

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

LORI BATHURST,

Petitioner,

v.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
CITY OF OCALA,

Respondents.

FILE OF RECORD NO. 87-592

FINAL ORDER

THIS MATTER, by agreement of the Petitioner and Respondents, came before the Governing Board for hearing pursuant to Section 120.57(2), Florida Statutes, on November 17, 1987. The appearances were as follows:

For Petitioner: Pro Se
Route 1, Box 642K
Summerfield, Florida 32671

For Respondents: City of Ocala
Philip S. Parsons
Landers, Parsons, & Uhlfelder
Post Office Box 271
Tallahassee, Florida 32301

St. Johns River Water
Management District
Wayne E. Flowers
Post Office Box 1429
Palatka, Florida 32078-1429

This is a proceeding to grant or deny a Management and Storage of Surface Waters (MSSW) permit for which the City of Ocala applied. The permit, if granted, would authorize the City to construct a water management system whereby treated municipal sewage would be discharged into and controlled as it flowed through an area known as Marshall Swamp.

Testifying for the Petitioner were the Petitioner and Mr. Ted Holley. Testifying for the Respondent, City of Ocala, were Messrs. Dan Homblette and Wayne Mather.

The parties entered into a stipulation in advance of the hearing. The stipulation identified facts which are and are not in

dispute. The stipulation also specified issues of law which are in dispute. Exhibit A to the stipulation set forth agreed upon facts except as the stipulation specifically noted otherwise. Exhibit A consists of 42 written/printed pages that comprised a composite staff report of the District's Department of Resource Management. Exhibit B to the stipulation is the permit the City wants issued to it.

The facts in dispute as set forth in the stipulation are:

1. Whether Petitioner has standing to challenge the issuance of the permit.

2. Page one (1) of the TSR states that "The northern portion (700 acres) will receive effluent through the spray system and be inundated for at least 6 months per year by controlling discharge through the swamp road," and that "approximately 1000 acres" will be impacted in the swamp. Petitioner disputes this statement and contends that due to the natural elevations of the site, channelization will occur along the west end of the swamp with the result that the effluent will not be evenly distributed over the northern portion of the swamp. This uneven distribution of effluent would not thus enable the vegetation in the swamp to maximally treat or reduce nutrients in the effluent before it is discharged to the Dead River.

3. Page five (5) of the TSR states: "Normal water level behind the structure will be approximately 42.6 to cause the detained water to spread over approximately 700 acres." Petitioner disputes this fact for the same reason outlined in paragraph 2 above.

4. Page six (6) of the TSR states: "Calculations indicate that it would require almost one month (27 days) to drain the stored water completely out of Marshall Swamp (to the Dead River)." Petitioner disputes this fact, again because Petitioner asserts that as a result of the channelization process outlined above, water will drain out of the swamp in a much shorter time period with the same results as discussed above.

5. Page six (6) of the TSR states: "A University of Florida wetland scientist recommends a dry period be scheduled for April

and May to allow vegetative regeneration." Petitioner disputes the fact that two months of drying will be sufficient to dry out the swamp bottom for vegetative regeneration. Because of the lengthy period of inundation, Petitioner asserts there will be an adverse impact on swamp vegetation.

6. Petitioner further asserts, but Respondent's dispute that as well as toxic wastes and heavy metals viruses will be inadequately treated resulting in a public health hazard.

The stipulation also identified the issues of law to be resolved, to wit:

1. Whether Petitioner has alleged or proven sufficient facts to show an entitlement to standing to challenge the permit.

2. Whether the City has given reasonable assurance that the operation of the water management system will not endanger public health.

3. Whether the City has given reasonable assurance that the operation of the water management system will not cause adverse impacts to the quality of receiving waters.

4. Whether the operation of the water management system will adversely affect natural resources, fish or wildlife (that is aquatic and wetland dependent species off-site or threatened or endangered species which are aquatic or wetland dependent on site).

The City had admitted into evidence a two page/sheet graphic depicting surveyed cross sections of the Marshall Swamp. No objection was made to the introduction of the graphic, Respondent's Exhibit I.

