

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

C.R.O.P., INC., GENEVA)	
DEFENSE ASSOCIATION, SAVE OUR)	
ST. JOHN'S, and DONALD)	
CRABTREE,)	
)	
Petitioners,)	
)	
v.)	CASE NO. 92-0894
)	
JAMES P. VEIGLE, EXCAVATED)	
PRODUCTS, INC., and ST. JOHNS)	
RIVER WATER MANAGEMENT)	
DISTRICT,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, final hearing in the above-styled case was held on April 22, 23, and 24, 1992 in Orlando, Florida, and on April 29, 1992 in Sanford, Florida, before Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

The parties were represented as follows:

For Petitioners: Attorney Irby Pugh
 218 Annie Street
 Orlando, Florida 32806

For Respondents
Veigle and
Excavated Products: Michael L. Gore
 Kenneth W. Wright
 Shutts & Bowen
 20 North Orange Avenue
 Suite 1000
 Orlando, Florida 32801

For Respondent St.
Johns River Water
Management District: Eric T. Olsen
 Assistant General Counsel
 St. John's River Water
 Management District
 P.O. Box 1429
 Palatka, Florida 32178-1429

STATEMENT OF THE ISSUE

The issue in this case is whether Excavated Products is entitled, under Chapter 373, Florida Statutes, and Chapter 40C- 4, Florida Administrative Code, to a Management and Storage of Surface Waters permit for the construction of a borrow pit and, if so, what if any conditions should be imposed upon the permit.

PRELIMINARY STATEMENT

On December 23, 1991, C.R.O.P., Inc., Geneva Defense Association, Save Our St. John's, and Donald Crabtree filed a Petition for Administrative Hearing Pursuant to F.S. Section 120.57. The Petition challenges the decision of the St. Johns River Water Management District to issue a Management and Storage of Surface Waters permit for the construction and operation of a borrow pit by Excavated Products.

The Petition alleges that the proposed excavation would create a gravity gradient in the surficial aquifer, which would allow leachate from a nearby Seminole County sprayfield to enter the excavation and intermix with water of the Upper Floridan aquifer. The Petition alleges that the filtering ability of the site would be reduced by 75% due to the proposed removal of overburden and that excavation would increase the amount of contaminated runoff entering the Upper Floridan aquifer.

The Petition alleges that the proposed excavation would dewater nearby wetlands and destroy the habitat of species that are endangered, threatened, or of special concern. The Petition also alleges, under the heading of "recharge functions," that the Applicant has inadequately tested the hydraulic conductivity of post-development overburden. Lastly, the Petition challenges the adequacy of the notice of the hearing at which the District decided to approve the subject application for a Management and Storage of Surface Waters permit.

On January 28, 1992, Petitioners filed an Amended Petition for Administrative Hearing Pursuant to F.S. Section 120.57 setting forth substantially the same allegations as in the Petition, but amending the allegations concerning standing.

At the final hearing, Petitioners were granted leave to amend their amended petition to assert that septic tank effluent would contaminate the borrow pit lake and aquifers. The undersigned also granted the District's request to take official recognition of the St. Johns River Water Management District's "Applicant's Handbook, Management and Storage of Surface Waters, 11-12-91."

At the final hearing, Petitioners called seven witnesses and offered into evidence 50 exhibits, Veigle and Excavated Products called six witnesses and offered into evidence 13 exhibits, and the District called five witnesses and offered into evidence 21 exhibits. All exhibits were admitted except Petitioners Exhibits 52 and 53 and Applicant Exhibit 13.

No transcript was ordered. Each party filed a proposed recommended order. Treatment of the proposed findings is detailed in Appendix A.

FINDINGS OF FACT

I. The Parties

1. Petitioner CROP is a Florida corporation. "CROP" is an acronym for the Committee to Resist Oppressive Politicians. Petitioners Geneva Defense Association and Save Our St. Johns are subcommittees of CROP. Petitioner Crabtree, who resides in Geneva, Florida, is chair of CROP and a member of the subcommittees.

2. Petitioner Crabtree obtains his residential potable water from the Mullet Lake Water Association, which has employed Petitioner Crabtree as its water plant manager. The principal well of the Mullet Lake Water Association, which draws from the Geneva bubble described below, is about 500 feet southeast of the subject site.

3. Respondents Veigle and Excavated Products (Applicant) have requested Respondent St. Johns River Water Management District (District) to issue a permit for the management and storage of surface waters (MSSW). Applicant proposes to excavate a borrow pit in northeast Seminole County about three miles south of the St. Johns River, three miles west of Lake Harney, 1.5 miles east of Lake Jessup, and four miles north of the Econlockhatchee River. The irregularly shaped parcel, which is about one mile northwest of Geneva, is bounded on the north and east by State Road 46 and the south by Cochran Road.

II. Hydrogeology of Region and Site

4. The parcel overlies a 22-square mile freshwater lens in the Upper Floridan aquifer^{1/} known as the Geneva bubble. The groundwater in the bubble contains chloride concentrations of less than 250 mg/l. The bubble, which is about 350 feet thick in the center of its recharge area, is surrounded by brackish relict seawater.

5. The bubble's 15-square mile recharge area is marked by land elevations of at least 25 feet.^{2/} The subject site is situated just inside the northwest boundary of the recharge area.

6. The Geneva bubble is dependent upon freshwater recharge from local rainfall, which flushes out ancient seawater from the Floridan aquifer. Greater recharge takes place at locally higher land elevations, which rest on more permeable sediments.

7. A USGS study, "Hydrogeology in the Area of a Freshwater Lens in the Floridan Aquifer System, Northeast Seminole County, Florida," prepared by G. G. Phelps and K. P. Rohrer and published in 1987, describes the recharge process as follows:

The Geneva freshwater lens is a result of local recharge that percolates downward from the surficial aquifer to the Floridan. Recharge occurs when water levels in the surficial aquifer are higher than the water levels in the Floridan (a downward gradient exists). The area enclosed by the 25-foot altitude contour . . . is where most of the recharge occurs. . . . In some areas of lower topography^{3/} the gradient is upward

(discharge areas) whereas in other areas the gradient is downward, but the head difference between the surficial aquifer and Floridan aquifer system is slight and little recharge takes place. At [one] site, the vertical hydraulic gradient changes direction seasonally--upward during the dry season and downward during the wet season.

* * *

The water level or head difference between the two aquifers is not the only factor controlling recharge. Other important factors are hydraulic conductivity and thickness of the intermediate confining unit. The confining unit must be thin and permeable enough to allow appreciable recharge to the upper part of the Floridan.

CROP Exhibit 44, page 20.

8. The relationship of current topography to the Geneva bubble is underscored by the proximity of the bubble to the Geneva Hill. Separated by the St. Johns River from the Deland Ridge, Crescent City Ridge, and Palatka Hill to the north, the Geneva Hill and these three other geological formations run a distance of about 70 miles parallel to, and about 25 miles inland of, the current Atlantic shoreline. This ridgeline, which forms part of the Wicomico Shoreline, was probably formed about 100,000 years ago when sea level was about 100 feet higher than present. Local land surfaces less than 25 feet elevation were the most recently covered by seawater, which may explain the brackish water contained in the Floridan aquifer under these lower elevations.

9. The hydrogeology of the region, including the site, consists of the surficial aquifer, which overlies the intermediate confining unit consisting of Miocene sediments. Beneath these confining sediments is the Floridan aquifer consisting of permeable limestone and dolomite beds. The water in the Floridan aquifer travels northeastward from prime recharge areas to discharge in areas along the St. Johns River.

10. In areas of high land elevations (over 25 feet) centered around Geneva, the confining sediments are sandy and thus leaky. By contrast, the confining unit in lower areas may be relatively impermeable due to clay layers as thick as 20 feet. The high land elevations, where the Geneva bubble is recharged, feature a downward hydraulic gradient from the surficial aquifer to the Floridan aquifer and the absence of thick clay layers.

11. Shallow lakes near the subject site replenish the Geneva bubble by collecting water that slowly percolates through the surficial aquifer to the Floridan aquifer. The rate of recharge may be affected by the fact that the water elevations of these lakes may vary dramatically from year to year and from wet- season to dry-season. On the other hand, the potentiometric surface water elevation of the Floridan aquifer in this area remains fairly constant over the long-term, although it varies about 5 feet seasonally.

12. The preservation of the boundary between the freshwater lens and surrounding brackish water requires that the bubble receive sufficient

freshwater recharge so that it can maintain an annual groundwater outflow of at least 10 inches annually. A year of little rainfall, such as 1981, may reduce the freshwater outflow to half the necessary amount. If the deficiency exists for a "number of years," the equilibrium between the freshwater and brackish water would be disturbed. CROP Exhibit 44, page 68.

13. Groundwater withdrawals from the Geneva bubble total less than 5% of the bubble's average annual recharge. Although the rate of well pumping is increasing, withdrawals will not significantly exceed this percentage for several years. However, the freshwater outflow and recharge are finely balanced prior to consideration of the impact of withdrawals.

14. Calculating 30-year averages, the USGS study discloses that the recharge available to the Geneva bubble is 10.8 inches annually and the groundwater outflow, exclusive of withdrawals, is 10.4 inches annually. For the years studied, 1981-82, the withdrawals totalled only 0.37 inches, so there was no significant change in groundwater storage. CROP exhibit 44, page 67.

15. The critical balance between recharge and groundwater outflow for the Geneva bubble will become even finer with projected increases in withdrawals. The USGS study reports that, in 1981, total pumpage--all reasonably assumed to be from the Floridan aquifer--was 0.44 million gallons per day (MGD). This translates to 0.37 inches when distributed over the 22- square mile freshwater lens. The pumpage volumes were: Mullet Lake Water Association--0.02 MGD; Lake Harney Water Association--0.03 MGD; individual wells--0.18 MGD; and agriculture--0.21 MGD. CROP Exhibit 44, pages 65-66.

16. The 1989 average daily flow for Mullet Lake and Lake Harney were 0.032 and 0.040 MGD, respectively, for a total of 0.072 MGD. The two utilities are predicted to pump, by 1996, 0.138 and 0.065 MGD, respectively, for a total of 0.203 MGD. CROP Exhibit 10, page 314.

17. Additionally, Seminole Woods is pumping groundwater from the Geneva bubble a little over one mile southeast of the subject site. CROP Exhibit 10, page 63. The withdrawals attributable to Seminole Woods are 0.028 MGD in 1989 and 0.131 MGD in 1996. CROP Exhibit 10, page 314.

18. Even assuming a constant pumpage rate for individual and agricultural wells, the total pumpage of the Geneva bubble in 1989 was 0.49 MGD, which is an increase of 11% in eight years. This translates to an annual withdrawal of 0.41 inches when distributed over the 22-square mile freshwater lens.

19. By 1996, the total pumpage of the bubble, again assuming no change for individual and agricultural wells, will be about 0.724 MGD, which is an increase of about 45% in seven years. This translates to an annual withdrawal of 0.6 inches when distributed over the entire freshwater lens.

III. Application for MSSW Permit

20. By Individual Permit Application filed May 14, 1991, James K. Froehlich applied for an MSSW permit. The application describes the project as a borrow pit that, upon completion, would become part of a single family residential development.

21. Following a request for further information, Mr. Froehlich's engineers, the Civil Design Group, provided additional information by response dated September 13, 1991. An accompanying letter dated September 12, 1991,

discloses that the owner and applicant is now Excavated Products, which purchased the bulk of the property.

22. The September 12 letter states that the project, now known as Froehlich Lake Estates, would produce no offsite discharge. The letter assures that the project would result in no dewatering of wetlands.

23. The September 12 letter indicates that readings had been taken from four piezometers from April to September, 1991. The letter reports:

As noted, the water table is fairly flat and at approximate elevation of +20.5 feet N.G.V.D. . . . Using this most recent site-specific data, we therefore estimate that the normal seasonal high water level of the proposed lake will be at approximate elevation of +20.5 feet N.G.V.D. This estimate supersedes the earlier estimate of +24.0 feet N.G.V.D. The estimated seasonal fluctuation of the water level is expected to be approximately 3 feet. Therefore, we will expect the water table to fluctuate from elevation +17.5 to +20.5 N.G.V.D. during the course of the year.

Applicant Exhibit 2, page 3.

24. The September 12 letter identifies only two culverts on the property. Running under State Road 46, both pipes are completely plugged with silty sediment. The letter indicates that none of the wetlands in the project area has any offsite connections, such as through wetlands vegetation or ditches.

25. The September 12 letter represents that the project would have "no connection to Waters of the State." Applicant Exhibit 2, page 11. The only wetland upon which the project would encroach is the 0.24-acre Wetland E, as identified on the map described below. No mitigation is proposed because of the limited size of Wetland E and the fact that no other encroachments would take place.

26. In response to a request for reasonable assurance that the construction of the borrow pit would not affect adversely the hydrologic functions of the wetlands in the area, the September 12 letter states:

As mentioned previously, the estimated seasonal high water table elevation is +20.5 feet N.G.V.D. In wetlands adjacent to the lake at higher elevations, a clay core will be installed to hydrologically isolate the wetlands from the lower elevation lake. The details of the clay core will be submitted when additional borings are done along the wetland perimeter.

Applicant Exhibit 2, page 9.

27. The September 12 letter acknowledges that the Applicant does not intend to create a littoral zone or marsh creation. Onsite muck would be stockpiled and used to create the 6:1 slopes from the edge of the pit to about 3.5 feet below anticipated pool elevation. Applicant does not propose dumping offsite muck onsite.

28. The Narrative portion of the September 13 response materials indicates that the normal high water was reduced from 24.0 to 20.5 feet based on new information, and the bottom of the excavation was raised from -20 to -17 feet to provide at least 15 feet of protection for the Floridan aquifer. Additionally, the Narrative notes that three groundwater monitoring wells would be constructed (one upgradient and two downgradient) to test monthly for level of groundwater, chloride, turbidity, Ph, and hydrocarbons.

29. The hydrogeological information contained in the September 12 letter and September 13 response is largely derived from Jammal & Associates (Jammal). Jammal has studied the site from early 1989 through 1991.

30. The September 13 response materials include a Jammal report dated April 17, 1991, concerning the location of the top of the limestone layer. Based on analysis of five test borings, the Jammal April 17 report determines that the top of the limestone layer and, thus, the Floridan aquifer is nearly flat on the site and ranges in depth from about -32 to -33.5 feet. The Jammal April 17 report concludes that the then- proposed excavation depth of -20 feet would leave a soils thickness of 12 to 16.5 feet between the bottom of the borrow pit and top of the limestone layer marking the top of the Floridan aquifer.

31. Following another request for further information, Applicant provided additional information by response dated October 25, 1991, from the Civil Design Group, Inc. The October 25 response materials contain a new application from James P. Veigle, President. The new description of the project is limited to the construction of a borrow pit to yield fill for the construction of an expressway.

32. The October 25 response materials include several diagrams and maps. All but one of these diagrams and maps are incorporated into the permit approved by the St. Johns River Water Management District (District).5/

33. The October 25 response materials include a post- development drainage map of the site. The map reports that the project site totals 111.3 acres, including a 36.5-acre proposed lake within a 55.2-acre borrow pit area, as measured from the dry top of the slope.

34. The post-development drainage map depicts the site's wetlands, which total 22.6 acres. The wetlands and proposed pit are depicted in Appendix B.6/

35. Wetland A, which consists of 9.8 acres, is slightly west and north of the center of the site. Wetland B, which is on the north boundary of the project boundary just north of Wetland A, consists of only 0.67 acres. Wetland C, which is at the northernmost tip of the subject parcel, consists of 1.1 acres and abuts State Road 46. About 500-600 feet south and east of Wetland C is Wetland D, which also abuts State Road 46. Wetland D consists of 1.6 acres.

