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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BOBBY C. BILLIE and SHANNON LARSEN,

AT

Petitioners,

v.

DOAH Case No. 03-1881 PMR-CWS
SJRWMD F.O.R. 2003-65

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and MARSHALL CREEK COMMUNITY DEVELOPMENT DISTRICT,

Respondents.
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable P. Michael Ruff, held a formal administrative hearing in the above-styled case on October 14, 15 and 16 and October 22, 2003 in St. Augustine, Florida.

A. APPEARANCES

For Petitioners/Intervenors Bobby C. Billie and Shannon Larsen	Deborah Andrews, Esquire 11 N. Roscoe Blvd. Ponte Vedra Beach, FL 32082
For Respondent St. Johns River Water Management District:	Veronika Thiebach, Esquire 4049 Reid Street Palatka, FL 32177l

For Respondent Marshall Creek Community Development District:

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On February 9, 2004, the Honorable P. Michael Ruff ("Administrative Law Judge" or "ALJ") submitted to the St. Johns River Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A". Petitioners, Bobby C. Billie and Shannon Larsen ("Petitioners"), timely filed joint exceptions to the Recommended Order. Respondent, St. Johns River Water Management District ("District"), timely filed exceptions to the Recommended Order. Respondent, Marshall Creek Community Development District ("MCCDD") timely filed exceptions to the Recommended Order. All parties timely filed responses to exceptions. This matter then came before the Governing Board on April 13, 2004, for final agency action.

B. STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether Environmental Resource Permit No. 4-109-0216-ERP should be modified to allow construction and operation of a surface water management system (project) for a residential development project known as EV-1 in a manner consistent with the standards for issuance of an ERP in accordance with Rules 40C-4.301 and 40C-4.302, F.A.C.

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), F.S. (2003), in acting upon a Recommended Order. The Administrative Law Judge ("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., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16, 1999).

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). 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).

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. (2003).

The Governing Board in its final order 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 is 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. (2003). 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 interpreting the "substantive jurisdiction" amendment as it first appeared in the 1996 changes to the Administrative Procedures Act, courts have continued to interpret the standard of review as requiring deference to an agency in interpreting its

own statutes and rules. See, e.g., State Contracting and Engineering Corporation v. Department of Transportation, 709 So.2d 607, 608 (Fla. 1st DCA 1998).

D. RULINGS ON EXCEPTIONS

Petitioners jointly filed 34 exceptions to the ALJ's findings of fact and conclusions of law. MCCDD filed ten exceptions to the ALJ's findings of fact and conclusions of law by pointing out typographical errors. The District filed four exceptions to the ALJ's findings of fact and conclusions of law by pointing out typographical and grammatical errors and errors in citing to the record. The parties' exceptions to the Recommended Order have been reviewed and are addressed below.

Hereinafter, references to testimony will be made by identifying the witness by surname, followed by the volume and transcript page number, (e.g., Esser Vol. 3: 47). References to exhibits received by the Administrative Law Judge will be designated "Petitioners" for Petitioners, Bobby C. Billie and Shannon Larsen; "District" for Respondent, St. Johns River Water Management District; and "MCCDD" for Respondent, Marshall Creek Community Development District, followed by the exhibit number, then page number, if appropriate (e.g., Petitioners 9: 2). Other references to the transcript will be indicated with a "T" followed by the page number (e.g., T. Vol. I: 84). Reference to the Prehearing Stipulation will be designated by "Prehrg. Stip." followed by the paragraph number, (e.g. Prehrg. Stip.: ¶ ___). References to the Recommended Order will be designated by "R.O." followed by the page number (e.g., R.O.: 13).

E. RULINGS ON PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1

Petitioners take exception to three portions of recommended finding of fact no. 9. Petitioners' exceptions and our rulings are set forth separately below.

Petitioners' first take exception to the ALJ's finding finds that "He [Petitioner Billie] testified that he has had no training with regard to identification of archeological sites, but that he can 'feel' if a burial site is present", as not being supported by the evidence. However, we find that there is competent substantial evidence to support this finding. First, Petitioner Billie testified that he did not have training "in your teaching" in the identification of archeological sites, but "in my way of life, yes." (Billie Vol. 7: 788). Additionally, in his deposition, when asked what training he had with regard to the identification of archeological sites, he stated, "Well, we don't have no training." (Billie Vol. 7: 788-89). Moreover, Petitioner Billie was not qualified as an expert in archeology. Rather, he was qualified as an expert in indigenous culture of Florida. (T. Vol. 7: 753). With regard to the archeological area, the ALJ ruled that Petitioner Billie could "give his opinion about what he saw based on his cultural knowledge and then that will go to the weight to be ascribed to it when comparing it to others' opinions that are expert opinions." (T. Vol. 7: 765-67). Finally, when MCCDD's counsel specifically asked Petitioner Billie during cross-examination: "[a]nd even though you can't see any signs of a burial site you believe that *you can feel that they're there, isn't that right*?" (Emphasis added), Mr. Billie responded: "[y]es, and then we know where they are." (Billie Vol. 7: 788-89). Thus, the ALJ's finding of fact is supported by competent substantial evidence and it may not be disturbed. See section 120.57(1)(l), F.S.; Freeze, supra; Berry, supra;

Florida Sugar Cane League, supra. Accordingly, we reject this portion of Petitioners' exception.

As to Petitioners' contention that the ALJ's finding is a "mischaracterization" reflective of his failure to provide a translator as formally requested by Petitioner Billie, we incorporate herein our ruling on Petitioners' exception no. 18 below.

Throughout the remaining paragraphs of their exception, it appears to us that Petitioners are attempting to relitigate the issues that are the basis of the ALJ's finding. However, 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, supra. 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, supra.

Petitioners also take exception to the portion of the finding that "all of the shell was located in a previously constructed road bed off of the EV-1 project site" as not being supported by competent substantial evidence. To the contrary, we find there is competent substantial evidence to support this finding. Petitioner Billie testified that "[w]hat I saw is the road project, it turned up a lot of the shell associated with the burial." (Billie Vol. 7: 764). He also testified that "[w]hen I'm across the road the other side I still see the associated burial." Billie Vol. 7: 769. When asked to describe the location where he saw the shell associated with the burial he testified "[s]hould be south of it, the site boundary is. Little bit – I think at least a hundred feet other side of boundary of that . . ." (Billie Vol. 7: 769). Because this portion of the recommended finding of fact no. 9 is

supported by competent substantial evidence, it may not be disturbed. See, §120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, this portion of Petitioners' exception is rejected.

Petitioners also take exception to that portion of the finding that Petitioner Billie "believes that the EV-1 project will adversely affect everyone just like it adversely affects him." We find that there is competent substantial evidence in the record to support this finding and therefore it may not be disturbed. (Billie Vol. 7: 790). See, section 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, for all the reasons discussed above, Petitioners' Exception No. 1 is rejected.

Petitioners' Exception No. 2

Petitioners' take exception to what they mistakenly refer to as recommended finding of fact no. 15, which is actually recommended finding of fact no. 16, wherein the ALJ found that "[e]ven when the pumps are not running, these components of the system are able to completely contain the required treatment volume." Petitioners' basis for their exception is that the finding "fails to explain the fact that when the pump system is full, it evacuates directly into Marshall Creek at the Hickory Hill Drive pump station and into the fresh water wetlands at the other pump station." Petitioners attempt to reargue the facts of the case throughout the remainder of their exception without identifying the legal basis for the exception as required by Section 120.57(1)(k), F.S. Therefore, we are not required to rule on this exception. Nevertheless, we find there is competent substantial evidence in the record to support the ALJ's finding of fact. (Hallock Vol. 1: 43; Vol. 2: 148-49, 158-59; Miracle Vol. 5: 564). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See

section 120.57(1)(l), F.S.; Freeze, supra; Berry, supra; Florida Sugar Cane League, supra. Accordingly, Petitioners' Exception No. 2 is rejected.

Petitioners' Exception No. 3

Petitioners' take exception to what they mistakenly refer to as recommended finding of fact no. 19, which is actually recommended finding of fact no. 20. The first portion of the ALJ's finding to which Petitioners object is "for the purpose of determining whether a project discharge constitutes a direct discharge to the Intracoastal Waterway, the waterway includes more than the navigable channel of the Intracoastal Waterway". Petitioners contend that this "is a legal conclusion unsupported by law". This finding by the Administrative Law Judge is clearly aimed at the exemption from the peak discharge requirement for systems "which discharge directly into . . . the Intracoastal Waterway north of the Matanzas Inlet" contained in section 10.3.2(a) of the ERP Applicant's Handbook (ERP-A.H.). This finding, more in the nature of an ultimate finding of fact, necessarily involves an interpretation and application of the District's rule and is therefore a mixed question of law and fact. Whether a finding of fact should be treated as a conclusion of law instead of a finding of fact is not a basis for rejecting it, but rather determines the Governing Board's ability to modify it. See, Berger v. Department of Professional Regulation, 653 So.2d 479, 480 (Fla. 3rd DCA 1985) (a finding which involves both a factual and legal conclusion cannot be rejected where there is a substantial competent evidence to support the factual conclusion and where the legal conclusion necessarily follows).

The determination of whether a system should be exempt from the peak discharge requirement is infused with policy considerations. The peak discharge

requirement and exemptions to it are set forth in sections 10.3 through 10.3.8, A.H. The relevant provisions provide as follows:

> 10.3 **Peak Discharge**
>
> 10.3.1. Criterion: The post development peak rate of discharge must not exceed the pre-development peak rate of discharge.
>
> 10.3.2. Storm Frequency:
>
> The peak discharge requirement shall be met for the 25 year frequency storm for all areas of the District except:
>
> (a) for those systems which discharge directly into the St. Johns River north of Lake George, the manmade portions of the Intracoastal Waterway, the Intracoastal Waterway north of the Matanzas Inlet, or the Atlantic Ocean. . .

The peak discharge requirement refers to the criterion that, for the presumption created in section 10.2.1 of the ERP Applicant's Handbook to apply, the post-development peak rate of discharge of a system may not exceed the pre-development peak rate of discharge. Satisfaction of this criterion along with three other criteria in section 10.2.1 creates a presumption that a system meets the criteria for issuance listed in 40C-4.301 (1)(a), (b), and (c), F.A.C. Significantly, these criteria all relate to a system's water quantity impacts. Specifically, sections 40C-4.301(1)(a) through (c) require an applicant to provide reasonable assurance that the proposed system will not cause (a) adverse water quantity impacts to receiving waters and adjacent lands, (b) adverse flooding to onsite or offsite property or (c) adverse impacts to existing surface water storage and conveyance capabilities, respectively. The peak discharge requirement, and exemptions to it are to be interpreted in light of the permit issuance criteria to which they are directed.

We find there is competent substantial evidence in the record to support the factual underpinnings for the ALJ's conclusion that the exemption should apply. (Miracle Vol. 5: 514-15, 575; Hallock Vol. 2: 176; MCCDD Ex. 14). This evidence included testimony that the peak discharge rate criterion is a "rainfall driven" criterion designed to evaluate the flooding impacts from rainfall events and that the water bodies named in section 10.3.2. (a), A.H. were exempted from this requirement because they are large, tidally influenced water bodies where flooding is not governed by rainfall, but rather by tides and storm surges. (Miracle Vol. 5: 576; Hallock Vol. 2: 246) (Emphasis added). The District's expert and Applicant's expert testified that in the areas of these named waterbodies, the floodplain becomes a function of these larger water bodies and does not depend on rainfall events. (Miracle Vol. 5: 576; Hallock Vol. 2: 246.) Additionally, competent substantial evidence was presented that the areas into which the EV-1 system discharges have a direct hydrologic connection to the waterway and abut the waterway within the floodplain of the waterway. (Miracle Vol. 5: 575; MCCDD Ex. 13 and 14 (Appendix G, p. 26)). Therefore, for the purpose of determining whether a system's discharge constitutes a direct discharge to the intracoastal waterway, the ALJ reasonably concluded that for purposes of this rule, the intracoastal waterway includes more than the navigable channel of the intracoastal waterway. 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. See Perdue, supra. If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. See

120.57(1)(l), F.S.; Freeze supra; Berry, supra. Therefore, the first part of Petitioners' exception to recommended finding of fact no. 19 is rejected.

The second part of recommended finding of fact no. 19 to which Petitioners object states "[f]looding in water bodies such as the intracoastal waterway is not governed by rainfall but rather by tides and storm surges." Petitioner's objection to this finding of fact is that "the use of the term 'governed' is inappropriate here" and that "the ALJ's dismissive statement with regard to the importance of rainfall in regards to flooding is contrary to the District's own statements, rules and policies with regard to the storm events." Petitioners fail to identify a legal basis and fail to provide appropriate and specific citations to the record for this part of their exception, and instead ask us to reconsider the evidence. Pursuant to section 120.57(1)(k), F.S., the Governing Board is not required to rule on this portion of Petitioners' exception. Nevertheless, we find there is competent substantial evidence to support the ALJ's finding. (Miracle Vol. 5: 576; Hallock Vol. 2: 246).

Accordingly, for all the reasons stated above, Petitioner's Exception No. 3 is rejected.

Petitioners' Exception No. 4

Petitioners take exception to the portion of recommended finding of fact no. 24 wherein the ALJ found that "even if there were a power outage, the system can store the full treatment volume without discharging until power is restored." Petitioners fail to cite a legal basis for this exception and instead merely refer to their exception to recommended finding of fact no. 15, (Petitioners' Exception No. 2), in which they also fail to cite a legal basis for their exception. Notwithstanding Petitioners' failure to

comply with section 120.57(1)(k), F.S., we find there is competent substantial evidence in the record to support the ALJ's finding of fact. (Hallock Vol. 1: 43, Vol. 2: 158-59; Miracle Vol. 5: 564). Accodingly, Petitioners' Exception No. 4 is rejected.

Petitioners' Exception No. 5

Petitioners take exception to recommended finding of fact no. 63 wherein the ALJ found that the Division of Historical Resources indicated that there would be no adverse impacts from this project to significant historical or archaeological resources. Petitioners contend this finding should be rejected as inadmissible hearsay and is not otherwise supported by admissible evidence. See Section 120.57(1)(c), F.S. Petitioners raised a hearsay objection to the testimony regarding the Division of Historical Resources' letter that had concluded the absence of adverse impacts to significant historical or archaeological resources. The ALJ overruled that objection and allowed the testimony that supports the ALJ's finding of fact. (T. Vol. 6: 660-662). Even if we agreed with Petitioners that the ALJ made an incorrect ruling on their hearsay objection, and we do not agree, (T. Vol. 4: 454-55), we nonetheless lack the substantive jurisdiction to overrule this evidentiary ruling. See, section 120.57(1)(l), F.S.; Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001) (the department lacks substantive jurisdiction to overrule the judge's hearsay ruling). The finding is otherwise supported by the deposition of Laura Kammerer that was admitted into evidence for the sole purpose of establishing the Division of Historical Resources' recommendation to the District. (T. Vol. 4: 454-55; MCCDD Ex. 22, with exhibits). Petitioners only objected to Kammerer's opinions contained in the deposition, but not to the facts in her testimony. (T. Vol. 4: 454-55; MCCDD Ex. 22). Because the ALJ's finding of fact is supported by

competent substantial evidence, it may not be disturbed. See section 120.57(1)(l), F.S.; Freeze, supra; Berry, supra; Florida Sugar Cane League, supra. Accordingly, for the reasons set forth above, Petitioner's Exception No. 5 is rejected.

Petitioners' Exception No. 6

Petitioners take exception to recommended finding of fact no. 66, wherein the ALJ found shovel tests were conducted across the EV-1 property. Petitioners contend that the finding is not supported by competent substantial evidence. With one exception, Petitioners fail to include appropriate or specific citations to the record as required by section 120.57(1)(k), F.S., and although we need not rule on this exception, we nevertheless find that there is competent substantial evidence to support the ALJ's finding of fact. (Stokes Vol. IV: 391, 403-04; MCCDD Ex. 20). In the remainder of the exception, Petitioners attempt to re-argue their case. We cannot reweigh the evidence as this is beyond our purview. These are evidentiary matters within the province of the ALJ. Fla. Dept. of Corrections v. Bradley, 510 So. 2d at 1122 (Fla. 1st DCA 1987). Additionally, contrary to Petitioners' contention, section 12.2.3.6, ERP-A.H., does not require an archeological survey or shovel tests within wetlands; rather it requires the applicant to map the location... of any known historical or archaeological resources that may be affected by the regulated activity located in, on or over wetlands or other surface waters. Further, MCCDD's expert testified that it was not physically feasible to conduct shovel tests in wetlands because of the inability to put the soil through the surveying screen and also that people do not live in the wetland areas. (Stokes Vol. 4: 452-53). There is also competent substantial evidence that MCCDD performed an extensive archeological survey consistent with the State's Division of Historic

Resources guidelines. (Stokes Vol. 4: 388-406; MCCDD Exs. 20-22). As to Petitioners' claim that the Applicant failed to demarcate the site, Dr. Stokes testified that the exact boundaries of archaeological site 8SJ3146[1] were determined through shovel testing. (Stokes Vo.4: 402). The ALJ made numerous findings regarding the survey results that were supported by competent substantial evidence. (R.O.: 32-35). Petitioners also contend the Applicant failed to protect the site. However, in uncontested find of fact 68, the ALJ found:

> After the Phase II assessment was conducted, site 8SJ3146 was considered to be significant, but the only part of the site that had any of the data classes (artifact related) that made it a significant site was in the area of the very southwest portion of 8SJ3146, surrounding test unit five. Dr. Stokes recommended that the area surrounding test unit five in the very southwestern portion of 8SJ3146 be preserved and that the remainder of the site would not require any preservation because the preservation of the southwestern portion of the site was the only preservation area which would be significant archeologically and its preservation would be adequate mitigation. That southwestern portion of the site, surrounding unit five, is not on the EV-1 site.

There is competent substantial evidence to support this finding. (Stokes Vol. 4: 39-03,401-06). Accordingly, for all the reasons set forth above, Petitioners' Exception No. 6 is rejected.

Petitioners' Exception No. 7

Petitioners take exception to recommended finding of fact no. 69, wherein the ALJ found that:

> Dr. Stokes recommended to the applicant and to the Division that a cultural resource management plan be adopted for the site and such a

[1] Site 8SJ3146 was determined to be the only site in the area to be affected by EV-1 that could be considered a significant historical or archaeological resource, by being potentially eligible for listing on the National Register of Historic Places. (Stokes Vol. 4: 391,402-05).

> plan was implemented. A Phase I cultural resource survey was also conducted on the reminder of the EV-1 site, not lying within the boundaries of 8SJ3146. That survey involved shovel tests across the area of the EV-1 project area and in the course of which no evidence of archeological sites was found. Those investigations were also reported to the Division in accordance with law.

As their only basis, Petitioners state "for the same reason set forth above for their exception to finding #66." Therefore, for the same reasons discussed in our ruling on Petitioners' Exception No. 6, we reject Petitioners' Exception No. 7. Further, we find there is competent substantial evidence in the record to support the remaining portions of the ALJ's finding. (Stokes Vol. 4: 401-04; MCCDD 22: 23, 25-34). Accordingly, Petitioners' Exception No. 7 is rejected.

