SPRATT JAMES E. PEAKE AND ALICIA M.PEAKE	Stephen Spratt, Qualified Representative 2492 Weatherford Drive Deltona, Florida 32738
For Petitioners, STEVEN E. LARIMER, KATHLEEN LARIMER AND HELEN ROSE FARROW	J. Christy Wilson, III., Esq. (no appearance) 437 N. Magnolia Avenue Orlando, FL 32801
For Respondent, ST. JOHNS RIVER WATER MANAGEMENT DISTRICT	Kealey A. West, Esquire 4049 Reid Street Palatka, FL 32177
For Respondent, CITY OF DELTONA	George Trovato, Esquire 2345 Providence Boulevard Deltona, Florida 32725

On May 27, 2005, the Honorable Robert S. Cohen ("ALJ") submitted to the St. Johns Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A." Petitioner Barbara Ash for herself and as Qualified Representative for Petitioners Francell Frei, Ted and Carol Sullivan, and Bernard J. and Virginia T. Patterson (collectively referred to as "Ash") and Petitioner Phillip Lott ("Lott") and Respondent St. Johns River Water Management District ("District") timely filed Exceptions to the Recommended Order. No other exceptions were filed. The District timely filed a Response to Exceptions filed by

Ash and Lott. This matter then came before the Governing Board on July 12, 2005, for final agency action.

B. STATEMENT OF THE ISSUE

The issue in this case is whether the City of Deltona's ("City") environmental resource permit application number 4-127-87817-1 for a surface water management system ("system") should be granted pursuant to Chapter 40C-4, Florida Administrative Code ("F.A.C."). The system is known as the Lake Doyle and Lake Bethel Emergency Overflow Interconnection.

C. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The Governing Board is prescribed by Section 120.57(1)(l), Florida Statutes ("F.S."), in acting upon a recommended order. The ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the findings of fact are not based upon competent substantial evidence or that the proceedings on which the findings of fact were based did not comply with essential requirements of law. Section 120.57(1)(l), F.S., Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but

refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991).

In its final order, the Governing Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. Furthermore, the Governing Board's authority to modify a recommended order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Servs., 419 So.2d 705 (Fla. 1st DCA 1982).

In issuing its final order, the Governing Board need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S.

D. EXCEPTIONS FILED

Petitioner Ash filed a document entitled "Exceptions to Recommended Order," and Petitioner Lott filed a document entitled "Phillip Lott's Exceptions to the Recommended Order." Most of the exceptions filed by Petitioners Ash and Lott are identical. These documents are presented in narrative form and do not conform to Section 120.57(1)(k), F.S. As a result, it is difficult to understand which statements in the narratives are "exceptions" for the Governing Board to consider. To be able to address the exceptions in this Final Order, we have assigned numbers to sentences and paragraphs in the narratives as indicated in the attached Exhibit "B". The District filed six exceptions to the ALJ's findings of fact and conclusions of law. The parties' exceptions to the Recommended Order have been reviewed and are addressed below.

After the ALJ submitted his Recommended Order to the District, Petitioners Steven Larimer, Kathleen Larimer, and Helen Rose Farrow filed a "Notice of Dismissal with Prejudice; and Withdrawal of Request for Administrative Hearing" with the Division of Administrative Hearings ("DOAH"). In any event, the ALJ's Recommended Order recommends that the District dismiss the petitions filed by the three Petitioners named above, and no exceptions to the dismissal were filed.

E. RULINGS ON EXCEPTIONS

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. Sections 120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a recommended order for the Governing Board to consider when it issues a final order. As discussed above in Section C (Standard of Review), the Governing Board may accept, reject, or modify the recommended order within certain limitations. When the Governing Board considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and the correctness of the ALJ's conclusions of law in areas where the District has substantive jurisdiction. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the Governing Board to any perceived defects in the ALJ's findings of fact, and in so doing the party must cite to specific portions of the record as support for the exception. John D. Rood and Jamie A. Rood v. Larry Hecht and Department of Environmental Protection, 21 F.A.L.R. 3979, 3984 (DEP 1999); Kenneth Walker and R.E. Oswalt d/b/a Walker/Oswalt v. Department of Environmental Protection, 19 F.A.L.R. 3083, 3086 (DEP 1997); Worldwide Investment Group, Inc. v. Department of Environmental Protection, 20 F.A.L.R. 3965,3969 (DEP 1998). Indeed, the Florida Statutes provide that the Governing Board need not rule on exceptions that do not clearly identify the disputed portion of the recommended order, do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S.

In this case, the Petitioners were reminded by letter dated May 31, 2005, that Section 120.57(1)(k), F.S., provides that "[an] agency need not rule on the exception that does not clearly identify the disputed portion of the Recommended Order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." See Exhibit "C". Despite the reminder, many of Petitioner Ash's and Lott's exceptions do not identify the disputed portion of the Recommended Order. None of the exceptions identify the legal basis for the exception. Most of the exceptions do not identify evidence in the record that supports the exception. Some of the exceptions purport to identify evidence in the record, but upon review some citations are to items that do not exist or do not relate to or support the particular exception. It is not the responsibility of the reviewing agency to review the recommended order and the exceptions to try to understand which findings of fact a party may be referring to in its exceptions, or to examine the record to ascertain whether there is evidence to support the party's exceptions. Rood, supra; Walker, supra; Worldwide Investment Group, Inc., supra. Nevertheless, to the extent possible, this Final Order includes rulings on Petitioner Ash's and Lott's exceptions.

Hereinafter, references to testimony will be made by identifying the page of the transcript of the administrative hearing (e.g., Tr. at 215.). References to exhibits will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., City Ex.2.). References to the Amended Prehearing Stipulation will be designated by "Am. Prhr'g Stip." followed by the paragraph number (e.g., Am. Prhr'g Stip.¶3(a)2.). References to the Recommended Order will be designated by "R.O." followed by the page number and paragraph number (e.g., R.O. at 10, ¶13).

RULINGS ON ASH'S EXCEPTIONS

Ash's Exception No. 1

Petitioner Ash takes exception to the "Appearances" section of the Recommended Order where the ALJ noted "No Appearance" for Petitioner Gary Jensen. (R.O. at 2.) Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, we find that there is no competent substantial evidence to support the "No Appearance" notation made by the ALJ. There is competent substantial evidence to support a notation that Mr. Jensen was present on March 30, 2005 (the first day of the hearing). (Tr. at 8-9, 300.) Accordingly, Petitioner Ash's Exception No. 1 is granted, and a portion of the "Appearances" section of the Recommended Order is modified as follows:

Gary Jensen, ~~(No Appearance)~~(Appeared first day only)

Ash's Exception No. 2

Petitioner Ash takes exception to the spelling of Petitioner Francell Frei's name in the fifth paragraph of the "Preliminary Statement" section of the Recommended Order where Ms. Frei's name is spelled "Frie." (R.O. at 5.) Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, we find that there is no competent substantial evidence to support the spelling "Frie." There is competent substantial evidence to support the spelling "Frei." (Tr. at 8, 9, 25, 315, 396, 397, 398, 399, and 478; Petition filed by Francell Frei.) Accordingly, Petitioner Ash's Exception No. 2 is granted, and the fifth

paragraph of the "Preliminary Statement" section of the Recommended Order is modified as follows:

Francell ~~Frie~~Frei

Ash's Exception No. 3

Petitioner Ash takes exception to the manner in which Petitioner Virginia Patterson's name is presented in Finding of Fact 19 because, according to Petitioner Ash, Ms. Patterson's middle initial "T." should have been included. (R.O. at 9.) Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Therefore, Petitioner Ash's Exception No. 3 is rejected. However, we note that Ms. Patterson's petition for administrative hearing included the middle initial "T." in her name and that she may be addressed as Virginia T. Patterson. (Petition Against Permit #4-127-87817-1 filed by Bernard J. Patterson and Virginia T. Patterson.)

Ash's Exception No. 4

Petitioner Ash takes exception to Finding of Fact 19 in which the ALJ found that Petitioners Sullivans live on Lake Louise because, according to Petitioner Ash, the Sullivans live adjacent to Lake Theresa. (R.O. at 9.) Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, we find that there is no competent substantial evidence that the Sullivans live on Lake Louise. The transcript of the administrative hearing states as follows:

> THE COURT: Well, why don't you go ahead with whatever you want to say on behalf of the Sullivans.
> MS. ASH: I actually did this – I said that they did not have much of anything to say. They just expressed their feelings.
> THE COURT: Do they live on one of the lakes?
> MS. ASH: They live on Lake Louise. In fact, their address is 2518 Sheffield Drive in Deltona. And it's Norm and Virginia Patterson.

(Tr. at 398-99.) The transcript demonstrates that the ALJ asked Ms. Ash about the Sullivans and that Ms. Ash responded with information about the Pattersons. The petition filed by the Sullivans states that they live on Lake Theresa. (Petition filed by Ted and Carol Sullivan.) The petition filed by the Pattersons states that they live on Lake Louise and that their address is 2518 Sheffield Drive in Deltona. (Petition Against Permit #4-127-87817-1 filed by Bernard J. Patterson and Virginia T. Patterson.) Therefore, there is competent substantial evidence to support a finding that the Sullivans live on Lake Theresa. (Petition filed by Ted and Carol Sullivan.) Accordingly, Petitioner Ash's Exception No. 4 is granted, and Finding of Fact 19 is modified as follows:

> Ms. Ash represented that Ms. Frei has lived on Lake Theresa for 12 years, and ~~both~~ the Pattersons ~~and the Sullivans~~ live on Lake Louise, which is within the area of concern for this proceeding. <u>The Sullivans live on Lake Theresa.</u>

<u>Ash's Exception No. 5</u>

Petitioner Ash takes exception to Finding of Fact 27 where the ALJ referred to J. Christy Wilson, an attorney representing three petitioners, as "Ms. Wilson" because, according to Petitioner Ash, the attorney should be referred to as "Mr. Wilson." (R.O. at 11.) Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Therefore, Petitioner Ash's

Exception No. 5 is rejected. However, we note that the attorney J. Christy Wilson may be addressed as Mr. J. Christy Wilson.

Ash's Exception No. 6

Petitioner Ash takes exception to Finding of Fact 28 where the ALJ finds that Petitioner Gary Jensen did not appear at the hearing on the grounds that Mr. Jensen was present at the hearing on March 30. (R.O. at 12.) This exception is related to Petitioner Ash's Exception No. 1. Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, we find that there is no competent substantial evidence to support the statement that Mr. Jensen did not appear at the hearing. There is competent substantial evidence that Mr. Jensen was present on March 30, 2005 (the first day of the hearing). (Tr. at 8-9, 300.) Accordingly, Petitioner Ash's Exception No. 6 is granted, and Finding of Fact 28 is modified as follows:

> Petitioner, Gary Jensen, ~~did not appear at the hearing~~appeared at hearing on March 30 (the first day), did not file any pleadings or papers seeking to be excused from appearing at the second day of the final hearing, and did not offer any evidence, testimony, pre- or post-hearing submittals.

Ash's Exception No. 7

Petitioner Ash takes exception to Conclusion of Law 73 where the ALJ states that "Gary Jensen...neither appeared at hearing, personally..." on the grounds that Mr. Jensen was present on March 30. (R.O. at 21.) Petitioner Ash does not take exception to Conclusion of Law 73 in its entirety. The Conclusion of Law is based on Finding of Fact 28, which is related to Petitioner Ash's Exception Nos. 1 and 6. Pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception

because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, we find that there is no competent substantial evidence to support the statement that Mr. Jensen did not appear at the hearing. There is competent substantial evidence that Mr. Jensen was present on March 30, 2005 (the first day of the hearing). (Tr. at 8-9, 300.) Accordingly, Petitioner Ash's Exception No. 7 is granted, and the first and second sentences of Conclusion of Law 73 are modified as follows:

> Petitioner Gary Jensen appeared at hearing on March 30 (the first day). Since Petitioner Jensen did not file any pleadings seeking to excuse himself from the second day of hearing or offer any pre- or post-hearing submittals, he has apparently abandoned his claim. Petitioners, ~~Gary Jensen~~, Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow, neither appeared at hearing, personally or through counsel or qualified representative. Moreover, since ~~none of these~~ Petitioners Larimer, Larimer, and Farrow did not file ~~filed~~ any pleadings seeking to excuse themselves from appearing at hearing or offered any pre- or post-hearing submittals, they have apparently abandoned their claims.

Ash's Exception No. 8

We have assigned No. 8 to a paragraph in which Petitioner Ash appears to take exception to the ALJ's recommendation that a Final Order be entered dismissing the Petition for Formal Administrative Hearing filed by Gary Jensen. This recommendation is related to Finding of Fact 28 and Conclusion of Law 73 in the Recommended Order. (R.O. at 12 and 21.) This exception is related to Petitioner Ash's Exception Nos. 1, 6, and 7. We note that Mr. Jensen did not file any exceptions to the recommended dismissal of his petition. First, pursuant to Section 120.57(1)(k), F.S., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Second, assuming that Petitioner Ash could file this exception for the benefit of another

petitioner whom she does not represent, the Governing Board lacks the substantive jurisdiction to alter this legal ruling, which evidently relates to Petitioner Jensen's prosecution of the case. Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140 (Fla. 2d DCA 2001); 1000 Friends of Florida, Inc. v. Dep't of Community Affairs, 23 F.A.L.R. 2841 (DCA 2001), aff'd 842 So.2d 989 (Fla. 4th DCA 2002); Section 120.57(1)(l), F.S. Therefore, Petitioner Ash's Exception No. 8 is rejected.

Ash's Exception No. 9

Petitioner Ash takes exception to the letter from the ALJ to the District where the ALJ transmits the Recommended Order on the grounds that (1) the letter does not address the Executive Director by his full name and (2) the letter quotes a portion of a statute that, according to Petitioner Ash, does not exist. Petitioners may file exceptions to the Recommended Order. Section 120.57(1)(b) and (k), F.S. The cover letter is not part of the Recommended Order, nor is it part of the record. Section 120.57(f), F.S. (In any event, the letter is addressed to "Kirby Green, Executive Director" and the allegedly non-existent portion of the statute does exist and is cited throughout this Final Order. Section 120.57(1)(k), F.S.) Petitioner Ash's Exception No. 9 is rejected.

Ash's Exception No. 10

Petitioner Ash takes exception to Finding of Fact 62 on the grounds that the first sentence contains a spelling error. Finding of Fact 62 states in part: "...surface *waster* management system... ." (R.O. at 19, ¶62; emphasis added.) The application at issue in this case is for a surface *water* management system. (R.O. at 21, ¶74; emphasis added.) Correcting this error will not change the outcome of the proceedings.

Accordingly, Petitioner Ash's Exception No. 10 is granted, and Finding of Fact 62 is modified as follows:

"...surface ~~wasterwater~~ management system..."

Ash's Exception No. 11

We have assigned No. 11 to several statements that do not appear to be exceptions to the Recommended Order but rather to the time that it took for the ALJ to enter the Recommended Order. Petitioner Ash states that the ALJ exceeded his allotted time. However, Petitioner Ash did not cite a legal rule supporting her statements and fails to explain how any delay materially affected the proceeding, except to complain generally that "this behavior is certainly a waste of taxpayer's money... ." To the extent that these statements constitute an exception to the Recommended Order and are within the substantive jurisdiction of the Governing Board, the Governing Board need not rule because they do not clearly identify the disputed portion of the Recommended Order, do not identify the legal basis for the exception, and do not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Accordingly, Petitioner Ash's Exception No. 11 is rejected.

Ash's Exception No. 12

We have assigned No. 12 to a sentence stating that the ALJ "over looked [sic] the Petitioners [sic] Proposed Recommended Order or he would have seen the errors in the construction of the gates and the construction drawings." This sentence appears to be a general complaint that the ALJ did not include findings of fact in support of Petitioner Ash's position. First, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order,

does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, the Governing Board notes that Petitioner Ash presented testimony on her behalf and on behalf of Petitioners Francell Frei, Bernard J. and Virginia T. Patterson, and Ted and Carol Sullivan, and that she entered Ash Exhibit numbers 1-6, 12-24 into evidence. (Tr. at 214-271.) Petitioner Ash, individually, and Petitioner Frei (who is represented by Ms. Ash), individually, filed Proposed Recommended Orders. (Petitioner Barbara Ash's Proposed Recommended Order; Proposed Recommended Order from Petitioner Francell Frei.) Section 120.57(1)(b), F.S. As the fact finder, the ALJ weighs the evidence, resolves conflicts in the evidence, and judges the credibility of witnesses. To the extent that Petitioner Ash is requesting the Governing Board to make new or different findings of fact, the Governing Board is limited by Section 120.57(1)(l), F.S., which states in part:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Except as explained in this Final Order, the Findings of Fact in the ALJ's Recommended Order are based on competent substantial evidence and cannot be disturbed. Freeze, supra. Accordingly, Petitioner Ash's Exception No. 12 is rejected.