36. Wetland E, which is just south of Wetland D, is slightly east of the center of the project. Wetland E, which would be excavated as part of the borrow pit, consists of 0.24 acre. Wetland F is in the southcentral part of the site and consists of 6.75 acres. Wetland G is south of Wetland F. Consisting of 2.64 acres, Wetland G was probably bisected at the property line by the construction of Cochran Road.

37. The post-development drainage map contains a table describing each of the wetlands, which are all classified as isolated herbaceous wetlands. The plant species for Wetland A are willows, primrose willows, dogfennel, and blackberry with one acre of sawgrass, pickerelweed, and associated panicum grasses. Wetland B hosts sawgrass and panicum. Wetlands C and D are characterized by panicum and sedges with bay trees around the perimeter. Wetland E has panicum and primrose willow. Wetland F features maidencane, pickerelweed, sedges, juncus, bullrush, and dogfennel. Wetland G has panicum, sedges, and dogfennel with young cypress trees.

38. The post-development drainage map indicates that significant areas of relatively land surface high elevations of about 50 feet exist immediately west of the north and west boundary of the site and immediately east of the south and east boundary of the site. The site itself features varying land surface elevations with greater slopes in the southeast and northwest corners. The post-development drainage map shows the direction of overland drainage. As at present, the site would continue to receive runoff at its northwest corner.

39. The post-development drainage map represents that the proposed method of excavation is to dry mine until the water table is encountered and then to proceed deeper with drag lines or hydraulic dredging to the final proposed depth. Regardless of the method, "[n]o water will be withdrawn from the excavation pit or circulated. Water control berms will not be necessary as the depth of the water table will be below the rim of the excavation area at all times." Applicant Exhibit 3, Sheet 2 of 3, General Note 13.

40. The post-development drainage map describes the groundwater monitoring wells, which would monitor the surficial aquifer. One well would be upgradient and two wells would be downgradient of the excavation area. Samples would be taken monthly and reported quarterly to the District and Seminole County for water level, chloride, turbidity, Ph, and hydrocarbons. Monitoring would begin 45 days prior to excavation below the water table. Applicant Exhibit 3, Sheet 2 of 3, General Note 19.

41. The proposed monitoring well locations are shown on the post-development drainage map. MW-1 is at the 29-foot contour just off the right-of-way for Cochran Road at the southern tip of the property. MW-1 is within 100 feet west of Wetland G. MW-2 is between the 25- and 26-foot contours less than 50 feet south of Wetland C. MW-3 is between the 42- and 43- foot contours at the southeast corner of the site. MW-3 is about 500 feet east of Wetland F and 500 feet northeast of Wetland G.7/

42. The post-development drainage map shows that the slope of the pit would be 6:1 (e.g., one foot deep per six feet parallel to land surface) down to 3.5 feet below anticipated water level. At 17 feet elevation, the slope would steepen to 2:1. The map indicates that normal water level for the pit would be 20.5 feet.

43. The October 25 response materials also include a cross-section diagram of the borrow pit. The cross-section shows the bottom of the pit at -17 feet, which means that the water depth of the pit would be 37.5 feet deep if the stabilized pool elevation is 20.5 feet. The cross-section depicts silt fences placed on the boundary of each wetland around which the pit would be excavated: Wetlands A, D, F, and G (except where no excavation would take place at the edge of Wetland G nearest Cochran Road and the edge of Wetland D nearest State Road 46). Except for the side of Wetland D facing the pit, the pit would be excavated to within 10 feet of each of the above-described wetlands boundaries facing the excavation.

44. The October 25 response materials include an additional discussion of groundwater management prepared by Jammal. The report, which is dated October 14, 1991, restates the projection that the wet season pool elevation of the excavated pit would stabilize at about 20.5 feet elevation. The Jammal October 14 report observes that the pool might stabilize at a higher elevation during construction.

45. The uncertainty as to the stabilized wet season water elevation of the filled pit is due to a number of factors set forth in the Jammal October 14 report. These include:

The estimated seasonal high groundwater table elevation around the perimeter of the pond in the post-development condition.

Potential for lateral groundwater inflow to and outflow from the pond from the surrounding aquifer. This potential is related to the upgradient/downgradient ambient seasonal high water table elevation, upgradient watershed, aquifer transmissivity, and hydraulic gradient upstream and downstream of the pond.

* * *

Increase in vertical groundwater inflow into or out of the pond as a result of reducing the thickness of clastic sediments between the water table aquifer and the subjacent aquifer (i.e., the intermediate aquifer of Floridan aquifer).

Volume of stormwater entering the pond and rate of dissipation of stormwater via natural infiltration into the water table aquifer or filtration through underdrains or similar structures.

Net of direct precipitation on the pool surface minus lake evaporation for the normal rainy season.

Applicant Exhibit 3, Jammal report, page 1.

46. If, during excavation, the pool were to stabilize at a higher elevation, the Jammal October 14 report recommends a minimum berm elevation of 25 feet to ensure that the borrow pit would not discharge into the wetlands. Ongoing monitoring would determine if a higher berm were needed.^{8/} The Jammal October 14 report does not address the possibility of a lower stabilized pool elevation for the filled pit.

47. The Jammal October 14 report notes that water withdrawn during the startup dewatering would be contained onsite in a settling basin to allow infiltration back into the surficial aquifer. According to the report, the sandy soils in the area are very permeable, and rainfall would quickly infiltrate the ground surface before reaching the excavation.

48. The discussion of the groundwater drawdown impacts in the Jammal October 14 report is dependent upon the projections of pool elevations of the pit during dredging and upon completion. The discussion of groundwater drawdown uses a 15-foot potentiometric surface of the Upper Floridan aquifer at the site. The Jammal October 14 report warns that reducing the water level in the pit below this elevation for a sustained period "may result in upward flow from the sensitive freshwater bubble in the Floridan aquifer." Applicant Exhibit 3, Jammal report, page 5.

49. The Jammal October 14 report deals with the potential upwelling problem by noting that the normal seasonal high water elevation in the pit is projected to be about 20.5 feet. Based on the excavation process proposed, the Jammal October 14 report does not anticipate water levels falling below 17 feet. In any event, the Jammal October 14 report assures that the water level in the pit will be monitored "to ensure that no upward flow from the Floridan Aquifer is induced." Applicant Exhibit 3, Jammal report, page 5.

50. The Jammal October 14 report states that the excavation will reduce the thickness of the sediments separating the water table aquifer from the Floridan aquifer by 37 feet, from 52 feet to 15 feet.^{9/} The 15-foot thickness of clastic sediments overlaying the limestones of the Floridan aquifer is "adequate for water quality treatment." Applicant Exhibit 3, Jammal report, page 5. But the 70% reduction in original thickness results in an increased downward gradient from the water table to the Floridan aquifer.

51. The ensuing increase in recharge to the Floridan aquifer is "not detrimental," according to the Jammal October 14 report. However, the stabilized pool elevation may be reduced if the "magnitude of the upgradient shallow aquifer groundwater feed [into the filled pit] is not adequate to compensate for the increased vertical recharge within the excavation." The report continues:

A normal pool elevation which stabilizes significantly below the pre-development groundwater table can affect the hydroperiods of the adjacent wetlands. Wetlands adjacent to the proposed excavation are at elevations ranging from +21 to +24 feet N.G.V.D. If we find adverse drawdown in the wetlands during

our monitoring program . . . , a clay core (or other acceptable method) will be used to hydrologically isolate the wetland from the lower elevation lake.

Id.

52. The Jammal October 14 report adds that the flow of contaminants into the pit is "mitigated" by the fact that "stormwater flow directly into the excavation will be minimized." Id. The report restates that the water table is "fairly flat" and at an approximate elevation of 20.5 feet. The report thus concludes that the normal seasonal high pool elevation for the proposed borrow pit is estimated to be 20.5 feet. Because the estimated seasonal fluctuation in the water table is about 40 inches, the Jammal October 14 report projects that the water elevation of the filled pit will vary during the year from 17- 20.5 feet.

53. The Jammal October 14 report describes a groundwater monitoring plan that involves devices in addition to the three shallow aquifer monitoring wells described above. A staff gauge in 0.1-foot increments would be placed in the pit and read twice daily during excavation. The records would be submitted at unstated intervals to the District and Seminole County.

54. A Jammal representative would select locations for the installation of an undetermined number of shallow aquifer piezometers along the edges of the wetlands adjacent to the excavation. The Jammal representative would also select the location for the installation into the Floridan aquifer of an additional piezometer "[s]ince there is no site specific data on the altitude of the potentiometric surface of the Floridan aquifer and since the aquifer is subject to seasonal variation." Applicant Exhibit 3, Jammal report, page 6. During the first month of operation, the readings (to the nearest 0.1 foot) would be taken daily. Again, records would be submitted at unstated intervals to the District and Seminole County.

55. The third element of the groundwater monitoring plan calls for on-site inspections by a Jammal "geotechnical engineer." At weekly intervals during the first month of operation and at unstated intervals thereafter, the engineer:

will examine the quality of effluent reentering the pit, the operation of the settling pond, the integrity of the installed piezometers, and look for any signs of adverse groundwater impacts. The . . . geotechnical engineer will make written recommendations to mitigate any noted possible adverse groundwater impacts. The . . . geotechnical engineer also reserves the right to make this plan more stringent if circumstances demand.

Applicant Exhibit 13, Jammal October 14 report, page 7.

IV. Technical Staff Reports and Permit Conditions

56. By letter to Mr. Crabtree dated November 20, 1991, the District advised that it would be considering the borrow pit application at a meeting on

December 10, 1991. The letter contains a Technical Staff Report dated November 27, 1991, and a Notice of Rights.

57. The November 27 Technical Staff Report (TSR-1) describes the proposed project, identifies Mr. Veigle as the applicant, mentions Lake Cochran as a receiving waterbody, and otherwise sufficiently describes the project so that Mr. Crabtree and other interested persons would know that the Board would be considering the borrow pit project.

58. Describing the wetlands, TSR-1 notes:

At the time of the field inspection, water depths within the wetlands varied from several inches to several feet. The water levels within the wetlands are dependent on the fluctuations of the Floridan Aquifer. The vegetation and condition of such wetlands change seasonally and annually, due to differences in the amount of rainfall and the degree of recharge.

Applicant Exhibit 13, page 5.

59. Concerning the impact of the proposed excavation on the wetlands, TSR-1 states:

No impact is proposed on the remainder of the 22.4 acres of herbaceous wetlands [other than the excavation of 0.24-acre Wetland E] within the project boundary. District Staff does not anticipate that drawdown will occur within the adjacent wetlands, due to the absence of a confining layer within the project area, and the method of construction proposed (no dewatering offsite). The 0.2 acre wetland [Wetland E] is below the threshold for review, as set forth in section 10.7.4, [Applicant's Handbook].

Applicant Exhibit 13, page 5.

60. TSR-1 approves the use of a dry detention pond and swales to control stormwater runoff. Although located in the 100-year floodplain, the proposed project, according to TSR-1, would not adversely affect the storage capacity of the floodplain because no fill would be added to the floodplain.

61. TSR-1 does not address in any detail the impact of the proposed project on the Geneva bubble. TSR-1 states that Applicant originally proposed to leave only 10 feet of confining sediments over the Floridan aquifer, but, due to concerns expressed by the public and comments from District staff, Applicant agreed to leave a minimum separation of 15 feet.

62. TSR-1 contains 11 conditions. Condition 1 is that the permit expires December 10, 1996. Condition 3 is: "The permittee must obtain a General or Individual permit from the District prior to beginning construction of subsequent phases or any other work not specifically authorized by this permit." Applicant Exhibit 13, page 6.

63. Incorporating as a condition the maps and diagrams discussed above, TSR-1 concludes that the proposed project is consistent with the requirements of Chapters 40C-4 and 40C-42. The accompanying Notice of Rights informs the recipient:

A party whose substantial interests are determined has the right to request an administrative hearing by filing a written petition with the [District] within 14 days of receipt of notice of the District's intent to grant or deny a permit application

A party whose substantial interests are determined has the right to request an administrative hearing by filing a written petition in the office of the District Clerk within 14 days of receipt of notice of final District action on a permit application, as provided in [Rule] 40C-1.511, if the Governing Board took action which substantially differs from the notice of intent to grant or deny the permit application, or if a substantially interested party did not receive notice of the District's intent to grant or deny the permit application.

Applicant Exhibit 13, page 8.

64. The certificate of service shows that the District mailed Mr. Crabtree a Notice of Rights on December 2, 1991. Mr. Crabtree received the Notice of Rights and TSR-1 on December 6, 1991--four days before the scheduled December 10 District meeting.

65. On December 10, 1991, the District mailed to Mr. Crabtree another letter, Technical Staff Report (TSR-2), and notice of rights, which Mr. Crabtree received December 12, 1991. The December 10 cover letter informs Petitioner Crabtree that the enclosed TSR-2 "constitutes a notice of the District's intent to grant or deny the application. Please refer to the enclosed notice of rights to identify any rights that you may have regarding the proposed agency action." Applicant Exhibit 13, page 10.

66. TSR-2 is identical to TSR-1 except for the addition of three new conditions pertaining to the impact of the excavation and operation of the borrow pit on groundwater. These conditions are:

12. During construction and operation, the permittee must conduct groundwater monitoring in accordance with the "Groundwater Monitoring Plan" described in the Hydraulic Dredging Plan, prepared by Jammal & Associates, dated October 14, 1991 and received by the District on October 25, 1991.10/ The permittee must include the following modifications in the referenced plan:

- a. The maximum interval for data collection is monthly.
- b. An additional shallow aquifer piezometer must be installed to monitor the surficial aquifer elevation outside the radius of influence of the borrow pit. The permittee must obtain written approval of the location for this piezometer.
- c. Monthly rainfall totals must be collected at the borrow pit.
- d. Monitoring must continue until sufficient data exists to indicate that the mean normal wet season water elevation in the final borrow pit is no less than 20.5 ft NGVD. The permittee must obtain written approval from the District prior to modifying or terminating the monitoring program.

13. No excavation can occur below elevation +0 ft NGVD until the permittee submits a water budget analysis, based on at least two years of data collection from the groundwater monitoring plan, that demonstrates that the mean normal wet season water elevation will not be less than 20.5 ft NGVD. District staff must review this analysis and provide written approval prior to any excavation below elevation +0 ft NGVD.

14. If at any time during construction or operation, District staff determine based on monitoring data or water budget analyses submitted by the permittee that the mean normal wet season elevation in the borrow pit is below 20.5 ft NGVD, the permittee must apply for and obtain a permit modification to prevent adverse impacts or mitigate for adverse impacts to adjacent wetlands.

Applicant Exhibit 13, page 15.

67. At the District Board meeting on December 10, 1991, the Board agreed to issue the MSSW permit, but added more conditions. The record is unclear as to what conditions were added and when they were added. It is clear, though, that the Board at the December 10 meeting expanded upon Condition 14 in TSR-2 by dividing the excavation project into two phases and, as noted below, required further review prior to excavation of the land following the first phase. On December 23, 1991, Petitioners filed the petition with the District challenging its intent to issue the MSSW permit.

68. A Technical Staff Report dated April 20, 1992 (two days before the final hearing commenced) (TSR-3) incorporates the conditions of the MSSW permit approved by the Board on December 10, 1991. Restating the introductory language and Conditions 1- 11 contained in the prior TSR's, TSR-3 states the following conditions:11/

12. During construction and operation, the permittee must conduct groundwater monitoring in accordance with the "Groundwater Monitoring Plan" described in the Hydraulic Dredging Plan, prepared by Jammal & Associates, dated October 14, 1991 and received by the District on October 25, 1991. The permittee must submit a revised plan for District staff approval within 30 days of permit issuance and prior to starting construction. The revised plan must include the following modifications: The permittee must include the following modifications in the referenced plan:

- a. The maximum interval for data collection is monthly.
- b. An additional shallow aquifer piezometer must be installed to monitor the surficial aquifer elevation outside the radius of influence of the borrow pit. The permittee must obtain written approval of the location for this piezometer.
- c. Monthly rainfall totals must be collected at the borrow pit.
- d. Monitoring must continue for a minimum period of at least one year until sufficient data exists to indicate that the mean normal wet season water elevation in the final borrow pit is no less than 20.5 ft NGVD pursuant to conditions 13 and 14. The permittee must obtain written approval from the District prior to modifying or terminating the monitoring program.
- e. The Floridan aquifer monitoring well must be installed and sufficient data collected to establish the potentiometric level prior to starting construction.