Petitioners' Exception No. 8

Petitioners take exception to recommended finding of fact no. 70, wherein the ALJ found that the preservation plan for archaeological site 8SJ3146 is adequate mitigation for this site and that the preservation area is twice as large as the area originally recommended by Dr. Stokes to be preserved. Petitioners' basis for their exception is that neither the public interest test nor the District's rules contain any mitigation standards for adverse impacts to archaeological or historic sites and that the ALJ's consideration of this mitigation is standardless discretion. We disagree. See, section 373.414(1)(b), F.S. (If the applicant is unable to otherwise meet the criteria set forth in this subsection, [i.e., the public interest test], the Governing Board . . . in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse affects that may be caused by the regulated activity. Such measures may include but are not limited to on-site mitigation, off-site mitigation,

off-site regional mitigation and the purchase of mitigation credits for mitigation banks under Section 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse impacts caused by the regulated activity." (Emphasis added)). See also, section 267.061(2)(b), F.S. Additionally, we find that competent substantial evidence exists to support the ALJ's findings. (Stokes Vol. 4: 404-05; MCCDD Ex. 1, 21 (page 24 Fig. 19), and 22 (pages 27-28)). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See section 120.57(1)(l), F.S.; Freeze, supra; Berry, supra; Florida Sugar Cane League, supra. Further, any attempt by Petitioners to challenge the District's interpretation of the public interest test and its rules is not properly at issue in this section 120.57, F.S., administrative licensing challenge case. We do not have jurisdiction to entertain a rule challenge in this proceeding brought under section 120.569, F.S. See 120.56 F.S. For all the reasons set forth above, Petitioners' Exception No. 8 is rejected.

Petitioners' Exception No. 9

Petitioners take exception to a portion of the ALJ's recommended finding of fact no. 71 wherein the ALJ found that the construction and operation of the EV-1 project will not adversely affect any significant archeological or historical resources. Petitioners claim this finding "is contrary to the evidence." However, 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. See, Goss, supra; Heifitz, supra; Brown, supra. Further, Petitioners' fail to include citations to the record and therefore, the Governing Board need not rule on this exception.

Nevertheless, we find there is competent substantial evidence to support the ALJ's finding of fact. (Stokes Vol. 4: 403, 405; MCCDD Ex. 22, Pages 25-34). To the extent Petitioners' are asserting a challenge to the District's interpretation of the public interest test and District rules, we incorporate herein our ruling in Petitioners' Exception No. 8. Accordingly, Petitioners' Exception No. 9 is rejected.

Petitioners' Exception No. 10

Petitioners take exception to a portion of recommended finding of fact no. 82 wherein the ALJ found that in the DRI plan, the EV-1 area was not actually designated a preservation area. Petitioners contend that the finding is not supported by the evidence "to the extent the wetland areas of EV-1 were marked as preservation areas in the DRI plan. There is competent substantial evidence in the record to support the ALJ's finding. (Esser Vol. 6: 712, 715-16; Petitioners 19; MCCDD 30). If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. See, Freeze, supra, Berry, supra. Additionally, to the extent Petitioners ask us to determine that there is sufficient evidence of changed circumstances thus making the doctrine of collateral estoppel inapplicable, the Governing Board does not have substantive jurisdiction to modify or reject the ALJ's determination on this issue. See, Deep Lagoon Boat Club, Inc. v. Sheridan, 784 So.2d 1140 (Fla. 1st DCA 2001). Accordingly, Petitioners' Exception No. 10 is rejected.

Petitioners' Exception No. 11

Petitioners take exception to the portion of recommended finding of fact no. 86 wherein the ALJ found that the parts of the project located in, on or over wetlands will

not cause any adverse impact on flood stages or flood plains. Petitioners assert "competent substantial evidence demonstrates that the flood plain will be filled here". Because Petitioners fail to include any citations to the record, pursuant to section 120.57(1)(k), F.S., the Governing Board need not rule on this exception. Nonetheless, we find there is competent substantial evidence to support the ALJ's finding. (Miracle, Vol. 5: 528). Accordingly, Petitioners' Exception No. 11 is rejected.

Petitioners' Exception No. 12

Petitioners' take exception to that part of recommended finding of fact no. 87 wherein the ALJ found that the mitigation offsets the adverse impacts to fish, wildlife or their habitat. Petitioners' fail to state a legal basis for their exception and fail to provide appropriate and specific citations to the record as required by section 120.57(1)(k), F.S. Therefore, the Governing Board is not required to rule on this exception. Nonetheless, there is competent substantial evidence to support the ALJ's finding. (Esser Vol. 6: 671, 677). To the extent that Petitioners' exception is based on their argument in Petitioners' exception no. 10, we herein incorporate our ruling on Petitioners' exception no. 10. To the extent Petitioners are asking us to reweigh the evidence, we may not. Goss, supra; Heifitz, supra; Brown, supra. Accordingly, Petitioners' Exception No. 12 is rejected.

Petitioners' Exception No. 13

Petitioners take exception to recommended finding of fact no. 88 wherein the ALJ found that there are no fish nursery areas within the project limits. Petitioners fail to state the legal basis for their exception, and fail to include appropriate and specific citations to the record as required by section 120.57(1)(k), F.S. As a result, the

Governing Board is not required to rule on this exception. Nonetheless, we find that there is competent substantial evidence to support the ALJ's finding. Expert testimony was presented at the final hearing that there are no recreational activity or fish nursery areas within the project limits and that the project will not change the temperature of the regime. (Esser Vol. 6: 677-78). Expert witness testimony was also presented that none of the impacts associated with the EV-1 site are within the mean high water line of the marine regime, that the activities are not going to interact with the tidal regime and the impacts are negligible impacts. (Zyski Vol. 3: 320-21; SJRWMD 3). To the extent that Petitioners' are attempting to reargue their case, 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, supra. Accordingly, Petitioners' Exception No. 13 is rejected.

Petitioners' Exception No. 14

Petitioners' take exception to recommended finding of fact no. 89 wherein the ALJ found that since the wetland impacts are landward of the marine system, the impact on marine productivity is inapplicable. Petitioners contend that that "there is no evidence that the impacts are not to marine systems." Further, they fail to provide the legal basis for their exception or citations to the record as required by section 120.57(1)(k), F.S. As a result, the Governing Board is not required to rule on this exception. Nevertheless, as to the ALJ's "finding" that, under the public interest test, impact on marine productivity is not applicable, we find that this a conclusion of law rather than a finding of fact. (emphasis added). This factor is indeed applicable as set forth in 12.2.3.4, ERP-A.H. The fact that this statement is contained in a section entitled

"Findings of Fact" rather than "Conclusions of Law" does not change the fact that this is actually a conclusion of law. Battaglia Properties, Ltd., v. Fla. Land and Water Adjudicatory Comm'n., 629 So. 2d 161(Fla. 5th DCA 1994) (an agency is not bound by labels affixed by an ALJ to findings or conclusions of law). Despite the ALJ's statement in recommended finding of fact no. 89 that impact on marine productivity is not applicable, the ALJ in fact made a specific finding of fact related to the issue of marine productivity in his recommended finding of fact no. 88. (R.O.: 42). Additionally, in the ALJ's conclusion no. 150, (R.O.: 75), he correctly concluded that the applicant provided reasonable assurance that the EV-1 project is not contrary to the public interest and additionally, he includes the statement "it was demonstrated that the project will not adversely affect ...marine productivity." Thus, the ALJ made the necessary finding of fact supporting his conclusion that the public interest criterion regarding marine productivity has been met. These findings of fact are supported by competent substantial evidence. (Zyski Vol. 3: 320-21, 362; Esser Vol. 6: 677-78). We reject Petitioner's exception no. 14 and further, we hereby modify the ALJ's recommended "finding of fact" no. 89 as follows:

> Concerning marine productivity, the wetland impacts are landward of the marine system~~;~~, ~~therefore, impact on marine productivity is not applicable.~~ Thus, this factor is considered neutral.

The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion. As to the portion of Petitioners' exception wherein they cite to recommended finding of fact no. 44 (R.O.: 26) as evidence in support of their claim that there will be impacts to marine systems, finding of fact no. 44 pertains, in part, to impacts to an "upper salt marsh community" that may provide some foraging for Marsh

Wrens, Clapper Rails and mammals such as raccoons and marsh rabbits and, pertains in remaining part, to a freshwater forested area. As such, this finding is not relevant to the issue of marine productivity in the case before us. Accordingly, for all the reasons set forth above, Petitioners' Exception No. 14 is rejected.

Petitioners' Exception No. 15

Petitioners' take exception to the ALJ's recommended conclusion of law no. 101 wherein the ALJ sets forth the procedural history related to Petitioners' attempts to gain an additional basis for standing. The ALJ's conclusion states that by order dated July 23, 2003, Judge Stampelos denied the Petitioners' Motion to Amend their petition to assert additional standing under section 403.412(5), F.S. (2002) but granted their Motion to Allow Intervention under this same section, should one Petitioner be found to have standing under Section 120.569, F.S. while the other Petitioner is found to lack such standing. In fact, Petitioner Billie was granted intervention as a party on the side of Petitioner Larsen. (R.O.: 51). Petitioners claim the ALJ had no basis to deny the Motion to Amend. They also contend that section 403.412,F.S. (2002) is unconstitutional.

First, while generally speaking the Governing Board lacks substantive jurisdiction to alter an ALJ's procedural rulings at hearing, such as Petitioners' Motion to Amend, the effect of this denial was to deny Petitioners' standing under section 403.412(5) to "initiate" a hearing. See, section 120.57(1)(l), F.S.; Toney v. Dep't of Envtl. Protection, 22 F.A.L.R. 2653, 2657 (DEP 2000), aff'd, 774 So.2d 696 (Fla. 1st DCA 2000) (the department lacks jurisdiction to overrule an ALJ's procedural rulings). While section 403.412(6) allows certain environmental corporations to "initiate" a section 120.57

proceeding, a citizen cannot "initiate" a hearing under section 403.412(5) but can "intervene" into an ongoing administrative proceeding. Sections 403.412(5) and (6), apply to "*any*...licensing...proceedings" for the protection of water or other natural resources, such as a permit proceeding under chapter 373 and its rules. Consequently, the issue of standing under section 403.412(5) and (6) to invoke, or intervene into, a section 120.57 hearing regarding a permitting activity under chapter 373 is a matter within the substantive jurisdiction of the District. See, Friends of the Everglades, Inc. v. South Florida Water Mgmt. Dist., 446 So.2d 1116 (Fla. 4th DCA 1984) (water management district did not err in denying environmental corporation's petition to intervene under section 403.412(5) in surface water management permit proceeding); Friends of Nassau County, Inc. v. Fisher Dev. Co. and St. Johns River Water Management District, 1998 WL 929876 (SJRWMD 1998) (hearing initiated by section 403.412(5) verified petition) Friends of the Wekiva v. Saboff and St. Johns River Water Management District, 1992 WL 880941 (SJRWMD 1992) (petitioners had standing under section 403.412(5)); also, Woodhouse v. Suwannee American Cement Co., Inc., 23 F.A.L.R. 503, 507 (Dep't of Envtl. Protection 2000) (DEP has substantive jurisdiction because it is charged with implementing section 403.412(5).

In so much as neither Petitioner pled nor proved they were a corporation authorized to initiate a proceeding under 403.412(6), we agree with the ALJ's ruling in denying Petitioners' standing under that provision and also under section 403.412(5) which does not allow citizens to initiate a section 120.57 proceeding.

However, both Petitioners were allowed to fully participate and present evidence on all issues and therefore, the ALJ's ruling on the Motion to Amend is moot.

Petitioners have not alleged nor shown how they have been harmed or prejudiced because of a lack of standing under sections 403.412(5) and (6), F.A.C. See, Gregory v. Indian River County, 610 So.2d 547 (Fla. 1st DCA 1992) (while it was error to deny a party standing, such error is harmless where the party is otherwise provided a full opportunity to participate and present evidence and the ALJ ruled upon all issues which the party may properly contest); Hamilton County Bd. of County Comm'rs v. State, Dep't of Envtl. Regulation, 587 So.2d 1378 (Fla. 1st DCA 1991) (same).

Petitioners' argument that section 403.412, F.S. (2002) is facially unconstitutional because it violates the single subject clause of the Florida constitution is not properly at issue in this proceeding. The Governing Board has no authority to determine the constitutionality of a statute. Palm Harbor Special Fire Control Dist. v. Kelly, 516 So.2d 249 (Fla. 1987); Myers v. Hawkins, 362 o.2d 926, 928, n. 4 (Fla. 1978). Accordingly, for all the reasons set forth above, Petitioners' Exception No. 15 is rejected.

Petitioners' Exception No. 16

Petitioners' take exception to the ALJ's recommended conclusion of law no. 105, wherein the ALJ found that Petitioner Larsen lacks standing to challenge the application as to District rule 40C-4.302(1)(a)(6), F.A.C., which deals with adverse effects to significant historical and archaeological resources. Petitioners' contend the law does not allow segregation of proof of standing to contest MCCDD's compliance with the criteria in rule 40C-4.302(1)(a)(6) from proof of standing to contest MCCDD's compliance with the other District permitting criteria. We agree with Petitioners.

The ALJ determined Petitioner Larsen proved standing under section 120.569, F.S., to contest the permit application except for standing regarding Rule 40C-

4.302(1)(a) 6. (R.O.: 11-12, 48-49). As stated in the Recommended Order [paragraph 102] and uncontested by Petitioners:

> "[t]he judicial standards for determining whether a third party has standing to challenge an agency decision are: (1) that the party will suffer an injury-in-fact which is of sufficient immediacy, and (2) that the injury is of the type or nature which the proceeding is designed to protect. Ameristeel Corp., v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). This judicial test for standing was derived from analogous federal law. Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985). The injury-in-fact part of the test focuses on whether the injury arising from the agency action is of a specific, real immediacy warranting relief and is not remote or speculative. Town of Palm Beach v. Department of Natural Resources, 577 So. 2d 1383 (Fla. 4th DCA 1981). The zone of interest portion of the test focuses on whether the type of injury asserted falls within the scope of the agency's statutory authority to protect. Boca Raton Mausoleum Inc., v. State Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987). The two parts of this standing test are inherently linked because the nature of the injury required to be shown to satisfy the first part of the test is determined by the statutes or rules which define the scope of the agency's authority which is the subject of the proceeding (i.e., the "zone of interest"). Friends of the Everglades, Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992) (the nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope and nature of the proceeding). Therefore, it is Chapter 373 and the District's rules which define the scope of this proceeding and the nature of the injury those laws are designed to protect." (Emphasis added).

There must be a possible injury-in-fact to a petitioner resulting from the permitting decision and that injury must be one arguably protected under the enabling statute. See, Nat. Credit Union Admin v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (what must be first discerned is the interests arguably to be protected by the statutory provision at issue, and then inquire whether the plaintiff's interests affected by the agency action in question are among them). In short, section 120.569,F.S., itself does not confer standing; the two-prong standing test is necessarily linked to the relevant

statute and rules at issue, which determine the nature and scope of injuries and interests protected in the proceeding. Cf. Marshall & Ilsley Corp. v. Heimann, 652 F.2d 685, 697 n. 19 (7th Cir. 1981) (the federal APA does not grant standing, the relevant statute confers standing). Therefore, the Governing Board has substantive jurisdiction to determine standing under section 120.569,F.S., in an administrative proceeding conducted under Chapter 373, F.S. See, section 120.57(1)(l), F.S.; Lane v. Int'l Paper Co. and Dep't of Envtl. Protection, 24 F.A.L.R. 262, 264 (DEP 2001), aff'd, 823 So.2d 769 (Fla. 1st DCA 2002) (the department exercised jurisdiction and concluded petitioner lacked standing under section 120.569,F.S.).

While there is federal case law which generally supports the legal principle that standing must be determined for each claim asserted, there is no analogous Florida case law which has applied this principle to administrative standing in a permitting context. Cf. Lewis v. Casey, 518 U.S. 343, 348 n. 6 (1996) (standing is not dispensed in gross); Rosen v. Tennessee Comm'r of Finance and Admin., 288 F.3d 918 (6th Cir. 2000) (1996) (standing is a claim by claim issue and plaintiffs had standing to challenge the State's Medicare program but lacked standing to challenge the implementation rule of the program); Bronco's Entertainment, Ltd. v. Charter Township of Van Buren, 29 Fed.Appx 310 (6th Cir. 2002) (in plaintiffs' suit against town's denial of site plan, plaintiffs were required to show standing for each claim against the town's zoning ordinance, the town's licensing ordinance and the State's liquor license transfer law); Center for Biological Diversity v. Abraham, 218 F. Supp.2d 1143 (N.D. Cal. 2002) (plaintiffs were required to show standing under the APA for each alleged claim of agencies non-compliance with the Energy Policy Act). As there is currently no Florida case law that

supports the segregation of proof of standing as to each regulatory permitting criterion at issue in a proceeding, Petitioners should not have been required to establish standing regarding Rule 40C-4.302(1)(a)6, F.A.C., because standing was otherwise proven as set forth in the Recommended Order, paragraphs 3-6, 101-104 and 106.

Accordingly, the Governing Board rejects Conclusion of Law No. 105. The Governing Board finds that this substituted legal conclusion is as or more reasonable than the ALJ's conclusion.

However, Petitioners' exception to the ALJ's finding is moot as Petitioners' were allowed to litigate this issue and the ALJ rendered findings and conclusions on this issue.

Petitioner's Exception No. 17

Petitioners take exception to the portion of recommended conclusion of law no. 106 wherein the ALJ found that Petitioner Billie's intention to use the receiving waters is speculative, as Petitioner Billie did not indicate any intention in the future to fish or use the Tolomato River. Petitioners' basis for their exception is that they submitted an affidavit in the record setting forth Petitioner Billie's intention to use the area in the future. They do not provide legal authority to support this contention nor do they include any citations to the record. Although the Governing Board is not required to rule on this exception pursuant to section 120.57(1)(k), F.S., nonetheless, we find that the affidavit was never identified, introduced and admitted as an exhibit into evidence to be considered by the ALJ in making his findings and legal conclusions. See, Petitioners' Exhibits, Supplemental Prehearing Stipulation of 10-9-03. A finding of fact must be based only upon evidence admitted into evidence at hearing. See sections

120.569(2)(g), (h), (j) and 120.57(1)(f) 2., (j), F.S.; Uniform Rule 28-106.213, F.A.C.; Rabren v. Dep't of Professional Regulation, 568 So.2d 1283, 1290 (Fla. 1st DCA 1990) (findings of fact must be based exclusively on record evidence to preserve the integrity of the fact-finding process in formal proceedings). Moreover, the Governing Board cannot consider matters outside the evidence of record in the hearing. See, section 120.569(2)(m), F.S. (findings of fact must be supported by underlying facts of record which support the findings); Lawnwood Medical Center, Inc. v. Agency for Health Care Admin., 678 So.2d 421 (Fla. 1st DCA 1996) (agency can only review a recommended order based upon the record evidence that was before the administrative law judge); Gen Dev. Utilities v. Hawkins, 357 So.2d 408 (Fla. 1978) (agency cannot consider matters outside the record evidence of the hearing). Furthermore, the Governing Board may only reject findings that are not supported by competent substantial evidence. Petitioner's exception does not assert the ALJ's findings are not supported by competent substantial evidence. Therefore, since the affidavit is not record evidence of the proceeding, it cannot serve as a basis for any finding of fact. Additionally, although the ALJ determined Petitioner Billie lacks standing under 120.569, F.S., Petitioner Billie was allowed to intervene under section 403.412(5), F.S., and was allowed to litigate all issues and therefore has suffered no harm or prejudice due to lack of standing. He was provided a full opportunity to participate and present evidence on all issues raised. See, Gregory, supra; Hamilton County Bd. of County Comm'rs, supra. Therefore, Petitioners' exception to the ALJ's conclusion is moot as Petitioners' were allowed to litigate this and all other matters and the ALJ rendered findings and conclusions. Accordingly, for all the reasons set forth, Petitioners' Exception No. 17 is rejected.