Ms. Bathurst had eleven (11) composite documents introduced into evidence. The City did not oppose introduction of the documents except as to the relevancy of them to the issues for hearing that were stipulated to as needing to be resolved. Petitioner's Exhibit I consists of a petition to the City of Ocala's City Council made up of 78 pages containing the names and addresses of 1500 persons. Petitioner's Exhibit II is a composite of an August 4, 1987 letter from Brian Barnett to Jeff Elledge that has a July 13, 1987 letter of Allen Egbert as an attachment. Petitioner's Exhibit III is one page and is a copy of a quad sheet that has the

Marshall Swamp on it and representations of discharge headers into the swamp. Petitioner's Exhibit IV is a composite of an excerpt of the City of Ocala's Code, an excerpt of Boyle Engineering's 201 Facilities Plan Amendment for the City of Ocala and an excerpt from Boyle Engineering's background monitoring program exemption proposal for the City. Petitioner's Exhibit V is a two-page excerpt from Southwest Florida Water Management District's Groundwater Resource Availability Inventory for Marion County. Petitioner's Exhibit VI is an excerpt from Boyle Engineering's 201 Facilities Plan for the City. Petitioner's Exhibit VII is a DER document entitled "Hazardous Wastes from Homes." Petitioner's Exhibit VIII is a composite of an excerpt from a document titled "Land Application of Wastes." Volume II and a copy of a document Lab Brief with an article called "Viral Myocarditis: Pathology and Laboratory Identification" featured. Petitioner's Exhibit IX is a composite of excerpts from the City's 201 Facilities Plan Amendment and a memo of Dirk Schmidt to the Governing Board of the St. Johns River Water Management District. Petitioner's Exhibit X is a copy of a document titled "Improved Water Distribution System A Patented System." Petitioner's Exhibit XI is a composite of a newspaper clipping, a copy of an Intent to Issue a wetlands exemption to the City by the Department of Environmental Regulation and a copy of a letter from Paul Parks to Lee Miller.

FINDINGS OF FACT

1. Petitioner resides in Summerfield in southwest Marion County, Florida. She has fished and swam in the Oklawaha River and its tributaries in and around the Marion County area all her life.
2. On November 13, 1987, the District received the following:
 - A. Letter seeking intervention from Captain Erika O'Lenick who states she owns property at Eureka;
 - B. Letter of objection from Gwen Ritter who states she owns property at Eureka;
 - C. Letter seeking intervention from Franklin W. Mason who states he owns property 1.5 miles north of SR 40;

D. Sworn to letter seeking intervention from Daniel Vanderhoof who states he own property at 280 Northeast 72nd Terrace on the east side of Marshal Swamp;

E. Letter seeking intervention from Bruce Klepper who states he resides at 295 Northeast 72nd Terrace;

F. Letter seeking intervention from Eileen Klepper who states she resides at 295 Northeast 72nd Terrace;

G. Sworn to letter of objection from Jessica Wood who states she owns property at Grahamsville on SR 314 joining the Canal Authority lands;

H. Sworn to letter of objection from Roger Wood who states he owns property at Grahamsville on SR 314 joining the Canal Authority lands;

I. Sworn to letter of objection from John Sullivan who states he owns property at Grahamsville on SR 314 joining the Canal Authority lands;

J. Sworn to letter of objection from Margaret Morningstar who states she is located at 240 Northeast 72nd Terrace;

K. Sworn to letter of objection from Mrs. Bernard David who states she lives at 305 Northeast 72nd Terrace;

L. Sworn to letter seeking intervention of George and Mary Vecchio who state they reside at 100 Northeast 72nd Terrace;

M. Sworn to letter seeking intervention of April Moore who states she resides at 245 Northeast 72nd Terrace;

N. Sworn to letter seeking intervention of Barbara Combs who states she resides at 210 Northeast 72nd Terrace; and

O. Sworn to letter seeking intervention of Sandra Carroll who states she resides at 185 Northeast 72nd Terrace.

All of the letters state they rely on the grounds and information presented by the Petitioner.

3. The City proposes to construct and operate a system to further treat treated effluent. The proposed system would be located in the northern section of Marshal Swamp, south of Sharpes Ferry Road and west of Heather Island, Marion County. The approximately 1700 acres of swamp, currently owned by Container

Corporation, the Barge Canal Authority, and the Army Corps of Engineers, is located east and north of an abandoned water control structure on the Dead River, a tributary to the Oklawaha River. A dirt road, commonly called the Swamp Road, divides the 1700 acres into a 700-acre northern portion and a 1000-acre southern portion. The swamp slopes from north to south. The swamp bottom is not uniform and flat but is uneven, and when water is present in quantity insufficient to submerge the entire bottom of the swamp, it collects into pools and channels.