13. The permittee must proceed with excavation in the following phased manner:

- a. Flag the limits of Area "A" as delineated on exhibit 1 and notify the District staff in the Orlando Field Office at least one week prior to starting construction. District staff must concur with flagged limits prior to starting construction.
- b. Excavate Area "A", as delineated on Exhibit 1, to a depth of no greater than +0 ft NGVD until such time that the permittee satisfies permit condition no. 14. The borrow areas outside of Area "A" may be excavated to a depth no greater than +21 ft NGVD concurrent with the excavation of Area "A".

c. Following the complete excavation of Area "A" to elevation +0 ft NGVD, a bottom contour survey of Area "A" must be submitted to the Orlando Field Office. This survey must be signed and sealed by a Registered Land Surveyor.

d. Following the submittal of the bottom contour survey of Area "A" the permittee must submit a water budget analysis supported by an appropriate groundwater flow model, based on sufficient data, collected for a minimum period of at least one year from the groundwater monitoring plan, that demonstrates that the mean normal wet season water elevation will not be less than 20.5 ft. NGVD.

134. No excavation can occur below elevation +0 ft NGVD in Area "A" and below elevation +21 ft NGVD in the borrow area outside Area "A" until the permittee submits a water budget analysis, based on at least two years of data collection supported by an appropriate groundwater flow model, based on sufficient data, collected for a minimum period of at least one year from the groundwater monitoring plan, that demonstrates that the mean normal wet season water elevation will not be less than 20.5 ft NGVD when the pit is fully excavated.

District staff must review this analysis and provide written approval prior to any excavation below elevation +0 ft NGVD in Area "A" and elevation +21 ft NGVD in the borrow area outside of Area "A".

145. If at any time during construction or operation, District staff determine based on monitoring data or water budget analyses submitted by the permittee that the mean normal wet season elevation in the borrow pit is below 20.5 ft NGVD, the permittee must stop all excavation and apply for and obtain a permit modification to prevent adverse impacts or mitigate for adverse impacts to adjacent wetlands or other water resources.

16. Within 30 days of permit issuance and prior to starting construction, the permittee must submit to the District Orlando Field Office, three (3) copies of a revised construction plan, including contractor notes

on mining operation, to comply with this permit. The permittee must obtain District written approval of the revised plan prior to starting any construction.

Applicant Exhibit 4, pages 4-5.

69. Area A, which is depicted in the diagram attached as Appendix B, covers a little more than half of the original area proposed for excavation. Area A includes the easterly side of the proposed pit and continues to abut State Road 46 and Wetland D. However, Area A does not approach as closely Wetlands A and F and imposes a setback of at least 100 feet from Wetlands A and F. This setback would not apply once excavation began following the completion of the deeper pit in Area A and shallower pit in the remainder of the original pit except for the 100-foot setback from Wetlands A and F.

70. A Technical Staff Report dated April 29, 1992 (TSR-4) (the last day of the hearing), was prepared to indicate the language of the conditions that District staff determined would be necessary after considering the evidence presented at the hearing. Although referred to as TSR-4, it would appear that the TSR form was adopted for ease of reference and District staff was not issuing TSR-4 as a formal TSR.

71. TSR-4 makes the following changes to TSR-3:

12. During construction and operation, the permittee must conduct groundwater monitoring in accordance with the "Groundwater Monitoring Plan" described in the Hydraulic Dredging Plan, prepared by Jammal & Associates, dated October 14, 1991 and received by the District on October 25, 1991. The permittee must submit a revised plan for District staff approval within 30 days of permit issuance and prior to starting construction. The revised plan must include the following modifications:

a. The maximum interval for data collection is monthly weekly.

b. An additional shallow aquifer piezometer and staff gauge must be installed at a "reference site" to monitor the surficial aquifer elevation outside the radius of influence of the borrow pit. The permittee must obtain written approval of the location for this piezometer monitoring location.

c. Monthly Weekly rainfall totals must be collected at the borrow pit.

d. Monitoring must continue for a minimum period of at least one year or longer after Area "A" is completed until sufficient data exists to indicate that the mean normal wet season water elevation in the final borrow pit is no less than 20.5 ft NGVD pursuant to conditions 13 and 14 complete the water budget analyses as required by conditions 15,

16 and 17. The permittee must obtain written approval from the District prior to modifying or terminating the monitoring program.

e. The Floridan aquifer monitoring well must be installed and sufficient data collected to establish the potentiometric level prior to starting construction.

13. Prior to starting construction (borrow operation), the permittee must install a staff gauge and piezometer, referenced to NGVD datum by a registered land surveyor, in wetlands "A", "B", "C", "D", "F" and "G". The permittee must monitor the water level at each wetland monitoring station and at the "reference site" located outside the influence of the borrow pit (as required under Permit Condition 12b.) on a weekly interval. This monitoring [must occur for a period prior to starting construction approved by the District as sufficient to establish a baseline comparison between the reference site and each monitored wetland. Monitoring must]12/ continue until construction is completed. The permittee must submit this monitoring data for each month to the District's Orlando office by the end of each calendar month.

14. The permittee must provide one surveyed transect each in wetlands A, G and F. The transects will be located as shown on Exhibit 1. The ground elevations and surface water elevations referenced to N.G.V.D. must be submitted as a part of the certified survey, prior to starting construction. The survey must be conducted and certified by a surveyor registered in the State of Florida.

135. The permittee must proceed with excavation in the following phased manner:

a. Flag the limits of Area "A" as delineated on exhibit 1 and notify the District staff in the Orlando Field Office at least one week prior to starting construction. District staff must concur with flagged limits prior to starting construction.

b. The limits of Area "A" must be at least 100' from the boundaries of wetlands A and F as such wetland boundaries are shown on the Post Development Drainage Map prepared by the Civil Design Group dated July 1991 and received by the District on October 25, 1991.

bc. Excavate Area "A", as delineated on Exhibit 1, to a depth of no greater than +0 ft NGVD until such time that the permittee satisfies permit condition no. 146. The borrow areas outside of Area "A" may be excavated to a depth no greater than +21 ft NGVD concurrent with the excavation of Area "A".

cd. Following the complete excavation of Area "A" to elevation +0 ft NGVD, a bottom contour survey of Area "A" must be submitted to the Orlando Field Office. This survey must be signed and sealed by a Registered Land Surveyor.

de. Following the submittal of the bottom contour survey of Area "A" the permittee must submit a water budget analysis supported by an appropriate groundwater flow model, based on sufficient data, collected in accordance with the approved monitoring plan, for a minimum period of at least one year or longer after Area "A" has been excavated to elevation 0 NGVD, until sufficient data exists to calibrate and verify the water budget analysis. The water budget analysis must demonstrate that the water level in the borrow pit in a normal rainfall year will be at least two (2) feet above the ground elevations within a 100 foot radius of the center of wetlands "A" and "G" during January through April from the groundwater monitoring plan, that demonstrates that the mean normal wet season water elevation will not be less than 20.5 ft. NGVD.

146. No excavation can occur below elevation +0 ft NGVD in Area "A" and below elevation +21 ft NGVD in the borrow area outside Area "A" until the permittee submits a District-approved water budget analysis supported by an appropriate groundwater flow model, based on sufficient data, collected in accordance with the approved monitoring plan, for a minimum period of at least one year or longer after Area "A" has been excavated to elevation 0 NGVD until [sic] sufficient data existing to calibrate and verify the water budget analysis. The water budget analysis must demonstrate that the water level in the pit in a normal rainfall year will be at least two (2) feet above the ground elevations within a 100 ft radius of the center of wetlands "A" and "G" during January through April from the groundwater monitoring plan, that demonstrates that the mean normal

wet season water elevation will not be less than 20.5 ft NGVD when the pit is fully excavated. District staff must review this analysis and provide written approval prior to any excavation below elevation +0 ft NGVD in Area "A" and elevation +21 ft NGVD in the borrow area outside of Area "A".

157. If at any time during construction or operation, District staff determine based on monitoring data or water budget analyses submitted by the permittee that the water level in the pit during a normal rainfall year will not be at least two (2) feet above the ground elevations within a 100 foot radius of the center of wetlands "A" and "G" during January through April mean normal wet season elevation in the borrow pit is below 20.5 ft NGVD, the permittee must stop all excavation and apply for and obtain a permit modification to prevent adverse impacts or mitigate for adverse impacts to adjacent wetlands or other water resources.

18. If at any time during construction (borrow operations), the measured water level in any of the wetlands, as adjusted for any difference observed with the "reference site" during pre-construction monitoring, is 0.5 ft. below corresponding water level in the "reference site", the permittee must immediately cease the borrow operation until the relative difference in water level between each monitoring site and the reference site is no more than 0.5 ft.

19. The limit of borrow operation must be at least 200 feet from any septic tank drain field. Prior to construction, the permittee must submit to the District a map delineating the location of all septic tanks and septic tank drain fields within 500 feet of the property boundary.

20. The permittee must maintain a continuous berm at elevation 27.0 ft NGVD between wetland "D" and the borrow pit during construction and operation of the project. A minimum berm width of four (4) feet must be maintained.

1621. Within 30 days of permit issuance and prior to starting construction, the permittee must submit to the District Orlando Field Office, three (3) copies of the following:

a. a revised construction plan, including contractor notes on mining operation, to

comply with this permit; and,
b. a detailed plan for the water budget analysis, including all methodologies and data to be used.

The permittee must obtain District written approval of the revised plan prior to starting any construction.

V. Impact of Proposed Borrow Pit and Adequacy of Permit Conditions

A. Contamination of Floridan Aquifer

72. Petitioners allege that excavation of the pit would facilitate the introduction of various pollutants into the Floridan aquifer. The potential sources of pollutants are a nearby sprayfield, possible septic tank drainfields, and general stormwater runoff. Regarding the sprayfield and possible septic tank drainfields, the issues involve surface water runoff and groundwater movement. Petitioners assert that the stormwater runoff problems would be exacerbated by the location of the subject site in the 100-year floodplain.

73. Two of these issues require little consideration. Nothing in the record suggests that effluent from any septic tanks in the area would flow onto the subject site or, if so, into the pit, regardless whether the flow were on the surface or in the ground. In any event, Condition 19 adequately addresses the septic tank issue, to the extent that one exists.

74. The principle source of polluted stormwater runoff onto the subject site is State Road 46, which drains into Wetlands C and D. Wetland D would abut the pit, but Condition 20 requires the construction of a berm at elevation 27 feet between the wetland and the pit to protect the latter from runoff. There is some evidence of agricultural activity in the area, but the evidence is insufficient to determine the volume and composition of the agricultural runoff or the direction of its flow.

75. The subject site is located in the 100-year floodplain. However, Applicant does not propose the introduction of any fill, so the floodplain functions in terms of storage and conveyance should not be substantially affected. The evidence concerning agricultural activities and septic tanks is insufficient to determine that floodwaters would necessarily carry livestock wastes, fertilizers, insecticides, herbicides, and septic tank effluent into the borrow pit. As noted below, sprayfield operations will cease during storm events. Thus, the design of the borrow pit, including the berms and Condition 20, adequately address the issues of the floodplain and runoff from the 100-year storm event.

76. The sprayfield raises the only serious pollution issue. A reclaimed-water sprayfield owned and operated by the City of Sanford will be located on a large parcel abutting the northwest boundary of the subject parcel. Consisting of nearly 900 acres of hay fields and citrus groves, the sprayfield will receive 2.84 million gallons per day of tertiary-treated domestic wastewater with, according to the DER permit, "high level disinfection for reclaimed water delivered to the reuse system."

77. Drainage from the southeast corner of the sprayfield is in the direction of the subject site. The flow in the shallow aquifer below the

southeast corner of the sprayfield is also in the direction of the subject site. The citrus groves will be located on the portion of the sprayfield nearest the subject parcel.

78. The sprayfield was permitted on April 15, 1991, and is still under construction. The conditions of the sprayfield permit are stringent in terms of requiring back-up equipment and operating personnel. Permit conditions demand a reduction in total suspended solids to not more than 5 mg/l and the maintenance of 1 mg/l total chlorine residual after a minimum contact period of 15 minutes. By these two parameters, the permit indirectly undertakes the complex process of viral monitoring; no direct monitoring of viral agents will be attempted.

79. The micro-jet irrigation system applies the reclaimed water in no more than a two-foot radius beneath each citrus tree so as to minimize the possibility of runoff. The rate of application is low--0.8 to 1 inch per week. The soils in the area are highly permeable, especially at the higher elevations where, otherwise, reclaimed water runoff would be a greater risk. The land application system will not be operated during storm events.

80. Some of the reclaimed water will be lost to evaporation. The majority of the reclaimed water will be transpired by the trees while the water is still in the root zone above the water table. The remainder of the reclaimed water will percolate into the shallow aquifer. The primary direction of travel for this reclaimed water is vertical through the confining layer and into the Floridan aquifer, not lateral within the shallow aquifer. As the reclaimed water migrates through the confining layer between the shallow and Floridan aquifers, additional contaminants will be filtered from the reclaimed water or simply fail to survive during the length of time required for the water to reach the Floridan aquifer while percolating through the undisturbed, relatively thick confining sediments.

81. The excavation of the borrow pit would create a downgradient that will attract the reclaimed water that moves laterally. Any portion of the reclaimed water that proceeds directly into the Upper Floridan aquifer beneath the pit without passing through the pit would travel through a longer section of the confining layer (given its diagonal path) than the reclaimed water percolating into the Floridan aquifer directly below the sprayfield. Nothing in the record establishes that the reclaimed water percolating straight down beneath the sprayfield threatens the quality of the water in the Floridan aquifer.

82. A portion of the reclaimed water will enter the shallow aquifer and then be discharged into the borrow pit, rather than pass from the shallow aquifer through the confining beds and into the Upper Floridan aquifer. The reclaimed water reaching the Upper Floridan aquifer from the borrow pit will not travel through as much confining sediments as will the reclaimed water passing straight into the Upper Floridan beneath the sprayfield. The reclaimed water will encounter relatively little resistance while traveling laterally through the shallow aquifer. Due to the 70% reduction in confining sediments, the reclaimed water entering the Floridan aquifer from the pit will also encounter less resistance than will the reclaimed water traveling straight down from the sprayfield.

83. However, the reclaimed water is heavily treated, released in controlled quantities (adjusted for rainfall), applied in a manner designed to maximize elimination by evapotranspiration, and carefully monitored (notwithstanding the indirect monitoring for viral agents).

84. Applicant has provided reasonable assurance that surface runoff and groundwater movement from possible septic tank drainfields, surface runoff from the sprayfield, and general surface runoff of stormwater--notwithstanding the location of the pit in the 100-year floodplain--will not adversely affect the Floridan aquifer. Applicant has provided reasonable assurance that the location of the borrow pit in the 100-year floodplain will not adversely affect the drainage functions of the floodplain. The question of sprayfield contaminants entering the pit from the surface aquifer and then entering the Floridan aquifer is considered at the end of the next section.

B. Wetlands and Hydraulic Conductivity

85. The remaining issues involve the wetlands and, as Petitioners allege it, the hydraulic conductivity of the overburden left after excavation. The latter issue raises questions of recharge or discharge of the shallow and Upper Floridan aquifers because recharge and discharge rates are a function of the hydraulic conductivity of confining beds, thickness of confining beds, and head difference between the surficial and Floridan aquifers.