Ash's Exception No. 13

Petitioner Ash appears to take exception to the word "short-term" in the Emergency Order in F.O.R. 2003-38. On April 10, 2003, the District rendered an Order concurring with Emergency Order in F.O.R. 2003-38. (Dist. Ex. 5.) Petitioners may file exceptions to the Recommended Order. Section 120.57(1)(b) and (k), F.S. This

paragraph seems to be an exception to the Emergency Order rather than to the Recommended Order. To the extent that it is an exception to the Recommended Order, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Therefore, Petitioner Ash's Exception No. 13 is rejected.

Ash's Exception No. 14

We have assigned No. 14 to a sentence that states that the gates do not close and mentions the "reasonable assurance" standard. First, because this exception does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record, the Governing Board need not rule on this exception. Section 120.57(1)(k), F.S. Second, the ALJ addressed the "reasonable assurance" standard in numerous Conclusions of Law. (R.O. at 22-30.) Third, to the extent that this sentence is an exception about the functioning of the system, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 18, 22, 26, and 30. For the foregoing reasons, Petitioner Ash's Exception No. 14 is rejected.

Ash's Exception No. 15

Petitioner Ash appears to take exception to State of Florida Office of the Governor Executive Order Number 03-60. (Lott Ex. 18.) Petitioners may file exceptions to the Recommended Order. Section 120.57(1)(b) and (k), F.S. This paragraph seems to be an exception to the Executive Order rather than to the Recommended Order. To the extent that it is an exception to the Recommended Order, the Governing Board

need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Moreover, the Governing Board notes that the ALJ addressed this matter at the hearing:

> THE COURT: But, again, that violation of previous emergency order is not relevant to whether this application satisfied the requirements for permit.
> MS. ASH: But he requested that they –
> THE COURT: It doesn't matter if it's from the Governor. With all due respect to the Governor, if the emergency order was violated, there was a process for challenging that and this is not it.

(Tr. at 266.) Accordingly, Petitioner Ash's Exception No. 15 is rejected.

Ash's Exception No. 16

We have assigned No. 16 to two sentences that are not understandable except for a reference to Section 120.54(4)(c), F.A.C. We note that Section 120.54(4)(c), F.A.C., applies to emergency *rules*, not emergency *orders*. To the extent that it is an exception to the Recommended Order, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Therefore, Petitioner Ash's Exception No. 16 is rejected.

Ash's Exception No. 17

We have assigned No. 17 to a number of statements related to Petitioner Ash's position on events that occurred on September 2 and 3, 2004, and on Emergency Order in F.O.R. 2004-75. (Dist. Ex. 24.) First, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended

Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, in this exception, Petitioner Ash is essentially rearguing her case in an attempt to have the Governing Board reweigh evidence and interpret evidence. As we explained in our ruling on Petitioner Ash's Exception No. 12, it is the ALJ's duty, as the fact-finder, to weigh and interpret the evidence presented at final hearing. The Governing Board cannot interpret the evidence in a case to reach a desired result. Rather, the Board is limited to determining whether any competent substantial evidence exists upon which the finding may reasonably be inferred, and whether the proceedings complied with the essential requirements of law. Goin v. Comm'n on Ethics, 658 So.2d 1131, 1138-39 (Fla. 1st DCA 1995); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 5th DCA 1990); Bay County Sch. Bd. v. Bryan, 679 So.2d 1246, 1247-48 (Fla. 1st DCA 1996), rehearing denied (October 16, 1996); Glover v. Sanford Child Care, Inc., 429 So.2d 91, 92 (Fla. 5th DCA 1983). Except as explained in this Final Order, the Findings of Fact in the Recommended Order are based on competent substantial evidence and cannot be disturbed. Freeze, supra. Third, to the extent that this exception is about the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. Fourth, to the extent that this exception is an exception to an emergency order, we incorporate herein our ruling on Petitioner Ash's Exception Nos. 13 and 15. For the foregoing reasons, Petitioner Ash's Exception No. 17 is rejected.

Ash's Exception No. 18

We have assigned No. 18 to a paragraph that references the seal on gates and the functioning of the system. First, the Governing Board need not rule on this

exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, in this exception, Petitioner Ash is essentially rearguing her case, and we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No. 18 is rejected.

Ash Exception No. 19

Petitioner Ash appears to take exception to the Recommended Order to the extent that it does not specify when the brick and mortar plug must be installed and that it describes the location of the plug in a way that is objectionable to Petitioner Ash. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Therefore, Petitioner Ash's Exception No. 19 is rejected.

However, at the administrative hearing, the District requested that the findings of fact include a permit condition that the plug be installed within 30 days of permit issuance and that the installation be certified by a professional engineer stating that the plug was installed in accordance with the plans submitted in the permit application. (Tr. at 473-74.) Neither the City nor the Petitioners objected to the District's request. (Tr. at 473-74.) The Recommended Order does not contain the requested permit condition. The District renewed its request in its response to this exception filed by Petitioner Ash. (Response to Petitioners' Exceptions at 17-18.) Therefore, since this permit condition

was requested at the administrative hearing without objection, the Governing Board adds the following condition to the Environmental Resource Permit:

> The variable weir structure in Lake Doyle shall remain closed and within 30 days of permit issuance, the permittee shall (1) complete construction of the brick and mortar plug as depicted on the plans dated February 25, 2005, and (2) provide the District certification from a professional engineer that the plug has been constructed in accordance with the plans dated February 25, 2005.

Ash Exception No. 20

We have assigned No. 20 to a paragraph that contains statements that appear to be similar to other statements that have been ruled on elsewhere in this Final Order. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that this exception relates to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. To the extent that Petitioner Ash is essentially rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. To the extent that Petitioner Ash is taking exception to an emergency order or to another permit, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 13 and 15. For the foregoing reasons, Petitioner Ash's Exception No. 20 is rejected.

Ash Exception No. 21

We have assigned No. 21 to a number of statements related to Petitioner Ash's position on events that occurred and on the Emergency Order in F.O.R. 2004-75. (Dist. Ex. 24.) The paragraph concludes that "[t]herefore [sic] cannot trust the District to

enforce the conditions of the ERP or City Ex.No.2." First, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, we note that the ALJ's Findings of Fact stated that a number of petitioners do not trust the City or the District. (R.O. at 9-10, ¶18, 20, 23.) Therefore, to the extent that Petitioner Ash is essentially rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. Third, to the extent that this is an exception to an emergency order, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 13 and 15. For the foregoing reasons, Petitioner Ash's Exception No. 21 is rejected.

Ash Exception No. 22

Petitioner Ash appears to take exception to the design of the gates and the functioning of the system and states that "the structure (weir) at Lake Doyle cannot be shut off (completely closed) ... ." First, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, we note that there was testimony about the design of the gates at the administrative hearing. (Tr. at 189-200.) In Conclusion of Law 92, the ALJ stated that "[t]he belief by many of the Petitioners that the City will not construct the proposed system as set forth in the permit application, was not supported by competent substantial evidence." (R.O. at 29.) Therefore, to the extent that Petitioner Ash is essentially rearguing her case, we

incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No. 22 is rejected.

Ash Exception No. 23

This exception appears to be similar to Petitioner Ash's Exception No. 22. and we incorporate herein our ruling on Petitioner Ash's Exception No. 22. To the extent that this exception relates to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. For the foregoing reasons, Petitioner Ash's Exception No. 23 is rejected.

Ash's Exception No. 24

This exception appears to be similar to Petitioner Ash's Exception No. 22, and we incorporate herein our ruling on Petitioner Ash's Exception No. 22. Petitioner Ash's Exception No. 24 is rejected.

Ash's Exception No. 25

Petitioner Ash appears to take exception to the failure of the ALJ to find that fish and wildlife will be trapped in the pipe between the variable weir structure at Lake Doyle and the brick and mortar plug. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that this is an exception to the design of the gates and the functioning of the system, we incorporate herein our ruling on Petitioner Ash's Exception No. 22. We note that competent substantial evidence on this issue was presented at the administrative hearing. (Tr. at 126-27.) For the foregoing reasons, Petitioner Ash's Exception No. 25 is rejected.

incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No. 22 is rejected.

Ash Exception No. 23

This exception appears to be similar to Petitioner Ash's Exception No. 22, and we incorporate herein our ruling on Petitioner Ash's Exception No. 22. To the extent that this exception relates to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. For the foregoing reasons, Petitioner Ash's Exception No. 23 is rejected.

Ash's Exception No. 24

This exception appears to be similar to Petitioner Ash's Exception No. 22, and we incorporate herein our ruling on Petitioner Ash's Exception No. 22. Petitioner Ash's Exception No. 24 is rejected.

Ash's Exception No. 25

Petitioner Ash appears to take exception to the failure of the ALJ to find that fish and wildlife will be trapped in the pipe between the variable weir structure at Lake Doyle and the brick and mortar plug. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that this is an exception to the design of the gates and the functioning of the system, we incorporate herein our ruling on Petitioner Ash's Exception No. 22. We note that competent substantial evidence on this issue was presented at the administrative hearing. (Tr. at 126-27.) For the foregoing reasons, Petitioner Ash's Exception No. 25 is rejected.

Ash Exception No. 26

Petitioner Ash appears to take exception to Finding of Fact 8 on the grounds that there is a discrepancy between the finding and the District's Technical Staff Report regarding the placement of riser boards at one location in the system. (Dist. Ex.38.) Petitioner Ash argues that this alleged discrepancy means that there are no reasonable assurances that the system will be installed correctly. First, the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, there is no discrepancy. Finding of Fact 8 states as follows:

> Two of the four pipes are overflow structures, controlled by canal gates. The pipes at Ledford Drive discharge into a ditch and into a large (greater than 20 acres) shallow bay swamp.

(R.O. at 7.) In her exception, Petitioner Ash quotes only a portion of a sentence in the Technical Staff Report. The full sentence states as follows:

> The system authorized under this application, includes a brick and mortar plug in the Lake Doyle weir structure outfall pipe, and closed channel gates and riser boards at the Ledford Drive and railroad berm structures, respectively, to maintain the pre-construction flow patterns.

(Dist. Ex.38, page 1.) In other words, the system will include closed channel gates at the Ledford Drive structure and riser boards at the railroad berm structure. Third, to the extent that this exception is about the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. For the foregoing reasons, Petitioner Ash's Exception No. 26 is rejected.

Ash Exception No. 27

We have assigned No. 27 to two sentences. In the first sentence, Petitioner Ash references "Petitioner Ex. No. 21" and states "pipes are closed but water is flowing

around the three pipes." In the second sentence, Petitioner Ash paraphrases Rule 40C-4.301(1)(a), F.A.C., which relates to adverse water quantity impacts. However, an exhibit entitled "Petitioner Ex. No.21" was not entered as evidence at the administrative hearing. (R.O. at 4.) There is an exhibit called Ash Exhibit No.21, but it bears the title "Agenda Memo / Review of Floodplain Management Plan" and its relationship to the two sentences is not evident. (R.O. at 4; Tr. at 252.) Even if this exception could be understood, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Petitioner Ash's Exception No. 27 is rejected.

Ash Exception No. 28

Petitioner Ash appears to take exception to Finding of Fact 9 where the ALJ found that "[w]ater flows through the bay swamp where it outfalls through five pipes at the railroad grade." (R.O. at 7.) Petitioner Ash appears to contend that there is some discrepancy about whether the system includes three or five pipes at the railroad berm structure and that therefore water flowing from this location will cause adverse water quantity impacts. Based on this contention, Petitioner Ash argues that the City has not provided the necessary reasonable assurance to meet the permitting criteria. The evidence presented at the administrative hearing, including the City's construction plans, shows that there will be five pipes at the railroad berm structure. (City Ex. 1; Tr. at 68-71, 73, 78, 85-87, 130-132.) Therefore there is no discrepancy. In any event, Petitioner Ash fails to identify the legal basis for the exception and fails to include appropriate and specific citations to the record, and therefore the Governing Board need

not rule on this exception. Section 120.57(1)(k), F.S. To the extent that this exception relates to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. For the foregoing reasons, Petitioner Ash's Exception No. 28 is rejected.

Ash Exception No. 29

Petitioner Ash appears to take exception to Finding Fact 10 where the ALJ found "[t]hree of the five pipes are overflow structures, controlled by channel boards. The pipes at the railroad grade discharge to a 1500-foot long finger canal that was dug some time during the period 1940-1972 from the north central shore of Lake Bethel." (R.O. at 7.) Petitioner Ash contends that these statements are not true. She also asserts that "this section...cannot be shut down and will cause adverse water quantity impacts." The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that Petitioner Ash repeats the previous exception, we incorporate herein our ruling on Petitioner Ash's Exception No. 28. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No. 29 is rejected.

Ash Exception No. 30

Petitioner Ash appears to take exception to Findings of Fact 11, 14, and 44 regarding the closure of the overflow structures and the flow of water between Lake Doyle and Lake Bethel. Petitioner Ash points out that some structures in the system will

not be closed. However, she fails to explain how this is inconsistent with the Findings of Fact. The ALJ found that the overflow structures can be shut down at three points in the system, and he found that with the overflow structures closed, there will be no increase or decrease in the quantity or quality of water throughout the path of the system as a result of the project. (R.O. at 8, ¶11, 13.) In any event, the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Petitioner Ash's Exception No. 30 is rejected.

Ash Exception No. 31

We have assigned No. 31 to a paragraph in which Petitioner Ash states that the District has ignored certain facts. First, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Second, it appears that Petitioner Ash is rearguing her case, and therefore we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. Petitioner Ash's Exception No. 31 is rejected.

Ash Exception No. 32

We have assigned No. 32 to a paragraph in which Petitioner Ash complains about the cost of the project that is the subject of the permit application because, according to Petitioner Ash, the project cost will cause an increase in taxes. She cites to several paragraphs in the Recommended Order, but it is not clear that she is taking exception to those paragraphs. We note that the ALJ correctly found that "[t]he District

does not consider impacts to property values." (R.O. at 20, ¶64; Section 12.2.3.1(d), Applicant's Handbook.) The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Petitioner Ash's Exception No. 32 is rejected.

Ash Exception No. 33

We have assigned No. 33 to a paragraph that states that "[i]t was never determined that flooding was the reason" for the project, that lake waters should not be mixed, and that the project has caused adverse impacts to existing surface water storage and conveyance capabilities. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that this is an exception to the emergency order that authorized construction of the system, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 13 and 15. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No 33 is rejected.

Ash Exception No. 34

We have assigned No. 34 to a paragraph that states that the permit application is incomplete because Sections C and E were missing from the permit application and that "the public cannot correct any errors made by the District." The Governing Board need

not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. However, we note that the City entered Exhibits 1, 2, 4, 5, 7, 8, 9, 13, and 14A-F in support of its permit application at the administrative hearing, which was a formal proceeding initiated by petitioners to determine whether the City's application meets the permitting criteria. The Recommended Order acknowledges that a number of petitioners do not trust the City or the District. (R.O. at 9-10, ¶18, 20, 23.) Petitioner Ash's Exception No. 34 is rejected.

Ash Exception No. 35

We have assigned No. 35 to a paragraph in which Petitioner Ash states that "there are still inconsistencies in the development of plans for the operation of the system." She cites to District Exhibit 38 (the Technical Staff Report) and City Exhibits 1 and 2 (the construction plans and the operations manual). However, she fails to identify any inconsistencies in those exhibits, or any inconsistencies between those exhibits and the Recommended Order. Even if there were inconsistencies, it is the ALJ's duty to resolve conflicts in the evidence and make findings of fact. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. Petitioner Ash's Exception No. 35 is rejected.

Ash Exception No. 36

We have assigned No. 36 to a paragraph in which Petitioner Ash states that the District's Technical Staff Report contains irrelevant information and not enough information. (Dist. Ex.38.) She cites to the District's Response to Interrogatories, but that document is not part of the record and therefore cannot be considered by the Governing Board. Section 120.57(1)(f), F.S. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. Petitioner Ash's Exception No. 36 is rejected.

Ash Exception No. 37

Petitioner Ash appears to take exception to the Recommended Order to the extent that the Recommended Order does not specify when the brick and mortar plug must be installed. This is the same exception as Petitioner Exception No. 19, and we incorporate herein our ruling on that exception.

Ash Exception No. 38

We have assigned No. 38 to a paragraph in which Petitioner Ash states that the project has been opposed by more than 296 homeowners for four years and that the project will adversely affect the public health, safety, or welfare or property of others pursuant to Rule 40C-4.302(1)(a)1, F.A.C. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include

appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. To the extent that paragraph is related to property values, we incorporate herein our ruling on Petitioner Ash's Exception No. 32. Petitioner Ash's Exception No. 38 is rejected.

Ash Exception No. 39

Petitioner Ash appears to take exception to Finding of Fact 50 wherein the ALJ found that "[u]nder the second part of the secondary impact test, the City must provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of the system will not adversely affect the ecological value of the uplands to aquatic or wetland dependent species for enabling existing nesting or denning by these species." (R.O. at 16.) Specifically, she contends that the City cannot provide the required reasonable assurance because, according to Petitioner Ash, "the lowering of water will affect the bird sanctuary on Lake Anna Marie." However, the project will be operated with the overflow structures closed. (R.O. at 8, ¶11, 13, 14 and R.O. at 15, ¶44.) This exception is similar to Petitioner Ash's Exception No. 30, and we incorporate herein our ruling on that exception. To the extent that this is an exception to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. In any event, the Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to

the record. Section 120.57(1)(k), F.S. For the foregoing reasons, Petitioner Ash's Exception No. 39 is rejected.