Petitioners' Exception No. 18

Petitioners take exception to recommended conclusion of law no. 107 wherein the ALJ determined Petitioner Billie failed to prove standing to challenge the permitting criteria in rule 40C-4.302(1)(a)(6), F.A.C. (R.O.: 12-14, 49-50). Petitioner Billie had been determined to lack standing under section 120.569,F.S., to contest the proposed agency action. However, the ALJ granted Petitioner Billie party status as an intervenor on the side of Petitioner Larsen under section 403.412(5), F.S. (R.O.:13-14,49-51).

For the reasons set forth in our ruling on Petitioners' Exception No. 16, the Governing Board rejects Conclusion of Law No. 107. The Governing Board finds that this substituted legal conclusion is as or more reasonable than the ALJ's conclusion.

However, Petitioners' exception to the ALJ's conclusion is moot as Petitioners' were allowed to litigate this issue and the ALJ rendered findings and conclusions on this issue.

Additionally, Petitioners' contend that the ALJ erred in denying Petitioner Billie's request for a translator. As discussed in our ruling on Petitioners Exception No. 1, the Governing Board lacks substantive jurisdiction to alter an ALJ's procedural rulings at hearing, such as the ruling on the motion for a translator. See, section120.57(1)(l), F.S.; Barfield, supra; Deep Lagoon Boat Club, supra; Toney, supra. Further, Petitioners' exception does not comply with section 120.57(1)(k), F.S., and to the extent Petitioner Billie asserts the findings resulted from a failure to comply with the essential requirements of the law, Petitioner Billie fails to explain how the denial was so egregious as to materially affect the entire proceeding. See, Putnam County Environmental Council, Inc. et al. v. DEP (Final Order, DOAH Case No. 01-2442 (August 6, 2002)).

Accordingly, the portion of Petitioners' Exception No. 18 regarding the ALJ's denial of a translator for Petitioner Billie is rejected.

Petitioners' Exception No. 19

Petitioners take exception to recommended conclusion of law no. 110 wherein the ALJ concluded that "[t]he requirements contained in paragraphs 40C-4.301(1)(a), (b) and (c) have been met because MCCDD has demonstrated that the EV-1 project complies with the applicable presumptive criteria in Section 10.2.1 A.H." Petitioners state that their exception is based on their exceptions to finding of fact nos. 15 and 19 and conclusion of law 21. However, the finding of facts Petitioners' object to are actually finding of fact nos. 16 and 20. To the extent Petitioners' exception is based on their exceptions to finding of fact nos. 15 and 19 (16 and 20), for the reasons set forth in our rulings on those exceptions, Petitioners' Exception No. 19 is rejected. To the extent they base their exception on conclusion of law no. 21, there is no such conclusion in the ALJ's Recommended Order. We went one step further in reviewing the record and found that paragraph 21 of the Recommended Order is an uncontested finding of fact. 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. See, Section 120.57(1)(k), F.S. (2003). Accordingly, Petitioners' Exception No. 19 is rejected.

Petitioners' Exception No. 20

Petitioners take exception to recommended conclusion of law no. 113 wherein the ALJ concluded that MCCDD was not required to demonstrate that the post-development peak rate of discharge will not exceed the pre-development peak rate of discharge for the 25 year, 24 hour duration storm because such a showing is not required for those systems which discharge directly into ...the Intracoastal Waterway north of the Matanzas Inlet and that the District's expert concluded that since the EV-1 project discharges into a wetland system that has a direct hydrologic connection to the Intracoastal Waterway north of the Matanzas Inlet, the Section 10.3.2(a) exemption applies. Petitioners assert that the ALJ's conclusion is based on a finding of fact that is contrary to law as set forth in their exception to finding of fact no. 19. Accordingly, for the reasons set forth in our ruling on Petitioners' exception no. 3, Petitioners' Exception No. 20 is rejected.

Petitioners' Exception No. 21

Petitioners take exception to recommended conclusion of law no. 114 in which the ALJ discusses the definition of "direct discharge" vis a vis another District rule and analogizes that definition to the instant case. Petitioners' exception is virtually identical to their exception no. 20. Accordingly, Petitioners' Exception No. 21 is rejected for the reasons set forth in our ruling on Petitioners' Exception No. 3.

Petitioners' Exception No. 22

Petitioners take exception to recommended conclusion of law no. 117 wherein the ALJ concluded that the preponderant evidence demonstrates that the EV-1 project

will not alter floodway, floodplains or levels of flood flows or velocities of adjacent water courses such as streams so as to adversely affect the off-site storage and conveyance capabilities of the water resource, in this instance, the Tolomato River. Petitioners contend the ALJ's conclusion "was not supported by professionally acceptable studies or evidence" and that "the District had never accepted the kind of analysis submitted by the applicant before." However, their argument goes to the weight and credibility of the evidence. Thus, it is up to the ALJ to decide what facts to accept. Heifitz, 475 at 1281. There is competent substantial evidence in the record to support the ALJ's conclusion. (Hallock, Vol. 2: 137-40; Miracle, Vol. 5: 516, Vol. 9: 1114-15; MCCDD 14: Appendix G). The Applicant's expert, Peter Hallock, testified that the methodology for determining potential impacts involves a practical application of basic engineering principles. (Hallock Vol.2: 242-244). The District's expert, David Miracle, testified that the applicant's analysis is reasonable and they satisfied the District's rule criteria. (Miracle Vol. 9: 1114-15). We are not free to reweigh the evidence. Because the ALJ's finding of fact is supported by competent substantial evidence, it may not be disturbed. See, section 120.57(1)(l), F.S.; Freeze, supra; Berry, supra; Florida Sugar Cane League, supra. Further, Petitioners failed to file exceptions to recommended finding of fact nos. 25, 26, 27 and 28 that provide the factual underpinnings for the ALJ's conclusion of law. Accordingly, Petitioners' Exception No. 22 is rejected.

Petitioners' Exception No. 23

Petitioners take exception to recommended conclusion of law no. 121 wherein the ALJ concluded that the Applicant has met the requirements of section 12.2.1.2(b), ERP-A.H. The ALJ also found, pursuant to the October 13, 2003, ruling, on the District's

Motion in Limine, that the mitigation "plan" litigated in the Parcel D case constitutes a plan of regional ecological value.

Petitioners contend that the wetland areas proposed to be filled under the EV-1 application were on the accepted map of the plan as preservation areas and that filling these wetlands will make the plan "nebulous, undefined and subject to change" but they fail to state a legal basis for their exception and fail to provide appropriate and specific citations to the record as required by section 120.57(1)(k), F.S. Therefore, the Governing Board is not required to rule on this exception. Nonetheless, we find there is competent substantial evidence in the record to the support the ALJ's conclusion. The "plan" (Map H of the Marshall Creek DRI) contains a note that states, "Preservation areas are shown as generalized areas and are subject to final design, road crossings and final wetland surveys. (MCCDD 30; Petitioners 19).

To the extent Petitioners attempt to challenge the District's rules by contending that the application of rule 12.2.1.2(b) constitutes standardless discretion, we lack jurisdiction to entertain such a rule challenge.

Lastly, we find Petitioners' exception to be largely an abbreviated version of their exception no. 10, which we rejected. Therefore, for the reasons set forth in our ruling on Petitioners' exception no. 10 and for the reasons set forth above, Petitioners' Exception No. 23 is rejected.

Petitioners' Exception No. 24

Petitioners take exception to recommended conclusion of law no. 122 in which Petitioners state the ALJ concluded that the applicant has met Section 12.2.1.2 (b), since the wetland impacts proposed here are part of a previously accepted plan.

However, this is not what the conclusion states nor can it be inferred. Petitioners' exception no. 24 is taken almost verbatim from Petitioners' exception no. 23. Accordingly, to the extent Petitioners' exception is based on their exception no. 23, and because the stated exception is not related to the ALJ's conclusion, Petitioners' Exception No. 24 is rejected.

Petitioners' Exception No. 25

Petitioners take exception to recommended conclusion of law no. 124 wherein the ALJ concluded that the mitigation proposed for the EV-1 project provides greater long-term ecological value that the wetlands to be adversely affected. Although finding of fact nos. 75-80 provide the underpinnings for the ALJ's conclusion, Petitioners have not taken exception to those findings. There is competent substantial evidence in the record to support those findings. (Esser, Vol. 6: 668-69, 672; SJRWMD Ex. 3.) Additionally, to the extent Petitioners' are attempting to challenge the District's rules, as set forth in our rulings on Petitioners' exception nos. 8 and 23. We lack jurisdiction to entertain a rule challenge. Accordingly, Petitioner's Exception No. 25 is rejected.

Petitioners' Exception No. 26

Petitioners take exception to recommended conclusion of law no. 130 wherein the ALJ concluded that MCCDD has provided reasonable assurance that the criteria in section 12.2.4, ERP-A.H., is met through the design of the stormwater management system, its long-term maintenance plan for the system, and the long and short-term erosion and turbidity control measures that are proposed as part of the project. Petitioners' fail to identify the legal basis for their exception and fail to provide

appropriate and specific citations to the record as required by section 120.57(1)(k), F.S. Therefore, the Governing Board is not required to rule on this exception. Nevertheless, there is competent substantial evidence in the record to support the factual findings that form underpinnings for the ALJ's conclusion. (Miracle Vol. 5: 521-25, 564-66, 572; Harper Vol. 9: 1061-62, 1065, 1070-74, 1081-83; Hallock Vol. 1: 43; Vol. 2: 135, 148-49,158-59, 231-33; MCCDD Ex. 11, 13 (sheet 24), 14, and 29; Prehrg. Stip.: ¶¶ 3(a), 3(a)4, 3(a)5, and 3(a)7). Additionally, Petitioners only stated basis for this exception is "as a result of the design flaws described above, stormwater will not be properly treated and will discharge directly into the marsh and wetlands at the pump stations..." This reason is not sufficient to allow us to reject this conclusion of law. However, to the extent Petitioners possibly refer to their exception nos. 2,4, 11, 19, 20 and 22, we incorporate herein our rulings on those exceptions. Accordingly, Petitioners' Exception No. 26 is rejected.

Petitioners' Exception No. 27

Petitioners next take exception to recommended conclusion of law no. 132 wherein the ALJ concluded that the project will not violate water quality standards. Petitioners' only contention for this exception is "for the reasons described above, the system will discharge untreated water directly into Marshall Creek and freshwater wetlands." Petitioners fail to identify the legal basis for their exception and fail to provide appropriate and specific citations to the record as required by section 120.57(1)(k), F.S., therefore, the Governing Board need not rule on this exception. Nevertheless, there is competent substantial evidence in the record to support the factual findings that form the underpinnings for the ALJ's conclusion. (Miracle Vol. 5:

521-25, 566, 572; Harper Vol. 9: 1062, 1065, 1067, 1070-71, 1073-74, 1081-83; Hallock Vol. 2: 135, 231-33; Esser Vol. 6: 672, 674-75; MCCDD 11, 13 (sheet 24), 14, and 29; Prehrg. Stip.: ¶¶ 3(a), 3(a)4, 3(a)5, 3(a)7, 3(a)12, and 4(h)). To the extent Petitioners refer to their exception nos. 2,4, 11, 19, 20, 22 and 26, we incorporate herein our rulings on those exceptions. Accordingly, Petitioners' Exception No. 27 is rejected.

Petitioners' Exception No. 28

Petitioners take exception to recommended conclusion of law no. 135 wherein the ALJ concluded that discharges from the project will not contribute to existing water quality violations since the lengthy detention time, large surface area for aeration and dilution provided by the EV-2 pond will result in a net improvement in the existing water quality. Petitioners' only argument is that the facts demonstrate that most of the water will flush straight out into Marshall Creek and the freshwater wetlands. Petitioners fail to identify the legal basis for their exception and fail to provide appropriate and specific citations to the record as required by section 120.57(1)(k), F.S., and therefore, the Governing Board need not rule on this exception. They apparently seek to have us to reweigh the evidence, which we cannot do. 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, supra. Nevertheless, finding of fact nos. 29-32 provide the factual underpinnings for the ALJ's conclusion and we find there is competent substantial evidence in the record to support those findings. (Miracle Vol. 5: 523-24; Harper Vol. 9: 1070-71,1073). Accordingly, Petitioners' Exception No. 28 is rejected.

Petitioners' Exception No. 29

Petitioners take exception to recommended conclusion of law no. 136 wherein the ALJ concluded that since the system will not violate water quality standards and will result in a net improvement for two parameters, the project will not significantly degrade an OFW. Again, as Petitioners fail to identify the legal basis for the exception and fail to include appropriate and specific citations to the record, the Governing Board is not required to rule on this exception. Nonetheless, there is competent substantial evidence in the record to support this conclusion and further, we find that Petitioners' exception is a reiteration of Petitioners' exception nos. 26-28, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' Exception No. 29 is rejected.

Petitioners' Exception No. 30

Petitioners take exception to recommended conclusion of law no. 141 wherein the ALJ concluded that the third part of the Secondary Impact Test, found in Section 12.2.7(c) ERP-A.H., is evaluated as part of the public interest criteria. Petitioners are mistaken in their contention that the ALJ failed to evaluate the criteria of Rule 12.2.7(c), A.H. The ALJ incorporated this evaluation in his conclusions of law regarding the Public Interest Test. (R.O.: 75). The ALJ's recommended conclusion is consistent with the Governing Board's previous ruling on this issue. See, The Sierra Club and Bobbie C. Billie and Shannon Larsen v. Hines Interest Limited Partnership, DOAH Case No. 99-1905 (rendered February 10, 2000) at 62 ("The secondary impacts test in Section 12.2.7 is considered as part of the public interest balancing test in Rule 40C-4.302(1)(a), Fla. Admin. Code"). (Emphasis added). Petitioners also incorporate by

reference their exceptions to recommended conclusion of law no. 150 (Petitioners' exception no. 33) and recommended finding of fact no. 66 (Petitioners' exception no. 6). Accordingly, for the reasons set forth in our rulings on Petitioners' exception nos. 6 and 33, and for the reasons stated above, Petitioners' Exception No. 30 is rejected.

Petitioners' Exception No. 31

Petitioners take exception to recommended conclusion of law no. 142 wherein the ALJ discusses section 12.2.7(d), A.H. and concludes that the evidence showed that additional phases of the project could be designed in accordance with the relevant rule criteria. (Emphasis added). Petitioners' apparently misread the conclusion because they state the ALJ concluded "the system will not violate water quality standards". It is clear from the plain meaning of the ALJ's conclusion that he is referring to future activities and not to the system proposed in the application that is the subject of this litigation. (Emphasis added). Petitioners fail to identify the legal basis for the exception and fail to include appropriate and specific citations to the record. As such, the Governing Board is not required to rule on this exception pursuant to section 120.57(1)(k), F.S. Nonetheless, as Petitioners' sole contention for this exception is "as described above, the system as designed will discharge untreated water directly into Marshall Creek and the freshwater wetlands" and as this contention is almost verbatim that of Petitioners' contentions set forth in their exception nos. 26-29, we incorporate herein our rulings on those exceptions. Further, uncontested finding of fact no. 72 provides the factual underpinnings for the ALJ's conclusion and we find there is competent substantial evidence in the record to support that finding. (Miracle Vol. 5:

521). Accordingly, for the reasons set forth in our rulings on Petitioners' Exception Mos. 26-29 and for the reasons set forth above, Petitioners' Exception No. 31 is rejected.

Petitioners' Exception No. 32

Petitioners take exception to recommended conclusion of law no. 145 wherein the ALJ concluded that the construction, operation, or maintenance of the EV-1 system will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed, in accordance with Section 40C-4.301(1)(i), F.A.C. Petitioners fail to identify the legal basis for the exception and fail to include appropriate and specific citations to the record. As such, the Governing Board is not required to rule on this exception pursuant to section 120.57(1)(k), F.S. Nevertheless, as to Petitioners contentions that "the system is atypical..." and that "the analysis" is not based on generally acceptable scientific principles, we find that the record contains competent, substantial evidence that the system design is based on generally accepted engineering practices and that it will be able to function and operate as designed. (Miracle Vol. 5: 521, 566; Harper Vol. 9: 1068). This testimony forms the basis for uncontested finding of fact no. 34, which in part provides the factual underpinnings for the ALJ's conclusion. To the extent Petitioners base their exception on their contention that the system "is designed to directly flush untreated stormwater into Marshall Creek and the freshwater wetlands", we incorporate herein our rulings on Petitioners' Exception Nos. 26-29 and 31. Accordingly, for all the reasons set forth above, Petitioners' Exception No. 32 is rejected.

Petitioners' Exception No. 33

Petitioners take exception to recommended conclusion of law no. 150 wherein the ALJ concluded that "MCCDD has provided reasonable assurance that the EV-1 project is not contrary to the public interest because the evidence established that all of the public interest factors to be balanced were determined to be neutral. Petitioners' basis for their exception is "for the reasons described above" and to that extent, this reason is not sufficient to allow us to reject this conclusion of law. To the extent this reason is based on their previously enumerated exceptions, we incorporate herein our rulings on those exceptions.

Petitioners also contend that the ALJ failed to conduct a legal analysis of the secondary impact test with regard to archeological resources and that the applicant has failed to comply with Rule 12.2.3.6, A.H. With one exception, Petitioners' fail to include any citations to the record as required by section 120.57(1)(k), F.S. and therefore, we need not rule on this exception. Nevertheless, Petitioners' are mistaken in their belief that "[u]nder the secondary impact test, Section 12.2.3.6, A.H. the District is required to 'evaluate whether the regulated activity located in, on, or over wetlands or other water resources will impact significant historical or archeological resources'". (Emphasis added). In fact, Section 12.2.3.6, A.H. is part of the public interest test and as set forth in our ruling on Petitioners' Exception No. 30, the third part of the secondary impact test is evaluated as part of the public interest test. (Emphasis added). Additionally, finding of fact nos. 63-71 provide the factual underpinnings for the ALJ's conclusion and there is competent substantial evidence in the record to support those findings. (Esser Vol. 6: 657, 660; Stokes Vol. 4: 388-94, 398, 401-05, 418-20, 425, 427-28, 443, 450-51;

MCCDD 1; MCCDD 4; MCCDD 20: 20-24, 54, 57, fig. 2; MCCDD 21: 23, 24, fig. 4, fig. 19, 33, 39, 41, 58; MCCDD 22: 22, 23, 25-34). To the extent Petitioners' ask us to reweigh the evidence, we may not do so. See, Goss, supra; Heifitz, supra; Brown, supra.