86. The wetland and hydraulic conductivity issues are intertwined due largely to the question of what would be the stabilized water table elevation, and thus pool elevation of the filled pit, following excavation. The primary threat to the wetlands is due to dewatering, which requires consideration of the impact of the proposed excavation upon the water table. However, mitigation conditions focusing directly upon the impact to wetlands of a lowered water table do not necessarily address the question of recharge implicit in the hydraulic conductivity issue.

i. Wetlands

87. A key factor concerning the wetland issue is the condition of each wetland, which in turn affects the functional value of the wetland. In this case, the primary function is that of providing habitat. This function can be impaired or eliminated by any disturbance of the timing or quantities of water delivered to or taken from the wetland.

88. In fact, the wetlands are not all in the same condition and none of them is in superior condition. Wetlands B, C, D, and E (which is to be excavated) are of little value. In particular, Wetlands C and D, which receive polluted runoff from State Road 46, have suffered from the invasion of many undesirable plant species. Wetland B tends to remain dry even when the other on-site wetlands are inundated. When other wetlands have as much as 30 inches of water in them, Wetland B has only a thin veneer of water. Wetlands B and C are quite small. Wetland E shares most of these negative attributes and is also the smallest.

89. Wetlands A and G are of the highest relative value. Wetland F, which is a high prairie and, thus, different from the others, maintains a fair functional value, although not as high as the functional values of Wetlands A and G. Wetlands A, G, and F are the three largest wetlands, with Wetlands A and F constituting about three-quarters of the wetlands acreage on the site.

90. Wetland A, which is 9.7 acres, has suffered an invasion of woody vegetation extending through its northern one-third to one-half. Partly due to its significant water levels, Wetland A has potential as nesting habitat for the sandhill crane. Wetland A had at least 24 inches of water at its fringe and

more toward the center during the dry months this year. The more inundated portion of Wetland A is the part of the wetland closest to the edge of the pit.

91. Wetland G, which is 2.64 acres, also has potential as nesting habitat for the sandhill crane, again partly due to its significant water levels. In the absence of unusually high water elevations, Wetland G is no longer connected with the wetland south of Cochran Road or, thus, with Lake Cochran, which is located south of the wetland across Cochran Road. Wetland G contains an area of standing water for extended periods with water depths exceeding 36 inches prevailing in the center of the wetland.

92. Wetland F, which is 6.75 acres, also enjoys significant water levels and contains a deep hole in the middle of the wetland where water can usually be found throughout the year. Even during the dry months, as much as two acres of Wetland F remain inundated. During the rainy season, Wetland F may contain as much as 30 inches of water across much of its surface.

93. Both sides of Wetland F would be within 10 feet of the edge of the pit, and, according to the cross-section diagram, Wetland F would be separated from the pit by only a silt fence (no berm). This is because Wetland F, as a high prairie, is at elevation 25 feet.

94. Both sides of Wetland A would be about 30-40 feet from the edge of the pit. Wetland A would be separated from the pit by a silt fence and a berm.

95. The side of Wetland G opposite Cochran Road would be about 20 feet from the edge of the pit. Due to the relatively high elevation of this end of Wetland G, only a small berm and a silt fence separate this side of Wetland G from the pit.

96. Wetland D would be in a valley between State Road 46, which crowns at nearly 30 feet, and the edge of the pit, which, originally proposed at 25.5 feet, is now proposed to reach 27 feet under Condition 20. The side of Wetland D nearer the pit is about 50 feet distant from the top of the pit. This side of Wetland D is at 24 feet.

97. The functions presently performed by the on-site wetlands would not be adversely impacted, transitory or long term, by a maximum transitory drawdown (during construction) of no more than 0.5 feet, as permitted by Condition 18, or the destruction of Wetland E.

ii. Hydraulic Conductivity

98. As noted above, the dewatering question, which involves the wetlands issue, also involves the issue of the hydraulic conductivity of the post-excavation overburden. However, the reasonable assurance provided by Condition 18 with respect to the wetlands does not necessarily extend to the matters raised by the issue of hydraulic conductivity. The issue of hydraulic conductivity raises the question of the impact of the proposed project on the Upper Floridan aquifer, especially with respect to the exchange of groundwater between, on the one hand, the pit, into which the surficial aquifer will discharge, and, on the other hand, the Upper Floridan aquifer or, at this location, the Geneva bubble.

99. The various projections of water elevations for the wetlands and the transient and stabilized pool elevations for the borrow pit are arrayed against a background of conflicting evidence offered by expert hydrogeologists called by

the three parties. There are serious questions concerning the models, assumptions, and data inputs used by the experts to project water elevations in the pit, adjacent water table, and wetlands. Reaching conflicting conclusions on some matters and no conclusions at all as to other matters, the expert witnesses in the case apply various well-recognized laws of hydrogeology to an incomplete data set of hydrogeological conditions prevailing at the subject site. In many cases, assumptions based on regional conditions replace missing, site-specific data.

100. There is an clear lack of reasonable assurance concerning certain key aspects of the hydraulic conductivity issue. The USGS Modflow model employed by the experts for the District and Petitioners (to yield conflicting results due to different values for leakants inside the pit) is itself rejected by the Applicant's expert, who is an employee of Jammal. Applicant's expert, who has considerable experience with the model, indicates that the USGS Modflow model is unsuitable in this case because, among other things, it assumes a relatively flat water table.

101. The assumption of a flat water table is incorrect and the suitability of the USGS Modflow model for this pit is doubtful. At the subject site, the water table tends to follow the grade of the ground surface, and the subject site contains a sloping terrain. Unfortunately, the source of the misinformation concerning the gradient of the water table was the Jammal October 14 report, which inaccurately describes the water table as "fairly flat."^{13/} The faulty assumption concerning the gradient of the water table may understate the water table impact in the downgradient direction and overstate the water table impact in the upgradient direction.

102. The USGS Modflow is a powerful model. The degree of error contained in faulty data inputs or assumptions may be multiplied in final results. As conceded by the District in its proposed recommended order, "neither [expert's] groundwater flow model was calibrated using test data from the site." District's Proposed Recommended Order, Paragraph 52.

103. Significantly, the District's expert admits that he would have liked to have a value for recharge to the Floridan aquifer. Applicant's expert testified that useful tests would include, with respect to each wetland, a pump test for leakage, a slug test, and the installation of a piezometers and auger borings. At least certain of these data would be obtained under TSR-4, but not until Area A and the shallow remainder of the pit have been excavated and the required monitoring begins. District's Proposed Recommended Order, Paragraph 53.

104. The inadequacy of the data, especially in view of the power of the modelling tool, undermines the reliability of the modelling results, as does the incorrect assumption concerning the water table gradient. Questionable assumptions different at the subject site--displace site-specific data so as to reduce materially the reliability of the ensuing analysis.^{14/}

105. The reliability of the hydrogeological projections in this case is undermined somewhat by the disagreement between the experts for the Petitioners and District, who used the USGS Modflow model, and Applicant's expert, who rejected the model. The reliability of the hydrological projections is further undermined by a fundamental disagreement between the District's experts as to the impact of the proposed project on the water table.

106. The District expert who spent considerable time and effort in analyzing the application is a Hydrologist III, who has been employed by the District for five years. He testified that the pit would not substantially lower the water table.

107. The subject application was initially reviewed for about one and one-half hours by the Director of the District's Department of Ground Water Programs and Technical Support. Employed by the District for 17 years and in charge of 11 hydrogeologists or engineers, the Division Director disagreed with the Hydrogeologist III. The Director instead concluded that the excavation would necessarily result in lower water elevations than Applicant and Jammal had projected.

108. The Division Director based his conclusion on a largely intuitive analysis of such factors as the elevation of the water table, depth of the borrow pit, and potentiometric surface of the Floridan aquifer. In fact, Applicant's expert also employed an intuitive approach in part in determining that the proposed project would not dewater the on-site wetlands. Although in this case more reliable than the modelling work, the intuitive approach is necessarily preliminary in nature. Moreover, Applicant's expert made assumptions that cast into doubt some of his conclusions.

109. One problem is the attempt by Applicant's expert to estimate the water table elevation for 98 points around the proposed borrow pit. This would measure the depth from the surface of the ground to the seasonal high water table. Applicant's expert identified four sources of data for this work. One of these was the Soil Conservation Soils map, which, due to the large scale involved, is a poor substitute for soil classifications based upon soils samples taken from the site itself.

110. Another source used by Applicant's expert was site-specific topographical information including the wetlands elevations. This information included or culminated in an estimate that the water table was one foot over the floor of the wetlands. For this information, Applicant's expert relied on information supplied by the biological experts employed by Petitioners and Applicant. However, elevation data of this type supplied by biologists were not sufficiently reliable for the purposes used.

111. A second problem in the intuitive approach of Applicant's expert involves his assumptions concerning the friction of the excavated overburden versus the remaining overburden. Applicant's expert took 16 feet as the value for the potentiometric surface of the Upper Floridan aquifer. He then took 26.3 feet (rounded off to 26 feet) as the top of the water table, which itself may be suspect due to its derivation in part from the data described in the immediately preceding paragraph. Tentatively assuming that the water elevation of the stabilized pit would be 26 feet, Applicant's expert then calculated a head difference of 10 feet between the stabilized pool elevation and the Upper Floridan aquifer.

112. By calculating the effect of the removed overburden on head difference, Applicant's expert projected the final pool elevation, as adjusted for the removed overburden. The process requires that the original head difference be multiplied by the percentage representing the friction or resistance of the remaining overburden when compared to the friction or resistance of the original overburden. The new head difference is then subtracted from the stabilized pool elevation to yield a truer stabilized pool elevation.

113. The process is clearer when illustrated. Petitioners' expert estimated that the removal of 70% of the overburden removed 70% of the friction or resistance offered by the confining layer to migrating groundwater. This assumes that the friction or resistance of the confining sediments is unchanged with depth.

114. If the original head difference were 10 feet (26 feet assumed unadjusted stabilized pool elevation minus 16 feet potentiometric surface of Floridan aquifer), then the friction or resistance remaining in the unexcavated overburden less than the original head difference of 10 feet. Subtracting the assumed unadjusted pool elevation of 26 feet by the head difference of seven feet means that the true stabilized pool elevation would be 19 feet.

115. Applicant's expert altered the above-described calculations in a manner not justified by the record. He opined that the friction or resistance of the confining soils nearest the limestone top of the Upper Floridan aquifer was greater than the friction or resistance of the confining sediments closer to the surficial aquifer. Estimating that the remaining 15 feet of overburden had 45% of the friction or resistance of the original 52 feet of overburden, Applicant's expert determined a head difference of 4.5 feet, which is 5.5 feet less than original head difference of 10 feet. Thus, the true stabilized pool elevation would be 20.5 feet (26 feet less 5.5 feet), according to Applicant's expert.

116. Again, the absence of site-specific data undermines the validity of conclusions based on logical analysis. The regional experience of Applicant's expert supports his adjustment to friction, but this experience is unrelated to the site in question. Other sources in the record support the regional existence of such a phenomenon. But the available site-specific data do not suggest that regional characteristics apply to the subject site, and, on balance, the record compels a conclusion that Petitioner's expert was correct in assuming a proportional relationship.^{15/}

117. There are site-related hydrogeological questions for which, notwithstanding the existence of powerful models, scientific laws, and capable experts, sufficient data do not exist to provide reasonable assurances.

118. As noted above, data do not exist concerning the present recharge rate of the Floridan aquifer at the site. Data concerning the potentiometric surface of the Floridan aquifer at the site are variable, reflecting perhaps seasonal changes or the necessary inexactness of measurements. Applicant's expert used 16 feet at the hearing, which he indicated was from the Ardaman report used in connection with the sprayfield application. Ardaman reports a potentiometric surface of 16.2 feet, although the report warns that the number may vary somewhat. Applicant Exhibit 11, Tab 2, page 5. As the February 13, 1990, Jammal report notes, the pressure head of the Floridan aquifer--at the proposed site

119. One of the predicted effects of the sprayfield operation is to increase the recharge of the Floridan aquifer due to the introduction of more water into the surficial aquifer with the effect of raising the water table. This is the conclusion of the Law Environmental report dated January 10, 1989 (Applicant Exhibit 11, Tab 1, page 23) and the Ardaman report dated November 14, 1988. The Ardaman report states:

An increase in deep recharge to the Floridan aquifer at [the sprayfield] site results from the rise of the groundwater level caused by increased recharge to the surficial aquifer. The magnitude of deep recharge increase is a function of the increased head in the surficial aquifer and the permeability of the confining layer.

Applicant Exhibit 11, Tab 2, page 13.

120. Both of these reports were prepared by an engineering firm handling the sprayfield project. The same engineering firm also became involved in the subject application when it sent Jammal a letter dated February 21, 1990, asking three questions.

121. The February 21 letter to Jammal asks:

1. What potential aspects of intermixing of surface waters into the aquifer might be involved due to the reduction of thickness of the aquaclude resulting from the lake construction? As you know, the aquaclude could be thinned appreciably by the lake construction and thus the hydraulic path length, and, therefore, head loss between the two minimized and some potential of pollution of the aquifer by surface waters may occur.

2. Are there upwelling concerns due to the reduction of the aquaclude thickness? Is it likely that the potentiometric surface of the aquifer at elevation 13 and the proposed pond bottom at elevation -20 might cause breaching of the thinner layer of aquaclude postconstruction and thus intermixing of the two zones.

3. What might the long-term effects on the shallow ground water table both on and off site be? Reduction of the aquaclude thickness may cause the aquaclude at that particular location to leak more readily, thus, the lake level of 24 proposed on our plans may not be maintainable and a lower lake level might result. This in turn may create a hydraulic gradient which would affect the shallow ground water table both onsite, in terms of viability of wetlands, and offsite in terms of both viability of offsite wetlands as well as potential drying up of shallow wells on onsite properties.

...

Applicant Exhibit 9, Tab 6,

122. In response to the first question, the Jammal letter, which is dated March 1, 1990, notes that the only source of contaminants would be stormwater runoff. The Jammal letter reports that the District had previously determined that a three-foot sand bottom was sufficient in the Ocala area for filtration prior to water entering underlying limestone formations. The answer concludes that "due to the sensitive nature of water supply in the vicinity of the site [and the ensuing scrutiny to be given the proposed separation of 7-10 feet], . . . it is our opinion that any increase in separation distance between lake bottom and the underlying aquifer will be better." Applicant Exhibit 9, Tab 6.

123. With respect to the second question concerning "upward vertical leakage," the Jammal letter discusses the vertical leakage during lake excavation and dewatering. The response notes that dewatering is now limited to 0 feet, 16' after which wet excavation must take place through draglining or hydraulic dredging. Later, the Jammal letter asserts: "The intermixing of waters between the aquifers is not considered to be a problem since natural seepage of groundwater from the surficial aquifer to the Floridan aquifer will not be altered except during dewatering and excavation." Id.

124. The Jammal response to the third question mentions stabilized pool elevations of the filled pit, as discussed above:

The potential for long term lowering of water level in the excavated lake is a concern at this site due to a reduction in the hydraulic barrier between the shallow aquifer and the underlying Floridan aquifer. The current hydraulic head difference of approximately 12 feet between the two (2) aquifers is the result of head losses between the surficial aquifer to the underlying Floridan aquifer due to groundwater seepage. The primary head loss is anticipated to occur in the sands and clayey sands of the shallow aquifer. Theoretically, removing approximately two-thirds of these sands may decrease the hydraulic head difference by as much as two-thirds. Consequently, the hydraulic head between the two aquifers may create a stabilized lake level 4 to 5 feet above the potentiometric surface elevation (+17 to +18 feet NGVD). In reality, the theoretical proportioning presented herein may not be accurate. In order to estimate this potential head difference, a piezometer can be installed with a screen interval extending from the bottom of the clayey sands to the bottom of the lake excavation. The piezometer will need to be grouted in order to isolate this clean zone and measure the new potential head elevation at that depth. In this manner, it will be possible to evaluate the potential stabilized lake level more accurately.