Ash Exception No. 40

We have assigned No. 40 to a paragraph entitled "Conclusion" where Petitioner Ash repeats her position on the City's permit application. The Governing Board need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S. To the extent that this is an exception to the application of the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. To the extent that Petitioner Ash is rearguing her case, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. For the foregoing reasons, Petitioner Ash's Exception No. 40 is rejected.

RULINGS ON LOTT'S EXCEPTIONS

Lott's exceptions are identical to Ash's exceptions except for the three exceptions below. For the exceptions that are identical to Petitioner Ash's exceptions, we incorporate herein our rulings on Petitioner Ash's exceptions as presented above.

Lott's Exception No. 1

Petitioner Lott takes exception to the omission of evidence in the ALJ's Findings of Fact that, according to Petitioner Lott, "proved that the City and the District acted outside the law and did no [sic] provide reasonable assurances for a structure that has been in use for two years." The exception does not describe what evidence was omitted. In fact, the exception does not clearly identify the disputed portion of the

Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record, and therefore the Governing Board need not rule on this exception. Section 120.57(1)(k), F.S. To the extent that Petitioner Lott takes exception to the general omission of evidence in the Recommended Order, we note that it is the ALJ's duty, as the fact-finder, to weigh the evidence presented, resolve conflicts in the evidence, judge the credibility of witnesses, and determine what evidence will be incorporated into the Recommended Order. The Governing Board is limited to determining whether any competent substantial evidence exists upon which the finding may reasonably be inferred, and whether the proceedings complied with the essential requirements of law. Goin, 658 So.2d at 138-39; Heifetz, 475 So.2d at 1281; Bay County Sch. Bd., 679 So.2d at 1247-48; Glover, 429 So.2d at 92. Except as explained in this Final Order, the Findings of Fact in the ALJ's Recommended Order are based on competent substantial evidence and cannot be disturbed. Freeze, supra. To the extent that this exception is about the "reasonable assurance" standard, we incorporate herein our ruling on Petitioner Ash's Exception No. 14. For the foregoing reasons, Lott's Exception No. 1 is rejected.

Lott's Exception No. 2

We have assigned No. 2 to a paragraph in a section entitled "Conclusions" where Petitioner Lott appears to take a general exception to the ALJ's recommendation to issue the permit. He states that "[g]ranting the permit will potentially devalue thousands of upstream lakefront properties, a violation of multiple Florida Statutes which protect lakefront homeowner rights." The exception does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception,

and does not include appropriate and specific citations to the record, and therefore the Governing Board need not rule on this exception. Section 120.57(1)(k), F.S. To the extent that this exception asks the Governing Board to reweigh the evidence, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. To the extent that this exception is related to property values, we note that the ALJ correctly found that "[t]he District does not consider impacts to property values." (R.O. at 20, ¶64; Section 12.2.3.1(d) of Applicant's Handbook.) For the foregoing reasons, Petitioner Lott's Exception No. 2 is rejected.

Lott's Exception No. 3.

We have assigned No. 3 to two paragraphs in a section entitled "Conclusion" where Petitioner Lott states that "[d]itching and draining landlocked freshwater lakes in an area of maximum recharge to the Floridan Aquifer is diametrically opposed to the rules and policies of the ... District" and that this permit "will provide the means to literally ditch away hundreds of thousands of gallons of fresh water a day." Because the exception does not clearly identify the disputed portion of the Recommended Order, does not identify the legal basis for the exception, and does not include appropriate and specific citations to the record, the Governing Board need not rule on this exception. Section 120.57(1)(k), F.S. To the extent that this exception asks the Governing Board to reweigh the evidence, we incorporate herein our rulings on Petitioner Ash's Exception Nos. 12 and 17. To the extent that this exception claims that the project will cause a change in the quantity of water throughout the system as a result of the project, we incorporate herein our ruling on Petitioner Ash's Exception No. 30. For the foregoing reasons, Petitioner Lott's Exception No. 3 is rejected.

RULINGS ON DISTRICT'S EXCEPTIONS

The District filed exceptions numbered 1, 2, 3, 5, 6, and 7, for a total of six exceptions.

District Exception No. 1

District staff take exception to the first sentence in the third paragraph of the Preliminary Statement on the grounds that there is no competent substantial evidence in the record to support a portion of the sentence as written. The first sentence in the third paragraph states in part: "The District presented the testimony of Lee Kissick, an expert in ... environmental resource *planning* and regulation ..." (R.O. at 4; emphasis added). There is no competent substantial evidence in the record that Lee Kissick was an expert in environmental resource *planning* and regulation. Rather, he was an expert in environmental resource *permitting* and regulation. (Tr. at 405-406.) Correcting this error does not change the outcome of the proceedings. Accordingly, District Exception No. 1 is granted, and the first sentence in the third paragraph of the Preliminary Statement is modified as follows:

> The District presented the testimony of Lee Kissick, an 'expert in ... environmental resource ~~planning~~ permitting and regulation ...

District Exception No. 2

District staff take exception to Finding of Fact 6 on the grounds that there is no competent substantial evidence in the record to support a portion of the sentence as written. Finding of Fact 6 states in part: "...the system consists of a variable *water* structure on the west shore of Lake Doyle..." (R.O. at 6-7; emphasis added) There is no competent substantial evidence in the record that the structure on the west shore of Lake Doyle is a variable *water* structure. Rather, there is evidence that there is a

variable *weir* structure. (Tr. at 76, 190, 193, 195; City Ex.1; Dist. Ex.38.) Correcting this error will not change the outcome of the proceedings. Accordingly, District Exception No. 2 is granted, and Finding of Fact 6 is modified as follows:

> ...the system consists of a variable ~~water~~ weir structure on the west shore of Lake Doyle...

District Exception No. 3

District staff take exception to Finding of Fact 62 on the grounds that the sentence contains a spelling error. This exception is the same as Petitioner Ash's Exception No. 10 and is granted for the reasons set forth in our ruling on that exception.

District Exception No. 5

In District Exception No. 5, District staff take exception to Conclusion of Law 76. However, it appears that District Exception No. 5 contains a typographical error because the exception does not to relate to Conclusion of Law 76 of the Recommended Order. However, it does relate to Conclusion of Law 78. Therefore, District's Exception No. 5 is treated as an exception to Conclusion of Law 78.

District staff take three exceptions to Conclusion of Law 78 on the grounds that there is no competent substantial evidence to support it. First, District staff take exception to the legal citation following the first sentence in Conclusion of Law 78. The Recommended Order states that the First District Court of Appeal of Florida affirmed the cited case. (R.O. at 22-23, ¶78.) In fact, the Second District Court of Appeal of Florida affirmed the case. Manasota-88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319 (DER 1990), aff'd 576 So. 2d 781 (Fla. 2d DCA 1991).

Second, District staff take exception to the use of the word "reasonable" in the third and fourth sentences in Conclusion of Law 78. The grammatically correct form of the word is the adjective "reasonably."

Third, District staff take exception to the second legal citation following the last sentence in Conclusion of Law 78. The Recommended Order cites to pages 2440-41 of the case. (R.O. at 22-23.) The case cited does not appear on pages 2440-41. Rudloe v. Dickerson Bayshore, Inc., 10 F.A.L.R. 3426 (DER 1988). The citation should be to pages 3440-41 of the case.

Correcting these errors will not change the outcome of these proceedings and is consistent with District precedent in Billie v. SJRWMD, F.O.R. #2003-65 (SJRWMD 2004); Haynes v. SJRWMD, F.O.R. #2001-132, 2001-133 (SJRWMD 2002). Accordingly, District Exception No. 5 is granted, and Conclusion of Law 78 is modified as follows:

> (a) The first citation states: Manasota-88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319, 1325 (DER 1990), aff'd 576 So. 2d 781 (Fla. ~~1st~~2d DCA 1991).
>
> (b) The third and fourth sentences state: "Reasonable assurances must deal with ~~reasonable~~ reasonably foreseeable contingencies. The standard does not require an absolute guarantee that a violation of a rule is a scientific impossibility, only that its non-occurrence is ~~reasonable~~ reasonably assured by accounting for reasonably foreseeable contingencies.
>
> (c) The last citation states: Rudloe v. Dickerson Bayshore, Inc., 10 F.A.L.R. ~~3426-2440-41~~ 3426, 3440-41 (DER 1988).

District Exception No. 6

District staff take exception to Conclusion of Law 90 on the grounds that there is no competent substantial evidence in the record to support the last sentence in the paragraph as written. The last sentence does not completely reflect the statement of

law to which Petitioners Ash, Lott, Frei, B. Patterson, V. Patterson, T. Sullivan, and C. Sullivan, the District, and the City agreed in the Amended Pre-hearing Stipulation (which was admitted as Joint Exhibit 1 and was agreed to at hearing by additional Petitioners Spratt, J. Peake, and A. Peake [Tr. at 484]). (Am. Prhr'g Stip. ¶4(e).) The parties and the ALJ are bound by the stipulation. Eicoff v. Denson, 896 So.2d 795, 799 (Fla. 5th DCA 2005). Since the stipulation paraphrases the related rule found in Rule 40C-4.302(1)(c), F.A.C., this legal conclusion involves the substantive regulatory jurisdiction of the District and is more reasonable than the incomplete statement in Conclusion of Law 90. Modifying this sentence will not change the outcome of the proceedings. Accordingly, District Exception No. 6 is granted and the last sentence of Conclusion of Law 90 is modified as follows:

> Since the parties stipulated that the project is not adjacent to or in close proximity to Class II waters or located in or adjacent to Class II waters or Class III waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting as set forth or incorporated by reference in chapter 62R-7, Fla. Admin. Code, this criterion is not applicable.

District Exception No. 7

District staff take exception to Conclusion of Law 92 on the grounds that there is no competent substantial evidence in the record to support the fourth sentence of the paragraph as written and that it mischaracterizes Rule 40C-4.751(2)(c), F.A.C. The conclusion states as follows:

> If the City were to open the plug in the system without first seeking a permit, it would be required to return the system to the condition that existed before the illegal construction pursuant to Florida Administrative Code Rule 40C-4.751.

Rule 40C-4.751(2), F.A.C., states as follows:

> A system which is constructed or altered without a permit and which requires a permit and *the permit, when applied for after the construction, is denied*, must be restored to its pre-construction condition.

(Emphasis added.) Thus, Rule 40C-4.751(2), F.A.C. requires that the system be restored to its pre-construction condition when (a) the system is constructed or altered without a permit and (b) the system required a permit and (c) the permit, when sought after construction, is denied. Conclusion of Law 92 contains an incomplete statement of the District's enforcement authority under Rule 40C-4.751, F.A.C. and should be modified. This legal conclusion involves the substantive regulatory jurisdiction of the District and is more reasonable than the statement in Conclusion of Law 92. Modifying this sentence will not change the outcome of the proceedings. Accordingly, the fourth sentence in Conclusion of Law 92 is modified as follows:

> If the City were to open the plug in the system without first seeking a permit, then the provisions of Florida Administrative Code Rule 40C-4.751, would apply. If the City constructed or altered the system without a permit and the system requires a permit and the permit, when applied for after the construction, is denied, then the City ~~it~~ would be required to return the system to the condition that existed before the illegal construction pursuant to Florida Administrative Code Rule 40C-4.751.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

The Recommended Order dated May 27, 2005, attached hereto as Exhibit "A", is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the ruling on Petitioner Ash's Exceptions 1, 2, 4, 6, 7, and 10 and District's Exceptions 1, 2, 5, 6, and 7. The City's application number 4-127-87817-1 for an environmental resource permit is hereby granted under the terms and conditions contained in the Technical Staff Report dated

March 23, 2005, attached hereto as Exhibit "D", with the addition of the following condition.

> The variable weir structure in Lake Doyle shall remain closed and within 30 days of permit issuance, the permittee shall (1) complete construction of the brick and mortar plug as depicted on the plans dated February 25, 2005, and (2) provide the District certification from a professional engineer that the plug has been constructed in accordance with the plans dated February 25, 2005.

DONE AND ORDERED this 13th day of July, 2005, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
KIRBY B. GREEN III
EXECUTIVE DIRECTOR

RENDERED this 13th day of July, 2005.

BY: Sandra Bertram
SANDRA BERTRAM
DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA ASH, et al.,	)	Case Nos. 04-2399
	)	04-2400
Petitioners,	)	04-2401
	)	04-2403
vs.	)	04-2404
	)	04-2405
CITY OF DELTONA AND ST. JOHNS	)	04-2406
RIVER WATER MANAGEMENT	)	04-2408
DISTRICT,	)	04-2409
	)	04-2411
Respondents.	)	04-2412
	)	-04-3048

EXECPTIONS TO RECOMMENDED ORDER

COMES NOW Petitioner Barbara Ash with recommended exceptions in accordance with finding of facts on the issues of the City of Deltona's request for an Environmental Resource Permit to construct (already constructed structures) of an Emergency overflow interconnection system between Lake Doyle and Lake Bethel aka "Big Ditch". This cause came before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 30 through March 31, 2005, in Deltona, Florida.

(1) Judge Cohen's Recommended Order are the following errors under "APPEARANCES" Page 2, 5th "Petitioner Gary Jensen :(No Appearance)" False he was present March 30, this is not acceptable omission.

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(3) Page 9, Number 19, 3rd line listed Virginia Patterson her middle initial "T" was omitted, but has been included in all documents until present; 5th line

(4) "Sullivans live on Lake Louise" False they live on Lake Theresa.

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(7) Under CONCLUSIONS OF LAW page 21, Number

73. "Petitioners, Gary Jensen...neither appeared at hearing, personally or ..." False as he appeared on March 30th proper roll call was not performed or record keeping error...

(8) Page 31 Line 4, "dismissing the Petitioners for Formal Administrative Hearing filed by Gary Jensen in Case No. 04-2405," again in error as he was present March 30th. Therefore there are improper records in the proceedings.

(9) Judge Cohen's cover letter of May 27, 2005 did not address the Executive Director with his full name.

Page two of two first line; "As required by Subsection 120.57(1)(k), Florida Statutes. 120.57 (1) highest letter is (e) there is no (k) not even under abstract.

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(11) Judge by law exceeded his time limit by 27 days, and when requesting when we would receive the Recommended Order told it was being approved by the proof readers.

Furthermore, Judge Cohen's Recommended Order was repeated from the District's Proposed Recommended Order dated April 29, 2005 so should not have exceeded Judge's 20 day time limit.

Petitioners late in filing were excluded from objecting this behavior is certainly a waste of taxpayer's money plus an unfair justice and not a reasonable condition in behalf of Petitioners. Therefore, City of Deltona does not need to comply with or the District to enforce the conditions of the ERP. The Judge

(12) over looked the Petitioners Proposed Recommended Order or he would have seen the errors in the construction of the gates and the construction drawings.

FINDING OF FACTS

EVIDENCE THAT PROVES THE CITY AND/OR DISTRICT ACTED OUTSIDE THE LAW AND NOT PROVIDED REASONABLE ASSURANCE FOR THE WEIR STRUCTURE ALREADY IN USE WITHOUT A PERMIT TO BE OPENED

(13) The Emergency Order (F.O.R) No. 2003-38) authorized the construction and short-term operation of the Lake Doyle and Lake Bethel Emergency Overflow Interconnection. Petitioners Ex. 14, 16 and 24. The term "short term"

has long exceeded its life by two years of continual flow of water from the system, therefore cannot be considered short-term. "Reasonable assurance" is a rule applied when requesting a permit not after facts are established and system is operating for two years as it is a known fact with reasonable assurance that the construction of the gates are unable to close. 40C-4.301 F.A.C.

(14)

(15) Honorable Jeb Bush's Executive Order Number 03-60 was violated as it allowed temporary construction and operation of the flooded area not draining entire basin, and time limit of 60 days. District Ex. No. 5

(16) In Section 120.54(4) (c) Florida Statutes "Emergency rule under this subsection shall not be effective for a period of longer than 90 days." Amendment states with fair conclusion, therefore reasonable assurance of abiding by the law cannot be assumed will take place in the future as it has not in the past.

(17) September 3, 2004, just ONE (1) day after meeting on September 2, 2004, with all Petitioners and District and City Officials, the flood gates were opened wide. On September 2, 2004, at the scheduled meeting of all District and City official assured Petitioners, repeatedly, that the gates would not be opened due to this litigation. The water level was at 22.1 feet NGVD.when the elevation was established to be 23.4' NGVD and the gates were opened violating the signed agreement.Petitioner Ex. 9a.. After the fact the District's Jeff Eldridge ordered. Emergency Order, No. 24. FOR 2004 75 of 9/22/2004 District Ex. Number 24. Page 13; Amended Pre-Hearing Stipulations. (Acted outside the established law) Judge's Recommended Order page 22, Number 78 ""reasonable assurance" that the applicant to establish substantially, likelihood that the project will be successfully implemented" but the system has been implemented and in use for over two years. Both Respondents violated the signed agreement so cannot be trusted to enforce the conditions of the ERP or to abide by rules in the future when proof is they did not abide by them in the past.