Additionally, we disagree with Petitioners' contention that mitigation cannot be provided for adverse impacts to significant archeological or historic sites. See, Section 373.414(1)(b), F.S. ("If the applicant is unable to otherwise meet the criteria set forth in this subsection, [i.e., the public interest test], the Governing Board . . . in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse affects that may be caused by the regulated activity. Such measures may include, but are not limited to, on-site mitigation, off-site mitigation, off-site regional mitigation and the purchase of mitigation credits for mitigation banks under Section 373.4136,F.S. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse impacts caused by the regulated activity." (Emphasis added)). See also, 267.061(2)(b),F.S. Accordingly, Petitioners' Exception No. 33 is rejected for all the reasons set forth above.

Petitioners' Exception No. 34

Petitioners take exception to that portion of recommended conclusion of law no. 153 wherein the ALJ concluded that the preponderant evidence from the hearing demonstrates that MCCDD has provided reasonable assurances that all applicable District rule criteria will be met. Petitioners' sole reason for this portion of their exception is, "for the reasons described above." Petitioners fail to identify any legal basis for this portion of their exception and fail to include appropriate and specific citations to the

record. As such, the Governing Board is not required to rule on this exception pursuant to Section 120.57(1)(k), F.S. Nevertheless, for the all the reasons contained in our rulings on Petitioners' exceptions set forth above, and because we find there is competent substantial evidence in the record to support the ALJ's conclusion, this portion of Petitioners' exception no. 34 is rejected. The remainder of the ALJ's conclusion states that the ERP should be granted with the conditions proposed in the District's Technical Staff Report (TSR) that was accepted into evidence. Petitioners take specific exception to one condition in the TSR regarding the individual permits for the lots. They attempt to re-argue the facts that form the basis for this condition. To the extent Petitioners' exception asks us to reweigh the evidence, we are precluded from doing this. Also, there is competent substantial evidence in the record that the system proposed by the applicant meets the District's permitting criteria. Pursuant to section 40C-4.381(2), F.A.C., the Governing Board "shall impose on any permit granted under this chapter [40C-4] and chapter 40C-40, F.A.C., such reasonable project-specific conditions as are necessary to assure that the permitted system will not be inconsistent with the overall objectives of the District or be harmful to the water resources of the District as set forth in District rules." (Emphasis added). The condition Petitioners oppose is a project specific condition District staff believe should be placed on the permit and this condition was supported by competent substantial evidence. (SJRWMD Ex. 3). Accordingly, for all the reasons set forth above, Petitioners' Exception No. 34 is rejected.

RULINGS ON DISTRICT'S EXCEPTIONS

District's Exception No. 1

District staff take exception to typographical and grammatical errors on pages 6-9 of the Preliminary Statement, and Findings of Fact Nos. 3, 10,17, 36,53, 57 and 81, on the basis that there is no competent substantial evidence in the record to support them. These errors are corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

District's Exception No. 2

District staff take exception to an error in Finding of Fact No. 44, wherein the ALJ states that "[t]he wading birds would be able to flush very quickly" on the basis that there is no competent substantial evidence in the record to support this. We agree and find there is no competent substantial evidence in the record to support this. Expert testimony was presented that the wading birds would not be able to flush very quickly in this area. (Esser Vol. 6: 648). This is an apparent typographical omission and is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

District's Exception No. 3

District staff take exception to a typographical error in Conclusion of Law No. 113 on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

District's Exception No. 4

District staff take exception to an error in Conclusion of Law No. 113 on the basis that there was no evidence presented that the District's expert opined that the Intracoastal Waterway includes wetlands in and adjacent to the floodplain. Instead the expert opined that the Intracoastal Waterway includes wetlands in or adjacent to the floodplain. (Miracle Vol. 5:575; District's PRO, paragraph 127). This is an apparent typographical error and is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

RULING ON MCCDD'S EXCEPTIONS

MCCDD's Exception No. 1

MCCDD takes exception to typographical errors in the Preliminary Statement, on pages 6 and 7, on the basis that there is no competent substantial evidence in the record to support them. These errors are corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 2

MCCDD takes exception to a typographical error in Finding of Fact No. 7, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 3

MCCDD takes exception to a typographical error in Finding of Fact No. 10, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 4

MCCDD takes exception to typographical errors in Finding of Fact Nos. 19 and 20, on the basis that there is no competent substantial evidence in the record to support them. These errors are corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 5

MCCDD takes exception to a typographical error in Finding of Fact No. 25, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 6

MCCDD takes exception to typographical errors in Finding of Fact No. 26, on the basis that there is no competent substantial evidence in the record to support them. These errors are corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 7

MCCDD takes exception to a typographical error in Finding of Fact No. 36, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 8

MCCDD takes exception to a typographical error in Finding of Fact No. 44, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 9

MCCDD takes exception to a typographical error in Finding of Fact No. 81, on the basis that there is no competent substantial evidence in the record to support it. This error is corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

MCCDD's Exception No. 10

MCCDD takes exception to typographical errors in Conclusion of Law No. 109, on the basis that there is no competent substantial evidence in the record to support them. These errors are corrected in the section of the Final Order titled "Typographical and Grammatical Corrections."

TYPOGRAPHICAL and GRAMMATICAL CORRECTIONS

In addition to its rulings on exceptions, the Governing Board makes the following corrections to typographical and grammatical errors:

1) The Preliminary Statement, page 6, first full paragraph, contains a misspelling of the name Cheryl Johnson. The spelling is hereby corrected to "Cheryl Johnson."

2) In the Preliminary Statement, page 7, first full paragraph, the following correction should be made: after the words "Robert Bullard" the word "Ph.D." should be deleted and the word "P.E." should be inserted.

3) In the Preliminary Statement, on page 9, in the last sentence of the paragraph that begins on page 8, the following correction should be made: "[o]nce they clearly had become aware of and possessed ~~of the~~ MCCDD's objections..."

4) In the Preliminary Statement, on page 9, in the first full paragraph, in the second sentence, the following correction should be made: "Those are the areas of subject matter of opinions of which the MCCDD and the District had ~~have~~ notice..."

5) In Finding of Fact number 3 of the Recommended Order, in the second sentence, the following correction should be made: "Sometime early in 2002, she apparently moved to the Crescent Beach area and lived there for five-six months."

6) In Finding of Fact number 7 of the Recommended Order, in the fifth sentence, the following correction should be made: "About 10 to 30 years ago Billie visited the east side ~~Eastside~~ of the Tolomato River,..."

7) In Finding of Fact number 10 of the Recommended Order, in the fourth sentence, the following corrections should be made: "[c]oncrete and PVC ~~pvc~~ stormwater pipes..."

8) In Finding of Fact number 10 of the Recommended Order, in the fourth sentence, the following corrections should be made: "[W]hich was previously permitted and is located south and west EV-1 site."

9) In Finding of Fact number 17 of the Recommended Order, the following correction should be made: "[The] applicant has limited the amount of impervious surface ~~service~~".

10) In Finding of Fact numbers 19 and 20 of the Recommended Order, over the words "intracoastal waterway" pier, these are hereby corrected to "Intracoastal Waterway."

11) In Finding of Fact number 25 of the Recommended Order, in the second sentence, the following correction should be made: "The finished floor ~~finished flood~~ elevation of the houses would e 8.0 feet."

12) In Finding of Fact number 26 of the Recommended Order, in the third sentence, the following correction should be made: "Thus, 2,691 cubic feet of water will be displaced in the 10-year floodplain..."

13) In Finding of Fact number 36 of the Recommended Order, in the first sentence, the following correction should be made: "[A]s conditionally restricted ~~restrictive~~..."

14) In Finding of Fact number 44 of the Recommended Order, in the eighth sentence, the following correction should be made: "[f]or these types of birds to forage ~~forge~~..."

15) In Finding of Fact number 44 of the Recommended Order, in the last sentence, the following correction should be made: "[T]he wading birds also would not be able to flush very quickly in this area..."

16) In Finding of Fact number 53 of the Recommended Order, the following correction should be made: "MCCDD must provide reasonable ~~reasonably~~ assurance."

17) In Finding of Fact number 57 of the Recommended Order, the following correction should be made: "[T]here will still be a 3 foot high shrub ~~scrub~~ area."

18) In Finding of Fact number 69 of the Recommended Order, the following correction should be made: "[w]as also conducted on the remainder ~~reminder~~ of the EV-1 site..."

19) In Finding of Fact number 81 of the Recommended Order, in the first sentence, the following correction should be made: "The Petitioners contend that a change ~~chance~~ in circumstances has occurred..."

20) In Finding of Fact number 81 of the Recommended Order, in the third sentence, the words "Florida Wildlife Commission" should be corrected to read "Florida Fish and Wildlife Conservation Commission".

21) In Finding of Fact number 109 of the Recommended Order, in the second sentence, the following correction should be made: the word "applicant's handbook" should be changed to "Applicant's Handbook".

22) In Conclusions of Law number 113 of the Recommended Order, in the fourth sentence, the following corrections should be made: "[D]oes not depend on ~~or~~ rainfall events."

23) In Conclusions of Law number 113 of the Recommended Order, in the last sentence, the following correction should be made: "[T]he wetlands in or ~~and~~ adjacent to the floodplain..."

24) In Conclusions of Law number 138 of the Recommended Order, in the first sentence, the following correction should be made: "[t]he secondary impacts from construction, alteration ~~alternation~~ and intended or reasonably intended uses..."

25) In Conclusions of Law number 139 of the Recommended Order, in the third sentence, the following correction should be made: "[i]n those areas ~~area~~ where a 25-foot buffer is proposed..."

26) In Conclusions of Law number 145 of the Recommended Order, in the first sentence, the following correction should be made: "Rule 40C-4.301(i)~~(j)~~..."

27) In Conclusions of Law number 145 of the Recommended Order, in the first sentence, the following correction should be made: "[o]f being performed and of functioning as proposed."

28) The Recommended Order contains a misspelling of the name Anne Stokes. The spelling is hereby corrected to "Anne Stokes, Ph.D."

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

As to the ERP application, the Recommended Order dated February 9,2004, attached hereto, 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 rulings on Petitioners, Bobby C. Billie and Shannon Larsen's, Exceptions 14,16 and 18, District's Exceptions 1,2,3 and 4, MCCDD's Exceptions 1-10, and the typographical corrections noted above. MCCDD's application number 4-109-56730-22 for an individual environmental resource permit is hereby granted under the terms and conditions contained in the District's proposed agency action as set forth in the Technical Staff Report dated September 24, 2003, attached hereto.

DONE AND ORDERED this 13th day of April, 2004, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Ometrias D. Long
CHAIRMAN

RENDERED this 15th day of April, 2004.

BY: Sandra Bertram
SANDRA BERTRAM
DISTRICT CLERK

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOBBY C. BILLIE AND SHANNON LARSEN,	)	
Petitioners,	)	
vs.	)	Case No. 03-1881
ST JOHNS RIVER WATER MANAGEMENT DISTRICT AND MARSHALL CREEK COMMUNITY DEVELOPMENT DISTRICT,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in St. Augustine, Florida, on October 14, 15, 16 and 22, 2003. The appearances were as follows:

APPEARANCES

For Petitioners: Deborah Andrews, Esquire
11 North Roscoe Boulevard
Ponte Vedra Beach, Florida 32082

For Respondent St. Johns River Water Management District:

Veronika Thiebach, Esquire
William Congdon, Esquire
4049 Reid Street
Palatka, Florida 32177

For Respondent Marshall Creek Community Development District:

Marcia Parker Tjoflat, Esquire
Pappas, Metcalf, Jenks & Miller, P.A.
200 West Forsyth Street, Suite 1400
Jacksonville, Florida 32202

and

Stephen D. Busey, Esquire
Allen E. Wulbern, Esquire
Smith Hulsey & Busey
225 Water Street, Suite 1800
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether an environmental resource permit (number 4-109-0216-ERP) (the ERP) should be modified to allow construction and operation of a surface water management system (the project) for a residential development known as EV-1, in a manner consistent with the standards for issuance of ERPs in accordance with Florida Administrative Code Rules 40C-4.301 and 40C-4.302.

PRELIMINARY STATEMENT

This cause arose on April 18, 2003, when the St. Johns River Water Management District (District) issued a notice of intent to issue a modification to an environmental resource permit, application number 4-109-56730-22 (the permit) to provide for the construction and operation of a 23.83 acre, single-family, residential development on parcel EV-1, with an

associated surface water management system; including modifications to a previously permitted stormwater pond which lies on parcel EV-2 (collectively the "project"), as well as on-site and off-site wetland mitigation areas. An ERP had previously been issued for construction of portions of the "Marshall Creek Development of Regional Impact" (DRI). This case involves a proposed modification to that original ERP.

The above-named Petitioners filed a Petition for Formal Administrative Hearing on May 12, 2003, challenging the District's proposed issuance of the permit. They alleged they are "residents" of the state of Florida whose substantial interests would be adversely affected by issuance of the permit. The matter was subsequently referred to the Division of Administrative Hearings to conduct a formal administrative proceeding. The cause was then assigned to Administrative Law Judge Charles A. Stampelos.

A final hearing was originally scheduled for July 29 and 30, 2003, to be held in St. Augustine, Florida. Motions for Continuance were filed by both the Respondent, Marshall Creek Community Development District (MCCDD) and the Petitioners. The final hearing was therefore re-scheduled for the week of October 13, 2003.

The Petitioners moved to amend their Petition on July 15, 2003, requesting that they be allowed to allege standing under

both "substantial interest standing" pursuant to Section 120.569, Florida Statutes, and "citizen standing" pursuant to Section 403.412(5), Florida Statutes (2002). On July 16, 2003, the Petitioners amended the Motion to Amend, clarifying that they sought to claim "citizen standing" pursuant to Section 403.412(5), Florida Statutes (2000), as opposed to the current version of Section 403.412(5), Florida Statutes (2002). In that Amended Motion to Amend, the Petitioners alternatively requested that, if only one Petitioner was able to demonstrate substantial interest standing, the other would be allowed to intervene pursuant to Section 403.412(5), Florida Statutes (2002). In response to the Motions and Responses filed by the other parties, Judge Stampelos denied the Petitioners' request to add Section 403.412(5), Florida Statutes (2002), as a basis for standing to "institute, initiate, petition for or request a proceeding under Section 120.569 or Section 120.57" on the basis that Section 403.412(5), Florida Statutes (2002), does not authorize a citizen to initiate a request for an administrative proceeding to contest an agency action. Judge Stampelos authorized the second Petitioner leave to intervene under Section 403.412(5), Florida Statutes (2002), in the event that only one Petitioner was found to have demonstrated substantial interest standing.

MCCDD filed a Motion for Sanctions on July 16, 2003, alleging that the Petitioners had filed similar Petitions against two related permits which, after hearing, had been granted, and that the Petitioners and their counsel knew that the allegations in their current Petition are not supported by material fact. On July 21, 2003, Judge Stampelos ordered that a ruling on the Motion for Sanctions would be deferred until issuance of a recommended order. On August 12, 2003, the Petitioners responded to the Motion for Sanctions and on August 13, 2003, Judge Stampelos again deferred ruling until the issuance of a recommended order and additional briefing.

A Motion to Relinquish Jurisdiction and a supporting Memorandum of Law was filed on August 1, 2003, by MCCDD, stating that the Petitioners had failed to allege in their Petition, and demonstrate in deposition testimony, how their substantial interests would be affected. Based upon review of the Motion and the response by the Petitioners, Judge Stampelos denied the Motion to Relinquish Jurisdiction on August 12, 2003.

On October 2, 2003, Petitioner Shannon Larsen filed a Motion to Recuse and Disqualify Judge Stampelos. On October 7, 2003, that Motion was granted and the undersigned administrative law judge was assigned to the case.

A Motion-In-Limine was filed by the District on October 6, 2003, shortly before hearing, requesting that an order be

entered precluding the Petitioners from presenting testimony and arguing the issue of whether a mitigation plan exists and whether that plan has "regional ecological value" under the District's rule, since those issues were previously litigated in DOAH Case Nos. 00-2230 and 00-2231. A hearing was conducted on the Motion on October 12, 2003, and the Motion was granted, precluding the Petitioners from re-litigating those referenced issues unless they could show "changed circumstances."

On October 7, 2003, the Petitioners filed a Motion for Expert Witness Fees and on October 10, 2003, MCCDD filed a Motion for Recovery of certain discovery costs, a Response to the Motion for Expert Witness Fees and a Request for timing of payment.

The cause came on for final hearing as noticed. MCCDD presented testimony from the following witnesses: Peter Hallock, an expert in civil engineering; Nancy Zyski, an expert in biology, wetlands mitigation, and wildlife and wildlife habitat; Ann Stokes, Ph.D., an expert in cultural resource management, archeology and cultural resources; Harvey Harper, III, an expert in civil engineering, stormwater treatment and hydraulic, hydrology and water quality; Nick Oweis, an expert in geotechnical engineering; Donald Fullerton; and the deposition testimony of Laura Kammerer, State of Florida, Deputy Historic Preservation Officer. During her deposition Ms. Kammerer was

offered as an expert in archeology and cultural resource management. She is so accepted. MCCDD Exhibits numbered 1-7, 10, 11, 12-14, 16, 18-23, and 25-30 were received into evidence. MCCDD Exhibit 11 was partially admitted. A September 17, 2003, letter from Cherly Johnson contained in Exhibit 11 was not admitted. The remainder of the exhibit was admitted, however. MCCDD Exhibit 12 was admitted with an amendment. The map "location of tributary one to Tolomato River in St. Johns County" in Appendix G of MCCDD Exhibit 14 was not admitted. The remainder of Exhibit 14 was admitted. The District presented testimony from the following witnesses: David Miracle, an expert in water resource engineering, hydrology, and water quality; Walter Esser, an expert in wetland and wildlife ecology, mitigation planning and wetland delineation. Exhibits 1-5 were offered by the District and received into evidence.

The Petitioners presented testimony from the following witnesses: Richard McCann, an expert in biology, wildlife and wildlife habitats; Bobby Billie, an expert in the indigenous cultures of Florida; Bruce Piatek, an expert in archeology; Frank Marshall, III, an expert in civil, stormwater and environmental engineering and water quality; Robert Burks, an expert in ecology, biology, marine biology, and water quality; Glenda Thomas; Robert Bullard, Ph.D., an expert in civil and stormwater engineering; Shannon Larsen; and the deposition

testimony of Thomas S. Hoctor (Petitioners' Exhibit 39-A). The following exhibits offered by the Petitioners were received into evidence: The Petitioners' Exhibits numbered 3-5, 7, 15, 17-19, 22-23, 26-28, 33, 35, and 40. The Petitioners' Exhibit 7 was admitted on a limited basis only to show generalized pictures of the EV-1 site and surrounding area.