If the lake level stabilizes at elevations of +17 to +18 feet NGVD, it will create a cone of depression around the lake. Specific modelling was not conducted at this time to determine the exact extent and shape of the cone of depression. However, based on our preliminary evaluation, we estimate that the cone of depression may extend laterally 400 to 500 feet around the perimeter of the lake. Therefore, if existing wells are installed into the shallow aquifer and are located within this cone of depression, the water level in the wells may be expected to decline 1 to 4 feet depending on the location of the well. Wells located outside the 500 foot area surrounding the lake should not experience a drawdown effect from the long term drawdown of the lake.

Applicant Exhibit 9, Tab 6.

125. The three responses involve the issue of the hydraulic conductivity of the overburden remaining after excavation. The first answer, which concerns filtration, acknowledges that more separation means more filtration. Although more separation was later added to the proposal, the letter offers no guidance as to the practical limits of this principle.

126. The second response is unsatisfactory and unsupported by the record. It defies logic to assert that the removal of 70% of the overburden does not "alter" the "natural seepage of groundwater from the surficial aquifer to the Floridan aquifer," even without regard to transient alterations taking place during excavation itself. The District's witness primarily responsible for the subject application alluded to this deficiency when he testified that he would like information concerning the recharge rate to the Floridan aquifer. A sufficient disturbance to the present hydraulic relationship could produce a spring-fed borrow pit, as the Floridan aquifer could seep into the pit if enough confining soils are removed and head difference between the aquifers (or the Floridan aquifer and free water of the pit) is lost.17/

127. The third response addresses an issue that has been considered at length above. The response rather casually acknowledges the possibility of a stabilized pool elevation for the filled pit of 17 to 18 feet and fails even to attempt to quantify the extent to which confining soils may offer more resistance closer to the limestone formation of the Floridan aquifer. The response identifies a means by which to estimate the potential head difference and readily concedes the possibility of a 1-4 foot reduction in the water table elevation extending a distance of 400-500 feet from the filled pit. Although these estimates and projections might have been refined by the time the response materials were submitted in the fall of 1991--about 18 months later--Jammal continued to project even then a stabilized pool elevation of only 20.5 feet, as contrasted with the testimony at hearing of Applicant's expert, who is an employee of Jammal, that the stabilized pool elevation would be higher.

128. As discussed in the Conclusions of Law, it is possible to divide the proposed project into two phases. The first phase (Phase I) is the excavation of a little more than half the original proposed pit to an elevation of 0 feet, which would mean the removal of about 20 feet of overburden, rather than 37 feet

as originally proposed. The remainder of the original pit, except for a wetland setback of 100 feet, would be excavated during Phase I, but only to an elevation of 21 feet, which would mean the removal of no overburden.18/

129. The second phase (Phase II) is the excavation of an additional 17 feet from Area A, 38 feet from the already- excavated area outside Area A (including 37 feet of confining sediments), and 52 feet of confining sediments from the area outside Area A within the Phase I 100-foot wetland setback.

130. Based on TSR-4 with the six-inch drawdown provision, Applicant has provided reasonable assurance in all respects that excavation of Phase I will not adversely affect the Upper Floridan aquifer. The record fails to provided a basis for serious concern that removal of about 38% of the overburden from a little more than half of the original pit area will so disturb the hydraulic relationship between the Upper Floridan and surficial aquifers as to allow possible sprayfield contaminants to enter the Upper Floridan aquifer, or Geneva bubble at this location, or adversely alter the current recharge rate to the Upper Floridan aquifer or Geneva bubble.

131. There are various factors underlying the reasonable assurance provided by the record as to the contamination and recharge issues through Phase I. First, as to the contamination issue, based on the record, it is unlikely that contaminants will reach the Upper Floridan aquifer through the pit and it is unlikely that the removal of relatively little overburden will adversely alter the site's recharge to the Floridan aquifer. Because of the unlikelihood of contaminants traveling through the surficial aquifer and entering the pit coupled with the unlikelihood of any such contaminants reaching the pit passing through the relatively thick confining sediments, Phase I excavation leaves a wide margin for safety within which the hydrogeological limitations of the record do not raise a serious concern.

132. Second, as to the recharge issue, based on the record, it is unlikely that the removal of relatively little overburden will adversely alter the site's recharge to the Floridan aquifer and, notwithstanding the proximity of the wells of the Mullet Lake Water Association and Seminole Woods, it is unlikely that the small area covered by the pit relative to the area of the Geneva bubble or even its smaller recharge area would disturb the water budget on which the Geneva bubble depends for recharge to maintain its freshwater properties. Because of the unlikelihood of a significant impact to the site's recharge capacity coupled with the unlikelihood of the relatively small area of the pit disturbing withdrawals from the Geneva bubble, Phase I excavation leaves a wide margin for error within which the hydrogeological limitations of the record do not raise a serious concern.

133. Based on TSR-4 with the six-inch drawdown provision Applicant has not provided reasonable assurance that excavation of Phase II will not adversely affect the Upper Floridan aquifer. The elimination of the additional overburden likewise eliminates the above-described margins of error within which the hydrogeological limitations of the record could, in effect, be ignored.

CONCLUSIONS OF LAW

I. Jurisdiction and Standing

134. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

135. The District has jurisdiction over the issuance of the MSSW permits. Chapters 373 and 403, Florida Statutes.

136. Rule 40C-1.511 provides:

Unless otherwise provided by law or District rule:

1. Persons requesting a hearing on district action which does or may determine their substantial interest shall file an original petition with the District Clerk within 14 days of the receipt of notice of intended action, or within 14 days of the receipt of notice of District action for persons who did not receive the notice of intended action. The notice shall state the time limit for requesting a hearing and shall reference this chapter.

. . . If the Board takes action which substantially differs from the notice of intended action, the applicant or persons who may be substantially affected shall have an additional 14 days from the date of receipt of notice of said action to request an administrative hearing, in accordance with this section, but this request for administrative hearing shall only address the substantial deviation.

2. Any person who receives written notice of a District action or who receives written notice of an intended action and who fails to file a written request for an administrative hearing in the office of the District Clerk within 14 days shall have waived his right subsequently to request an administrative hearing on such matters. . . .

137. Rule 40C-1.501 provides that the procedural rules promulgated by the District "shall apply in all proceedings in which substantial interests of the party are determined by the District, and shall be construed to secure the just, speedy, and inexpensive determination of every proceeding."

138. The application procedures are described in Rules 40C-1.605, 40C-1.607, and 40C-1.608. Rule 40C-1.605(5) requires that a notice of intent to deny an application must be provided to the applicant no less than 14 days prior to the Board meeting at which the recommendation will be considered. No similar provision governs a notice of intent to grant an application. Rule 40C-1.608(6)

provides that the Board may approve, reject, or modify "intended District action." This rule clearly implies an intent to treat a TSR as intended agency action, even if the Board has not yet considered the application. Under the rules, the time for a duly notified individual to demand a hearing generally begins to run when District staff issues a TSR, not when the Board decides whether to issue the permit.

139. As to TSR-1, the time for Petitioner Crabtree to demand a hearing began to run when he received a copy of TSR-1 with a Notice of Rights. Due to the agency relationship existing between Petitioner Crabtree and the other Petitioners, their time began running from this point too. Petitioners received TSR-1 and the Notice of Rights on December 6, 1991. The 14 days within which they could demand a hearing expired on December 20. They filed their petition on December 23.

140. The rules clearly allow Petitioners to demand a hearing as to TSR-2 and the decisions of the Board on December 10, to the extent that these actions "substantially deviate" from the action proposed in TSR-1.

141. TSR-1 can be construed as a basic permit. Only two potential "intended agency actions" followed the issuance of TSR-1. On December 10, District staff issued TSR-2 and the Board created Area A. Although dated months later, TSR-3 presumably reflects the Board action on December 10.

142. In TSR-2 and -3, the District or its staff added conditions that have restricted Applicant's rights under the basic permit described in TSR-1. In other words, any substantial deviations that followed TSR-1 were unfavorable to Applicant, although not enough to elicit protest except as to the 6-inch drawdown criterion, for which Applicant proposes, in its proposed recommended order, a 12-inch criterion. Conversely, the substantial deviations that followed TSR-1 have been favorable to the interests of Petitioners in protecting natural resources, although obviously not sufficiently to elicit a dismissal of their challenge to the permit.

143. Applicant argues, in essence, that the "substantial deviation" rule basically limits challenges to actions or proposed actions altering TSR-1. Under the rules, the relief available to Petitioners would be restricted to the alterations to TSR-1.

144. However, the better interpretation of the substantial deviation rule in this case does not limit Petitioners' standing in any respect. Rule 40C-1.511(1) requires interested persons to file petitions within 14 days of receipt of notice of intended agency action. Under the rules, a TSR may be treated as intended agency action. The last sentence of Rule 40C-1.511(1) provides that a person who failed to timely challenge intended agency action may challenge only a "substantial deviation." A "substantial deviation" arises if "the Board takes action which substantially differs from the notice of intended agency action."

145. The District's rules explicitly allow a person to challenge a substantial deviation from intended agency action if the deviation is an action of the Board. By omitting any mention of substantial deviations in the form of TSR's issued by staff, the rule leaves open the question whether the unchanged contents of unchallenged TSR's remain insulated from challenge when the substantial deviation consists of another TSR, rather than Board action.

146. For reasons discussed below, the approach more consistent with the "just, speedy, and inexpensive determination of every proceeding" would be not

to elevate a TSR to the level of Board action. In other words, challenges to later TSR's should not be limited to "substantial deviations" from earlier TSR's. A contrary approach might require interested persons, including applicants, to file petitions challenging staff action months before staff finally completed its responsibilities. The better approach is to treat each later-issued TSR as, in effect, restating all conditions, even if they had been included in TSR's issued over 14 days earlier. Thus, each TSR issued prior to Board action would, under the rules, create a new point of entry to challenge the entire permit application.

147. In the event that the District elects not to construe its rule in this fashion, there are two possible approaches to the application of the "substantial deviation" rule. First, Petitioners have no standing under the rule because the only relief available to them is to eliminate some or all conditions that were attached to TSR-1 after its issuance. These conditions made the permit more restrictive and, if the only relief left to Petitioners were to remove these restrictive conditions, then presumably they would not elect to pursue such relief. This interpretation would leave the District's standing rules in conflict with statutory and case law.

148. The better interpretation of the District's rules harmonizes them with statutory and case law. Under this approach, Petitioners have standing under the rule to challenge the conditions that were attached to TSR-1 after its issuance. And in the course of the challenge, Petitioners may, if they prevail, cause the District to attach even more restrictive conditions, such as limiting the permit to Phase I or attaching even more conditions to Phase II. Under this approach, the "substantial deviation" rule may be given effect by eliminating as potential relief available to Petitioners the possibility of the denial of the permit in its entirety; such relief became unavailable when Petitioners failed to challenge timely TSR-1. As discussed below, the elimination of such relief in this case is unimportant because, on the merits, Applicant is entitled to the permit for Phase I, even assuming Petitioners' standing entitled them to challenge the basic permit itself.

149. Regardless of how the District elects to interpret its own standing rules, there are two other sources of standing available to Petitioners: statutory and case law.^{19/} Under this authority, Petitioners could theoretically prevail on the merits to extent of causing the application to be denied.

150. First, Petitioners are entitled to challenge the issuance of the permit itself under Section 120.57(1), to which the District's standing rules, if in conflict, are necessarily subordinate. Standing under Section 120.57(1) is extended to all parties whose "substantial interests . . . are determined by an agency."

151. Nothing is determined by an agency, for the purpose of Section 120.57(1), until the duly authorized person or body has taken action that, barring a timely filed petition, represents the agency's final word on the matter. At this point, and no earlier, the issues are ripe for a formal administrative hearing under Section 120.57(1).

152. The District standing rules attempt to force the filing of a petition during free-form agency action. A TSR represents nothing more than staff work, culminating in a staff recommendation. The Board has retained authority to decide whether to adopt, modify, or reject the staff recommendation. Requiring possible objectors or the applicant to prepare and file petitions, if the Board meeting is scheduled more than 14 days after the TSR is issued, subject these

persons to possibility of unnecessary expense. But regardless of the wisdom of such a policy decision, the purpose of Chapter 120 is to provide the opportunity for a formal administrative hearing of intended agency action, not mere recommendations of agency staff.

153. The earliest point at which the District determined the substantial interests of Petitioners was on December 10, and Petitioners timely demanded a hearing with respect to such action. Construing a staff recommendation as the determination of a party's substantial interest defies common sense and threatens to destroy the distinction between free-form agency action and the formal administrative hearing.

154. Second, even if the petition were filed three days late, Petitioners are entitled to challenge the issuance of the permit under applicable case law. The courts have held that a party does not waive its right to a hearing by a short delay in demanding a hearing, at least in the absence of demonstrated prejudice.

155. In *Stewart v. Department of Corrections*, 561 So. 2d 15 (Fla. 4th DCA 1990), the court held that the lower court erred by not invoking the principle of equitable tolling and allowing an employee to appeal a decision of the Public Employment Relations Commission even though the employee's attorney had filed the petition one business day late. The court noted that there was no allegation that the delay caused the agency prejudice. The decision omits any discussion of why the attorney filed late; the decision does not even describe the act as inadvertent. Rather, the decision turns on "reasonably prudent regard for appellant's rights." *Id.* at 16.

156. Petitioners' standing renders immaterial any deficiencies in the noticing of the December 10 Board meeting, to the extent that Petitioners' challenge of such notice was intended to rebut Applicant's claim that Petitioners lack standing. To the extent that Petitioners' challenge of the notice was intended to invalidate the Board action taken at the December 10 meeting, any infirmities in the notice are not sufficient to warrant such relief.

II. Permitting Criteria

157. Applicant has filed an individual permit application for an MSSW. To obtain a permit for the "operation, maintenance, removal or abandonment" of a system, Rule 40C- 4.301(1) requires Applicant to provide "reasonable assurance" that the permitted activity will not:

* * *

3. Endanger life, health or property;

* * *

5. Adversely affect the availability of water for reasonable beneficial purposes;
8. Adversely affect existing agricultural, commercial, industrial, or residential developments;

9. Cause adverse impacts to the quality of receiving waters;
10. Adversely affect natural resources, fish and wildlife; [and]
11. Induce saltwater or pollution intrusion[.]

* * *

158. Rule 40C-4.301(b) allows the District to balance a proposed project's beneficial and harmful effects in terms of the above-stated criteria.

159. To obtain a permit for the "construction, alteration, operation or maintenance" of a system, Rule 40C- 4.301(2) requires Applicant to provide "reasonable assurance" that the permitted activity will meet the following standards:

1. Adverse water quantity impacts will not be caused to receiving waters and adjacent lands;
2. Surface and ground water levels and surface water flow will not be adversely affected;
3. Existing surface water storage and conveyance capabilities will not be adversely affected;

* * *

7. Wetland functions will not be adversely affected; and
8. Otherwise not be harmful to the water resources of the District.

160. Rule 40C-4.301(2)(b) states that if the applicant provides reasonable assurance of the satisfaction of the design criteria set forth in the Applicant's Handbook Part II "Criteria for Evaluation," then it shall be presumed that the standards of Rule 40C-4.301(2)(a) have been met.

161. The Applicant's Handbook sets forth the following guidelines with respect to the wetlands criteria set forth in Rule 40C-4.301(1) and (2). Applicant's Handbook Section 10.7.4 provides that the above-stated criteria will be applied only with regard to "the impacts to fish and wildlife and threatened or endangered species relative to the functions the wetland currently provide them." This section advises that the District will focus on adverse impacts to species' habitat, abundance and diversity, and food sources.

162. Section 10.7.4 also states that the development of an isolated wetland of less than one-half acre is presumed to be in compliance unless the wetland is used by threatened or endangered species or reasonable scientific judgment indicates such use.