(18) October 1, 2004 a signed settlement agreement between Petitioners and the City agreed on Lake Doyle level to be 23.4 feet NGVD but that was violated as the water flowed out of the system at 22.1 NGVD feet, District Ex. 24. New elevation is set at 24.5 NGVD feet, but the pipe elevation is at 21' the gates do

not seal, so water will continue to flow until it reaches the 21' elevation. 40C-4.301 (1) (i) engineering principles of being performed and of functioning as proposed has not happened as the gates do not seal.

(19) With "reasonable assurance" the pipe will be plugged by the 8 inch thick plug at the outlet side of the pipe which is greater than a half mile from the weir structure so it cannot be classified to be at the weir structure at Lake Doyle. Per ALJ "The evidence was unequivocal, from both the city and the District, that the system would be plugged so that no water would flow through the weir at Lake Doyle." Page 29 No. 92. But it has not been determined when the plug must be implemented (installed) as it is not stated in the TSR and the plug is not at Lake Doyle the gates are not sealed and water will flow until it reaches the plug over a half mile away.

(20) "No construction shall begin until a permit is issued" 40C-4.041(1) F.A.C. but the construction was started before the permit issued due to the Emergency Order knowing a ERP needs to be issued. Now wants to revert back to rules used when issuing a permit before construction. This is unfair justice as known facts exist and have different meaning as "reasonable assurance" but the system is in operation and it is known how the system operates therefore "reasonable assurance" is for the successful operation of the system is not valid. It is known of engineering construction plans different from gate manufacturer's sheet, therefore is not capable of functioning as proposed 40C-4.301(1) (i) F.A.C. "Short term" can not be relied upon as the system has been in continuous operation and cannot trust the District to enforce the conditions of the ERP or rules. Permits have been issued after the fact rather than before construction i.e. Permit No. 400-127-94053 and Emergency Order FOR 2004-75 District Ex. No. 24 and Petitioner Lott's Ex. No. 9a. Again cannot trust District to enforce the conditions of the ERP or District Rules, Florida Statutes or F.A.C.

(21) Table 3.1 shut-off elevations schedule for Lake Bethel July through November elevations is 5.0 feet NGVD (TSR), But September 3, 2004, at elevation 5.5 feet the District authorized opening the gates (per Jeff Eldridge).

District Exx No. 24. Consequently the St. Johns River floods at 5.8 feet caused the flood of Stone Island. ALJ Page 12 No. 29, City and District recognize Stone Island floods. District Ex. No.38. City Engineer letter April 8, 2003 to Stone Island homeowners association stated a specific regulation schedule and set elevations by which the gate structure at Lake Doyle will be shutoff completely and not discharged to Stone Island. ALG Recommended Order Page 10 No. 23. This was violated. District Ex. No. 38, Petitioner Ex. No. 19. Therefore cannot trust the District to enforce the conditions of the ERP or City Ex.No. 2.

(22) The structure (weir) at Lake Doyle cannot be shut off (completely closed) or operated in accordance to the manufactures instructions as the bottom of the weir structure is at 16 feet and the pipe elevation is at 21 feet; difference of 5 feet. The Gator SG-15 Sluice Gates according to instructions from the manufacturer states "The bottom of the gates must be a minimum of three (3) inches below the bottom of the concrete openings. This critical point on the gates can be located by measuring 3'-9" from the top of the gates. Improper gate closure does not allow for that proper seal and the gates will leak." (Therefore the gates are four feet high). The City Engineer's construction drawing is 4'8" City Ex. 1, and 2, "reasonable assurance of closing gates is impossible as there is a discrepancy in the height of the gates and if sealed gates do not reach the 21' elevation. Petitioner Ex. 17. 40C-4.301 (1) (i) Engineering principles of being performed and of functioning as proposed has not happened in over two years, therefore cannot be trusted it will change in the future.

(23) Using common sense proves the applicant cannot provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed. 40C-4.301(1)(i).F.A.C. and ALJ Recommended Order page 19 No. 61 Applicant cannot close the gates per the above facts of calculations of the height of the gates. At the hearing it was stated the gates were raised to 25', should have been lowered, due to complaints of water flowing from the system again proof the gates cannot be closed and the 23.4' NGVD

elevation was violated. Also the structure has been in operation for two years ditching away 648,000 gallons fresh water daily without control, therefore Petitioners cannot rely on the fact "of reasonable assurance" that the system will operate in accordance with the permit to be granted or District rule or Florida Administrative Code..

(24) ALJ Recommended Order Page 29, No. 92, "Petitioners belief that the City will not construct the proposed system as set forth in the permit application, was not supported by competent substantial evidence. The system would be plugged so that no water would flow through the weir at Lake Doyle." ALJ Page 7, No. 7, and Page 29 No. 92 and District Exhibit No. 38. The plug is to consist of a 4" x 4" x 8" brick and mortar plug at the outfall located at downstream end of 60" RCP which is 3,524 linear feet from the weir at Lake Doyle and not at Lake Doyle (that is well over one-half mile from the lake location). City Ex. No. 1. Therefore the eight (8) inch thick plug will be the first point of closing the weir. Therefore the Lake Doyle water level will recede to the 21' elevation of the pipe and the recommended elevation of 24.5' has no meaning District Ex. No. 38. It has been proven the gates cannot be closed as early as appearing before the District Board Tuesday, January 13, 2004, when the entire Board Members heard that water is flowing from the system Also letter to Kirby B. Green III, and his reply dated May 28, 2004, that he is aware that water is flowing from the system Petition Ex. No. 6a.

(25) With water flowing through 3,524 linear feet of pipe before it is stopped this creates a fish and wildlife hazard as animals get trapped in long lengths of pipe with no escape F.A.C. 40C-4.301(1)(d) F.A.C. .It will impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. And F.A.C. 40C-4.302 (2) activity will affect the conservation of fish and wildlife

(26) TSR Site Description District Ex.No. 38 (Phase 1) states riser boards at the Ledford Drive and railroad berm structures, **respectfully**." City Ex.No. 1, riser boards at the railroad berm ONLY (ALJ) Recommended Order page 7 No. 8. 2 of 4 pipes are overflow structures, controlled by canal gates at Ledford Drive.

TSR states "riser boards at the Ledford Drive and railroad berm structures respectfully. Therefore, a discrepancy and will not be able to rely on reasonable assurance that the system will be installed correctly as it cannot be determined (27) correct wording of placement of channel boards. Petitioner Ex. No. 21, pipes are closed but water is flowing around the three pipes. 40C-4.301 (1) (a) F.A.C. Applicant must provide reasonable assurance that the construction will not cause adverse water quantity impacts to receiving waters and adjacent lands.

(28) The original TSR stated another adjustable weir in the RR berm indicating it was installed at the time of the original construction which is not true as there are no boards. Water flows from this location into the "Horse Pond" therefore it is causing adverse water quantity impacts to receiving waters and adjacent lands pursuant to Rule 40C-4.301(1) (a), F.A.C. The location of placement of planks is not indicated on the diagram but the City Engineer confirmed they would be place on the inlet side. On that side there are only two pipes the diagram City Ex. No. 1 is for three at that location (that would be on the outfall side) total of 5 pipes, (ALJ) Recommended Order page 7 No. 9 states 5 pipes. Petitioner Ex. No. 21. Therefore, reasonable assurance with mentioned discrepancies will not allow proper installation. of the system and not a description of the exact location of the planks also called channel boards.

(29) ALJ Page 7 No. 10 "controlled by channel boards" means the boards and/or called planks are installed which is not a true statement. Also 'The pipes at the railroad grade discharge to a 1500 foot long finger canal" Not a true statement as The pipes at the railroad grade discharge via three 30" culverts to the "Horse Pond" that would discharge over a 30 ft. weir to a 7' x 4' box culvert that was constructed. The original TSR called an adjustable weir/dam. that location drains under Enterprise Osteen Road to the 1500 foot long finger canal that was dug sometime during the period of 1940-1972. Petitioner Ex. No. 21 Now that constructed box culvert was constructed without a permit and is being eliminated from the environmental permit. District Ex. No.. 38. Mr. William E. Carlie statement Friday, December 19, 2003 "Some vegetation debris on the weir consists of maple leaves.." proof this section was constructed and cannot be

shut down and will cause adverse water quantity impacts to receiving waters and adjacent lands pursuant to Rule 40C-4.301(1)(a), F.A.C. Petitioner Ex. 21.

(30) ALJ Page 8 No. 11, The three locations whereby the system can be shut down

1) Lake Doyle control weir, controlled by three sluice gates. 2) Ledford Drive – two thirty-inch reinforced concrete pipes, controlled by canal gates; and 3) railroad grade – three thirty-inch reinforced concrete pipes, controlled by channel boards. But, as earlier stated the description of all three locations is not correct or not completely defined. ALJ Page 8 No. 14 "An unequivocal condition of the permit is that the system would operate with all of the Overflow Structures closed." Then ALJ Page 15, No. 44, District Page 11, No 35 and Ex 38. Gates cannot be closed; Ledford only 2 of 4 culverts can be closed, and water is going around the 3 pipes at the RR crossing therefore just relying on the 8 inch plug to stop the water from flowing through the system. ALJ Page 15 No. 44. "No outfall from the Theresa Basin to Lake Monroe." Is not a correct statement as there is neither a control nor mention of control at the "Horse Pond" culvert that is eliminated and not mentioned as part of the permit but was constructed as part of the system and water flows to Lake Bethel.

(31) Natural lakes should not be used as Stormwater Management as "Retention systems are closed systems, constructed so that storm water does not reach natural water bodies." District is ignoring these facts as proven in Petitioner Ex. Nos. 12, 13, 14, and 16, and Districts publications "Neighborhood Guide to Stormwater Systems" Page Three (3). "Flood Protection and Assistance" Page Ten (10) District Handbook 13.9 page 13-8.

(32) ALJ Page 20 No. 64, The District does not consider impacts to property values. But our stormwater assessment taxes are doubled due to this project with a cost of which is known of $1,801,071.00 and un-determined hidden costs. Now Volusia County is increasing there stormwater assessment to 47,000 residents to correct flooding to Stone Island ALJ Page 12 No. 29, District Exhibit 38. Further mitigation will be required to remove Tussocks and the plan to compensate for losses of ecological function (e.g. wildlife habitat) ALJ Page 14,

No. 39, 40 District Page 9-10 , No. 28 and 30. . Recommend using a harvesting machine to fulfill this permit qualification at an undetermined cost for a system to be used once in 15 years. Plus man cannot compensate for Mother Nature.

(33) It was never determined that flooding was the reason for the installation of this system. The mixing of varying lake chemistries and the receiving body of water (Lake Monroe, St. Johns River, Critically impaired water body).ALG Page 15 No. 41 District Page 10, No. 31 should not be allowed as our lake water conditions are worse that before this project was started. As it has caused adverse impacts to existing surface water storage and conveyance capabilities 40C-4.301 (1) (c) F.A.C. This permit should be denied.

(34) District's Environmental Resource Permit Application" Section A" where applicant checked "Standard General" "include information requested in Section C and E" those sections were not attached to the permit. Therefore it is not a complete permit application, but your own rules apply therefore completion is not necessary as other permits have been granted without full information just to inform how our tax dollars are being spent and the public cannot correct any errors made by the District..

(35) The District and City requested an amendment to original permit which was granted to allow more time to develop its latest drainage scheme, and correct errors found in the original TSR, but there are still inconsistencies in the development of plans for the operation of the system. District Ex. No. 38. and City Ex. No. 1 and 2.

(36) The TSR (3/23/05) indicates that adjustments need to be made to the outflow of two other drainage basins, in order for the Lake Theresa Basin outfall to be operational. Originally the two other drainage basins were not to be interconnected with Lake Theresa Basin this statement should not have been included in this permit application as it is irrelevant. But detailed information about the box culvert "dam" that was constructed and part of the system was eliminated from the TSR. The TSR is the document that memorializes the staff recommendation for approval or denial of a permit application. And it must describe the project with enough particularity to provide information relevant to

the application review and the resulting recommendation. Page 11 District Response to Interrogatories and 40C-4.301 F.A.C. Conditions for Issuance of Permits.

(37) The District Rules and TSR are changeable therefore easy to violate, also the time limit for plugging the pipe was not specified in the amended TSR District Ex. No.38. The statement that the City has to follow for plugging the pipe is with "reasonable assurance" standard has been judicially defined to require an applicant to establish "a substantial; likelihood that the project will be successfully implemented." ALJ Page 22 No. 78. Therefore the meaning is that there is not a time limit as to when the pipe must be plugged. The original TSR stated 30 days after issuing the permit. Judge Cohen's recommended statement Page 31, granting the permit with the conditions set forth in the TSR. Unclear which rule will take precedence as again a discrepancy and unclear facts.

(38) The system has been opposed by over 296 homeowners over the past four years Petitioners Ex. No.19 it will adversely affect the public health, safety, or welfare or property of others pursuant to Rule 40C-4.302(1)(a)1, F.A.C.

(39) ALJ Page 16 No. 50, District Page 12, No. 40 The City cannot prove reasonable assurance that the use of the system will not adversely affect the ecological value of the uplands to aquatic or wetland dependent species for enabling existing nesting or denning by these species. As the lowering of the water will affect the bird sanctuary on Lake Anna Marie.

CONCLUSION

(40) The City of Deltona should not be granted the Environmental Resource Permit for Construction due to the discrepancies in building construction, use of gates, plugging the pipe as water finds its way around blockages which have been noted. The City or District have not given "reasonable assurances" that rules will be adhere to as proven they have violated them in the past including Governor Jeb Bush's Executive Order. The District's TSR conditions are not complete and well definded, also the Judge's Recommendation Order has flaws and inconsistencies. Therefore, the petitioners have faith in the judicial system

that the Governing Board will not grant the environmental resource permit due to the aforementioned discrepancies and rules.

Respectfully Submitted, this 13th day of June, 2005

_____

Barbara Ash,
943 South Dean Circle, Deltona, Florida 32738 (386) 574-6076
And as Qualified Representative for the following:

Francell Frei1080, Peak Circle, Deltona, Florida 32738 (386) 860-5752

Ted and Carol Sullivan, 1489 Timbercrest Drive, Lake Theresa
Deltona, Florida 32738 (386) 574-8646

Bernard J. and Virginia T. Patterson, 2518 Sheffield Drive,
Deltona, Fl, 32738 (386) 860-1605

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by email on this 13th day of June, 2005 to: clerk@sjrwmd.com.

Email to the parties listed on the Service List

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Phillip Lott's Exceptions to the Recommended Order

COMES NOW Petitioner Phillip Lott with recommended exceptions in accordance with finding of facts on the issues of the City of Deltona's request for an Environmental Resource Permit to construct (already constructed structures) of an Emergency overflow interconnection system between Lake Doyle and Lake Bethel aka "Big Ditch". This cause came before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 30 through March 31, 2005, in Deltona, Florida.

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Petitioners late in filing were excluded from objecting this behavior is certainly a waste of taxpayer's money plus an unfair justice and not a reasonable condition in behalf of Petitioners. Therefore, City of Deltona does not need to comply with or the District to enforce the conditions of the ERP. The Judge over looked the Petitioners Proposed Recommended Order or he would have seen the errors in the construction of the gates and the construction drawings.

Finding of Facts omitted the evidence presented that proved that the City and the District acted outside the law and did no provide reasonable assurances for a structure that has been in use for two years.

The Emergency Order (F.O.R) No. 2003-38) authorized the construction

and short-term operation of the Lake Doyle and Lake Bethel Emergency Overflow Interconnection. Petitioners Ex. 14, 16 and 24. The term "short term" has long exceeded its life by two years of continual flow of water from the system, therefore cannot be considered short-term. "Reasonable assurance" is a rule applied when requesting a permit not after facts are established and system is operating for two years as it is a known fact with reasonable assurance that the construction of the gates are unable to close. 40C-4.301 F.A.C.

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The structure (weir) at Lake Doyle cannot be shut off (completely closed) or operated in accordance to the manufactures instructions as the bottom of the weir structure is at 16 feet and the pipe elevation is at 21 feet; difference of 5 feet. The Gator SG-15 Sluice Gates according to instructions from the manufacturer states "The bottom of the gates must be a minimum of three (3) inches below the bottom of the concrete openings. This critical point on the gates can be located by measuring 3'-9" from the top of the gates. Improper gate closure does not allow for that proper seal and the gates will leak." (Therefore the gates are four feet high). The City Engineer's construction drawing is 4'8" City Ex. 1, and 2, "reasonable assurance of closing gates is impossible as there is a discrepancy in the height of the gates and if sealed gates do not reach the 21' elevation. Petitioner Ex. 17. 40C-4.301 (1) (i) Engineering principles of being performed and of functioning as proposed has not happened in over two years, therefore cannot be trusted it will change in the future.