The Petitioners sought to enter into evidence Exhibit 39-A, the October 7, 2003, discovery deposition of Dr. Thomas S. Hoctor, Ph.D. The deposition had been noticed and conducted by MCCDD and the District and select deposition exhibits were attached thereto. MCCDD and the District objected to its admissibility on several grounds, including that Dr. Hoctor had not been qualified as an expert witness, concerning due process violations, relevancy, and hearsay. The deposition was not then admitted into evidence. The Petitioners were allowed to proffer the deposition and all its exhibits.

The deposition was excluded because it did not meet the standards of Section 90.803(22), Florida Statutes, because it was noticed and conducted as a discovery deposition, and not taken for the purpose of preserving expert opinion testimony for potential use in lieu of live testimony for hearing. Consequently, the parties calling the deposition, MCCDD and the District did not have the same motives in questioning upon direct examination or re-direct examination, as might be the

case had the Petitioners, who sought to use the deposition at hearing, deposed Dr. Hoctor for purposes of preserving his testimony prior to hearing. The Petitioners only asked one question, concerning the deponent's resume, during the course of the entire deposition. Thus, all of the frailties associated with using discovery depositions as testimony are presented. See In Re: Amendments to the Evidence Code, 782 So. 2d 339 (Fla. 2000); Friedman v. Friedman, 764 So. 2d 754 (Fla. 2nd DCA 2000). Accordingly, the deposition was not admitted at hearing.

The Petitioners were allowed to proffer and MCCDD and the District were allowed a five-day period, post-hearing, to submit memoranda stating their objections to the deposition as an exhibit. They timely submitted their memoranda objecting to the deposition opinion testimony of Dr. Hoctor on October 29, 2003. The Petitioners were accorded a like time to respond to the objections and demonstrate a basis for admissibility. The Petitioners responded on November 5, 2003, to the District's memorandum, but have not responded to MCCDD's memorandum and objections. Instead, on November 12, 2003, the Petitioners filed a "notice of non-service" of MCCDD's objections and memorandum regarding admitting the expert discovery deposition in lieu of live testimony. Also, on that date, MCCDD filed a response to the Petitioners' notice of non-service. It would appear that the MCCDD served its objections and memorandum

concerning admission of the discovery deposition by facsimile transmission. In an earlier order in this proceeding Judge Stampelos had authorized the use of "fax" service as appropriate. Nevertheless, the Petitioners maintained that they did not receive the fax, because their fax machine was not operating or "turned off" on the day of service. Notwithstanding that, once they clearly had become aware of and possessed of the MCCDD's objections to the deposition testimony, and related memorandum of law they have never filed a response.

The transcript of the deposition reveals that Dr. Hoctor believed that he was called upon to render expert opinions relating to only two issues: (1) whether the Marshall Creek Mitigation Plan has regional ecological value and (2) the value of the mitigation plan offered for the project. Those are the areas or subject matter of opinions of which the MCCDD and the District have notice. The first issue however, was rendered irrelevant by the ruling on the District's Motion-in-Limine, namely, that the Marshall Creek Mitigation Plan existed and had regional ecological value. That ruling occurred after the time of the deposition and therefore the parties did not have a motive or opportunity to object to Dr. Hoctor's testimony on that issue at the deposition. Concerning the second issue, Dr. Hoctor was not tendered or accepted as an expert in the field of mitigation and his resume does not reflect extensive

experience in that field, although he has training and experience in the area of wildlife conservation ecology and the study of and delineation of conservation reserve-type lands. Consequently, although strictly considered, under the above-referenced authority, the deposition should not be admissible, because both MCCDD and the District conceded in their proposed recommended orders to limited admissibility of the deposition, the deposition testimony will be admitted. It will, however, be accorded less weight in the area of mitigation, the only remaining relevant area on which Dr. Hoctor himself indicates he was opining, in relation to the other witnesses' testimony, particularly that of witness Zyski and Esser, who had substantially more direct observational and analytical experience with the proposed project, the site, and the surrounding geographical area than Dr. Hoctor.

MCCDD has filed a Motion for Sanctions against the Petitioners and the Petitioners' counsel and a Motion for Recovery of certain discovery costs. The Petitioners have moved for Expert Witness Fees. Upon consideration of all relevant circumstances, the three motions are denied. The parties obtained a nine-volume transcript of the proceedings and timely filed Proposed Recommended Orders. The Proposed Recommended Orders have been read and considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The applicant MCCDD is a unit of special purpose government established in accordance with the provisions of Chapter 190, Florida Statutes for purposes enunciated by that statute. MCCDD has applied for the permit modification at issue in this proceeding.

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

3. Petitioner Larsen was born in Daytona Beach, Florida. Sometime early in 2002 she apparently moved to the Crescent Beach area and lived for 5-6 months. Crescent Beach is approximately 30 minutes from the EV-1 site. Since October 2002, Petitioner Larsen has been a resident of Live Oak, Florida. She resided for most of her life in Daytona Beach, approximately one hour and 20 minutes from the site. She has been involved with the approval process of the entire Palencia Development (DRI) since 1998, of which the subject parcel and project is a part. The Petitioner likes to observe wildlife in natural areas and to fish, swim, and camp.

4. Ms. Larsen has visited the Guana River State Park (Park) which borders the Tolomato River. Her first visit to the

Park was approximately one to two years before the DRI approval of the Palencia project. Ms. Larsen has used the Park to observe birds and other wildlife and to fish. She has fished the Tolomato River shoreline in the Park, and also at the Park dam located across the river and south about two and one-half miles from the EV-1 site. Ms. Larsen has seen the Tolomato River some 30 to 40 times and intends to continue using the Tolomato River and the Guana River State Park in the future.

5. On several occasions she and Petitioner Billie have visited "out-parcel" residents of the Palencia development and viewed wildlife and birds and walked the Marshall Creek area and the marsh edge viewing various bird species. In June 2003, after this litigation ensued, she, her niece and out-parcel resident Glenda Thomas walked a great deal of the subject site taking photographs of wildlife.

6. In July 2003, Larsen and Billie participated in a fishing boat trip in the Marshall Creek area. In September 2003, she and Petitioner Billie kayaked on two consecutive days in the Tolomato River and in Marshall Creek, observing various wildlife such as endangered Wood Storks. Petitioner Larsen has been actively involved for the past 12 years as an advocate for the protection of indigenous or native American burial, village and midden sites on private and government property.

7. Petitioner Billie is a spiritual leader or elder of the Independent Seminole Nation of Florida. In that capacity he sees it as his responsibility to protect animals, rivers, trees, water, air, rains, fish, and "all those things." The Independent Traditional Seminole Nation consists of approximately 200 persons, most of whom reside in Southern Florida. Mr. Billie lives in Okeechobee, Florida, several hours distant by automobile from the project site. About 10 to 30 years ago Billie visited the Eastside of Tolomato River, to visit the beach, the river and other areas in what is now Guana State Park. He visited the dike or dam area and walked along the river front in what is now the Park. He checked on burial sites along the Tolomato River in what is now Guana State Park.

8. Billie first visited the Palencia property about five years ago and has been back a number of times. He has observed various forms of wildlife there and has visited out-parcel owners in the development area to ensure that they do not destroy any burial sites. Billie considers himself an environmental and indigenous rights advocate charged with maintaining the earth and resources for the next generation and preserving sacred and burial sites of indigenous people. He has in the past assisted governmental entities in preserving sacred indigenous sites and burial sites and has participated in the reburials of human remains and their belongings.

9. Sometime ago Billie went on a boat ride on the Tolomato River. Since the filing of the Petition in this proceeding he has been in a kayak on the Tolomato River twice and once in a boat in the vicinity of Marshall Creek. He has also observed Marshall Creek from Shannon Road. He has been on the EV-1 site three times, all in conjunction with this litigation. His concerns with the EV-1 project in part stem from alleged impacts to an indigenous burial ground which he feels he identified, due to the presence of "a lot of shell." However, all of the shell was located in a previously constructed road bed off of the EV-1 project site. He testified that he has had no training with regard to identification of archeological sites, but that he can "feel" if a burial site is present. He believes that the EV-1 project will adversely affect everyone just like it adversely affects him.

The Project

10. The project is a 23.83-acre, single-family residential development and an associated stormwater system known as EV-1. It lies within the much larger Marshall Creek DRI in St. Johns County, Florida. The project is in and along wetlands associated with the Tolomato River to the east and wetlands associated with Marshall Creek, a tributary of the Tolomato River, to the north. The project consists of thirteen residential lots, two curb and gutter roadway segments with cul-

de-sacs (Hickory Hill Court and North River Drive), paved driveways to individual lots, concrete and pvc stormwater pipes, two stormwater lift stations, perimeter berms, four stormwater run-off storage ponds, and an existing wet detention stormwater pond, which was previously permitted and located south and west of the EV-1 site. The project will also have on-site and off-site wetland mitigation areas. All portions of the EV-1 site are landward of the mean high waterline of the adjacent water bodies.

11. The project plan calls for permanent impacts to 0.82 acres of wetlands. A total of 0.75 acres of that 0.82 acre wetlands is comprised of fill for four access crossings for roads and driveways and a total of 0.07 acres is for clearing in three areas for boardwalk construction.

12. MCCDD proposes to preserve 6.47 acres of forested wetlands and 5.6 acres of saltmarsh wetlands, as well as to preserve 10.49 acres of upland buffers; to restore 0.05 acres of salt marsh and to create 0.09 acres of salt marsh wetlands as mitigation for any wetland impacts. The EV-1 mitigation plan is contiguous to and part of the overall Marshall Creek DRI mitigation plan. The Marshall Creek DRI is also known as "Palencia." The upland buffers are included to prevent human disturbance of the habitat value of off-site wetlands. The upland buffers on the EV-1 site range from 25 feet in areas that

do not adjoin tidal marshes to 50 feet in areas which front the Tolomato River or Marshall Creek. Within the 25-foot buffers restrictions include (1) no trimming of vegetation and (2) no structures may be constructed. Within the 50-foot buffers the same restrictions apply, except that for 50 percent of the width of each lot, selected hand trimming may be done on branches 3 inches or less in diameter between 3 and 25 feet above the ground surface. The buffers and other preserved areas will be placed in conservation easements, ensuring that they will remain undisturbed.

The Stormwater Management System

13. The 23.83 acre drainage area of the EV-1 project is divided into two types: (1) "Developed Treated Area" consisting of the houses, a portion of each residential lot, all driveways, sidewalks and both cul-de-sac roadway sections, comprising 11.27 acres and (2) "Undeveloped Buffer Area" consisting of the undeveloped portion of the residential lots or 12.56 acres. The buffer areas are located between the developed treated area and the surrounding receiving water.

14. The developed and undeveloped areas of each lot will be separated by earthen berms. The berms will be constructed within each lot and will be a minimum of one foot high above existing ground level at the landward ledge of the natural buffer area. When water falls on the house and the surrounding

yard it will be directed through grading to the berm of the lot. Once it reaches the berm it will be collected in a series of inlets and pipes; and once collected within the pipe system it will be stored within the collection system and in several storage ponds.

15. The developed areas storage systems consisting of the inlets, pipes and storage ponds are then connected to two stormwater lift stations that transfer the stored runoff to an existing wet detention pond, known as the EV-2 pond, which is located immediately adjacent to the EV-1 project area.

16. There are two pumps and a wet well in each pump station. The combination of storage ponds, piping systems, the wet wells and the pump stations provide storage of the entire required treatment volume which is 61,000 cubic feet. Actually, the system has been designed to treat 65,000 cubic feet, somewhat in excess of the required treatment volume. Even when the pumps are not running these components of the system are able to completely contain the required treatment volume.

17. The system has been designed to capture and treat in excess of 1.5 inches of runoff. This is the runoff that would be generated from a 5.3 inch rainfall event which is expected to occur less than once per year. This l.5 inches of runoff would generate the required 61,000 cubic feet of treatment volume. In order to ensure that the design volume is not exceeded, the

applicant has limited the amount of impervious service on each lot to a maximum of 10,000 square feet.

18. In order to ensure that the on-lot ponds in the collection system are hydrologically isolated, they have been designed to be either completely lined or constructed with "cut-off walls" placed in soils with either a hard pan layer or a layer of low permeability. This would prevent the ponds from de-watering nearby wetlands by removing any hydrologic communication between those wetlands and the ponds. Further, the liners and cut-off walls will isolate the pond from the effects of groundwater. This will ensure that the ponds can be maintained at the designed water level and that, therefore, the collection system will have the required storage volume.

19. The EV-2 pond provides for wet detention treatment and was previously permitted and constructed as part of the EV-2 project. In order to accommodate the additional flow from the EV-1 site, the existing orifice will be plugged and an additional orifice will be installed. No changes will be made to the shape, depth, width, or normal water elevation of the EV-2 pond. The EV-2 pond discharges into wetland systems that are directly connected to the intracoastal waterway.

20. The EV-2 pond discharges into a wetland system and has a direct hydrologic connection to the intracoastal waterway north of the Matanzas inlet. The District rules do not contain

a legal definition of the intracoastal waterway; however, for the purpose of determining whether a project discharge constitutes a direct discharge to the intracoastal waterway, the waterway includes more than the navigable channel of the intracoastal waterway. (Projects that have a direct discharge to the intracoastal waterway north of the Matanzas inlet are not required to demonstrate that the post-development peak rate of discharge does not exceed the pre-development peak rate of discharge, because this criterion was designed to evaluate the flooding impacts from rainfall events.) Flooding in water-bodies such as the intracoastal waterway is not governed by rainfall, but rather by tides and storm surges.

21. The system design includes a clearing and erosion control plan and specific requirements to control erosion and sediment. The system design incorporates best management practices and other design features to prevent erosion and sedimentation, including (1) capturing turbidity; (2) sodding and grassing side slopes; (3) filtering water; (4) use of siltation fences during construction; (5) removing sediment; (6) early establishment of vegetative cover; and (7) keeping water velocities low, at less than 2 feet per second.

22. The EV-2 pond is hydrologically isolated from groundwater influence because it was constructed with cut-off walls placed into a hard pan, impermeable layer. The EV-2 pond

appears to be working properly, with no indication of adverse groundwater influence.

23. The system has been designed to prevent adverse impacts to the hydro-period of remaining wetlands. The wetlands are hydrated through groundwater flow. The groundwater will still migrate to the wetlands as it did in the pre-development condition. The cut-off walls and liners in the ponds will prevent draw-down of groundwater from the wetlands. No septic tanks are planned for the project.

24. The system is designed based on generally accepted engineering practices and should be able to function as designed. The pumps are three inch pumps that can handle solids up to two and one-half inches in diameter. Yard grates have one-inch slots that will prevent anything larger than one inch diameter from entering the system. Additionally, solids would accumulate in the sump areas. Finally, even if there were a power outage, the system can store the full treatment volume, without discharging, until power is restored.

Flood Plain Consideration

25. The 100-year flood elevation for the EV-1 site is 7.0 feet NGVD. The finish flood elevation of the houses will be 8.0 feet. The streets and roadways have been designed to be flood free in accordance with the St. Johns County criteria relating to flooding.

26. The 10-year flood elevation for the EV-1 site is 4.1 feet NGVD. The project will result in filling 2,691 cubic feet of fill in areas below the 4.1-foot NGVD elevation which will include 2,456 cubic feet for "Hickory Hill" and 235 cubic feet for "North River." Thus, 2,691 feet of water will displaced in the 10-year floodplain of the Tolomato River as a result of the EV-1 project. This fill will result in a rise in water elevation in the Tolomato River of 0.0002 feet, which is less than the thickness of the single sheet of paper and is statistically insignificant. If other applicants were to impact the 10-year floodplain to the same extent, there would be no adverse cumulative impact in the flood storage capability of the floodplain. The Tolomato River/intracoastal waterway does not function as a floodway because it is more influenced by wind and tide than by stormwater runoff. Therefore, the project will not cause a net reduction in the flood conveyance capabilities of a floodway.

Surface Water

27. Each roadway and master driveway is provided with culverts to ensure redundant, multiple paths for water flow. For this reason, the wetland fill will not significantly impact the flow of water. These redundant connections also ensure that the water velocities are low, reducing the likelihood of erosion.

28. In order to ensure that erosion will not occur, surface water velocities will be less than two feet per second and steep slopes (greater than two percent) will be sodded. The project does not impound water other than for temporary detention purposes. The project does not divert water to another hydrologic water basin or water course.

Water Quality

29. The Tolomato River and Marshall Creek, its tributary, are classified as Class II water bodies pursuant to Florida Administrative Code Rule 62-302.400. The designated use for Class II water is for shellfish harvesting. The Tolomato River is the receiving water for the EV-1 project.

30. The Marshall Creek and Tolomato River Class II waters do not meet the applicable Class II water quality standards for total fecal coliform bacteria and for dissolved oxygen (DO). Water sampling indicates that sometimes the regulatory parameters for fecal coliform and for DO are exceeded in the natural occurring waters of Marshall Creek and the Tolomato River.

31. The EV-2 pond has a large surface area and the top of the water column will be the most well-oxygenated due to contact with the atmosphere. Any water discharging from the pond will come from the surface of the pond which is the water containing the highest oxygen content in the entire water column of the

pond. Thus, discharges from the EV-2 pond will not violate water quality standards for DO and the construction and operation of the project will actually improve the water quality in the receiving waters with respect to the dissolved oxygen parameter.

32. Bacteria such as fecal coliform, generally have a life span of a few hours to a few days. The EV-2 pond will have a detention time, for water deposited therein, of approximately 190 days. This lengthy residence time will provide an ample opportunity for die-off of any coliform bacteria in the water column before the water is discharged from the pond. Additionally, there will be substantial dilution in the pond caused by the large volume of the pond. No new sources of coliform bacteria such as septic tanks are proposed as part of the EV-1 project. The fecal coliform discharge from the pond will thus be very low in value and will lead to a net improvement in the water quality of the receiving water-body. In fact, since the commencement of construction on the Marshall Creek DRI phases, a substantial and statistically significant decrease in fecal coliform levels has been observed in the main channel of Marshall Creek.

33. The applicant has provided a detailed erosion control plan for the construction phase of the EV-1 project. The plan requires the use of best erosion and sediment control practices.

In any location that will have slopes exceeding a two percent gradient, sodding will be provided adjacent to roadways or embankments, thereby preventing erosion.

34. The EV-1 project design is based on generally accepted engineering practices and it will be able to function and operate as designed. The liner and cut-off wall components of the pond portions of the project are proven technology and are typical on such project sites which are characterized by high groundwater table and proximity to wetlands. The pump stations component of the project design is proven technology and is not unusual in such a design situation. The pump stations have been designed according to the stringent specifications provided for wastewater lift station pumps in sewer systems which operate with more frequency and duration of running times and therefore, more stressful service, than will be required for this system.

35. Once constructed, the surface water management system will be operated and maintained by the applicant, which is a community development district. An easement for access in, on, over and upon the property, necessary for the purpose of access and maintenance of the EV-1 surface water management system, has been reserved to the community development district and will be a permanent covenant running with the title to the lots in the project area.