4. The proposed system would consist of spray heads located at the edge of the wetlands along 1.75 miles of the west side of the northern 700-acre area and alterations to the dirt road. The road would be enlarged, and three 24-inch culverts now in the road would be replaced with six adjustable weir structures. Each adjustable weir would have a 29-inch culvert and removable log/wooden risers. Water levels would be adjustable in half foot increments from 40 feet NGVD, ground level, to 43 feet NGVD.

5. The operation scheme for the system is to spray treated effluent through the header system and then control its flow/storage in the northern 700 acres. In winter, water in the 700-acre area would be kept at 42.6 followed by 25-35 days of lowering water levels, 60 or so days with the weir at 40 feet, 60-140 days to fill the swamp back up to 42.6 beginning in June. The weir structures would be managed to cause water both north and south of the road to spread out as much as possible. Additionally, the riser height would be adjusted to allow the flow of the Oklawaha River into the 700 acres when the 700 acres is needed for storage of Oklawaha River water.

6. The swamp's hydroperiod is man induced. Drainage ditches near the southern end of the swamp and channelization of the Oklawaha River allow runoff to leave the swamp area much quicker than before they were built. The impact on the swamp was to allow transition types of vegetation to move to lower elevations on the periphery of the swamp. The introduction of the treated effluent will cause the fringe vegetation to shift back towards what it once was.

7. Treated effluent will be sprayed into the swamp. The treatment processes employed prior to piping the effluent to the spray heads consists of secondary treatment followed by chemical treatment and deep bed filtration to remove phosphorus, nitrification, disinfection with chlorine, and dechlorination after disinfection with chlorine. The City also had ordinances controlling the discharge of pollutants into the sewer system; pollutants the treatment plant cannot readily deal with. Lastly, the City has a backup disposal plan for treatment plant malfunctions. The effluent, prior to spraying into the swamp, will be suitable for spraying on golf courses and other such areas.

8. The soils and vegetation of a swamp cause nutrients, toxics, and heavy metals to be removed from water. The City would be required to reduce nutrients in the effluent, prior to spraying it, to .4 ppm phosphorus and .02 ppm nitrogen as ammonia. The swamp soils and vegetation would further reduce nutrients beyond the .4 and .02 ppm levels. Modeling of the nutrient uptake and comparison with background conditions could not be done due to the man-induced drainage having dewatered the swamp to a large extent.

9. The 1000 acres of Marshal Swamp south of the dirt road will receive releases from the six adjustable weir structures, but water will not be stored on it. The releases will impact the area but not adversely.

10. Monitoring requirements are proposed to be required of the City. Nutrient removal between the spray headers and Dead River is to be monitored. Likewise, impacts to the flora and fauna in the swamp have to be monitored. Corrective measures can be required if the effluent causes adverse impacts to water quality, flora and fauna, although adverse impacts are not foreseen at this time.

CONCLUSIONS OF LAW

11. The hearing in this matter was conducted by stipulation under Subsection 120.57(2), Florida Statutes, which authorizes

administrative proceedings where the "substantial interests of a party are determined by an agency ..." Section 120.57, Florida Statutes. Although the Statute does not define "substantial interests", the courts have held that a petitioner must show (a) that the person will suffer an injury in fact and (b) that the person's substantial injury is of the type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. DER, 406 So.2d 478 (Fla. 2d DCA 1981). Additionally, Petitioner must be directly affected in a manner different from that of the general public. See, Grove Isle Ltd. v. Bayshore Homeowner's Assoc., 418 So.2d 1046 (Fla. 1st DCA 1982); Village Park Mobile Home Assoc. v. State, 506 So.2d 426 (Fla. 1st DCA 1987). In short, Petitioner must have a direct stake in the determination to prevent the hearing process from becoming nothing more than a method for vindication of the value interests of concerned bystanders rather than a determination of the specific interests of a party. See, Sierra Club v. Morton, 405 US 727 (1972).