Using common sense proves the applicant cannot provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed. 40C-4.301(1)(i).F.A.C. and ALJ Recommended Order page 19 No. 61 Applicant cannot close the gates per the above facts of

calculations of the height of the gates. At the hearing it was stated the gates were raised to 25', should have been lowered, due to complaints of water flowing from the system again proof the gates cannot be closed and the 23.4' NGVD elevation was violated. Also the structure has been in operation for two years ditching away 648,000 gallons fresh water daily without control, therefore Petitioners cannot rely on the fact "of reasonable assurance" that the system will operate in accordance with the permit to be granted or District rule or Florida Administrative Code..

ALJ Recommended Order Page 29, No. 92, "Petitioners belief that the City will not construct the proposed system as set forth in the permit application, was not supported by competent substantial evidence. The system would be plugged so that no water would flow through the weir at Lake Doyle." ALJ Page 7, No. 7, and Page 29 No. 92 and District Exhibit No. 38. The plug is to consist of a 4" x 4" x 8" brick and mortar plug at the outfall located at downstream end of 60" RCP which is 3,524 linear feet from the weir at Lake Doyle and not at Lake Doyle (that is well over one-half mile from the lake location). City Ex. No. 1. Therefore the eight (8) inch thick plug will be the first point of closing the weir. Therefore the Lake Doyle water level will recede to the 21' elevation of the pipe and the recommended elevation of 24.5' has no meaning District Ex. No. 38. It has been proven the gates cannot be closed as was revealed to the District Board Tuesday, January 13, 2004, when the entire Board Members heard that water is flowing from the system Also letter to Kirby B. Green III, and his reply dated May 28, 2004, that he is aware that water is flowing from the system Petition Ex. No. 6a.

With water flowing through 3,524 linear feet of pipe before it is stopped this creates a fish and wildlife hazard as animals get trapped in long lengths of pipe with no escape F.A.C. 40C-4.301(1)(d) F.A.C. It will impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. And F.A.C. 40C-4.302 (2) activity will affect the conservation of fish and wildlife

TSR Site Description District Ex.No. 38 (Phase 1) states riser boards at

the Ledford Drive and railroad berm structures, **respectfully**" City Ex.No. 1, riser boards at the railroad berm ONLY (ALJ) Recommended Order page 7 No. 8. 2 of 4 pipes are overflow structures, controlled by canal gates at Ledford Drive. TSR states "riser boards at the Ledford Drive and railroad berm structures respectfully. Therefore, a discrepancy and will not be able to rely on reasonable assurance that the system will be installed correctly as it cannot be determined correct wording of placement of channel boards. Petitioner Ex. No. 21, pipes are closed but water is flowing around the three pipes. 40C-4.301 (1) (a) F.A.C. Applicant must provide reasonable assurance that the construction will not cause adverse water quantity impacts to receiving waters and adjacent lands.

The original TSR stated another adjustable weir in the RR berm indicating it was installed at the time of the original construction which is not true as there are no boards. Water flows from this location into the "Horse Pond" therefore it is causing adverse water quantity impacts to receiving waters and adjacent lands pursuant to Rule 40C-4.301(1) (a), F.A.C. The location of placement of planks is not indicated on the diagram but the City Engineer confirmed they would be place on the inlet side. On that side there are only two pipes the diagram City Ex. No. 1 is for three at that location (that would be on the outfall side) total of 5 pipes, (ALJ) Recommended Order page 7 No. 9 states 5 pipes. Petitioner Ex. No. 21. Therefore, reasonable assurance with mentioned discrepancies will not allow proper installation. of the system and not a description of the exact location of the planks also called channel boards.

ALJ Page 7 No. 10 "controlled by channel boards" means the boards and/or called planks are installed which is not a true statement. Also 'The pipes at the railroad grade discharge to a 1500 foot long finger canal" Not a true statement as The pipes at the railroad grade discharge via three 30" culverts to the "Horse Pond" that would discharge over a 30 ft. weir to a 7' x 4' box culvert that was constructed. The original TSR called an adjustable weir/dam. that location drains under Enterprise Osteen Road to the 1500 foot long finger canal that was dug sometime during the period of 1940-1972. Petitioner Ex. No. 21 Now that constructed box culvert was constructed without a permit and is being

eliminated from the environmental permit. District Ex. No.. 38. Mr. William E. Carlie statement Friday, December 19, 2003 "Some vegetation debris on the weir consists of maple leaves.." proof this section was constructed and cannot be shut down and will cause adverse water quantity impacts to receiving waters and adjacent lands pursuant to Rule 40C-4.301(1)(a), F.A.C. Petitioner Ex. 21.

ALJ Page 8 No. 11, The three locations whereby the system can be shut down

1) Lake Doyle control weir, controlled by three sluice gates. 2) Ledford Drive – two thirty-inch reinforced concrete pipes, controlled by canal gates; and 3) railroad grade – three thirty-inch reinforced concrete pipes, controlled by channel boards. But, as earlier stated the description of all three locations is not correct or not completely defined. ALJ Page 8 No. 14 "An unequivocal condition of the permit is that the system would operate with all of the Overflow Structures closed." Then ALJ Page 15, No. 44, District Page 11, No 35 and Ex 38. Gates cannot be closed; Ledford only 2 of 4 culverts can be closed, and water is going around the 3 pipes at the RR crossing therefore just relying on the 8 inch plug to stop the water from flowing through the system. ALJ Page 15 No. 44. "No outfall from the Theresa Basin to Lake Monroe." Is not a correct statement as there is neither a control nor mention of control at the "Horse Pond" culvert that is eliminated and not mentioned as part of the permit but was constructed as part of the system and water flows to Lake Bethel.

Natural lakes should not be used as Stormwater Management as "Retention systems are closed systems, constructed so that storm water does not reach natural water bodies." District is ignoring these facts as proven in Petitioner Ex. Nos. 12, 13, 14, and 16, and Districts publications "Neighborhood Guide to Stormwater Systems" Page Three (3). "Flood Protection and Assistance" Page Ten (10) District Handbook 13.9 page 13-8.

ALJ Page 20 No. 64, The District does not consider impacts to property values. But our stormwater assessment taxes are doubled due to this project with a cost of which is known of $1,801,071.00 and un-determined hidden costs. Now Volusia County is increasing there stormwater assessment to 47,000

residents to correct flooding to Stone Island ALJ Page 12 No. 29, District Exhibit 38. Further mitigation will be required to remove Tussocks and the plan to compensate for losses of ecological function (e.g. wildlife habitat) ALJ Page 14, No. 39, 40 District Page 9-10 , No. 28 and 30. . Recommend using a harvesting machine to fulfill this permit qualification at an undetermined cost for a system to be used once in 15 years. Plus man cannot compensate for Mother Nature.

It was never determined that flooding was the reason for the installation of this system. The mixing of varying lake chemistries and the receiving body of water (Lake Monroe, St. Johns River, Critically impaired water body).ALG Page 15 No. 41 District Page 10, No. 31 should not be allowed as our lake water conditions are worse that before this project was started. As it has caused adverse impacts to existing surface water storage and conveyance capabilities 40C-4.301 (1) (c) F.A.C., This permit should be denied.

District's Environmental Resource Permit Application" Section A" where applicant checked "Standard General" "include information requested in Section C and E" those sections were not attached to the permit. Therefore it is not a complete permit application, but your own rules apply therefore completion is not necessary as other permits have been granted without full information just to inform how our tax dollars are being spent and the public cannot correct any errors made by the District..

The District and City requested an amendment to original permit which was granted to allow more time to develop its latest drainage scheme, and correct errors found in the original TSR, but there are still inconsistencies in the development of plans for the operation of the system. District Ex. No. 38. and City Ex. No. 1 and 2.

The TSR·(3/23/05) indicates that adjustments need to be made to the outflow of two other drainage basins, in order for the Lake Theresa Basin outfall to be operational. Originally the two other drainage basins were not to be interconnected with Lake Theresa Basin this statement should not have been included in this permit application as it is irrelevant. But detailed information about the box culvert "dam" that was constructed and part of the system was

eliminated from the TSR. The TSR is the document that memorializes the staff recommendation for approval or denial of a permit application. And it must describe the project with enough particularity to provide information relevant to the application review and the resulting recommendation. Page 11 District Response to Interrogatories and 40C-4.301 F.A.C. Conditions for Issuance of Permits.

The District Rules and TSR are changeable therefore easy to violate, also the time limit for plugging the pipe was not specified in the amended TSR District Ex. No.38. The statement that the City has to follow for plugging the pipe is with "reasonable assurance" standard has been judicially defined to require an applicant to establish "a substantial; likelihood that the project will be successfully implemented." ALJ Page 22 No. 78. Therefore the meaning is that there is not a time limit as to when the pipe must be plugged. The original TSR stated 30 days after issuing the permit. Judge Cohen's recommended statement Page 31, granting the permit with the conditions set forth in the TSR. Unclear which rule will take precedence as again a discrepancy and unclear facts.

The system has been opposed by over 296 homeowners over the past four years Petitioners Ex. No.19 it will adversely affect the public health, safety, or welfare or property of others pursuant to Rule 40C-4.302(1)(a)1, F.A.C.

ALJ Page 16 No. 50, District Page 12, No. 40 The City cannot prove reasonable assurance that the use of the system will not adversely affect the ecological value of the uplands to aquatic or wetland dependent species for enabling existing nesting or denning by these species. As the lowering of the water will affect the bird sanctuary on Lake Anna Marie.

Conclusions:

The City of Deltona should not be granted the Environmental Resource Permit for Construction due to the discrepancies in building construction, use of gates, plugging the pipe as water finds its way around blockages which have been noted. The City or District have not given "reasonable assurances" that

rules will be adhere to as proven they have violated them in the past including Governor Jeb Bush's Executive Order. The District's TSR conditions are not complete and well definded, also the Judge's Recommendation Order has flaws and inconsistencies.

(2) Granting the permit will potentially devalue thousands of upstream lakefront properties, a violation of multiple Florida Statutes which protect lakefront homeowner rights.

(3) Ditching and draining landlocked freshwater lakes in an area of maximum recharge to the Floridan Aquifer is diametrically opposed to the rules and policies of the St. Johns River Water Management District.

The District is spending millions of dollars with their ad campaigns to limit consumption of fresh water, however has no problem signing off of this permit which will provide the means to literally ditch away hundreds of thousands of gallons of fresh water a day.

Lakefront homeowners in the Lake Theresa Basin urge the Governing Board to reject this flawed permit application.

Respectfully Submitted, this 13th day of June, 2005

_____

Phillip Lott
948 N. Watt Circle, Deltona, Florida 32738
(386) 574-9552

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy has been furnished by email on this 13th day of June, 2005 to: clerk@sjrwmd.com.

Email to the parties listed on the Service List

St. Johns River
Water Management District
Kirby B. Green III, Executive Director • David W. Fisk, Assistant Executive Director

4049 Reid Street • P.O. Box 1429 • Palatka, FL 32178-1429 • (386) 329-4500
On the Internet at *www.sjrwmd.com*.

May 31, 2005

George Trovato
City of Deltona
2345 Providence Blvd.
Deltona, FL 32725

Diana E. Bauer
1324 Tartan Avenue
Deltona, FL 32738

Barbara Ash
943 S. Dean Circle
Deltona, FL 32738-6801

Gloria Benoit
1300 Tartan Avenue
Deltona, FL 32738

J. Christy Wilson, III, Esq.
(for Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow)
437 N. Magnolia Ave.
Orlando, FL 32801

Howard Ehmer
Nina Ehmer
1081 Anza Court
Deltona, FL 32738

Francell Frei
1080 Peak Circle
Deltona, FL 32738

Gary Jensen
1298 Tartan Avenue
Deltona, FL 32738

Phillip Lott
948 N. Watt Circle
Deltona, FL 32738-7919

Bernard J. Patterson
Virginia T. Patterson
2518 Sheffield Drive
Deltona, FL 32738

James E. Peake
Alicia M. Peake
2442 Weatherford Drive
Deltona, FL 32738

Steven L. Spratt
2492 Weatherford Drive
Deltona, FL 32738

Ted Sullivan
Carol Sullivan
1489 Timbercrest Drive
Deltona, FL 32738

Kealey West
Office of General Counsel
St. Johns River Water Management District
4049 Reid Street
Palatka, FL 32177

EXHIBIT "C"

Re: Barbara Ash, et al. v. SJRWMD and City of Deltona;
DOAH Consolidated Case Nos. 04-2399 through 04-2401;
04-2403 through 04-2406; 04-2408 through 04-2409;
04-2411 through 04-2412; 04-3048;
SJRWMD F.O.R. 2004-27

Dear Parties:

The Recommended Order for the above-referenced case was entered on May 27, 2005. You may file exceptions to the Recommended Order pursuant to § 120.57(1)(k), Florida Statutes (F.S.). If you do file exceptions, please remember that § 120.57(1)(k), F.S., provides that "[a]n agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

Exceptions to the Recommended Order must be filed with the District Clerk at District Headquarters in Palatka no later than 5:00 p.m. on June 13, 2005. Section 120.57(1)(k), F.S., and Chapter 28-106.217, Florida Administrative Code (F.A.C.). Responses to Exceptions to the Recommended Order must be filed no later than 10 days after the Exceptions are served. Chapter 28-106.217, F.A.C. The filing date for documents filed by hand delivery or mail shall be the date the District Clerk receives the complete document. The filing date for documents filed by e-mail at Clerk@sjrwmd.com shall be the date the District Clerk receives the complete document in the form of a PDF file in a manner capable of being stored and printed. A party who elects to file a document by e-mail is responsible for any delay, disruption, or interruption of the electronic signals and readability of the document and accepts the full risk that the document may not be properly filed with the District Clerk as a result. The District does not accept faxed filings.

The Governing Board must consider the proposed Final Order during the Governing Board meeting on June 7, 2005, unless the City of Deltona waives the 45-day statutory timeframe for consideration of this matter. Section 120.60(1), F.S. At this time, the City has indicated that it may waive the timeframe so that the Governing Board can consider this matter at its next meeting on July 12, 2005. I will inform you when I receive the City's waiver. The Governing Board meetings are at District Headquarters, Executive Building, 4049 Reid Street, in Palatka, at 1:00 p.m.

I will be preparing the proposed Final Order and will be presenting this matter to the Governing Board. I will be serving as the Governing Board's advisor during this proceeding and will not be representing District staff. The Governing Board is free to accept my advice, or to take any other action allowed under Chapter 120, F.S.

At the Governing Board meeting, you will have an opportunity to provide oral argument on Exceptions to the Recommended Order. If you wish to provide oral argument, I suggest that the parties agree on a proposed procedure (i.e., a limited timeframe and order of presentation) for making a brief oral argument to the Governing Board and that you submit your proposal to me as soon as possible. If an agreement cannot be reached, I will recommend a procedure to the Governing Board.

You are reminded that Section 120.66, F.S., restricts communication with members of the Governing Board (the agency head) during this period between issuance of the Recommended Order and entry of a Final Order.

Thank you for your attention. If you have any questions, you may contact me at (386) 329-4448.

Sincerely,

Tara Boonstra

Tara E. Boonstra
Assistant General Counsel
Office of General Counsel

TEB:kp

cc: Kathryn L. Mennella
SJRWMD F.O.R. No. 2004-27

INDIVIDUAL ENVIRONMENTAL RESOURCE PERMIT
TECHNICAL STAFF REPORT
March 23, 2005
APPLICATION #: 4-127-87817-1

Applicant: City of Deltona
C/O Fritz Behring
2345 Providence Blvd.
Deltona, FL 32725

Consultant: Hartman & Associates Inc
C/O William Musser & Roderick Cashe
201 E Pine St Suite 1000
Orlando, FL 32801

Project Name: Lake Doyle to Lake Bethel Emergency Overflow Interconnect
Acres Owned: 4.100
Project Acreage: 4.100
County: Volusia
Section(s): 2, 9, 10, 11 **Township(s):** 19S **Range(s):** 31E

Authority: 40C-4.041(2)(b)1, 40C-4.041(2)(b)2, 40C-4.041(2)(b)8

Existing Land Use: Urban and build-up(1000), Sand Pine(4130), Xeric Oak(4210), Streams and Waterways(5100), Lakes(5200), Bay Swamps(6110), Freshwater Marshes(6410)
Receiving Water Body: Lake Bethel / Lake Monroe **Class:** III Fresh.
Final O&M Entity: City of Deltona
ERP Conservation Easements/Restrictions: Yes
Interested Parties: Yes
Objectors: Yes

Authorization Statement:
Construction of an overflow interconnection system between Lake Doyle and Lake Bethel. The Lake Doyle to Lake Bethel Emergency Overflow Interconnection system is an integrated system of pipes, water level control structures, berms and swales, between Lake Bethel Lake Monroe. The system authorized under this application, includes a brick and mortar plug in the Lake Doyle weir structure outfall pipe, and closed channel gates and riser boards at the Ledford Drive and railroad berm structures, respectively, to maintain the pre-construction flow patterns.

Staff Comments:

Project Description
The City of Deltona is located in southwest Volusia County. There are four primary watershed basins within the Deltona area. They are referred to as Lake Gleason Basin, Lake McGarity Basin, Lake Theresa Basin, and Providence Basin. Three of the watersheds (McGarity, Gleason, and Providence) have a direct hydraulic connection to Lake Monroe and the St. Johns River.