163. Section 10.7.5 identifies a variety of factors used in evaluating wetlands. Larger wetlands are more valued because they generally support a greater diversity of species. Wetlands hydrologically connected to off-site areas are generally more important because they are more productive. The same is true of pristine or unique wetlands.

164. For Phase I, TSR-4, with the six-inch drawdown provision, provides the required reasonable assurance in all respects and as to all issues without exception.

165. For Phase II, TSR-4, with the six-inch drawdown provision, does not provide the required reasonable assurance due to the contamination and recharge issues discussed at the end of the Findings of Facts.

166. The wetlands provisions in the Applicant's Handbook reveal a logical relationship between the importance of a resource under the jurisdiction of the District and the degree of protection that the resource must receive under a permit. Here, the protection of resources is not compromised by the destruction of Wetland E, which is quite small and functionally impaired. Similarly, as to the remaining wetlands, more resource-protection is demanded in the MSSW permit as to Wetlands A, F, and G than as to Wetlands B, C, and D, due to the latter's relatively impaired condition and smaller size and, thus, reduced functional value.

167. In terms of value, Wetlands A, F, and G pale into relative insignificance when compared to the Geneva bubble. A rare natural resource, the Geneva bubble is a critically important source of potable water for present and future residents of the area, as well as for agricultural and possibly industrial needs.

168. In addition to its rarity, the Geneva bubble is also fragile. The interface between its freshwater and the surrounding brackish water is maintained by freshwater recharge from rainfall. The interface may easily be disturbed by surface land uses, such as the excavation of a 36.5-acre (wet) borrow pit that removes 70% of the confining bed overlaying the freshwater lens.

169. The rough-hewn calculations driven by regional data and general assumptions may be good enough for an excavation of a little more than one-third the thickness of the confining bed for a little more than one-half the original acreage and leaving the confining bed undisturbed for all of the remaining acreage. The record affords no basis for any conclusion except that, with respect to Phase I, there is a considerable margin of safety with respect to the natural resources protected under the law.

170. The only contaminant issue meriting serious consideration involves the sprayfield groundwater transported to the pit by the surficial aquifer. Nothing in the record indicates that the removal of a little more than one-third of the overburden beneath a little more than one-half of the original pit and the displacement of the shallow aquifer in nearly all of the original pit will deprive the confining beds of their capacity to remove contaminants by filtration or simple delay, as the water percolates through the still-thick layer to the Geneva bubble.

171. Likewise, the record offers no basis for serious concern as to the impact of such limited excavation on the rate of recharge of the Geneva bubble under the pit. Based on the record, the substantial thickness of the confining sediments remaining after Phase I, the changes in the water table and pool elevation after Phase I, the probable potentiometric surface of the Floridan aquifer at the site, and the hydraulic conductivity of the overburden remaining after Phase I should allow the recharge function of the site to continue without substantial disruption.

172. However, Phase II considerably reduces the margin for safety on the issues of contamination from the sprayfield traveling through the surficial aquifer and post-Phase I free water of the pit and hydraulic conductivity as a component of the recharge process. The hydrogeological evidence in the record is not of sufficient quantity or quality to provide the required reasonable assurance that the additional excavation will not adversely affect the availability of water for reasonable beneficial purposes; adversely affect existing agricultural, commercial, industrial, or residential developments; cause adverse impacts to the quality of receiving waters; adversely affect natural resources; induce saltwater or pollution intrusion; adversely affect surface and ground water levels and surface water flow; and otherwise not harm the Upper Floridan aquifer, of which the Geneva bubble is a part.

173. In general, TSR-4 requires two sets of conditions. The first set is procedural and may be easily formulated. The meaning of Conditions 3 and 17 must be clarified. Pursuant to Condition 3, Applicant must be required to obtain another general or individual permit before beginning Phase 2, regardless of the hydrogeological circumstances existing at the end of Phase I. This means a new point of entry for substantially affected persons. The language in Condition 17 should also be clarified to provide a point of entry to such persons at the end of Phase I under all circumstances.

174. The second set of conditions is substantial and addresses the monitoring, data collection, analysis, and standards that will be required, prior to the commencement of Phase II, in order to provide reasonable assurance as to the contamination and recharge issues. These conditions are complex and not amenable to preformulation based on the present record. The difficulty of formulation of these conditions is in large part responsible for the waves of TSR's in this case, by which means District staff tried to cobble together a permit that would simultaneously comply with the law and allow Applicant to obtain one permit for two distinct phases of excavation, notwithstanding the paucity of evidence of site-specific hydrogeological conditions.

175. The second set of conditions must impose upon Applicant the burden of collecting sufficient site-specific data that, using analytic methodologies appropriate to the site and circumstances, and assuming a normal rainfall year in the case of projections, will yield reasonably accurate information as to the following matters: 1) actual and projected seasonal rates of recharge from the pit to the Upper Floridan aquifer at the end of Phase 1; 2) actual and projected seasonal rates of discharge, if any, from the Upper Floridan aquifer into the pit at the end of Phase 1; 3) projected seasonal rates of recharge from the pit to the Upper Floridan aquifer during construction of Phase 2 and after completion of Phase 2 (steady-state); 4) projected seasonal rates of discharge, if any, from the Upper Floridan aquifer into the pit during construction of Phase 2 and after completion of Phase 2 (steady-state); 5) contaminants or pollutants in the pit and entering the Upper Floridan aquifer (separate items) at the end of Phase 1; and 6) projected contaminants or pollutants projected in the pit and entering the Upper Floridan aquifer at the end of Phase 2.

176. Aspects of the monitoring, data collection, and analysis, if done in advance of the achievement of stabilized conditions following completion of Phase I, will necessarily require the use of assumptions or projections where, in some cases, actual site-specific data can be obtained once Phase I has been completed and conditions have stabilized. Formulation of specific standards by which to evaluate whether resource-protection objectives in Phase II are met is also premature at this time.

177. Following the achievement of stabilized conditions after completion of Phase I, Applicant can obtain actual hydrogeologic values for the property. These actual measurements include the amount, if any, of sprayfield contaminants reaching the pit under a variety of conditions, the extent to which these contaminants may be capable of entering the Upper Floridan aquifer under a variety of conditions, the permeability of the remaining confining sediments, pool elevation of the pit inside Area A, water table elevation outside Area A, the potentiometric surface of the Upper Floridan aquifer underneath the pit, and actual rates of recharge under a variety of circumstances, as well as the status of nearby withdrawals, such as by individual and agricultural wells and utility operations. With these actual data, the District may determine whether and, if so, under what conditions, it may issue a permit for Phase II. At present, no combination of mitigative conditions could be designed to ensure that, upon completion of Phase I, a permit could authorize Phase II and still provide the reasonable assurance required to protect the unique resource of the Geneva bubble.

RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that the Governing Board of the St. Johns River Water Management District enter a final order denying the issuance of TSR-4, with the six-inch drawdown, for Phase II and approving the issuance of TSR-4, with the six-inch drawdown, for Phase I, as the phases have been identified in Paragraphs 128- 129 of the Findings of Fact.

ENTERED this __14__ day of July, 1992, in Tallahassee, Florida.

ROBERT E. MEALE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this __14__ day of July, 1992.

ENDNOTES

1/ "Upper Floridan aquifer" and "Floridan aquifer" are used interchangeably in this recommended order. Any differences between the Lower Floridan and Upper Floridan are irrelevant to the case.

2/ All elevations are NGVD. NGVD is National Geodetic Vertical Datum, and 0 NGVD represents mean sea level. All elevations are above sea level unless preceded by a minus sign.

3/ The cited material refers to a table with surficial and Floridan aquifer data for six well sites. The three well sites for which the water level of the Floridan aquifer exceeds the water level of the surficial aquifer, and where the

Floridan discharges into the surficial aquifer, are at land surface elevations of 17-18 feet. The two well sites indicative of recharge of the Floridan aquifer are at much higher land surface elevations--50 and 75 feet. A sixth well site, which is at land surface elevation 21 feet, involves an upper and lower surficial aquifer.

4/ The Lake Harney well(s) are located in the southwest area of the Geneva bubble.

5/ These maps and diagrams were contained in the September 13 response materials in somewhat different form. Because the proposed permit incorporates the maps and diagrams from the October 25 response materials (with one exception irrelevant to this case involving the construction of road improvements), the recommended order describes only the maps and diagrams contained in the October 25 response materials.

6/ Area A on the map is described at Findings of Fact Paragraphs 69 et seq.

7/ Sheet 3 of 3 in the October 25 response materials is an aerial photograph of the site. The photograph locates MW-1 and MW-2 in the same places as shown on the post-development drainage map, but places MW-3 considerably north of its location on the post-development drainage map. On the aerial, MW-3 is adjacent to State Road 46 at the easternmost extent of the project site, further from Wetland F and considerably further from Wetland G.

8/ As noted above, General Note 13 of Sheet 2 of 3, in effect, expressly rejects Jammal's recommendation of a minimum berm. However, the cross-section diagram (Sheet 2A of 3) shows that the rims of all of the excavations would be 25.5 feet.

9/ This is a reasonable approximation. The overburden remaining after excavation will range from 15-16.5 ft. thick. Due to variations in the elevation of the top of the confining layer separating the Upper Floridan from the surficial aquifer, varying depths of confining sediments will be excavated. A good estimate is that, on average, the excavation would remove 37' of 52', or 70%, of existing overburden.

10/ This is the part of the above-described Jammal October 14 report described in Findings of Fact Paragraphs 53-55 above.

11/ Additions are underlined; deletions are stricken through.

12/ In one final alteration to the language of the proposed permit, the District expert, during his testimony, substituted the bracketed language for the following: "must begin at least 3 months prior to construction and."

13/ Applicant's expert explained that the water table was fairly flat, but only at the site of the four piezometers.

14/ The necessity of site-specific data is disclosed in a hydrogeological report prepared by Ardaman & Associates in connection with the application for the sprayfield permit for the adjoining parcel. On the issue of site-specific data, the Ardaman report states:

The hydraulic capacity of a site for an irrigation system depends on the thickness of the surficial aquifer, the coefficient

of permeability of the surficial aquifer materials, the hydraulic gradient of the groundwater seepage, the distance to adjacent relief points, the precipitation, the surface runoff, the evapotranspiration rate, and the recharge to underlying aquifers. These variables are very site-specific and involve the use of judgment in the selection of the subsurface characteristics and water balance parameters.

Applicant Exhibit 11, Tab 2, p.11.

The Ardaman report continues by noting that the site-specific factors to determine the hydraulic capacity of the sprayfield site were obtained "from the field and laboratory data . . . , a review of site geology and hydrogeology, and previous experience with other similar sites and systems in Florida." Id.

15/ The most important evidence concerning the permeability of the confining soils on-site is contained in Applicant Exhibit 9, Tab 9 (Sheet 2 of 2). This diagram reveals the soils found from five borings deep enough to reach the top of the limestone layer marking the beginning of the Upper Floridan aquifer. (As a result of these borings, Applicant determined that the top of the Upper Floridan aquifer was level at the site.)

The test results do not support the opinion of the Applicant's expert that the friction is greater closer to the Floridan aquifer. In all but one of the borings, about 10 feet of clayey soils near the bottom of the surficial aquifer would be excavated. In three of the borings, no clayey soils would remain between the top of the Floridan aquifer and the bottom of the pit. In two of the borings, clayey strata of about five and seven feet would remain in the overburden, but these remaining clayey strata would be less thick than the clayey strata above them that would have been excavated.

The dominant soil in the overburden is "grayish-brown to greenish-gray slightly silty to silty fine sand with broken shell and occasional cemented sands, very loose to dense." The record suggests that the density of this layer is variable; nothing suggests that the denser material is disproportionately at the bottom. Moreover, nothing in the record supports the adjustment of Applicant's expert: the removal of 70% of the overburden reduces the resistance by only little more than 50%.

If density corresponds to permeability and resistance and if standard penetration resistance corresponds to density, then Sheet 2 of 2 at Tab 9 of Applicant Exhibit 9 discloses no direct relationship between depth and resistance in the dominant soil type.

The support in the record for resistance increasing with depth is from an earlier Jammal report on the hydrogeology of the site, dated February 13, 1990. In it, apparently a different employee of Jammal states: "The fines content generally increases with depth, which produces a corresponding decrease in permeability." Applicant Exhibit 9, Tab 5, p. 3. These remarks, which make no attempt to quantify the decrease in permeability, apply to regional hydrogeology, as indicated by the heading of the report under which the remarks appear. Additionally, there appears to be little relationship between fines content and permeability. See Ardaman report, Table 4, in which confining soils with the same fines content display very different coefficients of permeability

and confining soils with greater fines content may be more permeable than confining soils with lesser fines content. (Applicant Exhibit 11, Tab 2.)

Another hydrogeological evaluation of the region is found in Applicant Exhibit 11, Tab 1, which is a report from Law Environmental, Inc. in connection with the sprayfield. Noting that the confining unit over the Geneva bubble varies in thickness from 20-60 feet, the report states: "This unit is generally more clayey around the perimeter of the lens and allows little leakage of water to the Floridan aquifer." Id. at pp. 7-8. Again, this is an example of regional data that appear to bear little relationship to conditions prevailing on the site.

16/ Dewatering was later limited to the point at which the water table was encountered, which would be considerably higher than 0 feet. See Paragraph 39 above.

17/ The seepage is more common where land elevations are lower relative to potentiometric surface elevations. See, e.g., the Ardaman report, which notes an earlier report of a 15 ft. potentiometric surface for the Floridan aquifer under the sprayfield site and states:

This implies that the potentiometric surface of the Floridan aquifer is above land surface in the low areas along the shoreline of Lake Jessup. Therefore, no recharge to the Floridan aquifer occurs in these areas; instead, upward seepage from the Floridan aquifer is expected.

Applicant Exhibit 11, Tab 2, p. 5.

18/ If the top of the Floridan aquifer is at -32 to -33.5 feet and the average thickness of the confining sediments is 52 feet, then the bottom of the surficial aquifer (or the top of the confining bed) is, on average, at 18.5 to 20 feet. Thus, excavation of the area outside Area A, during Phase I, would displace much, if not all, of the surficial aquifer, but none of the confining bed beneath the surficial aquifer.

19/ A third, less certain source arises from the District's unusual standing rules, although it is unclear what range of relief would be available to Petitioners.

This approach ignores the issue whether the District may lawfully restrict standing by requiring a person to demand a hearing before final intended agency action has taken place. This approach recognizes the District's custom-tailoring to the Administrative Procedures Act so as to place the formal administrative hearing and recommended order at an earlier stage in the proceedings--specifically, during the free-form agency action. Under this approach, the standing of the objector to the permit, and the issues potentially available to an objector, are less important due to the free-form nature of the proceeding.

Under the free-form/hearing approach, the District may, as here, feel free to continue to revisit the permit conditions--and possibly the permit itself--without regard to the standing of the objectors, the relief sought by the parties, or even the issues raised by the parties. However the formlessness of such a proceeding, which is entirely appropriate to the free-form phase of

administrative action, is inconsistent with the nature and purpose of the formal fact-finding hearing contemplated by Section 120.57(1).

APPENDIX A

Treatment Accorded Proposed Findings of Petitioners

1-2: adopted or adopted in substance.

3 (first and fourth through seventh sentences): adopted or adopted in substance.

3 (second, third, eighth, and ninth sentences): rejected as unnecessary, irrelevant, legal argument, and unsupported by the evidence.

4: adopted or adopted in substance.

5 (first sentence): rejected as incomplete finding of fact.

5 (second sentence): rejected as legal argument.

6-5 (page 5): rejected as recitation of evidence, subordinate, and legal argument.

1 (page 5): adopted or adopted in substance.

2: rejected as recitation of evidence and, as to surface water runoff, unsupported by the appropriate weight of the evidence.

3 (first sentence): rejected as recitation of evidence.

3 (second sentence): adopted or adopted in substance.