36. The portions of the river and Marshall Creek adjacent to the project have been classified by the Department of Environmental Protection as conditionally restrictive for shellfish harvesting because of fecal coliform bacterial levels, which often exceed state water quality standards for that parameter. The boundary of the conditional shellfish harvesting area is the mean high water elevation. The EV-1 project site is located above the mean high water elevation. None of the wetland areas within the project site are able to support shellfish due to the characteristics of the wetlands and the lack of daily inundation of the high marsh portion of the wetlands. No shellfish have been observed on the EV-1 site. The EV-1 project will not result in a change in the classification of the conditionally restricted shellfish harvesting area.

37. The project will not negatively affect Class II waters and the design of the system and the proposed erosion controls will prevent significant water quality harm to the immediate project area and adjacent areas. The discharge from the project will not change the salinity regime or temperatures prevailing in the project area and adjacent areas.

Wetland Impact

38. The 23.83-acre site contains five vegetative communities that include pine, flatwood, uplands, temperate

hardwood uplands, wetland coniferous forest, wetland mixed forest and salt marsh. Several trail roads that were used for site access and forestry activities traverse the site.

39. The project contains 0.82 acres of wetlands. The wetland communities are typical and are not considered unique.

40. Most of the uplands on the main portion of the site exhibit the typical characteristics of a pine flatwood community. Some of the road-crossing areas within the EV-1 boundary are wetland pine flatwoods; these areas are dominated by pines and a canopy, but are still considered wetlands. There is also a very small area of high marsh vegetative community within the EV-1 boundary.

41. Most of the site, both wetlands and uplands, has been logged in the past. The wetlands are functional; however, the prior logging operations have reduced the overall wildlife value of the site, including that of the wetlands, due to the absence of mature trees. All of the wetlands on the EV-1 site are hydrologically connected to and drain to the Marshall Creek and Tolomato River systems.

42. The wetlands on the site are adjacent to an ecologically, important watershed. To the east of the EV-1 site, the Tolomato River and Marshall Creek are part of the Guana Marsh Aquatic Preserve. The Guana River State Park and Wildlife Management Area is also to the east of the EV-1 site.

All the wetlands and uplands on the EV-1 site are located above the elevation of the mean high water line and therefore are outside the limit of the referenced Aquatic Preserve and Outstanding Florida Water (OFW).

Direct Wetland Impact

43. Within the site boundary there will be a total of 0.82 acres of wetland impacts in seven areas. MCCDD proposes to fill 0.75 acres of the wetlands to construct roads to provide access to the developed uplands and selectively clear 0.07 acres of the mixed forested wetlands to construct three pile-supported pedestrian boardwalks. The fill impacts include 0.29 acres within the mixed forested wetlands, 0.32 acres within the coniferous wetlands, and 0.14 acres within the high salt marsh area. The direct impacts to wetlands and other surface waters from the proposed project are located above the mean high water line of Marshall Creek and the Tolomato River.

44. The first impact area is a 0.25-acre impact for a road crossing from the EV-2 parcel on to the EV-1 site. 0.14 acres of the 0.25 acres of impact will be to an upper salt marsh community and 0.11 acres of impact is to a mixed forested wetland. This impact is positioned to the south of an existing trail road. The trail road has culverts beneath it so there has been no alteration to the hydrology of the wetland as a result of the trail road. This area contains black needle rush and

spartina (smooth cord grass). The black needle rush portion of this area may provide some foraging for Marsh Wrens, Clapper Rails and mammals such as raccoons and marsh rabbits. The fresh-water forested portion of this area, which contains red maple and sweet gum, may provide foraging and roosting and may also be used by amphibians and song birds. Wading birds would not likely use this area because the needle rush is very sharp-pointed and high and will not provide an opportunity for these types of birds to forge and move down into the substrate to feed. The wading birds also would be able to flush very quickly in this area and their predators would likely hide in this area.

45. The second impact area is a 0.25-acre impact to a pine flatwoods wetland community and will be used for a road crossing. It is in a saturated condition most of the time. The species that utilize this area are typically marsh rabbits, possums, and raccoons.

46. The third impact area is a 0.18-acre impact to a mixed forested wetlands for a roadway crossing on the south end of the project. The impact is positioned within the area of an existing trail road. The trail road has culverts beneath it, so there will be no alteration to the hydrology of the wetland as a result of the road. This area is characterized by red maple, sweet gum and some cabbage palm. There will be marsh rabbits, raccoons, possums, some frogs, probably southern leopard frogs

and green frogs in this area. Wading birds would not likely use this area due to the same reasons mentioned above.

47. The fourth impact area is a 0.07-acre impact for a driveway for access to Lot two. This area is a mixed forested wetland area, having similar wildlife species as impact areas three and seven.

48. The fifth impact area is a 0.02-acre clearing impact for a small residential boardwalk for the owner of Lot six to access the uplands in the back of the lot. The proposed boardwalk will be completely pile-supported and will be constructed five feet above the existing grade. This area is a mixed forested wetland area, having similar species as impact areas three and seven. Wading birds would also not likely use this area for the same reasons delineated above as to the other areas.

49. The sixth impact area is also a 0.02-acre clearing impact similar to impact area five. The proposed board walk would be located on Lot five and be completely pile-supported five feet above the existing grade. This area is a mixed forested wetland area similar to impact area five. Deer will also use this area as well as the rest of the EV-1 site. Wading birds will probably not use this area due to the same reasons mentioned above.

50. The seventh impact area is a 0.03-acre impact for two sections of a public boardwalk (previously permitted) for the Palencia Development. The proposed boardwalk will be completely pile-supported, five feet above the existing grade. This is a pine-dominated area with similar wildlife species to impact area two.

51. All these wetlands are moderate quality wetlands. The peripheral edges of the wetlands will be saturated during most of the year. Some of the interior areas that extend outside the EV-1 site will be seasonally inundated.

Secondary Impacts

52. The applicant is addressing secondary impacts by proposing 8.13 acres of 25-foot wide (or greater) upland buffers and by replacing culverts at the roadway crossings to allow for wildlife crossing and to maintain a hydrologic connection. Mitigation by wetland preservation is proposed for those areas that cannot accommodate upland buffers (i.e., the proposed impact areas).

53. Under the first part of the secondary impact test MCCDD must provide reasonably assurance that the secondary impact from construction, alteration and intended or reasonably expected uses of the project will not adversely affect the functions of adjacent wetlands or other surface waters.

54. With the exception of wetland areas adjacent to the road crossings, MCCDD proposes to place upland buffers around the wetlands where those potential secondary impacts could occur. The buffers are primarily pine flatwoods (pine dominated with some hardwood). These buffers encompass more area than the lots on the EV-1 site. The upland buffers would extend around the perimeter of the project and would be a minimum of 25 feet and a maximum of 50 feet wide, with some areas actually exceeding 50 feet in width. The buffers along the Marshall Creek interface and the Tolomato River interface will be 50 feet and the buffers that do not front the tidal marshes (in effect along the interior) will be 25 feet. These upland buffers will be protected with a conservation easement.

55. No activities, including trimming or placement of structures are allowed to occur within the 25-foot upland buffers. These restrictions ensure that an adequate buffer will remain between the wetlands and the developed portion of the property to address secondary impacts. The restriction placed on the 25-foot buffers is adequate to prevent adverse secondary impacts to the habitat value of the off-site wetlands.

56. No types of structures are permitted within the 50-foot buffers. However, hand-trimming will be allowed within half of that length along the lot interface of the wetland. Within that 50 percent area, trimming below three-feet or above

25-feet is prohibited. Trimming of branches that are three inches or less in diameter is also prohibited. Lot owners will be permitted to remove dead material from the trimming area.

57. The 50-foot buffers will prevent secondary impacts because there will still be a three-foot high scrub area and the 50 foot distance provides a good separation between the marsh which will prevent the wading birds, the species of primary concern here, from flushing (being frightened away).

58. None of the wetland area adjacent to uplands are used by listed species for nesting, denning, or critically important feeding habitat. Species observed in the vicinity of Marshall Creek or the adjacent Tolomato River wetland aquatic system include eagle, least tern, brown pelican, and wading birds such as the woodstork, tri-color blue heron, and snowy egrets. Wading Birds will typically nest over open water or on a island surrounded by water. Given the buffers proposed by MCCDD, the ability of listed species to forage in the adjacent wetlands will not be affected by upland activities on the EV-1 site. The adjacent wetlands are not used for denning by listed species.

59. Under the second part of the secondary impact test, MCCDD 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 nesting or denning by these species.

60. There are no areas on the EV-1 site that are suitable for nesting or denning by threatened or endangered species and no areas on the EV-1 site that are suitable for nesting or denning by aquatic and wetland dependent species. After conducting on-site reviews of the area, contacting the U.S. Fish and Wildlife Service and the Florida Wildlife Commission and reviewing literature and maps, Mr. Esser established that the aquatic and wetland listed species are not nesting or denning in the project area.

61. There is a nest located on uplands on the first island east of the project site, which was observed on October 29, 2002. The nest has been monitored informally some ten times by the applicants, consultants and several times by personnel of the District. The nest was last inspected on October 14, 2003. No feathers were observed in the nest at that time. It is not currently being used and no activity in it has been observed. Based on the absence of fish bones and based upon the size of the sticks used in the nest (one-half inch) and the configuration of the tree (crotch of the tree steeply angled) it is very unlikely that the nest is that of an American Bald Eagle. It is more likely the nest of a red-tailed hawk.

Historical and Archeological Resources

62. Under the third part of the secondary impact test and as part of the public interest test, any other relevant activities that are very closely linked and causally related to any proposed dredging or filling which will cause impacts to significant historical or archeological resources must be considered.

63. When making a determination with regard to this part of the secondary impact test the District is required by rule to consult the Division of Historical and Archeological Resources (the Division) within the Department of State. The District received information from the Division and from the applicant regarding the classification of significant historical and archeological resources. In response to the District's consultation with the Division, the Division indicated that there would be no adverse impacts from this project to significant historical or archeological resources.

64. As part of the Marshall Creek DRI application, a Phase I archeological survey was conducted for the entire area of the DRI, including the EV-1 project area. The Phase I survey of the Marshall Creek DRI area revealed nine archeological sites. At the end of the Phase I survey, five of the nine sites were recommended to be potentially eligible for the National Register of Historical places and additional work was recommended to be

done on those five sites, according to Dr. Ann Stokes, the archeologist who performed the Phase I survey and other archeological investigation relevant to this proceeding.

65. One of the sites considered eligible for listing on the National Register of Historic Places was site 8SJ3146. Site 8SJ3146 was the only site found in the area near the EV-1 project site. The majority of the EV-1 project site lies to the east of this archeological site. The entry road leading into EV-1 crosses the very southeastern edge or corner of the 8SJ3146 archeological site.

66. Shovel tests for archeological remains or artifacts were conducted across the remainder of the EV-1 property and were negative. Ceramic shards were found in one of the shovel tests (shovel test number 380), but it was determined by Dr. Stokes that that ceramic material (pottery) had been within some type of fill that was brought into the site and the ceramics were not artifacts native to that site. Therefore, it was not considered a site or an occurrence. There was no evidence of any human remains in any of the shovel test units and there was nothing to lead Dr. Stokes to believe that there were any individuals buried in that area. (EV-1)

67. Because a determination was made that 8SJ3146 was a potentially significant site, a "Phase II assessment" was conducted for the site. During the Phase II assessment five

tests units were established on the site to recover additional information about the site and assess its significance. The test unit locations (excavations) were chosen either to be next to an area where there were a lot of artifacts recovered or where an interesting type of artifact had been recovered. Test units one through four contained very few or no artifacts. Test unit five however, yielded faunal bones (animal remains), pottery and a post mold (post molds are evidence of support posts for ancient structures).

68. After the Phase II assessment was conducted, site 8SJ3146 was considered to be significant, but the only part of the site that had any of the data classes (artifact related) that made it a significant site was in the area of the very southwest portion of 8SJ3146, surrounding test unit five. Dr. Stokes recommended that the area surrounding test unit five in the very southwestern portion of 8SJ3146 be preserved and that the remainder of the site would not require any preservation because the preservation of the southwestern portion of the site was the only preservation area which would be significant archeologically and its preservation would be adequate mitigation. That southwestern portion of the site, surrounding unit five, is not on the EV-1 site.

69. Dr. Stokes recommended to the applicant and to the Division that a cultural resource management plan be adopted for

the site and such a plan was implemented. A Phase I cultural resource survey was also conducted on the reminder of the EV-1 site, not lying within the boundaries of 8SJ3146. That survey involved shovel tests across the area of the EV-1 project area and in the course of which no evidence of archeological sites was found. Those investigations were also reported to the Division in accordance with law.

70. The preservation plan for site 8SJ3146, as to preservation of the southwest corner, is now called an archeological park. That designation was shown to be adequate mitigation for this site. The preservation area is twice as large as the area originally recommended by Dr. Stokes to be preserved; test unit five is within that preservation area.

71. Dr. Stokes's testimony and evidence are not refuted by any persuasive countervailing evidence and are accepted. They demonstrate that the construction and operation of the EV-1 project will not adversely affect any significant archeological or historical resources. This is because any effects to site 8SJ3146 are mitigated by the adoption of the preservation plan preserving the southwest portion of that archeological site.

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

quality violations. MCCDD has demonstrated that any future phase or expansion of the project can be designed in accordance with the District's rule criteria.

Mitigation of Adverse Impacts

73. The permit applicant has proposed mitigation to offset adverse impacts to wetland functions as part of its ERP application. The proposed mitigation consists of 0.05 acres of wetlands restoration, 12.07 acres of wetland preservation (including 6.47 acres of mixed forested wetlands and 5.60 acres of salt marsh), 10.49 acres of upland preservation (which includes buffers and additional upland areas) and 0.09 acres of salt marsh creation.

74. The mitigation for the EV-1 project will occur on-site and off-site; 10.49 acres of upland buffer are being committed to the project. The upland buffers are on-site; the rest of the mitigation is off-site and is adjacent to EV-1. There will be 5.6 acres of salt marsh preservation and 6.47 acres of forested wetland preservation. All of the mitigation is on land lying above the mean high water elevation and is outside the aquatic preserve and the OFW. The salt marsh restoration will occur by taking out an existing trail road that is in the northeast section of the site and the salt marsh creation site is proposed at the tip of lot number one.

75. The preservation of wetlands provides mitigation value because it provides perpetual protection, ensuring that development will not occur in those areas, as well as preventing agricultural activities, logging and other relatively unregulated activities from occurring there. This will allow the conserved lands to mature and to provide more forage and habitat for wildlife that would use those areas. The functions that are currently being provided by the wetlands to be impacted will be replaced and exceeded in function by the proposed mitigation. Additionally, MCCDD did not propose any impacts on site that could not be offset by mitigation. The EV-1 project will not adversely affect the abundance and diversity and habitat of fish and wildlife. The mitigation for the proposed project is also located within the same drainage basin as the area of wetlands to be adversely impacted.

76. MCCDD has proposed mitigation that implements all or part of a plan of regional ecological value and the proposed mitigation will provide greater long-term ecological value than the wetlands to be impacted.

77. The plan of regional ecological value consists of the land identified in the DRI as well as the lands that have been permitted as mitigation up to date and the proposed EV-1 mitigation lands. The plan includes lands that have been added to the plan since the approval of the Marshall Creek DRI.

78. The mitigation proposed for the impact to wetlands and other surface waters associated with the project is contiguous with the Guana River Marsh Aquatic Preserve, with previously preserved wetlands and upland islands and with Marshall Creek. When implemented the mitigation plan will create wetlands and preserve wetlands and uplands with functions similar to the impacted wetlands and those wetlands will be connected through wetland and upland preservation to the Guana River Marsh Aquatic Preserve.

79. Corridors and preservation areas important for wildlife movement throughout the whole Palencia site have been set aside. As development progresses towards the eastern portion of the Marshall Creek site, it is important to add preservation areas to the whole larger plan. The lands proposed to be added as mitigation for the EV-1 project will add to the value of the previously preserved lands from other phases of the DRI and development by helping to maintain travel corridors and forage areas for wildlife, to maintain water quality in the adjacent marsh and to maintain fish and wildlife benefits of the aquatic preserve.

80. MCCDD has provided more mitigation than is typically required by the District for such types of impact. The upland preservation ratios for example range from about three-to-one to twenty-to-one. MCCDD is providing upland preservation at a near

twenty-to-one ratio. Salt marsh preservation ratios are typically required to be sixty to one and MCCDD is providing mitigation at twice that ratio. Concerning fresh-water forested preservation, the District usually requires mitigation at a twenty to twenty-five-to-one ratio and the applicant is proposing a thirty to one preservation ratio. Additional mitigation will be provided beyond what is required to mitigate the adverse impacts for each type of impact anticipated. Although proposing more mitigation may in some instances not provide greater long-term ecological value than the wetlands to be adversely affected, the mitigation proposed by MCCDD will provide greater long-term ecological value.

81. The Petitioners contend that a chance in circumstances has occurred which would adversely affect the mitigation plan as a plan of regional ecological value. They claim its efficacy will be reduced because of a proposed development to a tract of land known as the Ball Tract which would, in the Petitioners' view, sever connection between the Marshall Creek site and the 22,000-acre Cummer Trust Tract also known as "Twelve mile swamp." Although a permit application has been submitted to the Florida Wildlife Commission for the Ball Tract property, located northwest of Marshall Creek and across U.S. Highway 1 from Marshall Creek and the EV-1 site, no permit has been issued by the District for that project. Even if there were impacts

proposed to wetlands and other surface waters as part of any development on the Ball Tract, mitigation would still be required for those impacts, so any opinion about whether the connection would be severed between the project site, the Marshall Creek site and the Cummer Trust Tract is speculative.

82. The Petitioners also sought to establish changed circumstances in terms of reduced effectiveness of the plan as a plan of regional ecological value because, in their opinion, Map H, the master plan, in the Marshall Creek development order plan, shows the EV-1 project area as being located in a preservation area. However, Map H of the Marshall Creek DRI actually shows the designation VP for "Village Parcel" on the EV-1 site and shows adjacent wetland preservation areas. Although Map H shows a preservation area adjacent to the EV-1 parcel, the Petitioners infer that EV-1 was not proposed for development. That is not the case. Map H contains a note that the preservation areas (as opposed to acreages) are shown as generalized areas and are subject to final design, road crossings and final wetland surveys before they were exactly delineated. Therefore, in the DRI plan, the EV-1 area was not actually designated a preservation area.

Surface Water Diversion and Wetland Draw-Down

83. Water will not be diverted to another basin or water course as a result of the EV-1 project. Water captured by the

treatment system and discharged from the EV-2 pond, will flow back through wetlands that meander through the project site. The EV-1 project will not result in significant diversion of surface waters.

84. The project will also not result in a draw-down of groundwater that will extend into adjacent wetlands. Each of the storage ponds on lots 1, 3, and 7 and between lots 9 and 10 has been designed to include cut-off walls around the perimeter of the ponds and the storage pond on lot 7 will be completely lined. The cut-off walls will be installed in a soil strata that has very low permeability. The cut-off walls and liner will restrict the movement of groundwater from the wetlands into the storage ponds. As a result, the zone of influence of each storage pond will not extend far enough to intercept with the adjacent wetlands.