EXHIBIT "D"

The fourth basin, the Lake Theresa Basin, is the largest of the four major watersheds and encompasses approximately 23,200 acres (36.3 square miles). The Theresa Basin is comprised primarily of a cascading system of interconnected lakes extending from Lake Macy in the City of Lake Helen to the Butler Chain of Lakes (Lake Butler and Lake Doyle). The system is land-locked, and does not have a natural outfall to Lake Monroe and the St. Johns River.

In 2003, after an extended period of above normal rainfall in the Deltona area, the lakes within the land-locked Lake Theresa Basin staged to extremely high elevations that resulted in standing water in residential yards, and rendered some septic systems inoperable. Lake levels within the Lake Theresa Basin continued to rise and were in danger of rising above the finished floor elevations of some residences within the basin. On March 25, 2003, the District issued an Emergency Order (F.O.R. No. 2003-38) for the construction and short-term operation of the Lake Doyle to Lake Bethel Emergency Overflow Interconnection. Since wetland and surface water impacts would occur, the emergency order required the City of Deltona to obtain an Environmental Resource Permit ("ERP") for the system.

This permit application is for the construction of the Lake Doyle to Lake Bethel Emergency Overflow Interconnection System. The Emergency Overflow System consists of a variable weir structure within Lake Doyle connected to a series of pipes, swales, water control structures and wetland systems which outfall to a finger canal of Lake Bethel, with ultimate discharge to Lake Monroe and the St. Johns River. As a part of this application, the City proposes to plug the Lake Doyle weir structure outfall pipe, thereby precluding the discharge of water from Lake Doyle, and to operate the system so that pre-construction flow patterns will be maintained. The City has submitted to the District preliminary plans for a future phase in which the system would be modified for the purpose of alleviating high water levels within the Lake Theresa watershed when the level in Lake Doyle rises above an elevation of 24.5'. A separate permit application would need to be submitted to the District for such a future phase

The first project segment of the system extends downstream from the west shore of Lake Doyle via a pipe entrenched in the upland berm of the Sheryl Drive right-of-way. The Lake Doyle shoreline is lightly developed and provides good aquatic and emergent marsh habitat. The pipe passes under Doyle Road and through xeric pine-oak uplands to the northeast shore of a large (ca. 15 acres) deepwater marsh. Water flows south through the deepwater marsh where it outfalls through four pipes at Ledford Drive. Two of these pipes are controlled by a canal gate structure. These pipes discharge to a ditch and into a large (>20 acres) shallow bay swamp. The south end of the bay swamp is defined (and somewhat impounded) by a 19th Century railroad grade. An adjustable flashboard riser weir in the railroad berm controls discharge to a 1500-foot long finger canal that was dug some time during the period 1940 – 1972 from the north central shore of Lake Bethel. The area abutting the project is little urbanized for much of the project's path

With the exception of the western shore area of the deepwater marsh ("west marsh area"), the bay swamp and remaining deepwater marsh area have good ecological value and appear to have recovered from impacts associated with historical land uses before the 1940s. The west marsh area was ditched and apparently incorporated into the drainage system of a poultry farm (now defunct). This area apparently suffered increased nutrient influxes and sedimentation that contributed to a proliferation of floating mats of aquatic plants and organic debris (i.e., "tussocks"). These tussocks reduced the

deepwater marsh's open water area and diminished the historical marsh habitat. Water under the tussocks is typically anoxic owing to total shading by tussocks and reduced water circulation. Thick, soft, anaerobic muck has accumulated under the matted vegetation. Exotic shrubs (primrose willow *Ludwigia peruviana*) and other problematic plants (cattails *Typha* spp.) dominate the tussocks.

Engineering Comments

Potential Flooding Issues:

Areas downstream from the project site, such as Stone Island and Sanford, have experienced flooding in the past. The system in this application does not allow for flow to occur from Lake Doyle and therefore will not cause or contribute to downstream flooding.

Water Quality Issues:

Lake Monroe is included on the Florida Department of Environmental Protection's verified list of impaired water bodies for nitrogen, phosphorous and dissolved oxygen. Prior to construction of the emergency overflow system under the Emergency Order, there was no natural outfall from the Lake Theresa Basin to Lake Monroe and therefore no contribution from this watershed to nitrogen and phosphorous loadings to Lake Monroe. The system proposed in this application precludes discharge from Lake Doyle due to the installation of the brick and mortar plug. Therefore, as proposed, the system will also not contribute to nitrogen and phosphorous loadings to Lake Monroe.

Minimum Flows and Levels:

Lake Colby, Three Island Lakes (aka Lake Sixma), and the Savannah are surface waters within the Theresa Basin watershed for which minimum levels have been adopted pursuant to Chapter 40C-8, F.A.C. As noted above, the system is proposed to maintain pre-construction flow patterns and will not allow discharge of water from Lake Doyle. Therefore, the system as currently proposed will not adversely impact the maintenance of surface water levels established in Chapter 40C-8, F.A.C.

Environmental Comments

Impacts:

Section 12.2.2 of the ERP Applicant's Handbook ("A.H.")states that an applicant "must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to: (a) the abundance and diversity of fish, wildlife and listed species; and (b) the habitat of fish, wildlife and listed species.

The system resulted in the loss of 1.3 acres of wetlands and 0.2 acres of other surface waters. The 0.2 acre impact was to the lake bottom and the shoreline of Lake Doyle.

The largest wetland impact (1.0 acre) was to the bay swamp. The swamp is a shallow body dominated by low hummocks and pools connected inefficiently by shallow braided channels and 1.0 acre was filled with a 1– to 2-foot layer of sediment following swamp channelization. Disturbance plants (e.g., primrose willow, Ludwigia peruviana and elderberry Sambucus Canadensis) are now colonizing this sediment plume. The City mapped the sediment plume's extent so that it will be possible to detect future impacts related to operation of the flow way, if authorized in a future phase.

This project adversely affected 1.3 acres of wetlands having moderately high - to high ecological value.

Secondary impacts:
Section 12.2.7 A.H. addresses additional impacts that may be caused by a project to wetland and surface water functions; water quality, upland habitat for aquatic or wetland dependent listed species, and historical and archeological resources.

Given the nature of the system, no adverse secondary impacts to the functions of wetlands and other surface waters or violations of water quality standards are anticipated to result from the construction and intended or reasonably expected uses of the system pursuant to Section 12.2.7(a), A.H. The construction and intended or reasonably expected uses of the system also will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed species for enabling existing nesting or denning of these species; no listed species occur on or near the project site. Based on consultation with the State's Division of Historical Resources, no historical or archeological resources are likely present on the site and therefore, no impacts to significant historical and archeological resources are expected.

Water Quality Issues:
As stated previously, the City has submitted preliminary plans to the District for construction of a future phase of the system. The operation of this future phase may, without additional measures result in minor increases in the loadings of nitrogen and phosphorous.

To address the impact on water quality of this potential future phase, the City has submitted a loading reduction plan for these parameters. The plan includes compensating treatment to fully offset the potential increased nutrient loadings to Lake Monroe. Specifically, the loading reduction plan includes:

- Construction and operation of compensating treatment systems to fully offset anticipated increased nutrient loadings to Lake Monroe.
- Weekly water quality monitoring of the discharge from Lake Doyle for total phosphorous and total nitrogen.
- A requirement that the overflow structure be closed if the total phosphorus level reaches 0.18 mg/l or higher or the total nitrogen level reaches 1.2 mg/l or higher in any given week and will remain closed until levels fall below those limits.

Under the plan, the City would construct treatment systems to provide water quality treatment within drainage basins that currently discharge to Lake Monroe to reduce the total nitrogen and total phosphorus such that the overall loadings to Lake Monroe would not be increased as a result of this future phase. The City has identified the areas where it would propose to construct and operate these treatment systems. The City will need to obtain a permit from the District prior to construction and operation of these treatment systems. The implementation of these water quality mitigation measures is anticipated to cause a net improvement of the water quality of Lake Monroe for nitrogen, phosphorous, and dissolved oxygen.

Minimum Flows and Levels:
As previously mentioned, Lake Colby, Three Island Lakes (aka Lake Sixma), and the Savannah are surface waters within the Theresa Basin watershed for which minimum levels have been adopted pursuant to Chapter 40C-8, F.A.C.

The City has provided an operating manual describing an operation schedule, in the event the future phase is authorized, to allow for emergency flood relief when the water level in Lake Doyle is above 24.5'. In the future phase, the frequency of use of the system is estimated to be approximately once every 25 years. Modeling results indicate that the operation of the overflow structure proposed in the future phase in accordance with the proposed operating schedule would not adversely impact the maintenance of surface water levels established in Chapter 40C-8, F.A.C.

Elimination/Reduction of Impacts:
Pursuant to Section 12.2.1 A.H. the applicant must implement practicable design modifications, which would reduce or eliminate adverse impacts to wetlands and other surface waters. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through endangerment of lives or property is not considered "practicable".

The unexpected erosive flows and sediment deposition in the bay swamp resulted in impacts that are difficult to remediate without extensively clearing and excavating other undisturbed parts of the swamp. Whereas restoration of the 1.1 acres of bay swamp is technically feasible, it is not considered practicable, because it would entail expensive pipe work and the removal of the sediment plume would require additional impacts to the interior of the bay swamp.

Mitigation:
To compensate for the loss of 1.3 acres of wetlands and 0.2 acres of surface waters, the City proposes to:

- Preserve part of the bay swamp (2.4 acres) and contiguous upland forest (0.1 acre);
- Preserve much of the deepwater marsh (6.8 acres) and its contiguous uplands (11.8 acres). The uplands are thickly wooded by mature mesic hardwoods and appear to be in a near-natural state; and
- Enhance the west marsh area (6.4 acres). The City proposes to restore the west marsh area by removing the tussocks and accumulated organic material from the marsh bottom. The marsh will then be revegetated using water lilies, sawgrass, or other native herbs. This enhancement area ultimately will be preserved by conservation easement. Thus, the preservation of the deepwater marsh shall be no less than 13.2 acres (6.8 acres preserved in the deepwater marsh as indicated above and the 6.4 acres of the enhanced west marsh area).

The mitigation plan will adequately compensate for losses of ecological function (e.g., wildlife habitat and biodiversity,) resulting from the project. Lake Doyle and the marsh had stable plant beds inter-spread among open waters that appeared to be optimally structured to provide forage and cover for waterfowl, waders, amphibians and their predators. The bay swamp provided arboreal habitat for migratory songbirds, woodpeckers, squirrels, tree frogs, raccoons, and opossums. All of the affected surface waters supported large (> 20 acres) well-integrated habitats for wetland-dependent species.

Comparing the functions that the wetlands and surface waters impacted provide to fish and wildlife to the functions that the mitigation areas will provide to fish and wildlife would result in no net loss to wetland and surface water functions. Some mitigation will ensure that suitable habitat remains for wildlife near the impact site and elsewhere within a watershed that will be subject to persistent urbanization. The marsh restoration work will improve greatly the habitat available for wetland and aquatic life (and their semi-aquatic predators). By preserving diverse habitat types, the plan ensures that habitat will remain available for wetland-dependent species requiring uplands, wetlands and transitional habitats. Protection of these lands by conservation easement will constrain incidental encroachment and ensure that secondary wetland impacts do not occur.

Cumulative Impacts:
Section 12.2.8 A.H. requires applicants to provide reasonable assurances that their projects will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the project for which a permit is sought. This analysis considers past, present, and likely future similar impacts and assumes that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications. Mitigation, which offsets a projects adverse impacts within the same basin as the project for which a permit is sought is deemed to not cause unacceptable cumulative impacts.

The proposed mitigation off-sets the project's adverse impacts and it is in the same drainage basin (#18, Figure 12.2.8-1, ERP A.H.); therefore the project will not cause unacceptable cumulative impacts

Public Interest Test:
Section 12.2.3 A.H. requires applicants to address whether a regulated activity located in, on, or over surface waters or wetlands, is not contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the regulated activity is clearly in the public interest.

The project does not significantly degrade and is not within an Outstanding Florida Water; therefore, the project must not be contrary to the public interest. The public interest test requires the District to evaluate only those parts of the project actually located in, on, or over surface waters or wetlands, against seven factors to determine whether a factor is weighed positive, neutral or negative and then these factors are balanced against each other.

(a) Whether the regulated activity will adversely affect the public health safety, or welfare or the property of others. This factor was considered neutral. There are no identified environmental hazards or improvements to public health or safety. Further, under this application the system will maintain pre-construction flow, therefore there should be no environmental impacts to the property of others.

(b) Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. This factor was considered neutral. As described earlier there will be some adverse impacts, however these impacts will be adequately offset by the propcsed mitigation plan.

(c) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling. This factor was considered neutral. Under this application the system will maintain pre-construction flow; therefore there should be no adverse effect to navigation or the flow of water. The sediment plume is considered an adverse impact, however, this impact will be adequately offset by the proposed mitigation plan.

(d) Whether the regulated activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity. This factor was considered neutral. Under this application the system will maintain pre-construction flow; therefore, there should be no change in nutrient levels or the current use of any waterway.

(e) Whether the regulated activity will be of a temporary or permanent nature. This factor was considered negative. The system is a permanent structure.

(f) Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of section 267.061, Florida Statutes. This factor was considered neutral. As previously indicated based on consultation with the State's Division of Historical Resources, no historical or archeological resources are likely present on the site and therefore, no impacts to significant historical and archeological resources are expected.

(g) The current condition and relative value of functions being performed by areas affected by the proposed regulated activity. This factor was considered neutral. As described earlier there will be some adverse impacts, however these impacts will be adequately offset by the proposed mitigation plan.

After balancing the seven factors, District staff believes that, on balance, the regulated activities located, in, on, or over surface waters or wetlands proposed in this application are not contrary to the public interest.

Wetland Summary Table
Lake Doyle to Lake Bethel Emergency Overflow Interconnect
Governmental/Institutional

	Acres
Total Wetlands On-site	1.3
Total Surface Waters On-site	0.2
Impacts that Require Mitigation	1.5
Impacts that Require No Mitigation	0.0
Mitigation	27.5
Wetland Preservation w/ Enhancement	6.4

Wetland Preservation	9.2
Upland Preservation	11.9

Recommendation: Approval

Conditions for Application Number 4-127-87817-1:

ERP General Conditions by Rule (October 03, 1995):
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

ERP/MSSW/Stormwater Special Conditions (November 09, 1995):
1, 10, 11, 12, 13, 15, 16, 28

Other Conditions:

1. The surface water management system shall be constructed and operated in accordance with the plans received by the District on February 25, 2005.

2. The City shall comply with the Mitigation Plan submitted to the District on March 17, 2005, which includes:
   - preservation of marsh #2 wetlands (6.8 acres) with contiguous uplands (11.8 acres);
   - preservation of swamp #1 (2.4 acres) and contiguous uplands (0.1 acre); and
   - preservation with substrate enhancement of marsh #2 (6.4 acres) as shown on the plan submitted on March 22 and 29, 2004.

3. The permittee must submit a reproducible survey of the sediment plume (shown initially on Figure 7-1 of the plan submitted on March 22, 2004).

4. This permit requires the recording of a conservation easement:

   Description of Conservation Easement Area
   Within 60 days of permit issuance, the permittee shall provide to the District for review and written approval a copy of: (a) the preliminary plat showing the area to be encumbered by the conservation easement, or (b) a surveyor's sketch and legal description of the area to be placed under the conservation easement, per the approved mitigation plan.

   Recording of Conservation Easement

   Within 30 days of receiving the District's written approval of the items above, the permittee shall record a conservation easement, which shall include restrictions on the real property pursuant to section 704.06, Florida Statutes, and be consistent with section 12.3.8, Applicant's Handbook, Management and Storage of Surface Waters (April 10, 2002). The conservation easement shall be in the form approved in writing by the District and, if no plat has been submitted, the easement shall include the approved legal description and surveyor's sketch.

Pursuant to section 704.06, Florida Statutes, the conservation easement shall prohibit all construction, including clearing, dredging, or filling, except that which is specifically authorized by this permit, within the mitigation areas delineated on the final plans and/or mitigation proposal approved by the District. The easement must contain the provisions set forth in paragraphs 1(a)-(h) of section 704.06, Florida Statutes, as well as provisions indicating that the easement may be enforced by the District, and may not be amended without written District approval.

Additional Documents Required

The permittee shall ensure that the conservation easement identifies, and is executed by, the correct grantor, who must hold sufficient record title to the land encumbered by the easement. If the easement's grantor is a partnership, the partnership shall provide to the District a partnership affidavit stating that the person executing the conservation easement has the legal authority to convey an interest in the partnership land. If there exist any mortgages on the land, the permittee shall also have each mortgagee execute a consent and joinder of mortgagee subordinating the mortgage to the conservation easement. The consent and joinder of the mortgagee shall be recorded simultaneously with the conservation easement in the public records of the county where the land is located.

Within 30 days of recording, the permittee shall provide the District with: (a) the original recorded easement (including exhibits) showing the date it was recorded and the official records book and page number, (b) a copy of the recorded plat (if applicable), (c) a surveyor's sketch of the easement area plotted on the appropriate USGS topographic map, and (d) the original recorded consent and joinder(s) of mortgagee (if applicable).