3 (third sentence): rejected as not finding of fact.

4: rejected as unsupported by the appropriate weight of the evidence.

5: rejected as recitation of evidence and unsupported by the appropriate weight of the evidence.

6-9: rejected as recitation of evidence.

10 and 12: rejected as unsupported by appropriate weight of the evidence and, as stated, irrelevant. The point is that Applicant has not provided reasonable assurance as to the contamination question during Phase II. However, Petitioners clearly did not prove that, if Phase II were constructed, contaminants would necessarily reach the filled pit and, once there, would make their way to the Floridan aquifer.

11: rejected as recitation of evidence.

13: rejected as recitation of evidence and irrelevant for the reasons set forth in 10 above.

14 (first sentence): rejected as recitation of evidence.

14 (remainder): adopted in substance as to the fact of recharge, but not the rate, which is unsupported by the appropriate weight of the evidence. Upon completion of Phase I and stabilization of hydrogeological conditions, sufficient data and analysis may disclose that Phase II would neither accelerate the recharge so as to increase the risk of contaminants entering the Geneva bubble nor decrease the recharge rate (possibly to the point of discharge) so as to decrease or reverse the replenishment of the Geneva bubble at this site. Absent evidence as to post-Phase I conditions, such as the water table elevation outside Area A, pool elevation in Area A, and hydraulic conductivity of the 15 feet of confining sediments above the Floridan aquifer, as well as the amount and location of other withdrawals, it is premature to determine what the effect of Phase II would be upon the recharge of the Geneva bubble.

15: rejected as recitation of evidence.

16 (first sentence): adopted.

16 (second sentence): rejected as recitation of evidence.

17: see 14.

18: adopted in substance.

19: rejected as unnecessary, irrelevant, and recitation of evidence except that stormwater entering Wetlands C and D and common floodplain are adopted.

20 (first sentence): rejected as legal argument.

20 (remainder): rejected as recitation of evidence.

21-24 and 26: rejected as unnecessary, irrelevant, and recitation of evidence. It is assumed that the 100-year floodplain encompasses a relatively large area. It is also assumed that a sufficiently large storm event could inundate Cochran Road. Without further evidence, such as the location of contamination sources and the impact upon them of a 100-year storm event with respect to the filled pit, there is no relevance to the proposed findings concerning the 100-year floodplain.

25: rejected as unsupported by the appropriate weight of the evidence.

27: rejected as unsupported by the appropriate weight of the evidence.

1 (page 15): rejected for the reasons set forth in 14. The result is the same whether the recharge projection assume water table and pool elevations or the water-table and pool elevation projections assume a recharge rate.

2-7 (except regarding conclusions of Mr. Munch, which are adopted): rejected as subordinate, recitation of evidence, and for reasons set forth in 1.

10-11 (except for third sentence, which is adopted): rejected as subordinate, recitation of evidence, and for reasons set forth in 1.

12: adopted in substance, although not as recited evidence.

13: rejected as recitation of evidence.

14: rejected as subordinate.

15: adopted or adopted in substance to the extent that forested wetlands species exist.

16-17: rejected as subordinate.

18: rejected as subordinate to the overall findings concerning the functional value of the subject wetlands and, to the extent of the implication that the conditions of TSR-4 are insufficient, unsupported by the appropriate weight of the evidence.

19: rejected as recitation of evidence.

20: rejected as recitation of evidence and unsupported by the appropriate weight of the evidence.

21: rejected as subordinate, recitation of evidence, and, to the extent of the implication that the conditions of TSR-4 are insufficient, unsupported by the appropriate weight of the evidence.

22-23: rejected as recitation of evidence except for last sentence of 23, which is adopted.

24: rejected as recitation of evidence and legal argument.

1 (page 23): adopted.

2: rejected as recitation of evidence and subordinate.

3-5: rejected for the reasons set forth in the 1 preceding the last 1.

1 (page 25) and 3 (first sentence): rejected as irrelevant.

2: adopted in substance.

3 (second and third sentences): adopted in substance except last clause is rejected as legal argument.

Treatment Accorded Proposed Findings of Excavated Products

1-4: adopted or adopted in substance.

5: adopted except for the implication that the permit for Phase II should issue.

6-7: adopted or adopted in substance except last sentence is rejected as unsupported by the appropriate weight of the evidence.

8-15: adopted or adopted in substance except for last sentence, which is rejected as speculation.

16: adopted or adopted in substance with respect to reuse water not traveling to pit through surficial aquifer.

17: rejected as unsupported by the appropriate weight of the evidence except that the primary direction of flow will be straight down beneath the sprayfield.

18: rejected as unsupported by the appropriate weight of the evidence. The evidence shows that the reuse water flowing in a diagonal direction from the surficial aquifer beneath the sprayfield to the Floridan aquifer beneath the pit will travel through a thicker confining bed and take more time than the reuse water passing straight down into the Floridan aquifer beneath the sprayfield. The same is not true for the reuse water passing along the surficial aquifer, into the pit, and then into the Floridan aquifer beneath the pit. There is less resistance in the surficial aquifer, so less filtration will take place and less time will pass for the reuse water to reach the pit.

19: adopted.

20: rejected as irrelevant.

21: adopted except as to the reuse water traveling through the surficial aquifer into the pit.

22-24: adopted.

25-39: adopted or adopted in substance except for the failure to acknowledge that Wetlands A, F, and G are relatively more valuable than the other wetlands on the site.

40-41: adopted.

42: rejected to the extent of the implication that the "better approach" is, in this case, sufficient to provide grounds for reasonable assurance. However, the intuitive approach, if free of invalid assumptions, is better than using the USGS Modflow model.

43: adopted or adopted in substance.

44: rejected as irrelevant due to incompleteness of data for site.

45: rejected as unsupported by the appropriate weight of the evidence.

46: rejected to the extent of the implication that this critical figure, which is regionally applicable, may be used in this case as a basis to decide whether to grant the subject MSSW permit. This is one site-specific figure that could have and should have been obtained prior to the issuance of the TSR's.

47: adopted as to calculation methodology. Rejected as to assumption regarding permeability of remaining 17 feet of confining sediments. The correct calculation should provide a lower limit for the stabilized pool elevation, which would need to be adjusted for groundwater flow into the pit. The result would vary seasonally. Also, the resulting calculation of head difference would need to consider seasonal variations in the potentiometric surface of the Floridan aquifer. Lastly, actual values for the hydraulic conductivity of the confining beds would then allow a reasonably accurate calculation of the projected recharge rate.

48 (first and second sentences): adopted.

48 (third sentence): rejected as unsupported by the appropriate weight of the evidence.

49: rejected as unnecessary.

50-52: adopted except for omission of 100-foot setback from Wetlands A and F imposed during Phase I.

Treatment Accorded Proposed Findings of the District

3-6 (first sentence): adopted.

6 (remainder)-16: rejected as recitation of evidence, subordinate, and irrelevant given the limitations of the data and inapplicability of the model.

17-18: adopted in substance for Phase I and rejected as unsupported by the appropriate weight of the evidence for Phase II.

19-26: adopted or adopted in substance.

27: rejected as unsupported by the appropriate weight of the evidence.

28: adopted except for the omission of 100-foot setback from Wetlands A and F imposed during Phase I.

29: adopted at least as to the bottom of the water table.

30-32 and 35-47: rejected as recitation of evidence and irrelevant given the limitation of the data, inapplicability of the model in the cases of the experts called by the District and Petitioners, and invalid assumptions in the case of the expert called by Applicant.

33: rejected as repetitious. See 27.

34: adopted as to the effect of a drawdown of less than 0.5 feet.

48: rejected as legal argument.

49: rejected as recitation of evidence.

50-52: adopted.

53: rejected as unsupported by the appropriate weight of the evidence even as to the hydraulic conductivity issue. Even if the requirements of data-collection were enlarged to include all data necessary to calculate recharge rates, there are no standards by which to determine what values are indicative of reasonable assurance of protection of the Upper Floridan aquifer. As to the contamination issue, TSR-4 attempts nothing.

54-55: adopted.

56: adopted except for the implication that Wetland F is no more valuable than the other, unnamed wetlands.

57: adopted.

58: rejected as unnecessary and, due to size of Wetland A, lack of support in the record.

59-63: adopted.

64-66: rejected. See 18 under Excavated Products.

67-73: adopted or adopted in substance. With respect to 73, as to surface water runoff only.

74: rejected as irrelevant.

75-76: rejected as speculation and unsupported by the appropriate weight of the evidence.

77-93: adopted or adopted in substance.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

=====
AGENCY FINAL ORDER
=====

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

C.R.O.P., INC., GENEVA DEFENSE)
ASSOCIATION, SAVE OUR ST. JOHN'S)
and DONALD CRABTREE,)
Petitioners,) DOAH NO. 92-0894
) SJRWMD FOR NO. 91-1161
)
vs.)
)
JAMES P. VEIGLE, EXCAVATED)
PRODUCTS, INC., and ST. JOHNS)
RIVER WATER MANAGEMENT DISTRICT,)
Respondents.)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated Hearing Officer, the Honorable Robert E. Meale, held a formal administrative hearing in the above-styled case on April 22, 23, 24, 29, 1992 in Orlando, Florida.

APPEARANCES

For Petitioners, C.R.O.P., Inc., Irby Pugh
Geneva Defense Association, 218 Annie Street
Save Our St. Johns Orlando, Florida 32806
and Donald Crabtree:
For Respondents, James Veigle Ken Wright
and Excavated Products, Inc.: Shutts and Bowen
20 North Orange Avenue
Suite 1000
Orlando, Florida 32801
For Respondent, St. Johns River Eric Olsen
Water Management District: Post Office Box 1429
Palatka, Florida 32178-1429

BACKGROUND

This matter involves the Petitioners' challenge to the St. Johns River Water Management District's (hereinafter "the "District") proposed issuance of Management and Storage of Surface Waters Permit No. 4-117-0309A (hereinafter "MSSW Permit") for the construction of a borrow pit near the intersections of State Road 46 and Cochran Road outside of the town of Geneva in Seminole County, Florida. The Applicant, Excavated Products, Inc. (hereinafter "Excavated") actually applied for a permit to construct a borrow pit, an entrance road from

the borrow pit to State Road 46 (SR 46), and a widening of SR 46. (Applicants Ex. 1, 2, and 3). However, at the outset of the hearing, the parties stipulated that the construction of the entrance road and the widening of SR 46 were not issues in dispute.

An MSSW Permit application was filed with the District by Excavated on or before October 25, 1991. On November 27, 1991, the District issued a Technical Staff Report (hereinafter "TSR") which recommended approval to the Governing Board of the MSSW permit application for the construction of the proposed borrow pit. The Petitioners received this TSR, Notice of Rights, and notification of the December 10, 1991 Board meeting on December 6, 1991. At the Governing Board meeting of the District on December 10, 1991, the Governing Board approved the issuance of the MSSW Permit; however, the Governing Board required additional permit conditions. Specifically, the Governing Board modified the November 27, 1991 TSR, maintaining intact original conditions 1 through 11, and adding additional permit conditions 12 through 16. Chief among these additional permit conditions was the requirement that Excavated could initially only excavate a delineated portion ("Area A") of the borrow pit site. Thereafter, Excavated was required to submit a water budget analysis to the District demonstrating that the mean normal wet season water elevation in the pit would not be less than +20.5 ft. NGVD, the lower limit elevation projected by Excavated Product's hydrogeologist.

On December 23, 1991, Petitioners, C.R.O.P., Inc., et. al., filed a request for a formal hearing pursuant to Section 120.57, Florida Statutes (1991) challenging the issuance of the MSSW permit.

A formal administrative hearing was held on April 22, 23, 24, and 29, 1992. All parties timely filed Proposed Recommended Orders. On July 14, 1992, the Hearing Officer issued his Recommended Order to the District for final agency action which was received by the District Clerk on July 20, 1992. Exceptions were due August 4, 1992. The Petitioner and District filed exceptions. The Petitioner, Applicant and District filed responses to the exceptions. Final agency action was taken on August 11, 1992.

ISSUE

The issue in this case is whether Excavated is entitled to an MSSW permit pursuant to Chapter 373, F.S., and Chapter 40C-4, F.A.C., for the construction of a borrow pit and, if so, what if any conditions should be imposed on the permit.

RULINGS ON EXCEPTIONS

A transcript of the hearing was not prepared. Pursuant to Section 40C-1.564, exceptions to findings of fact or conclusions of law which are based upon facts not found to be established by the presiding officer shall be accompanied by a complete transcript. Therefore, only exceptions to Conclusions of Law not based on facts may be considered.

A. Applicant's Exceptions

The Applicant did not file exceptions.

B. Petitioners Exceptions

1) Petitioner's Exception No. 1

Petitioner takes exception to Finding of Fact 71 which allows construction outside of Area "A". Petitioners' Exception No. 1 is rejected. The Hearing Officer found reasonable assurances that Phase I can be constructed and operated without causing harm to the Upper Florida Floridan aquifer. Phase I is defined in Finding of Fact 128 of the Recommended Order which includes excavation of Area "A" to an elevation of 0 NGVD and of the remainder of the site to +21 NGVD (p. 56). Also see Finding of Fact 130 (p. 57).

Petitioner seeks to change a Finding of Fact of the Hearing Officer. Pursuant to Rule 40C-1.564, F.A.C., exceptions to findings of fact which are based upon facts not found to be established by the presiding officer must be accompanied by a transcript. The exceptions to findings of fact were not accompanied by a transcript and are therefore, rejected.

Furthermore, the findings of fact which Petitioner seeks to modify were established by the Hearing Officer. The exception goes to the weight of the evidence and inferences drawn there from by the Hearing Officer. It is improper for this Board to retry the case after the hearing has concluded by altering findings and reweighing evidence. *Tampa Wholesale Liquors, Inc. v. Div. of Alcoholic Beverages and Tobacco*, 376 So.2d 1195 (Fla. 2d DCA 1979). The decision to believe one expert over another is left to the Hearing Officer, and the decision cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. *Fla. Chapter of Sierra Club v. Orlando Utility Comm.*, 436 So.2d 383, 389 (Fla. 5th DCA 1983). This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. *Heifetz v. Dept. of Business Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Freeze v. Dept. of Business Regulation*, 556 So.2d 1204 (Fla. 5th DCA 1990). If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. *Berry v. Dept. of Environmental Regulation*, 530 So.2d 1019 (Fla. 4th DCA 1988). This exception is rejected because the finding is supported by competent substantial evidence.

2) Petitioners' Exception No. 2

Petitioners seek to reinstate the elevation of 20.5 feet NGVD to Condition nos. 12(d), 15(e), 16 and 17 by stating that the conditions do not reflect the conditions which the Governing Board approved. Petitioner also seeks to include Wetland "F" in Condition nos. 15(b), 15(e), 16, and 17. Petitioners' Exception No. 2 is rejected.

The purpose of a chapter 120.57 proceeding is to develop final agency action. By filing a petition, the Petitioners caused the Board action of December 10, 1991 to be rendered non-final. Therefore, the conditions recommended by the Board are reviewed de novo during the administrative hearing. The purpose of a de novo hearing is to determine whether the permit application meets the criteria of chapter 40C-4, F.A.C., and if so what conditions should be placed on the permit. After weighing the evidence, the Hearing Officer made his recommendation to the Governing Board. As stated above, the Governing Board cannot reweigh the evidence and without a transcript; therefore, the Findings of Fact cannot be overturned.

3) Petitioner's Exception No. 3

Petitioner's Exception No. 3 is a response to District Exception No. 1. For the reasons stated in District Exception No. 1, Petitioner's Exception,7Response is-rejected. The ability of the Petitioner to object and be heard on future phases of this project are not limited by this Final Order. The Petitioners have a point of entry on subsequent permit applications through section 120.57, F.S., or can petition for enforcement on existing permits through section 120.69, F.S.