The Public Interest Test

85. The public interest test has seven criteria, with each criteria having equal weight. The public interest test applies to the parts of the project that are in, on or over wetlands, and those parts must not be contrary to the public interest unless they are located in, on or over an OFW or may significantly degrade an OFW; then the project must be clearly in the public interest. It is a balancing test. The EV-1 project, however, is not located in an OFW.

The Public Health Safety and Welfare Criteria

86. The parts of the project located in, on and over wetlands will not adversely affect the public health, safety or welfare. These parts of the project will not cause any adverse impact on flood stages or flood plains and discharges from the system will not harm shell fishing waters. This factor is thus considered neutral.

Conservation of Fish, Wildlife or Their Habitat

87. The mitigation from this project will offset any adverse impacts to fish wildlife or their habitat. Therefore this factor is considered neutral as well.

Fishing, Recreational Value and Marine Productivity

88. There is no recreational activity or fish nursery areas within the project limits and the project will not change the temperature of the aquatic regime. None of the impacts associated with the EV-1 site are within the mean high water line of the marine aquatic regime. The activities are not going to interact with the tidal regime and they cause negligible impacts.

89. Concerning marine productivity, the wetland impacts are landward of the marine system; therefore, impact on marine productivity is not applicable. Thus this factor is considered neutral.

Temporary or Permanent Nature

90. The project will be of a permanent nature. Even though the project is permanent, this factor is considered neutral because the mitigation proposed will offset any permanent adverse impact.

Navigation and the Flow of Water

91. The parts of the project located in, on and over wetlands will not adversely affect navigation. These parts will also not impound or divert water and therefore will not adversely affect the flow of water. The project has been designed to minimize and reduce erosion. Best management practices will be implemented, and therefore, the project will not cause harmful erosion. Thus this factor is also considered neutral.

Current Condition and Relative Value of Functions Being Performed

92. The current condition and relative value of the functions being performed by the areas affected by the proposed activity, wetlands areas, will not be harmed. This is because any adverse impacts to the wetlands involved will be more than offset by the mitigation proposed to be effected. Therefore, there may well be a net gain in the relative value and functions being performed by the natural areas and the mitigation areas combined. Thus this factor is neutral.

Works of the District

93. The proposed project will not cause any adverse impact to a work of the District established in accordance with Section 373.086, Florida Statutes.

Shoaling

94. The construction and operation of the proposed project to the extent it is located in, on or over wetlands or other surface waters will not cause any harmful shoaling.

CONCLUSIONS OF LAW

95. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003)

96. MCCDD's application for an ERP is governed by Rule Chapter 40C-4, Regulation of Surface Water Management Systems and Rule Chapter 40C-42, Florida Administrative Code, Regulation of Stormwater Management Systems. Rule Chapters 40C-4 and 40C-42 implement, in part, Part IV of Chapter 373, Florida Statutes. Pursuant to these laws and regulations the District has regulatory jurisdiction over the permit applicant and the project. Fla. Admin. Code R. 40C-4.041(2)(b)8.

97. The applicant has the burden in proof in demonstrating that it qualifies for the ERP. Department of Transportation v. J.W.C., Co., Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). The applicant has the burden of providing reasonable assurances that

the proposed project will not violate the applicable District rules or Florida Statutes. The applicant's burden is one of "reasonable assurances, not absolute guarantees." Manasota-88, Inc., v. Agrico Chemical, 12 F.A.L.R. 1319, 1325 (DER 1990), aff'd 576 So. 2d 781 (Fla. 2d DCA 1991). This "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 assurance must deal with reasonable foreseeable contingencies. This standard does not require an absolute guarantee that violation of a rule is a scientific impossibility, only that its non-occurrence is reasonably assured by accounting for reasonably foreseeable contingencies. Ginnie Springs, Inc., v. Watson, 21 F.A.L.R. 4072, 4080, 4103 (DEP 1999); Manasota-88, Inc., v. Agrico Chemical, 12 F.A.L.R. at 1325; See also Adams v. Resort Village Utility, 18 F.A.L.R. 1682, 1701 (DEP 1996). 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, 3440-41 (DER 1988).

98. 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. DOT v. 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 carry the Petitioner's burden. See Chipola Basin Protective Group, Inc., v. Florida Department of Environmental Protection, 11 F.A.L.R. 467, 480-81 (DER 1988). Thus, MCCDD is not required to disprove all the "worst case scenarios" or "theoretical impacts" raised by the Petitioners. Lake Brooklyn Civic Association, Inc., v. Florida Rock Industries, 15 F.A.L.R. 4051, 4056 (Fla. LWAC 1993); Hoffert v. St. Joe Paper Company, 12 F.A.L.R. 4972, 4987 (DER 1990).

99. Further, the proceeding before the Administrative Law Judge is a de novo one, and the proper test is not whether the District properly evaluated the original application, but whether the application, as presented in evidence to the Administrative Law Judge, provides reasonable assurance of compliance with the statutory and rule permitting standards.

See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977); D.O.T. v. J.W.C. supra.

100. In accordance with Section 120.57(1)(j), Florida Statutes, the standard of proof in this proceeding is to a preponderance of the evidence.

Standing

101. The standing of the Petitioners to initiate this proceeding under Section 120.569, Florida Statutes, is at issue. On July 16, 2003, the Petitioners filed a motion to amend the petition or alternatively to intervene. The Motion sought to amend the Petition to assert additional standing under Section 403.412(5), Florida Statutes (2002). The Motion also sought intervention under Section 403.412(5), Florida Statutes, after the hearing, should one Petitioner be found to have standing under Section 120.569 while the other Petitioner is found to lack such standing. The opposing parties did not object to such intervention, providing the Petitioner complied with the elements of Section 403.412(5). By order of Judge Stampelos on July 23, 2003, the Motion to Amend Standing under Section 403.412(5) was denied and the Motion to Allow Intervention under Section 403.412(5), subject to compliance with that provision, was granted. Under Section 120.569, a person whose substantial interests will be affected by proposed agency action may

petition for an administrative hearing. §§ 120.52(12)(c) and 120.569(1), Fla. Stat. (2003).

102. The judicial standards for determining whether a third party has standing to challenge an agency decision are: (1) that the party will suffer an injury-in-fact which is of sufficient immediacy, and (2) that the injury is of the type or nature which the proceeding is designed to protect. Ameristeel Corp., v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). This judicial test for standing was derived from analogous federal law. Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985). The injury-in-fact part of the test focuses on whether the injury arising from the agency action is of a specific, real immediacy warranting relief and is not remote or speculative. Town of Palm Beach v. Department of Natural Resources, 577 So. 2d 1383 (Fla. 4th DCA 1981). The zone of interest portion of the test focuses on whether the type of injury asserted falls within the scope of the agency's statutory authority to protect. Boca Raton Mausoleum Inc., v. State Department of Banking and Finance, 511 So. 2d 1060 (Fla. 1st DCA 1987). The two parts of this standing test are inherently linked because the nature of the injury required to be shown to satisfy the first part of the test is determined by the statutes

or rules which define the scope of the agency's authority which is the subject of the proceeding (i.e., the "zone of interest"). Friends of the Everglades, Inc., v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992) (the nature of the injury which is required to demonstrate standing will be determined by the statute which defines the scope and nature of the proceeding). Therefore, it is Chapter 373 and the District's rules which define the scope of this proceeding and the nature of the injury those laws are designed to protect.

103. The Petitioners have the burden to prove standing under Section 120.569, Florida Statutes. See generally Department of Health and Rehabilitative Services v. Alice P., 367 So. 2d 1045 (Fla. 1st DCA 1979) (the burden is on Petitioner to establish standing). This burden is not whether the Petitioners have or will prevail on the merits, but rather whether the Petitioners have presented sufficient proof of injury to their asserted interests within the two-prong standing test. See Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000). The law does not require that the Petitioners own land near or adjacent to the Palencia development in order to establish standing. Friends of the Everglades, supra.

104. Petitioner Larsen presented evidence that she fished and recreated on the Tolomato River and the Guana River State Park, across the Tolomato River from the subject Palencia development and in close proximity thereto. She testified that she will continue to do so. Petitioner Larsen fished along the shoreline of Tolomato River and in the area of the Guana Dam, has viewed wildlife in the immediate vicinity of the Palencia development and the EV-1 site. It is her intention to engage in such future uses. These uses are sufficient to establish an injury-in-fact regarding matters that fall within the protection of the District's permitting rules and statutes. Consequently, Petitioner Larsen has standing under Section 120.569, Florida Statutes. See Save Our Bays, Air and Cabals, Inc. v. Tampa Bay Desal, 24 F.A.L.R. 425 (DEP 2001) (the use of waters and wetlands of the Big Bend area for fishing and boating recreational activities established Petitioner's standing).

105. Petitioner Larsen also contends that the project will adversely affect significant historical and archaeological resources under Section 267.061, Florida Statutes, as treated in District Florida Administrative Code Rule 40C-302(1)(A)(4). Larsen, however, presented only evidence of her general advocacy and interest in protection of indigenous sites and failed to show any injury-in-fact of sufficient immediacy to herself as a result of the approval of the EV-1 project. Larsen's advocacy

for the protection of indigenous sites, although sincere, itself does not constitute a concrete, non-speculative injury in-fact. Accordingly, Larsen lacks standing to challenge the application as to District Florida Administrative Code Rule 40C-4.302(1)(a)(6).

106. Petitioner Billie testified that he has visited the Palencia property and observed wildlife, and that at some indistinct time in the past he had fished at the Guana Dam. He testified that he used the Tolomato River on three occasions in 2003, although they were after this proceeding was being litigated. However, unlike Larsen, he did not indicate any intention in the future to fish or use the Tolomato River. Consequently, he did not establish an injury-in-fact of sufficient immediacy to warrant standing regarding the protection and conservation of fish and wildlife since it is speculative that Petitioner Billie will ever use and recreate in the receiving waters, regardless of whether the EV-1 project is approved. See Village Park Mobile Home Association Inc. v. State Department of Business Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987) (speculative harm fails to establish standing).

107. Petitioner Billie also asserts that the proposed project will adversely affect significant historical and archeological resources under the protective criterion of Florida Administrative Code Rule 40C-4.302(1)(a)6. Like

Petitioner Larsen, Petitioner Billie only presented evidence of general involvement with issues concerning indigenous sites and failed to show a concrete, non-speculative injury-in-fact personal to himself as the result of any approval of the EV-1 project. While Petitioner Billie, as a Native-American, has a cultural link and affinity to the question of preservation of indigenous sites, this alone is insufficient to establish an injury-in-fact personal to himself under the facts presented in this proceeding. Accordingly, under the facts of this case, Petitioner Billie lacks standing to challenge the application of Florida Administrative Code Rule 40C-4.302(1)(a)(6).

108. Although Petitioner Billie lacks standing under Section 120.569, Florida Statutes, pursuant to Judge Stampelos' Order of July 23, 2003, Billie is granted intervention as party on the side of Petitioner Larsen, as provided in Section 403.412(5), Florida Statutes. Petitioner Billie established that he was born and currently resides in Florida. Consequently, he has established that he is a citizen of the state for purposes of Section 403.412(5), Florida Statutes.

Environmental Resource Permit

109. The District's requirements applicable to the ERP application are found in Florida Administrative Code Rules 40C-4.301 and 40C-4.302. These conditions are further explained in the "applicant's handbook: Management and Storage of Surface

Waters" (AH), adopted by reference in Florida Administrative Code Rule 40C-4.091(1)e. These rules provide as follows:

> Rule 40C-4.301 Conditions for Issuance of [ERP] Permits:
>
> (1) In order to obtain a standard, individual, or conceptual approval permit under this Chapter or Chapter 40C-40, Florida Administrative Code, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management 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, Florida Administrative Code, including any antidegradation provisions of paragraphs 62-4.2242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, Florida Administrative Code, and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), Florida Administrative Code, 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, Florida Administrative Code;
(h) Will not cause adverse impacts to a work of the District established pursuant to Section 373.086, Florida Statutes;
(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; and
(k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40C-41, Florida Administrative Code.

(2) If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the applicant must comply with the requirements set forth in subsection of 12.2.4.5 of the Applicant's Handbook: Management and Storage of Surface Waters.

(3) The standards and criteria, including the mitigation provisions and the provisions for elimination or reduction of impacts, contained in the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in Rule 40C-4.091, Florida Administrative Code, shall determine whether the reasonable assurances required by subsection 40C-4.301(1) and Rule 40C-4.302, Florida Administrative Code has been provided.

40C-4.302 Additional Conditions for Issuance of Permits

(1) In addition to the conditions set forth in Rule 40C-4.301, Florida Administrative Code in order to obtain a standard, individual, or conceptual approval permit under this chapter or Chapter 40C-40,

Florida Administrative Code an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system:

(a) 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, as determined by balancing the following criteria as set forth in subsections 12.2.3 through 12.2.3.7 of the Applicant's Handbook: Management and Storage of Surface Waters:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, Florida Statutes; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in subsections 12.2.8 through 12.2.8.2 of the Applicant's

Handbook: Management and Storage of Surface Waters adopted by reference in Rule 40C-4.901, Florida Administrative Code.
(c) Located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class III waters classified by Department as approved, restricted or conditionally restricted for shellfish harvesting as set forth or incorporated by reference in Chapter 62R-7, Florida Administrative Code will comply with the additional criteria in subsection 12.2.5 of the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in Rule 40C-4.091, Florida Administrative Code.
(d) Which constitute vertical seawalls in estuaries or lagoons, will comply with the additional criteria provided in subsection 12.2.6 of the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in Rule 40C-4.091, Florida Administrative Code.

(2) When determining whether a permit applicant has provided reasonable assurances that District permitting standards will be met, the District shall take into consideration the applicant's violation of any Department rules adopted pursuant to Sections 403.91-403.929, Florida Statutes (1984 Supp.), as amended, which the District had the responsibility to enforce pursuant to delegation, or any District rules adopted pursuant to Part IV, Chapter 373, Florida Statutes relating to any other project or activity and efforts taken by the applicant to resolve these violations. The Department's delegation to the District to enforce Department rules is set forth in the Operating Agreement concerning Strom water Discharge Regulation and Dredge and Fill Regulation, dated January 4, 1988; Operating Agreement concerning Management and Storage of Surface Water Regulation and Wetland Resource Regulation between the St. Johns River Water Management District and

> Department of Environmental Regulation, dated August 28, 1992; and Operating Agreement Concerning Regulation Part IV, Chapter 373, Florida Statutes between St. Johns River Water Management District and Department of Environmental Protection dated August 25, 1994, all incorporated by reference in Rule 40C-4.091, Florida Administrative Code.

Fla. Admin. Code. R. 40C-4.301(1)(a-c)

110. The requirements contained in paragraphs 40C-4.301(1)(a), (b) and (c) have been met because MCCDD has demonstrated that the EV-1 project complies with the applicable presumptive criteria in Section 10.2.1, A.H.

111. Section 10.2.1, A.H., provides that:

> It is presumed that a system meets the standards listed in paragraphs 9.1.1.(a) through (c) if the system meets the following criteria:
>
> (a) The post-development peak rate of discharge must not exceed the pre-development peak rate of discharge for the storm event as prescribed in Section 10.3.
>
> (b) The post-development volume of direct runoff must not exceed the pre-development volume of direct runoff for systems as prescribed in subsections 10.4.2 and 10.4.3.
>
> (c) Floodways and floodplains, and levels of flood flows or velocities of adjacent streams, impoundments or other watercourses must not be altered so as to adversely impact the off-site storage and conveyance capabilities of the water resources (See section 10.5).

> (d) Flows of adjacent streams, impoundments or other watercourses must not be decreased so as to cause adverse impacts (See section 10.6).

112. The standards listed in Section 9.1.1(a) through (c), ERP A.H., are identical to the requirements in Rule 40C-4.301(1)(a) through (c), Florida Administrative Code.

113. MCCDD was not required to demonstrate that the post-development peak rate of discharge will not exceed the pre-development peak rate of discharge for the 25-year, 24-hour duration storm because such a showing is not required for "those systems which discharge directly into . . . the Intracoastal Waterway north of the Matanzas Inlet." Section 10.3.2(a), A.H. The District's rules do not contain a definition of Intracoastal Waterway. Testimony from the District's expert witness explained that this criterion is a "rainfall-driven criterion," designed to evaluate the flooding impacts from rainfall events, and that the water bodies named in the rule were exempted from this requirement because they are large, tidally influenced waterbodies where flooding is not governed by rainfall, but rather by tides and storm surges. The District's expert opined that in the areas of those named waterbodies, the floodplain becomes a function of these large waterbodies and does not depend or rainfall events. Thus, he determined that the Intracoastal Waterway would include the waterbody itself and the

wetlands in and adjacent to the floodplain that have a direct hydrologic connection to it, and concluded that since the proposed project discharges into a wetland system that has a direct hydrologic connection to the Intracoastal Waterway north of the Matanzas Inlet, the exemption was applicable.

114. The only definition of "direct discharge" in this District's rules is contained in Section 2.0(9) of the stormwater handbook and pertains to direct discharges to classified shellfish waters. However, the rule gives examples of direct discharges and appears to emphasize the importance of connectivity to the shellfish waters. For example, it cites as an example of direct discharge to classified shellfish waters "a discharge without entering any other waterbody or conveyance prior to release to the [classified shellfish waterbody]." While the concern in the instant case relates to flooding rather than water quality, the emphasis on connectivity as a measure of whether the discharge is direct is analogous.

115. The District's construction or interpretation of its own rules which it is charged to administer is to be given great deference. Citizens of the State of Florida v. Wilson, 568 So. 2d 1269 (Fla. 1990); Maclen Rehabilitation Center v. DHRS, 588 So. 2d 12 (1st DCA 1991). See also Falk v. Beard, 614 So. 2d 1086 (Fla. 1993).

116. Section 10.2.1(b), A.H., does not apply because the system will not be discharging to a landlocked lake and it is not located in an area for which separate basin criteria have been established. See Sections 10.4.2 and 10.4.3, A.H.

117. The preponderant evidence demonstrates that the EV-1 project will not alter floodways, floodplains or levels of flood flows or velocities of adjacent watercourses such as streams so as to adversely impact the off-site storage and conveyance capabilities of the water resource, in this instance, the Tolomato River. See Section 10.5.1, A.H. Since each of the traversing works will have one or more culverts, water will be free to move back and forth and the crossings will not impound or dam water. Therefore, the traversing works associated with the project will not cause an increase in the 100-year flood elevation. Further, MCCDD provided an analysis showing that, excluding the fill associated with traversing works, fill proposed in the 10-year floodplain translates into a 0.0002-foot rise in the water elevation over the area encompassed by MCCDD's frontage on the Tolomato River flood plain. This amount of increase is statistically insignificant. Moreover, flooding in water bodies such as the Intracoastal Waterway is governed by tides and storm surges. Thus, MCCDD has provided reasonable assurance that the singular impact will not be harmful to the water resources and that if all other persons who could impact

the Tolomato River by floodplain encroachment did so to the same degree as MCCDD proposes, the cumulative impacts would not be harmful to the water resources of the District. Therefore, the off-site storage and conveyance capabilities of the water resource will not be adversely impacted and the requirements of Section 10.2.1(c), A.H., have been met.