Demarcation of Conservation Easement Area

Within 120 days of recording the easement, all changes in direction of the easement area boundaries must be permanently monumented above ground on the project site.

5. Prior to January 1, 2007, the permittee shall remove floating mats of aquatic plants and organic debris ("tussocks") that have accumulated in the west marsh (shown on Figure 8-1 submitted on March 17, 2005). The City may use sufficient aquatic equipment, such as a plant harvester, to remove the tussocks and then remove accumulated organic sludge by hydraulic dredge or comparable equipment. The dredged material shall be removed to a self-contained upland area in order to prevent the escape of the spoil material into wetlands or other surface waters. The self-contained upland area shall be identified and submitted for District approval prior to the commencement of tussock removal activities.

6. During mechanical removal of the organic sediments, the City shall erect turbidity barriers, which isolate the immediate work area and any turbidity associated with the operations, from the rest of the water body.

7. Five days prior to commencement of the tussock removal activities, the City shall monitor turbidity in the open water area of the west marsh area. This data will

represent the background turbidity level of the west marsh area. Samples shall be collected once daily for this five-day period.

8. During the tussock removal activities, the permittee must monitor turbidity at the following location:

   - Approximately 25 to 50 feet outside of the turbidity control measures in undisturbed portion of the west marsh area.

   Samples must be collected two times daily with a morning and afternoon sample at least four hours apart during the tussock removal activities.

   Before removal of the turbidity control measures, the turbidity levels within the area surrounded by the turbidity control measures must be sampled to ensure no release of turbid water once the turbidity control measures are removed. The turbidity control measures may not be removed until the sample data indicates levels that do not exceed the State Water Quality Standards. This sample data must be included within the weekly turbidity data report.

9. If at any time the turbidity level measured outside of the turbidity control measures exceeds the State Water Quality Standards, then all measures required to reduce the turbidity including stopping all tussock removal activities, must be taken. The tussock removal activities shall not resume until the turbidity has returned to acceptable levels. Any such violation must be reported immediately to the District.

10. All turbidity data must be submitted to the District's Altamonte Springs Office weekly. The data must contain the following information:

   - permit number;
   - date and time of sampling and analysis;
   - statement describing collection, handling, storage, and analysis methods;
   - a map indicating the location of the samples taken;
   - depth of sample;
   - antecedent weather conditions; and,
   - tidal stage and/or flow direction.

11. The enhancement mitigation area must be replanted with suitable native wetland plants (e.g., *Pontederia cordata, Nymphaea* spp., *Nuphar luteum,* etc.) by July 1, 2008.

Reviewers: Lee Kissick
Marjorie Cook

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BARBARA ASH, et al.,	)	Case Nos. 04-2399
	)	04-2400
Petitioners,	)	04-2401
	)	04-2403
vs.	)	04-2404
	)	04-2405
CITY OF DELTONA AND ST. JOHNS	)	04-2406
RIVER WATER MANAGEMENT	)	04-2408
DISTRICT,	)	04-2409
	)	04-2411
Respondents.	)	04-2412
	)	04-3048

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 30 through March 31, 2005, in Deltona, Florida.

APPEARANCES

For Petitioners Barbara Ash, Francell Frei, Bernard J. and Virginia T. Patterson, and Ted and Carol Sullivan:

Barbara Ash, Qualified Representative
943 South Dean Circle
Deltona, Florida 32738

For Petitioners Howard Ehmer and Nina Ehmer:

Howard and Nina Ehmer, pro se
1081 Anza Court
Deltona, Florida 32738

For Petitioners Steven L. Spratt, James E. Peake, and Alicia M. Peake:

Steven L. Spratt, Qualified Representative
2492 Weatherford Drive
Deltona, Florida 32738

For Petitioners Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow:

J. Christy Wilson, Esquire,
(No Appearance)
Wilson, Garber & Small, P.A.
437 North Magnolia Avenue
Orlando, Florida 32801

For Petitioner Diana E. Bauer:

Diana E. Bauer, pro se
1324 Tartan Avenue
Deltona, Florida 32738

For Petitioner Gloria Benoit:

Gloria Benoit, (Appeared First Day Only)
1300 Tartan Avenue
Deltona, Florida 32738

For Petitioner Gary Jensen:

Gary Jensen, (No Appearance)
1298 Tartan Avenue
Deltona, Florida 32738

For Petitioner Phillip Lott:

Phillip Lott, pro se
948 North Watt Circle
Deltona, Florida 32738-7919

For Respondent City of Deltona:

George Trovato, Esquire
City of Deltona
2345 Providence Boulevard
Deltona, Florida 32725

For Respondent St. Johns River Water Management District:

Kealey A. West, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

STATEMENT OF THE ISSUE

The issue is whether the applicant for an Environmental Resource Permit ("ERP"), the City of Deltona ("City" or "Applicant"), has provided reasonable assurance that the system proposed complies with the water quantity, environmental, and water quality criteria of the St. Johns River Water Management District's ("District") ERP regulations set forth in Florida Administrative Code Chapter 40C-4, and the Applicant's Handbook: Management and Storage of Surface Waters (2005).

PRELIMINARY STATEMENT

Petitioners received notice of the District's intent to issue the ERP to the City and timely filed Petitions for a Formal Administrative Hearing challenging the District's intended issuance of the ERP. The matter was referred to the Division to conduct a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. At the hearing, the City presented the testimony of William Musser, an expert in stormwater management, hydrology, and ecology; and

Roderick Cashe, an expert in stormwater management. Exhibit Nos. 1, 2, 4, 5, 7-9, 13, and 14A-F were offered by the City and were admitted into evidence.

Petitioner Ash testified herself and on behalf of Petitioners Francell Frei, Bernard J. and Virginia T. Patterson, and Ted and Carol Sullivan. Exhibit Nos. 1-6 and 12-24 were offered by Ms. Ash were admitted into evidence. Petitioner Diana E. Bauer testified herself, and offered no exhibits into evidence. Petitioner Howard Ehmer testified himself, and offered no exhibits into evidence. Petitioner Phillip Lott testified himself, and had Exhibit Nos. 1-19 admitted into evidence. Petitioner Stephen Spratt testified himself and on behalf of James E. and Alicia M. Peake, and offered no exhibits into evidence.

The District presented the testimony of Lee Kissick, an expert in wetland and wildlife ecology, mitigation planning, wetland delineation, and environmental resource planning and regulation; and Marjorie Cook, an expert in water resource engineering, surface water and stormwater management systems, and environmental resource permitting and regulation. Exhibit Nos. 5, 17, 24, 32, 33, and 38 were offered by the District and were admitted into evidence.

The Amended Pre-Hearing Stipulation, filed with the Division on March 29, 2005, was admitted into evidence as Joint Exhibit No. 1.

A three-volume Transcript was filed on April 19, 2005. The parties had been permitted to file their proposed recommended orders within 10 days of the date on which the transcript was filed. Petitioner Phillip Lott filed his Proposed Recommended Order on April 12, 2005, Petitioner Howard Ehmer filed his Proposed Recommended Order on April 13, 2005, and Petitioners' Barbara Ash, Francell Frie, and Gloria Benoit filed their Proposed Recommended Orders on April 15, 2005. Respondent St. Johns River Water Management District filed its Proposed Recommended Order on April 29, 2005, and Respondent City of Deltona filed its approval and adoption of St. Johns River Water Management District's Proposed Recommended Order on May 2, 2005.

References are to Florida Statutes (2004), unless otherwise noted.

FINDINGS OF FACT

1. The District is a special taxing district created by Chapter 373, Florida Statutes, charged with the duty to prevent harm to the water resources of the District, and to administer and enforce Chapter 373, Florida Statutes, and the rules promulgated thereunder.

2. The City of Deltona is a municipal government established under the provisions of Chapter 165, Florida Statutes.

3. The Lake Theresa Basin is comprised primarily of a system of interconnected lakes extending from Lake Macy in the City of Lake Helen to the Butler Chain of Lakes (Lake Butler and Lake Doyle). The Lake Theresa Basin is land-locked and does not have a natural outfall to Lake Monroe and the St. Johns River.

4. In 2003, after an extended period of above-normal rainfall in the Deltona area, the lakes within the land-locked Lake Theresa Basin staged to extremely high elevations that resulted in standing water in residential yards, and rendered some septic systems inoperable. Lake levels within the Lake Theresa Basin continued to rise and were in danger of rising above the finished floor elevations of some residences within the basin.

5. On March 25, 2003, the District issued an Emergency Order (F.O.R. No. 2003-38) authorizing the construction and short-term operation of the Lake Doyle and Lake Bethel Emergency Overflow Interconnection. Since wetland and surface water impacts would occur, the Emergency Order required the City of Deltona to obtain an ERP for the system.

6. The project area is 4.1 acres, and the system consists of a variable water structure on the west shore of Lake Doyle

connected to a series of pipes, swales, water control structures, and wetland systems which outfall to a finger canal of Lake Bethel, with ultimate discharge to Lake Monroe and the St. Johns River.

7. The first segment of the system extends downstream from the weir structure on the west shore of Lake Doyle via a pipe entrenched in the upland berm of the Sheryl Drive right-of-way. The pipe passes under Doyle Road and through xeric pine-oak uplands to the northeast shore of a large (approximately 15 acres) deepwater marsh. Water flows south through the deepwater marsh where it outfalls through four pipes at Ledford Drive.

8. Two of the four pipes are overflow structures, controlled by canal gates. The pipes at Ledford Drive discharge into a ditch and into a large (greater than 20 acres) shallow bay swamp.

9. The south end of the bay swamp is defined (and somewhat impounded) by a 19th Century railroad grade. Water flows through the bay swamp where it outfalls through five pipes at the railroad grade.

10. Three of the five pipes are overflow structures, controlled by channel boards. The pipes at the railroad grade discharge to a 1500-foot long finger canal that was dug some time during the period 1940-1972 from the north central shore of Lake Bethel.

11. The overflow interconnection system has three locations whereby the system can be shut down: 1) Lake Doyle--a control weir, controlled by three sluice gates; 2) Ledford Drive--two thirty-inch reinforced concrete pipes, controlled by canal gates; and 3) railroad grade--three thirty-inch reinforced concrete pipes, controlled by channel boards (collectively referred to as "Overflow Structures").

12. The Overflow Structures are designed to carry the discharge of water from Lake Doyle to Lake Bethel.

13. With the Overflow Structures closed the system returns to pre-construction characteristics, meaning there will be no increase or decrease in the quantity or quality of water throughout the path of the system as a result of the project.

14. An unequivocal condition of the permit is that the system would operate with all of the Overflow Structures closed.

15. As an added assurance, the City proposes to place a brick and mortar plug in the Lake Doyle weir structure outfall pipe to prevent any discharge from the weir.

16. The City has submitted to the District preliminary plans for a future phase in which the system would be modified for the purpose of alleviating high water levels within the Lake Theresa Basin when the water level in Lake Doyle rises above an elevation of 24.5 feet.

17. The District shall require a separate permit application to be submitted for such future plans.

18. Petitioner, Barbara Ash, has lived on Lake Theresa for 19 years. Ms. Ash lives upstream from the area of the weir that will be plugged in accordance with the ERP. She does not trust either the City of Deltona to comply with or the District to enforce the conditions of the ERP applied for by the City.

19. Petitioner, Barbara Ash, also served as the qualified representative for Petitioners, Francell Frei, Bernard J. and Virginia Patterson, and Ted and Carol Sullivan. Ms. Ash represented that Ms. Frei has lived on Lake Theresa for 12 years, and both the Pattersons and the Sullivans live on Lake Louise, which is within the area of concern in this proceeding.

20. Petitioner, Diana Bauer, has lived on Lake Theresa since February 2004. She fears that the lake will become too dry if the system is allowed to flow. She also believes the wildlife will be adversely affected if the water levels are too low since many species need a swampy or wet environment to thrive. She fears her property value will decrease as a result of the approval of the ERP. She also does not trust either the City to comply with or the District to enforce the conditions of the ERP.

21. Petitioner, Howard Ehmer, lives two to three hundred yards down Lake Theresa from Ms. Bauer. He is concerned about

the lake bed being too dry and attracting people on all terrain vehicles who enjoy driving around the lake bottom. He is concerned about his property value decreasing if the lake bed is dry. Further, when the lake level is too low, people cannot enjoy water skiing, boating, and fishing on Lake Theresa.

22. Petitioner, Phillip Lott, a Florida native, has also owned and lived on property abutting Lake Theresa since 1995. Mr. Lott has a Ph.D. in plant ecology, and M.P.A. in coastal zone studies, an M.B.A. in international business, and a B.S. in environmental resource management and planning. Mr. Lott has been well acquainted with the water levels on Lake Theresa for many years. Based upon his personal observations of the lake systems in the Deltona area over the years, Mr. Lott has seen levels fluctuate greatly based upon periods of heavy and light rainfall.

23. Mr. Lott is concerned that the District will permit the City to open the weir to let water flow through the system and cause flooding in some areas and low water levels in other areas. He fears that the District will allow the water to flow and upset the environmental balance, but he admits that this ERP application is for a closed system that will not allow the water to flow as he fears. Mr. Lott similarly does not trust the City to comply with and the District to enforce the conditions of the ERP.

24. Petitioners, James E. and Alicia M. Peake, who were represented by Steven L. Spratt at hearing as their qualified representative, live on Lake Louise, which is interconnected with the Lake Theresa basin. The Peakes are concerned that if the level of Lake Louise drops below 21 feet, nine inches, they will not be able to use the boat launch ramps on the lake.

25. Petitioner, Steven L. Spratt, also lives on Lake Louise, and is concerned about the water levels becoming so low that he cannot use the boat launch on the lake. He has lived on the lake since 2000, and remembers when the water level was extremely low. He fears that approval of the ERP in this case will result in low levels of water once again.

26. Petitioner, Gloria Benoit, has live on Lake Theresa for two years. She also enjoys watching recreational activities on the lake, and feels that approval of the ERP will devalue her lakefront property. Ms. Benoit appeared at the first day of the hearing, but offered no testimony on her behalf.

27. J. Christy Wilson, Esquire, appeared prior to the final hearing as counsel of record for Petitioners, Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow. Neither Ms. Wilson nor any of the three Petitioners she represented appeared at any time during the hearing, filed any pleadings

seeking to excuse themselves from appearing at the final hearing, or offered any evidence, testimony, pre- or post-hearing submittals.

28. Petitioner, Gary Jensen, did not appear at hearing, did not file any pleadings or papers seeking to be excused from appearing at the final hearing, and did not offer any evidence, testimony, pre- or post-hearing submittals.

29. Both the City and the District recognize that areas downstream from the project site, such as Stone Island and Sanford, have experienced flooding in the past in time of high amounts of rainfall.

30. The system proposed by the City for this ERP will operate with the overflow structures closed and a brick and mortar plug in the outfall pipe to prevent water flow from Lake Doyle to Lake Bethel. So long as the overflow structures are closed, the system will mimic pre-construction flow patterns, with no increase in volume flowing downstream.

31. The District has considered the environment in its proposed approval of the ERP. The area abutting the project is little urbanized and provides good aquatic and emergent marsh habitat. With the exception of the western shore area of the deepwater marsh ("west marsh area"), the bay swamp and remaining deepwater marsh area have good ecological value.

32. In the 1940's, the west marsh area was incorporated into the drainage system of a poultry farm that occupied the site. This area apparently suffered increased nutrient influxes and sedimentation that contributed to a proliferation of floating mats of aquatic plants and organic debris.

33. These tussocks reduced the deepwater marsh's open water and diminished the historical marsh habitat. Water under the tussocks is typically anoxic owing to total shading by tussocks and reduced water circulation. Thick, soft, anaerobic muck has accumulated under the matted vegetation. Exotic shrubs (primrose willow Ludwigia peruvania) and other plants (cattails Typha spp.) dominate the tussocks.

34. The construction of the project, from the 2003 Emergency Order, resulted in adverse impacts to 1.3 acres of wetlands having moderately high- to high ecological value and 0.2 acres of other surface waters.

35. The 0.2 acre impact to other surface waters was to the lake bottom and the shoreline of Lake Doyle where the weir structure was installed.

36. The 0.3 acres of wetland impacts occurred at the upper end of the deepwater marsh where the pipe was installed.

37. The largest wetland impact (1.0 acre) was to the bay swamp. The bay swamp is a shallow body dominated by low hummocks and pools connected inefficiently by shallow braided

channels and one acre is filled with a 1-2 foot layer of sediment following swamp channelization. Disturbance plants (e.g., primrose willow, Ludwigia peruvania, and elderberry Sambucus Canadensis) now colonize the sediment plume.

38. Pursuant to the District's elimination and reduction criteria, the applicant must implement practicable design modifications, which would reduce or eliminate adverse impacts to wetlands and other surface waters. A proposed modification, which is not technically capable of being done, is not economically viable, or which adversely affects public safety through endangerment of lives or property is not considered "practicable."

39. The City reduced and/or eliminated the impacts to the lake bottom and shoreline of Lake Doyle and deepwater marsh, to the extent practicable. The impacts were the minimum necessary to install the weir structure and pipe for the system; the weir structure and pipe were carefully installed on the edges of the wetland and surface water systems, resulting in a minimum amount of grading and disturbance.