4) Petitioner's Exception No. 4

Petitioner's Exception No. 4 is a response to District Exception No. 3. Petitioner's Exception/Response is rejected. As discussed below, the criteria regarding "adversely affecting natural resources, fish and wildlife" does not pertain to the Floridan aquifer. See section 10.7.4, A.H. However, other criteria of Rule 40C-4.301, F.A.C., do include impacts to the Floridan aquifer as part of the review of MSSW permit applications. Therefore, the District does review impacts to the Floridan aquifer.

5) Petitioner's Exception No. 5

Petitioner's Exception No. 5 requests that the conditions of the permit be revised to incorporate the Hearing Officer's recommendation. This exception is accepted. Exhibit B attached to this Order reflects the changes in accordance to the Recommended Order to limit the project to Phase I as described by the Hearing Officer in paragraph 128 of the Recommended Order.

C. District Exceptions

1) District Exception No. 1

The District takes exception to the Hearing Officer's Conclusion of Law No. 40. For the reasons stated herein, District's Exception no. 1 is accepted.

Changes to condition nos. 3 and 17 of the Final TSR admitted into evidence as District Exhibit No. 12 are not necessary since the permitted activity is limited to Phase I. Condition no. 3, as stated in District's Exception No. 1, states that other-permits are required for activities not specifically permitted. This condition needs no explanation and serves as a notice condition. The instant permit authorizes only the activity specifically referenced. All other activity requires additional review and authorization.

The Hearing Officer's recommendation regarding Condition No. 17 are moot given the factual findings of the Hearing Officer. The condition needs no clarification since the permitted activity is limited to Phase I. In addition, specification of a point of entry in a permit condition serves no purpose for third parties. Pursuant to Section 120.69, F.S., a third party may petition the District for enforcement of a permit. This relief is available at any time during the pendency of a permit. In addition, this permit will not expire. Once construction is complete, the permit is converted to an operation and maintenance permit. As stated above, section 120.69 provides a relief mechanism for third parties.

2) District Exception No. 2

For the reasons stated below, District Exception No. 2 is accepted. The Hearing Officer's Conclusions of Law 5 through 23 are rejected as inconsistent with established law and the District's interpretation of its rules. Harloff v. Southwest Florida Water Management District, 575 So.2d 1324 (Fla. 2d DCA 1991), rev. denied 583 So.2d 1035).

Throughout the Conclusion of Law section of the Recommended Order, the Hearing Officer has incorrectly combined the legal term of standing with the District rules regarding point of entry into proceedings. The law regarding standing is dictated by section 120.57 and not by District rules. Standing under the Administrative Procedure Act (APA) is conferred on persons whose substantial interests will be affected by the proposed agency action. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981), rev. denied, 415 So.2d 1359 (Fla. 1982) and 415 So.2d 1361 (Fla. 1982). A party seeking to show a substantial interest must demonstrate

1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and

2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

The substantial interests of the Petitioners have not been challenged in this case. Therefore, the discussion and Conclusions of Law relating to standing are misplaced. The relevant issue is whether, pursuant to Rule 40C-1.511, F.A.C., the Petitioners have waived their right to challenge the permit in whole or in part and not whether the Petitioners have standing to challenge the proposed action. Therefore, all references to standing should be replaced with point of entry.

In Conclusions of Law 5 through 23, the Hearing Officer has interpreted Rule 40C-1.511, F.A.C., in a manner which is inconsistent with established law and the Board's interpretation of its rule. Rule 40C-1.511, F.A.C., governs the point of entry for persons seeking an administrative hearing if their substantial interests are or may be affected by District action or intended action. Rule 40C-1.511, F.A.C., provides, in pertinent part,

40C-1.511 Point of Entry Into proceedings.
Unless otherwise provided by law or District rule:

(1) Persons requesting a hearing on District action which does or may determine their substantial interest shall file a petition with the District Clerk within 14 days of the receipt of notice of intended action, or within 14 days of the receipt of notice of District action for persons who did not receive the notice of intended action. The notice shall state the time limit for requesting a hearing and shall reference this chapter. In the case of District permitting action the notice shall be in the form specified in subsection (5) below. If the Board takes action which substantially differs from the notice of intended action, the applicant or persons who may be substantially affected shall have an

additional 14 days from the date of receipt of notice of said action to request an administrative hearing, in accordance with this section, but this request for administrative hearing shall only address the substantial deviation.

(2) Any person who receives written notice of a District action or who receives written notice of an intended action and who fails to file a written request for an administrative hearing in the office of the District Clerk within 14 days shall have waived his right subsequently to request an administrative hearing on such matters. A petition for an administrative hearing shall contain the information set forth in section 40C-1.521.

....

(5) When publication is made of the District action or intended action on a permitting matter, the notice shall be prepared by the District and shall contain as a minimum:

- (a) name of applicant and a brief description of the proposed activity and its location;
- (b) location of the application and its availability;
- (c) statement of the District's intended action;
- (d) scheduled date of Board action, if such action is necessary; and
- (e) notification of administrative hearing opportunity.

The Petitioner received actual notice of intended agency action on December 6, 1991. (District Exhibit 1 and Applicant's Exhibit 13). The notice of intended agency action contained a letter to Mr. Crabtree, the Technical Staff Report dated November 27, 1991, and a Notice of Rights. Petitioner had 14 days from December 6, 1991 within which to file a petition with respect to that notice of intended agency action. Pursuant to 40C-1.511, F.A.C., Petitioner waived their rights to object to the project as proposed in the first notice since a petition was not filed within 14 days of December 6, 1991.

To establish waiver based on passage of time, an agency's notice must only contain a statement concerning a right to a hearing, set forth a time limit for seeking a hearing, and refer to the applicable procedural rules of the agency. *City of St. Cloud v. Dept. of Environmental Regulation*, 490 So.2d 1356 (Fla. 5th DCA 1986); *Manasota - 88 v. Dept. Environmental Regulation*, 417 So.2d 846 (Fla. 1st DCA 1982); *City of LaBelle v. Bio-Med Services, Inc. and Dept. of Environmental Regulation*, 17 F.L.W. D1177 (Fla. 2d DCA May 6, 1992). When an agency's point of entry procedures are clearly defined by rule, as they are in this case, the court's task of finding waiver is less problematic. *Henry v. State, Dept. of Administration*, 431 So.2d 677, 680 (Fla. 1st DCA 1983)

In Conclusion of Law nos. 21 and 22, the Hearing Officer states that the Petitioners did not waive their rights in the absence of demonstrated prejudice citing *Stewart v. Department of Corrections*, 561 So.2d 15 (Fla. 4th DCA 1990). Both the rule and notice contain information regarding the right to a hearing, a

time period within which to seek a hearing, and reference to the District's procedural rules. No more is required to establish waiver based on a failure to act and passage of time. City of St. Cloud, City of LaBelle, and Rudloe, supra. Moreover, the very purpose of the rule and notice is to enable lay persons to gain access to agency decision-making. City of LaBelle, supra (Providing for publication allows more comprehensive awareness of, and participation in, the proceeding). Equitable tolling cannot be applied. Therefore, Conclusion of Law nos. 21 and 22 are hereby stricken.

On December 10, 1991, another letter, Technical Staff Report dated December 10, 1991 and Notice of Rights were mailed to Petitioner Crabtree. However, at the Governing Board meeting also on December 10, 1991, the Board amended Condition Nos. 12, 13 (renumbered as 14), and 14 (renumbered as 15) and added Condition Nos. 13 and 16. (Applicant's Exhibit 4). The Board then took action on the permit. The Board action was different from the notice received by the Petitioner.

On December 23, 1991, Petitioner filed its Petition for Administrative Hearing with the District Clerk. The next issue is whether the changed conditions of the Governing Board on December 10, 1991 constituted a substantial deviation which initiated another point of entry for Petitioner. The Hearing Officer implies in Conclusion of Law that Petitioner had no right to object to the revised conditions because the conditions restricted the Applicant and were otherwise favorable to the Petitioner. Rule 40C-1.511 does not specify that the deviation must benefit one party or another. Therefore, Conclusion of Law no. 9 is hereby stricken.

The conditions which were revised on December 10, 1991 by the Board required that the project be constructed in two Phases. Agency action cannot become final until the time period for a point of entry has expired. See Capeletti Bros., supra; Hillsboro-Windsor Condominium Assoc. v. Dept. of Natural Resources, 418 So.2d 359 (Fla. 1st DCA 1982); B.C.C.I. v. Administration Comm., 570 So.2d 383 (Fla. 1st DCA 1990); and Florida League of Cities, supra. Therefore, the agency action would not be final until December 24, 1991. To the extent that the revised conditions substantially deviated from the noticed intended agency action, Appellant had 14 days from December 10, 1991, to institute a de novo proceeding on the permit regardless that the District took agency action on the permit application. The evidence presented and arguments made at the Hearing related to these conditions. Although the Hearing Officer's Conclusions of Law are inconsistent with established law, he correctly limited the scope of the hearing.

Conclusion of Law no. 12, refers to revised conditions during the de novo proceeding. Condition nos. 12 - 16 of applicant's Exhibit 4 were revised by condition nos. 12 - 21 of District's Exhibit 12. A section 120.57, F.S. formal proceeding is de novo and intended to formulate final agency action rather than review earlier or preliminary agency action. Once a petition is filed, the proceeding is reviewed de novo. Changed conditions and circumstances should always be considered in determining final agency action. McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 584 (Fla. 1st DCA 1977); Fla. Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981); Gulf Coast Nursing Center v. DHRS, 483 So.2d 700 (Fla. 1st DCA 1985); Beverly Enterprise v. DHRS, 573 So.2d 23 (Fla. 1st DCA 1990); Ryan v. Spang and DER, 8 FALR 4288 (DER 8.14.86). Consequently, a section 120.57, F.S. hearing inherently contemplates changed conditions and issues in the formulation of a final agency action so that an applicant's project may be modified to conform to the law. Hopwood v. Fla., DER, 402 So.2d 1296 (Fla. 1st DCA 1981). A potential

due process impediment in such situations occurs when a new issue or matter is raised without opportunity of opposing parties to conform their evidence to the new issue. Absent a substantial modification in mid-proceeding that creates a due process problem, modifications, when supported by the evidence, are appropriate. Hopwood, supra. No due process violation occurs if the parties had notice of the determinative issues at hearing. Manatee County v. State, DER, 429 So.2d 360 (Fla. 1st DCA), rev. denied, 438 So.2d 833 (Fla. 1983). In addition, it is the opposing party's burden to identify how a modifications caused prejudice to the party's case. DeCarion v. DER, 445 So.2d 619 (Fla. 1st DCA 1984). The revisions during this de novo proceeding are permissible and do not create another point of entry. The remaining conditions are not challenged or revised during the de novo proceeding. Therefore, Conclusion of Law no. 12 is irrelevant and hereby stricken.

Conclusion of Law no. 23 is unclear. The correct conclusion is that Petitioners waived their rights to object to the notice as received on December 6, 1991. However, that waiver became irrelevant when the Governing Board amended the pertinent conditions on December 10, 1991 and the Petitioners timely filed a petition with regard to that action. The filing of the petition rendered the action on December 10, 1991 as nonfinal.

The Governing Board can reject and replace the Hearing Officer's conclusions of law and interpretations of District rules. See section 120.57(1)(a)10., F.S.; Harloff v. Southwest Florida Water Management District, 575 So.2d 1324 (Fla. 2d DCA 1991), rev. denied 583 So.2d 1035). For the reasons stated above, Conclusions of Law 5 through 23 are modified as discussed herein.

3) District Exception No. 3

District takes exception to Conclusion of Law 39. District Exception No. 3 is accepted. Rule 40C-4.301(1)(a)10., F.A.C. is identical to one of the objectives of the District. The objectives of the District are enumerated in section 9.1.1 of the MSSW Applicant's Handbook (A.H.), parts of which are adopted by rule. Paragraph 9.1.1(j) is the relevant objective. Section 10.7.4, A.H., discusses how paragraph 9.1.1(j) is applied. Section 10.7.4 reads:

To determine whether a system will meet the objective contained in paragraph 9.1.1(j), ..., the District will consider only the impacts to fish and wildlife and threatened and endangered species relative to the functions the wetlands currently provide to them. (Emphasis added).

Therefore, Rule 40C-4.301(1)(a)10., F.A.C., must be applied as stated in section 10.7.4, A.H., which does not include the Floridan aquifer. Although the criteria of 40C-4.301(1)(a)10., F.A.C., does not include impacts to the Floridan aquifer, the Floridan aquifer is protected through other criteria. Rule 40C-4.301(1)(a) and (2)(a), F.A.C., include impacts to ground water and thus the Floridan aquifer. See 40C-4.301(1)(a)5., 9. and 11., and 40C-4.301(2)(a)1., 2., and 6. Therefore, the reference to the criteria "adversely affect natural resources" should be deleted from Conclusion of Law 39.

4) District Exception No. 4

In District Exception No. 4, the District suggests conditions which comport with the Hearing Officer's Recommended Order. District Exception No. 4 is accepted. The Hearing Officer recommended that the project be limited. The

revised permit conditions which conform to the Hearing Officer's ultimate recommendation are attached as Exhibit B to this Final Order.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The Hearing Officer's recommended findings of fact contained in Exhibit A are adopted and incorporated herein.

2. The Hearing Officer's Conclusion of Law are modified as discussed herein.

3. The permit application no. 4-117-0309 is hereby granted with respect to Phase I as recommended by the Hearing Officer. The conditions to be placed on the permit are attached as Exhibit B incorporated herein.

DONE AND ORDERED this 11th day of August 1992, in Palatka, Florida.

ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT

BY: _____
JOE E. HILL
CHAIRMAN

RENDERED this 13th day of August 1992.

BY: _____
PATRICIA C. SCHULTZ
DISTRICT CLERK

EXHIBIT B

Final Order Permit Conditions

General Conditions: 2 - 8

Other Conditions:

1-8 No change from District Exhibit 12.

9. Revised to conform with Hearing Officer's Recommended Order to read:

The proposed surface water management system shall be constructed as per plan sheets 1, 3, and 4 of 4, 2, 2A, and 3 of 3, 1 of 1 and sheet 1 of 1 received by the District on October 25, 1991, and sheet 2 of 4 received by the District on November 18, 1991, as limited by other condition no. 15 herein.

10 - 14 No change from District Exhibit 12.

15 - 16 Revised to conform with Hearing Officer's Recommended Order to read:

15. The permittee must proceed with excavation in the following phased manner:
 - a. No change from District Exhibit 12.
 - b. No change from District Exhibit 12.
 - c. Excavate Area "A", as delineated on Exhibit 1, to a depth of no greater than +0 ft NGVD [deleting "until such time that the permittee satisfies permit condition no. 16"]. The borrow areas outside of Area "A" may be excavated to a depth no greater than +21 ft NGVD concurrent with the excavation of Area "A".
 - d. No change from District Exhibit 12.
 - e. No change from District Exhibit 12.

16. No excavation can occur below elevation +0 ft NGVD in Area "A" and below elevation +21 ft NGVD in the borrow area outside of Area "A". [deleting the remainder of the condition].

17 - 21 No change from District Exhibit 12.

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of Property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within (90) days of the rendering of the final District action,

2. Pursuant to Section 120.68, Florida Statutes, party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla. R. App. P. 9110 within 30, days of the rendering of the final District action,

3 A party to the proceeding who claims that a District order inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Regulation and any person named in the order within 2 days of the rendering of the District order. However, if the order to be reviewed is determined by the Commission within 20 days after receipt of request for review to be of statewide or regional significance, the Commission may accept a request for review within 30 days of the rendering of the order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 and #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review,

CERTIFICATE OF SERVICE

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

IRBY PUGH
218 ANNIE STREET
ORLANDO FL 32806

and

KEN WRIGHT
20 NORTH ORANGE AVE #1000
ORLANDO FL 32801

at 4:00 p.m. this 13th day of August, 1992.

PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429
(904) 328-4233

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