118. Section 10.2.1(d), A.H., does not apply because the system will not be impounding water other than for temporary wet detention storage. See Section 10.6, A.H.

Fish and Wildlife

119. Florida Administrative Code Rule 40C-4.301(1)(d), and Sections 9.1.1(d), 12.1.1(a), and 12.2, et. seq., A.H., require that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

Elimination or Reduction of Impacts

120. In order to qualify for an ERP, an applicant must first eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed system, by implementing practical design modifications as described in Section 12.2.1.1, ERP-A.H. However, Section 12.2.1.1, ERP-A.H., only requires an elimination and reduction analysis when: (1) a "proposed system will result in adverse impacts to wetlands functions and other surface water functions such that it does

not meet the requirements of subsection 12.2.2 through 12.2.3.7," or (2) neither exception within Section 12.2.1.2, ERP-A.H., applies. Section 12.2.1.2, ERP-A.H., provides:

> 12.2.1.2 The District will not require the applicant to implement practicable design modifications to reduce or eliminate impact when:
>
> * * *
>
> b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

121. The two requirements of Section 12.2.1.2.b, ERP-A.H., have been met in this case. It has previously been ruled on October 13, 2003, during a hearing on the District's Motion-in-Limine that the "plan" litigated in the Parcel D proceeding (DOAH Case Nos. 00-2230 and 00-2231) constituted a plan of regional ecological value. In that case, the "plan" consisted of three parts: (1) the preservation of certain wetlands and uplands on-site, as required by the Marshall Creek DRI Development Order; (2) the creation, enhancement, and preservation of certain wetlands on-site and the preservation of certain uplands on-site, as required by prior permits issued by the District; and (3) the mitigation proposed for the Parcel D project. (DOAH Case Nos. 00-2230 and 00-2231; Final Order at 10-12).

122. The "Plan" in the Parcel D case was found to provide regional ecological value because the land encompassed therein was either adjacent to or in close proximity to the following regionally significant ecological resources or habitats: (1) the Guana River State Park; (2) an Outstanding Florida Water; (3) the 55,000-acre Guana-Tolomato-Matanzas National Estuarine Research Reserve; (4) an Aquatic Preserve; (5) the Guana Wildlife Management Area; and (6) the 22,000-acre Cummer Tract Preserve. The Recommended Order and Final Order in the Parcel D case also found that the "Plan" would provide for a wildlife corridor between these resources, preserve their habitat, and ensure protection of water quality for these regionally significant resources. (DOAH Case Nos. 00-2230 and 00-2231 R.O.: paragraph 30, p. 19; Final Order at 10-12). In addition to upholding the above-referenced findings of the Recommended Order in the Parcel D case, the Final Order in that case upheld the conclusion in the Recommended Order that the "out" provision in Section 12.2.1.2(b), A.H., applied (F.O. at 11). Ultimately that Parcel D Final Order found the existence of a "Plan" and that the plan had regional ecological value under Section 12.2.1.2(b), A.H. Thus, consideration of whether requirements of Section 12.2.1.b ERP-A.H. have been complied with in this proceeding must focus on whether the mitigation proposed for the EV-1 project is part of the plan of regional ecological value

and whether it has greater long-term ecological value than the wetlands to be adversely affected under the EV-1 application.

123. In the instant case, the mitigation proposed for EV-1 is part of a plan of regional ecological value, which consists of the Parcel D plan and additional preserved lands, because it contributes to the plan by providing wetland restoration, wetland creation, upland preservation and wetland preservation. These areas are adjacent to or in close proximity to the Tolomato River and the Guana River Aquatic Preserve. The evidence showed that the mitigation will add to the value of previously preserved lands by helping to maintain travel corridors and forage area for wildlife, to maintain water quality in the adjacent marsh, and to maintain fish and wildlife benefits of the Aquatic Preserve. The mitigation provides additional lands to the wildlife corridor that have already been established in the Marshall Creek development.

124. The mitigation proposed for the EV-1 project also provides greater long-term ecological value than the wetlands to be adversely affected. The greater amount of mitigation coupled with the fact that it is in-kind mitigation to be preserved in perpetuity will allow a larger area of conserved lands to mature and to provide more forage and habitat for the wildlife that would utilize those areas over the long-term than the wetlands to be adversely affected.

125. Although it has been ruled that collateral estoppel precludes Petitioners from re-litigating whether MCCDD has demonstrated the existence of a plan which has regional ecological value, as it relates to the Parcel D proceedings, under Section 12.2.1.2, A.H., collateral estoppel will not apply where unanticipated subsequent events or a substantial change of circumstances related to the subject matter with which the prior ruling was concerned is sufficient to promote or prompt a different or contrary determination. University Hospital Limited v. Sate Agency for Health Care Administration, 697 So. 2d 909, 912 (Fla. 1st DCA 1997); Holiday Inns, Inc., v. City of Jacksonville, 678 So. 2d 528, 529 (Fla. 1st DCA 1996). There has been no preponderant evidence presented to show a change in circumstances that would justify a change in the prior ruling of the existence of a plan of regional ecological value stemming from the Parcel D proceedings. Therefore, the provision in Section 12.2.1.2, A.H., has been met.

126. Section 12.2.2., A.H., requires consideration of whether the project will impact the values of wetlands and surface waters on the site so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife and listed species. Section 12.2.2.3, A.H., contains the factors that should be considered when assigning the value of a function that any wetland or other surface water provides to fish, wildlife,

and listed species. They include: (a) quality; (b) hydrologic connection; (c) uniqueness; (d) location; and (e) fish and wildlife utilization.

127. The evidence shows that the applicant is proposing to dredge and fill within .75 acres of wetlands for road-crossings and to clear .07 acres of wetlands to construct three boardwalks. As mitigation for these impacts, MCCDD proposes wetlands restoration, wetland creation, upland preservation at a 20 to 1 ratio, wetland preservation at a 60-to-1 ratio for saltmarsh preservation and 30-to-1 ratio for the freshwater forested preservation. The evidence establishes that the mitigation more than replaces the functions provided by the wetlands to be adversely affected by the project. The evidence also demonstrates that the EV-1 project will not cause the hydro-period of wetlands or other surface waters to be altered so as to adversely affect wetland functions or surface water functions. Therefore, the requirements of Florida Administrative Code Rule 40C-4.301(1)(d) have been met.

Quality of Receiving Waters

128. Rule 40C-4.310(1)(e), Florida Administrative Code, requires the applicant to provide reasonable assurance that the proposed project will not adversely affect the quality of receiving waters such that the water quality standards, as set forth in Rule Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and

62-550, Florida Administrative Code, including any anti-degradation provisions of Rule 62-4.242(1)(a) and (b) and Rule 62-4.242(2) and (3), Rule 62-302.300, Florida Administrative Code, and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters, set forth in Rule 62-4.242(2) and (3), Florida Administrative Code, will be violated.

129. MCCDD has provided reasonable assurance that the construction and operation of the project will not adversely affect the quality of receiving waters such that the state water quality standards will be violated. The preponderant evidence shows that the EV-2 pond is an existing, previously permitted wet-detention pond that was designed in accordance with the District's wet-detention criteria contained in 40C-42.026(4), Florida Administrative Code and will be modified in accordance with those criteria. The pond is operating in compliance with the permit and its operation is not being adversely affected by groundwater inflow. Under the District's rules this created a presumption that state water quality standards, including those for outstanding Florida Waters, will be met. See Fla. Admin. Code. R. 40C-42.023(2)(a). This presumption has not been rebutted and therefore, the requirements of Rule 40C-4.301(1)(e), Florida Administrative Code, have been met.

130. Additionally, Section 12.2.4, of the ERP A.H., states that reasonable assurances regarding water quality must be

provided both for the short and long term, addressing the proposed construction, alteration, operation, maintenance, removal and abandonment of the system. MCCDD has provided reasonable assurance that this requirement is met through the design of the stormwater management system, its long-term maintenance plan for the system, and the long and short-term erosion and turbidity control measures that are proposed as part of the project. If issued, the permit will require that the stormwater management system be constructed and operated in accordance with the plans approved by the District. The permit will also require that the proposed erosion and turbidity control measures be implemented.

131. Rule 40C-4.302(1)(c), Florida Administrative Code, requires the applicant to provide reasonable assurance that any portion of the surface water management system located 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, Florida Administrative Code, will comply with the additional criteria in Section 12.2.5 ERP-A.H., adopted by reference in Rule 40C-4.091, Florida Administrative Code. (Rule Chapter 62R-7, Florida Administrative Code, was transferred to Rule Chapter 5L-1, Florida Administrative Code.)

This chapter establishes a classification system for shellfish harvesting area and incorporates by reference shellfish harvesting areas descriptions and maps. See Rule 5L-1.003, Florida Administrative Code. The preponderant evidence establishes that no part of the subject project is located in shellfish waters. None of the Petitioners' witnesses opined as to the relationship between the proposed project and the boundary of the conditionally-restricted shellfish harvesting area. However, evidence showed that shellfish would not occur in areas impacted by the project based upon the habitat needs of shellfish. Therefore, the applicant was required to comply with Sections 12.2.5(a) and (b) ERP-A.H., which provide as follows:

> In accordance with paragraph 12.1.1(d) [Rule 40C-4.302(1)(c), Florida Administrative Code], the District shall:
>
> (a) deny a permit for a regulated activity Class II waters which are not approved for shellfish harvesting unless the applicant submits a plan or proposes a procedure to protect those waters and water in the vicinity. The plan or procedure shall detail the measures to be taken to prevent significant damage to the immediate project area and the adjacent area and shall provide reasonable assurance that the standards for Class II waters will not be violated;
>
> (b) deny a permit for a regulated activity in any class of waters where the location of the system is adjacent or in close proximity to Class II waters, unless the applicant submits a plan or proposes a procedure which demonstrates that the regulated activity

> will not have a negative effect on the Class II waters and will not result in violations of water quality standards in Class II waters.

132. MCCDD has satisfied these requirements by submitting plans and detailed measures implementing erosion and turbidity control measures and designing the stormwater treatment system to provide a higher level of treatment than the required minimum level of treatment and to ensure that state water quality standards will not be violated as a result of discharges from the proposed project. The measures detailed to be taken by MCCDD will prevent significant damage to the immediate project area and the adjacent area and the plans submitted by MCCDD demonstrate that the project will not have a negative effect on the Class II waters and will not result in a violation of water quality standards in the Class II waters. Therefore, reasonable assurances have been provided that any portion of the surface water management system in, adjacent to, or in close proximity to Class II waters or located in Class II waters or Class III waters and classified as approved, restricted or conditionally restricted for shellfish harvesting will comply with the additional criteria in Section 12.2.5, ERP-A.H.

133. Subsection 373.414.(1)(b)3, Florida Statutes, provides:

> If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

134. Section 12.3.1.4, ERP-A.H., which implements this statutory provision, states:

> In instances where an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards and the system will contribute to this existing condition, mitigation for water quality impacts can consist of water quality enhancement. In these cases, the applicant must implement mitigation measures that will cause a net improvement of the water quality in the receiving waters for those parameter which do not meet standards.

135. The preponderant evidence shows that discharges from the project will not contribute to the existing ambient water quality violations for dissolved oxygen and total fecal coliform levels. The lengthy detention, large surface area for aeration and dilution provided by the EV-2 pond and its over design will result in a net improvement in the existing ambient water quality levels for dissolved oxygen and total fecal coliform bacteria.

136. The evidence establishes that since the construction, operation and maintenance of the EV-1 system will not violate water quality standards and will result in a net improvement for

two parameters, the project will not significantly degrade an OFW.

Secondary Impacts

137. Rule 40C-4.301(1)(f), Florida Administrative Code, requires that an applicant provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of a system will not cause adverse secondary impacts to the water resources. Compliance with this criterion is determined by applying the test in Section 12.2.7 ERP-A.H.

Construction, Alteration, and Intended Use of Uplands

138. As part of the Secondary Impacts Test, the applicant must provide reasonable assurances that the secondary impacts from construction, alternation and intended or reasonably intended uses of a proposed system will not cause violations of water quality standards of adverse impacts to the functions of wetlands. Section 12.2.7, (a) A.H., provides in pertinent part that:

> Secondary impacts to the habitat functions of wetlands associated with adverse upland activities will not be considered adverse if buffers with a minimum width of 15' and an average width of 25' are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat. The mere fact that a species is listed does not imply that all of its feeding habitat is critically important. Where an applicant

> elects not to utilize buffers of the above dimensions, buffers of different dimensions, measures other than buffers, or information may be provided to provide the required reasonable assurance.

139. The preponderant evidence shows that MCCDD has proposed buffers with a minimum width of 25 feet and a maximum width of 50 feet although the buffers in some areas will exceed 50 feet. Trimming will be prohibited in the 25-foot buffers. No compelling evidence of the use of the wetlands by listed species for nesting, denning or critically important feeding habitat was presented in those area where a 25-foot buffer is proposed and no additional measures are shown to be needed. Thus, pursuant to Section 12.2.7(a), the secondary impacts of human activity adjacent to the wetlands in areas where a 25-foot buffer is provided are not considered adverse. The evidence showed that hand trimming, however, is permitted in the 50-foot buffer areas as proposed, but is limited to an area of half of the length along the lot interface of the wetland, no trimming is allowed below 3 feet or above 25 feet. In these areas the wildlife species of primary concern were shown to be wading birds. These buffer areas will also prevent secondary impacts due to their greater width, the distance to the marsh, and the limitations placed on trimming.

Ecological Value of Uplands for Nesting or Denning of Aquatic or Wetland Dependent Species

140. Under this Second Part of the Secondary Impacts Test found in Section 12.2.7(b), ERP-A.H., MCCDD must provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of the system will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed animal species for "enabling existing nesting or denning" by these species. Consideration for areas needed for foraging or wildlife corridors will not be required, except as necessary for ingress and egress to a nest or a den site from the wetland or other surface water. Section 12.2.7(b), ERP-A.H. The evidence shows that none of the listed aquatic or wetland dependent species currently use the project site for nesting or denning. An existing nest was identified on an upland island east of the project site. However, the unrebutted evidence shows that this nest is not currently being used.

Significant Historical and Archeological Resources

141. This third part of the Secondary Impact Test is found in Section 12.2.7(c), ERP-A.H., and is evaluated below as part of the public interest criteria.

Causally Related Future Activities

142. The fourth part of the Secondary Impact Test is found in Section 12.2.7(d), ERP-A.H. This section requires the applicant to provide reasonable assurance that certain activities or additional phases will not result in water quality violations or adverse impacts to the functions of wetlands or other surface waters. The evidence showed that additional phases of the project could be designed in accordance with the relevant rule criteria.

Groundwater Levels and Surface Water Flows

143. The parties stipulated that the project will not adversely impact the maintenance of surface or groundwater levels or surface water flows established in Rule Chapter 40C-8, Florida Administrative Code. Therefore, the project meets Rule 40C-4.301(1)(g), Florida Administrative Code.

Works of the District

144. The parties stipulated that the proposed project will not cause adverse impacts to a work of the District established pursuant to Section 373.086, Florida Statutes. Therefore, the

project meets the requirement of Rule 40C-4.301(1)(h), Florida Administrative Code.

System Functioning as Proposed

145. Rule 40C-4.301(1)(j), Florida Administrative Code, requires the applicant to provide reasonable assurance that the construction, alteration, operation or maintenance of a surface water management system will be capable, based on generally accepted engineering and scientific principles of being performed and functioning as proposed. The evidence shows that the design of the project is based on generally accepted engineering practices and does not include atypical or unique components. Moreover, the EV-2 pond, which will be modified to a limited degree as a result of the project is currently operating in compliance with its existing permit and the applicant will be required to submit inspection reports of the pump stations to the District on an annual basis. Therefore, the project meets the requirement of Rule 40C-4.301(1)(i), Florida Administrative Code.

The Operation and Maintenance Entity

146. Rule 40C-4.301(1)(j), Florida Administrative Code, requires the applicant to provide reasonable assurance that the construction, alteration, operation or maintenance of a surface water management system will be conducted by an entity with the financial, legal and administrative capability of ensuring that

the activity will be undertaken in accordance with terms and conditions of the permit, if issued. The applicant is an established entity and, as a community development district, is a unit of special purpose government established under the provisions of Chapter 190, Florida Statutes. The preponderant evidence shows that the MCCDD has provided reasonable assurance that it has the financial, legal, and administrative capability of ensuring that the EV-1 project will be undertaken in accordance with the terms and conditions of the ERP, if issued. Thus, this project meets the requirements of the rule last cited above.

Special Basin Criteria

147. The proposed project is not located in a special basin or geographic area as established in Rule Chapter 40C-41, Florida Administrative Code, thus these criteria are not at issue.

Minimum Flows and Levels

148. The preponderant evidence shows that for purposes of Rule 40C-4.301(1)(g), Florida Administrative Code, that the project will not adversely impact the maintenance of surface or groundwater levels or surface water flows established in Rule Chapter 40C-8, Florida Administrative Code.

Public Interest Test

149. In accordance with Rule 40C-4.302(1)(a), Florida Administrative Code, MCCDD must provide reasonable assurance that the parts of its surface water management system located in, on, or over wetlands are not contrary to the public interest. See also Section 12.2.3, A.H. It was not required to provide reasonable assurance that these parts of the project are clearly in the public interest, since no part of the system will significantly degrade, or be located within, an Outstanding Florida Water. See Rule 40C-4.302(1)(a), Florida Administrative Code.

150. MCCDD has provided reasonable assurance that the EV-1 project is not contrary to the public interest since the evidence established that all of the public interest factors to be balanced were determined to be neutral, as found above. Because the mitigation proposed for the project will offset the adverse impacts to wetlands, no adverse effects to the conservation of fish or wildlife or due to the project's permanent nature will occur. There will be no harmful erosion, and it was demonstrated that the project will not adversely affect the flow of water, navigation, significant historical or archeological resources, recreational or fishing values, marine productivity, or the public health, safety, or welfare or property of others. The project's design, including mitigation,

was found to be such that the current condition and relative value of functions performed by wetlands will be maintained.

Cumulative Impacts

151. The mitigation offered for the proposed project is adequate to offset all the adverse impacts to the area of wetlands to be impacted. Thus, the proposed project will not result in unacceptable cumulative impacts. See Fla. Admin. Code R. 40C-4.302(1)(b).

Rule 40C-4.302(1)(d), Florida Administrative Code - Seawalls

152. The proposed project does not contain any vertical seawalls in estuaries or lagoons. Thus, this subject matter is not at issue.

153. In summary, the preponderant evidence adduced at hearing demonstrates that MCCDD has provided reasonable assurance that all applicable requirements of the District rules will be met and that the ERP should be granted with the conditions proposed in the District's Exhibit 3 in evidence, consisting of the technical staff report.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a Final Order be entered by the St. Johns River Water Management District granting MCCDD's application for an individual environmental resource permit with the conditions set forth in the technical staff report dated September 24, 2003, in evidence as St. John's River Water Management District's Exhibit 3.

DONE AND ENTERED this 9th day of February, 2004, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.