40. To compensate for the loss of 1.3 acres of wetlands and 0.2 acres of other surface waters, the City proposes to preserve a total of 27.5 acres of wetlands, bay swamp, marsh, and contiguous uplands. Included in this 27.5 acres are 6.4 acres of the west marsh, which are to be restored. The parties

stipulated that the mitigation plan would adequately compensate for losses of ecological function (e.g. wildlife habitat and biodiversity, etc.) resulting from the project.

41. Water quality is a concern for the District. Lake Monroe is included on the Florida Department of Environmental Protection's verified list of impaired water bodies for nitrogen, phosphorous, and dissolved oxygen. Water quality data for Lake Monroe indicate the lake has experienced high levels of nitrogen and phosphorous and low levels of dissolved oxygen.

42. Prior to construction of the project, there was no natural outfall from the Lake Theresa Basin to Lake Monroe and therefore no contribution from this basin to nitrogen and phosphorous loadings to Lake Monroe.

43. Lake Colby, Three Island Lakes (a/k/a Lake Sixma), and the Savannah are surface waters within the Lake Theresa Basin for which minimum levels have been adopted pursuant to Florida Administrative Code Chapter 40C-8.

44. The system will operate with the overflow structures closed and a brick and mortar plug in the outfall pipe to prevent water flow from Lake Doyle to Lake Bethel, resulting in no outfall from the Theresa Basin to Lake Monroe.

45. Minimum flows established for surface waters within the Lake Theresa Basin will not be adversely impacted.

46. Under the first part of the secondary impact test, the City must provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonable expected use of the project will not adversely affect the functions of adjacent wetlands or surface waters.

47. The system is designed as a low intensity project. As proposed, little activity and maintenance are expected in the project site area. The reasonably expected use of the system will not cause adverse impacts to the functions of the wetlands and other surface waters.

48. None of the wetland areas adjacent to uplands are used by listed species for nesting or denning.

49. In its pre-construction state, the project area did not cause or contribute to state water quality violations.

50. Under the second part of the secondary impact test, the City must provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of the system will not adversely affect the ecological value of the uplands to aquatic or wetland dependent species for enabling existing nesting or denning by these species.

51. There are no listed threatened or endangered species within the project site area.

52. Under the third part of the secondary impact test, and as part of the public interest test, the District must consider

any other relevant activities that are closely linked and causally related to any proposed dredging or filling which will cause impacts to significant historical and archaeological resources. When making this determination, the District is required, by rule, to consult with the Division of Historical Resources. The Division of Historical Resources indicated that no historical or archaeological resources are likely present on the site.

53. No impacts to significant historical and archaeological resources are expected.

54. Under the fourth part of the secondary impact test, the City must demonstrate that certain additional activities and future phases of a project will not result in adverse impacts to the functions of wetlands or water quality violations.

55. The City has submitted to the District preliminary plans for a future phase in which the system would be modified for the purpose of alleviating high water levels within the Lake Theresa Basin when the level in Lake Doyle rises above an elevation of 24.5 feet.

56. Based upon the plans and calculations submitted, the proposed future phase, without additional measures, could result in minor increases in the loadings of nitrogen and phosphorous to Lake Monroe.

57. Lake Monroe is included on the Florida Department of Environmental Protection's verified list of impaired water bodies due to water quality data indicating the lake has experienced high levels of nitrogen and phosphorous, and low levels of dissolved oxygen.

58. Under this potential future phase, there would be an outfall from the Lake Theresa Basin to Lake Monroe. To address the impact on water quality of this potential future phase, the City has submitted a loading reduction plan for nitrogen, phosphorous, and dissolved oxygen. The plan includes compensating treatment to fully offset the potential increased nutrient loadings to Lake Monroe. Specifically, the loading reduction plan includes:

> Construction and operation of compensating treatment systems to fully offset anticipated increased nutrient loadings to Lake Monroe. Weekly water quality monitoring of the discharge from Lake Doyle for total phosphorous and total nitrogen. A requirement that the overflow structure be closed if the total phosphorous level reaches 0.18 mg/l or higher or the total nitrogen level reaches 1.2 mg/l or higher in any given week and will remain closed until levels fall below those limits.

59. The implementation of these water quality mitigation measures will result in a net improvement of the water quality in Lake Monroe for nitrogen, phosphorous, or dissolved oxygen.

60. The future phase was conceptually evaluated by the District for impacts to wetland functions. The future phase as proposed could result in adverse impacts to wetland functions. Operation of the system with the overflow structures open could impact the bay swamp and deepwater marsh. The City has demonstrated that any adverse impacts could be offset through mitigation.

61. Based upon the information provided by the City and general engineering principles, the system is capable of functioning as proposed.

62. The City of Deltona will be responsible for the operation, maintenance, and repair of the surface waster management system. A local government is an acceptable operation and maintenance entity under District rules.

63. The public interest test has seven criteria. The public interest test requires the District to evaluate only those parts of the project actually located in, on, or over surface waters or wetlands, to determine whether a factor is positive, neutral, or negative, and then to balance these factors against each other. The seven factors are as follows:

1) the public health, safety, or welfare of others;

2) conservation of fish and wildlife and their habitats;

3) fishing, recreational value, and marine productivity;

4) temporary or permanent nature; 5) navigation, water flow,

erosion, and shoaling; 6) the current condition and relative value of functions; and 7) historical and archaeological resources.

64. There are no identified environmental hazards or improvements to public health and safety. The District does not consider impacts to property values.

65. To offset any adverse impacts to fish and wildlife and their habitats, the City has proposed mitigation.

66. The areas of the project in, on, or over wetlands do not provide recreational opportunities.

67. Construction and operation of the project located in, on, or over wetlands will be permanent in nature.

68. Construction and operation of the project located in, on, or over wetlands will not cause shoaling, and does not provide navigational opportunities.

69. The mitigation will offset the relative value of functions performed by areas affected by the proposed project.

70. No historical or archaeological resources are likely on the site of the project.

71. The mitigation of the project is located within the same drainage basin as the project and offsets the adverse impacts. The project is not expected to cause unacceptable cumulative impacts.

CONCLUSIONS OF LAW

72. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

73. Petitioners, Gary Jensen, Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow, neither appeared at hearing, personally or through counsel or qualified representative. Moreover, since none of these Petitioners filed any pleadings seeking to excuse themselves from appearing at hearing or offered any pre- or post-hearing submittals, they have apparently abandoned their claims. Accordingly, Petitioners Jensen, the Larimers, and Farrow are dismissed from these proceedings.

74. The City's application for an environmental resource permit is governed by Florida Administrative Code Chapter 40C-4, Regulation of Surface Water Management Systems, which implements, in part, Part IV of Chapter 373, Florida Statutes. Pursuant to this statute and rules, the District has regulatory jurisdiction over the permit applicant and project in this proceeding.

75. The applicant must satisfy the conditions for issuance set forth in Florida Administrative Code Rules 40C-4.301 and 40C-4.302. The applicant must provide reasonable assurances that the conditions for issuance have been satisfied.

76. An administrative hearing conducted pursuant to Sections 120.569 and 120.57(1), Florida Statutes, is a de novo proceeding designed to formulate final agency action. See County Comm'rs v. State, 587 So. 2d 1378,1387-88 (Fla. 1st DCA 1991); Fla. Dept. of Transportation v. J.W.C., 396 So. 2d 778 (Fla. 1st DCA 1981).

77. The initial burden is on the applicant to prove entitlement to the permit by a preponderance of the evidence. J.W.C., 396 So. 2d at 788. The applicant must provide reasonable assurances through presentation of credible evidence of entitlement to the permit that the proposed project will not violate applicable District rules or Florida Statutes. Id. At 789.

78. The applicant's burden is one of "reasonable assurances, not absolute guarantees." Manasota-88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319, 1325 (DER 1990); aff'd 576 So. 2d 781 (Fla. 1st DCA 1991). The "reasonable assurance" standard has been judicially defined to require an applicant to establish "a substantial; likelihood that the project will be successfully implemented." Metro Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurances must deal with reasonable foreseeable contingencies. The standard does not require an absolute guarantee that a violation of a rule is a scientific impossibility, only that its

non-occurrence is reasonable assured by accounting for reasonably foreseeable contingencies. Ginnie Springs, Inc. v. Watson, 21 F.A.L.R. 4072, 4080 (DEP 1999); Manasota-88, 12 F.A.L.R. at 1325. In assessing the risk to resources or water quality, the District is not required to assume a "worst case scenario" unless such a scenario is "reasonably foreseeable." Florida Audubon Society v. South Florida Water Management District, 14 F.A.L.R. 5518, 5524 (SFWMD 1992); Rudloe v. Dickerson Bayshore, Inc., 10 F.A.L.R. 3426-2440-41 (DER 1988).

79. Once an applicant has presented evidence and made a preliminary showing of reasonable assurance, a challenger must present "contrary evidence of equivalent quality" to that presented by the permit applicant. J.W.C., 396 So. 2d at 789. "If the petitioner fails to present evidence, or fails to carry the burden of proof as to the controverted facts asserted -- assuming that the applicant's preliminary showing before the hearing officer warrants a finding of 'reasonable assurances'-- then the permit must be approved." Id. Simply raising concerns or even informed speculation about what "might occur" is not enough to meet the Petitioners' burden. See Chipola Basin Protective Group, Inc. v. Florida Dep't of Environmental Regulation, 11 F.A.L.R. 467, 480-81 (DER 1988). Thus, the City is not required to disprove all the "worst case scenarios" or "theoretical impacts" raised by Petitioners in this proceeding.

Lake Brooklyn Civic Ass'n v. Florida Rock Industries, 15 F.A.L.R. 4051, 4056 (Fla. LWAC 1993); Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (DER 1990).

80. Furthermore, since the proceeding is de novo, the proper test is not whether the District properly evaluated the original application, but whether the application as presented at hearing provides reasonable assurance of compliance with District permitting standards. See McDonald v. Dept. of Banking & Finance, 346 So. 2d 569,584 (Fla. 1st DCA 1997).

81. To meet their respective burdens of proof, Petitioners must present a preponderance of competent and substantial evidence. See Section 120.57(1)(j) and (l), Fla. Stat.; Gould v. Division of Land Sales, 477 So. 2d 612 (Fla. 1st DCA 1985).

82. The ultimate question of whether reasonable assurances have been provided is a conclusion of law rather than a finding of fact. Coscan Florida, Inc. v. Dep't of Environmental Regulation, 12 F.A.L.R. 1359 (DER 1990); see generally, 1800 Atlantic Developers v. Fla. Dep't of Environmental Regulation, 552 So. 2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So. 2d 345 (Fla. 1990).

83. In this proceeding, Petitioners failed to produce competent substantial evidence to refute the reasonable assurances proposed by the City.

84. The City has provided reasonable assurance the project meets the criteria set forth in Florida Administrative Code Rule 40C-4.301(1), since the "construction, alteration, operation, maintenance, removal, or abandonment of" the proposed system:

> (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 water quality standards set forth in Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4,242(2) and (3), 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;
> (g) Will not adversely impact the maintenance of surface or groundwater levels or surface water flows established in Chapter 40C-8, F.A.C.;
> (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 being performed and of functioning as proposed;

> (j) Will be conducted by an entity 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;
> (k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40C-41, F.A.C.

85. The City demonstrated through competent substantial evidence that the proposed system will meet each of the conditions contained in Florida Administrative Code Rule 40C-4.301(1), and is therefore entitled to the issuance of the ERP by the District, with the exception of Subsection 40C-4.4.301(1)(k), which the parties stipulated does not apply to this project.

86. Moreover, the City demonstrated through competent substantial evidence that the proposed project meets each of the applicable criteria contained in Florida Administrative Code Rule 40C-4.302(1)(a), which requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system located in, on, or over wetlands or other surface waters will not be contrary to the public interest, or if such an activity significantly degrades or is within an Outstanding Florida Water, that the activity will be clearly in the public interest.

87. Since no part of the proposed system will significantly degrade or be located within an Outstanding Florida Water, the City was not required to provide reasonable assurances on this point.

88. Since the evidence clearly demonstrated that the mitigation for the project will offset the project's adverse impacts to wetlands, no adverse effects to the conservation of fish and wildlife or due to the project's permanent nature will occur. The evidence further showed that the project will produce no harmful erosion. Additionally, the project will not adversely affect the flow of water, navigation, significant historical or archaeological resources, recreational or fishing values, marine productivity, or the public health, safety, or welfare or property of others. The evidence showed that this project is permanent in nature and the project's design, including mitigation, is such that the current condition and relative value of functions performed by wetlands will be maintained. Therefore, the City has provided reasonable assurance that the project is not contrary to the public interest since the evidence established that, on balance, the public interest factors were neutral.

89. Florida Administrative Code Rule 40C-4.302(1)(b), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or

abandonment of a surface water management system will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in Sections 12.2.8 through 12.2.8.2 of the Applicant's Handbook. When an applicant proposes to mitigate adverse impacts within the same drainage basin as the impacts, and the mitigation fully offsets the impacts, the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters. See 12.2.8, Applicant's Handbook. The evidence showed that the mitigation for the project is located within the same drainage basin as the project and offsets the adverse impacts. Therefore, the project meets the requirements of Florida Administrative Code Rule 40C-4.302(1)(b).

90. Florida Administrative Code Rule 40C-4.302(1)(c), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system "[l]ocated in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting as set forth or incorporated by reference in Chapter 62R-7, F.A.C., will comply with the additional criteria in subsection 12.2.5 of the Applicant's Handbook . . . ." Since the parties stipulated that the project

is not located in or adjacent to Class II or III waters classified by the Department for shellfish harvesting, this criterion is not applicable.

91. Florida Administrative Code Rule 40C-4.302(1)(d), requires an applicant to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system which constitute vertical seawalls in estuaries or lagoons, will comply with the additional requirements found in subsection 12.2.6 of the Applicant's Handbook. Since the parties stipulated that this project does not contain any vertical seawalls in estuaries or lagoons, this criterion is not applicable.

92. The belief by many of the Petitioners that the City will not construct the proposed system as set forth in the permit application, was not supported by competent substantial evidence. The evidence was unequivocal, from both the City and the District, that the system would be plugged so that no water would flow through the weir at Lake Doyle. In the event the City desires to seek a modification of the permit issued by the District for this system, it will be required, in accordance with Florida Administrative Code Rule 40C-4.331, to apply for such modification and demonstrate that the application for modification meets the requirements set forth in Florida

Administrative Code Rules 40C-4.301 and 40C-4.302, just as it was required to do in the case at issue. If the City were to open the plug in the system without first seeking a permit, it would be required to return the system to the condition that existed before the illegal construction pursuant to Florida Administrative Code Rule 40C-4.751. Both the City and the District testified at hearing that they are aware they must comply with the statutes and rules governing the issuance of permits. No competent substantial evidence was produced to prove that either the City or the District would act outside the law concerning the issuance of environmental resource permits. Based upon the evidence and testimony at hearing, Petitioners' fears are unfounded and, should their concerns come to fruition in the future, they will have adequate remedies at law to address them.

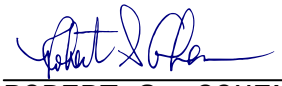
93. The evidence produced at the final hearing demonstrates that the City has provided reasonable assurance that the applicable requirements of the District's rules have been met and the environmental resource permit should be granted with the conditions proposed by the District in its Technical Staff Report.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered granting the City of Deltona's application for an environmental resource permit with the conditions set forth in the Technical Staff Report, and dismissing the Petitions for Formal Administrative Hearing filed by Gary Jensen in Case No. 04-2405, and by Steven E. Larimer, Kathleen Larimer, and Helen Rose Farrow in Case No. 04-3048.

DONE AND ENTERED this 27th day of May, 2005, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 2005.

COPIES FURNISHED:

George Trovato, Esquire
City of Deltona
2345 Providence Boulevard
Deltona, Florida 32725

Diana E. Bauer
1324 Tartan Avenue
Deltona, Florida 32738

Barbara Ash, Qualified Representative
943 South Dean Circle
Deltona, Florida 32738-6801

Phillip Lott
948 North Watt Circle
Deltona, Florida 32738-7919

Howard Ehmer
Nina Ehmer
1081 Anza Court
Deltona, Florida 32738

Francell Frei
1080 Peak Circle
Deltona, Florida 32738

Bernard T. Patterson
Virginia T. Patterson
2518 Sheffield Drive
Deltona, Florida 32738

Kealey A. West, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

J. Christy Wilson, Esquire
Wilson, Garber & Small, P.A.
437 North Magnolia Avenue
Orlando, Florida 32801

Gloria Benoit
1300 Tartan Avenue
Deltona, Florida 32738

Gary Jensen
1298 Tartan Avenue
Deltona, Florida 32738

James E. Peake
Alicia M. Peake
2442 Weatherford Drive
Deltona, Florida 32738

Steven L. Spratt
2492 Weatherford Drive
Deltona, Florida 32738

Ted Sullivan
1489 Timbercrest Drive
Deltona, Florida 32738

Kirby Green, Executive Director
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177

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.