12. Petitioner Bathurst failed to present sufficient evidence at hearing to establish that she will suffer a substantial injury in fact different from that of the general public by the issuance of the District permit to Respondent. Bathurst stated that she fished and swam in the Oklawaha River in the general vicinity of Marshal Swamp. Additionally, Bathurst testified that she resides in the town of Summerfield which is not even located in the immediate vicinity of Marshall Swamp, the disposal area for wastewater from Respondent's sewage treatment plant. Petitioner presented nothing more than generalized concern for the preservation of the water resources of the Oklawaha River no different from that of the general public and which the District's own MSSW permitting process is intended to address. Consequently, petitioner Bathurst has failed to show how she will suffer a specific injury in fact to establish standing to initiate this proceeding under Section 120.57, Florida Statutes.

13. The District also received fifteen (15) letters, some of which asked to intervene and some of which didn't, from people who own or reside in the vicinity of the Marshall Swamp disposal area.

Some of whom appeared and presented testimony at the hearing but who also adopted Petitioner's grounds and evidence as their own. Regardless, since Petitioner Bathurst has no standing, there is no proceeding for which intervenors may petition, and therefore, petitioners for intervention also lack standing. State, Department of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045 (Fla. 1st DCA 1979). Furthermore, fundamental fairness, when looking at the time the Petitioner's petition has been pending and the time the letters were received, preclude additional hearings. Likewise, Petitioner's Exhibit I, which is not a petition to intervene in this proceeding in any event, cannot be considered as giving party status to any of the signatories.

14. A stipulation is a voluntary agreement between opposing counsel concerning the disposition of some relevant point so as to obviate the need for proof or to narrow the range of litigable issues. Arrington v. State, 233 So.2d 634 (Fla. 1970). Evidence need not be taken on matters agreed upon. Troup v. Bird, 53 So.2d 717 (Fla. 1951). Likewise, by stipulation, parties may limit the issues to be taken up. Godshalk v. Winter Park, 95 So.2d 9 (Fla. 1957). A stipulation is binding on the parties. Dorson v. Dorson, 393 So.2d 632 (Fla. 4th DCA 1981). The stipulation entered into in this case is dispositive of factual and legal matters that are and are not at issue. Consequently, evidence not relevant to the stipulated issues is of no import and is superfluous. Conversely, if some evidence is reasonably related to a stipulated issue, the evidence is of import and not superfluous.

15. The application was for a Management and Storage of Surface Waters permit. Consequently, Sections 373.413 and 373.416, Florida Statutes, Section 40C-4.301, Florida Administrative Code, and Sections 9.0 and 10.0, inclusive of subparts, Applicant's Handbook, establish statutory and rule requirements for such applications. The stipulation narrowed the points of contention to Subsections 40C-4.301(1)(a)3., 9, and 10, and the equivalent provisions in the Applicant's Handbook. All of these provisions relate to operation of the proposed system.

16. The portion of Petitioner's evidence relating to

alternatives other than discharge to Marshall Swamp are irrelevant based on the stipulation. This would include those portions of her testimony on alternatives and Petitioner's Exhibits V, VI, and X. Likewise, Petitioner's Exhibit XI seems to be irrelevant because statements made at the hearing and the letter of Paul Parks to the Petitioner indicate that a direct discharge to the Oklawaha River is not at issue in the instant proceeding. In any event, the Letter of Intent was issued by an agency other than the District.

17. The concept of competent substantial evidence includes an aspect of being qualified to speak on a subject and an aspect of adequate amount of evidence. DeGroot v. Sheffield, supra. In the instant case, the Petitioner did not establish for herself any special qualifications on any subject. Indeed the balance of her testimony consisted of pointing out portions of the exhibits she introduced, querying whether adequate assurance of compliance existed and concluding that it had not. Mr. Holley, although he has a scientific background, is not an expert in surface water hydrology or hydraulics, nor one in water quality. Conversely, Mr. Homblette had experience, training, and education in the areas of water chemistry, environmental monitoring, and water resource management to qualify him as an expert, and Mr. Mather, a professional engineer, had experience, training, and education in engineering waste treatment facilities and works and dealing with effluent impacts to qualify him as an expert. On balance, more credence is given to the evidence of the City than the Petitioner. Moreover, Petitioner's testimony is heresay.

18. The stipulation reduced the areas of factual and legal dispute, other than standing, to four. Numbers 2, 3, and 4 of the facts in dispute center on how the proposed system will function. If the proposed system cannot function as proposed, the nutrient uptake will be minimal. Mr. Holley's disputing the City's consultant's predictions arises from disagreement about the ability of the proposed system to spread and retain the effluent over the 700 acres before it is passed through the weir structure and then where the effluent will go in the 1000 acres once it is released. The water quality improvements are planned to occur, primarily in the

700 acres, and the ability to block flows in the channels Mr. Holley is concerned with, in storage as well as release phases of operation, and cause the water to take different flow patterns than normal seems to obviate his concerns. Treatment is effectuated through the effluent contacting the soil and vegetation in the swamp for a sufficient amount of time and the management scheme seems to allow for that to occur.

19. The effect of the impounding of water for the majority of the year in the northern 700 acres is to re-establish a more swamp-like hydroperiod. This is more so in the northern 700 acres than the southern 1000 acres because the 1000 acres will not be impounded although water will be released from the various weir structures that will be spaced along the dirt road. Currently, the swamp has a dense overstory, except at its periphery, that inhibits the growth of grasses, saplings, etc. The more swamp-like water regime over the northern 700 acres will cause an extirpation of transitional species on the periphery of the swamp. This will occur in the southern area but not as markedly due to the lack of impounding the water. Regeneration in the swamp should continue as it has.

20. The last factual and legal issue concerns viruses, toxins, and heavy metals. The effluent before it would be sprayed into the swamp would be treated sufficiently to spray in areas such as golf courses where contact by humans could occur. The Petitioner's concerns for viruses, toxicity, and heavy metals can only be addressed by providing treatment to a high degree such as that proposed by the City. Concerns for viruses, toxicity, and heavy metals exist irrespective of the way in which effluent is disposed, and these concerns can only be dealt with in ways the City proposes. Alternatively, prohibitions such as the City has in its ordinance on pollutants (see Petitioner's Exhibit IV) coupled with education (see Petitioner's Exhibit VII) are means to combat toxicity and heavy metals in sewage. Moreover, the swamp causes a reduction in toxicity and heavy metals.

21. Nutrient loadings to the Oklawaha River cannot be

addressed by only looking at concentrations; total poundage of nutrients that the treated effluent would add, if any, following exit from the swamp is important. Enough detention time seems to be proposed to allow for poundage of nutrients to be adequately dealt with. However, monitoring requirements provide a safeguard because additional treatment can be required based on monitoring results. This applies to impacts to the flora and fauna of the swamp as well.

22. The City of Ocala has provided competent substantial evidence to support its application. It has provided reasonable assurance of compliance with Subsection 40C-4.301(1)(a)3, 9, and 10, Florida Administrative Code, and consequently, compliance with Section 373.416, Florida Statutes. Compliance with other requirements was not at issue based on the stipulation. THE PERMIT SHOULD BE GRANTED.

DONE AND ENTERED this 8th day of December, 1987.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT


RALPH E. SIMMONS
CHAIRMAN

RENDERED this 9th day of December, 1987.

FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to 120.52(9)
Florida Statutes, with the designated District
Clerk, receipt of which is hereby acknowledged.


Clerk

12/9/87
Date

RUTH D. HEDSTROM
DISTRICT CLERK

NOTICE OF RIGHTS

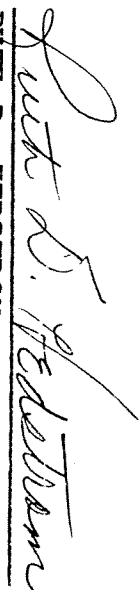
1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, within 90 days of the rendering of the final District action.
2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App.P. 9.110 within 30 days of the rendering of the final District action.
3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Regulation and any person named in the order within 20 days of the rendering of the District order. However, if the order to be reviewed is determined by the Commission within 60 days after receipt of the request for review to be of statewide or regional significance, the Commission may accept a request for review within 30 days of the rendering of the order.
4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.
5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 and #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

Ms. Lori Bathurst
Route 1, Box 642K
Summerfield, Florida 32671

at 4:30 a.m. p.m. this 9th day of December, 1987.


RUTH D. HEDSTROM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32078-1429
(904) 328-8321