

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD ECKLER and DENISE HOK,            )  
  )  
    Petitioners,                                )  
  )  
and THE FLORIDA WILDLIFE FEDERATION    )  
  )  
    Intervenor,                                )            CASE NO. 90-8083  
  )  
vs.    )  
  )  
UNIVERSITY OF NORTH FLORIDA            )  
and ST. JOHNS RIVER                        )  
WATER MANAGEMENT DISTRICT            )  
  )  
    Respondents.                             )  
\_\_\_\_\_)

RECOMMENDATION

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William F. Quattlebaum, held a formal hearing in the above-styled case on June 11-12, 1991, in Jacksonville, Florida.

APPEARANCES

For Petitioners                            Timothy D. Keyser, Esq.  
and Intervenor:                            Post Office Box 92  
  Interlachen, Florida 32148

For Respondent University:                Marcia P. Parker, Esq.  
of North Florida:                           Emily G. Pierce, Esq.  
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For Respondent St. Johns:                Clare E. Gray, Esq.  
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STATEMENT OF THE ISSUE

Whether Respondent University of North Florida should be issued a Management and Storage of Surface Waters ("MSSW") permit and a Wetlands Resource Management ("dredge and fill") permit, both related to road construction at the University.

## PRELIMINARY STATEMENT

The University of North Florida (UNF) has applied to the St. Johns River Water Management District (SJRWMD) for an MSSW permit and a dredge and fill permit, both related to the planned construction of roadways and related stormwater management systems. The SJRWMD issued notice that it intended to grant the permits. Petitioners challenged the intended grant of the permits and were subsequently joined by the Intervenor.

Petitioners specifically challenge the permits on the basis that UNF has failed to provide reasonable assurance that applicable standards will be met, that the information provided by UNF to the SJRWMD was inaccurate and incomplete and thus prevented the SJRWMD from properly balancing the public interest criteria set forth at section 403.918, Florida Statutes, and that the proposed mitigation fails to offset the adverse impacts to wildlife and habitat from the loss of wetlands.

At hearing, Petitioners/Intervenor presented the testimony of Robert Loftin, Patrick Jodice, Madeline Fernald, Glen Lowe, Adam Herbert, Denise Hok, Michael Woodward, and, by deposition, Richard Eckler. Petitioner's exhibits numbered 1-5 were admitted. Respondent UNF presented the testimony of Russell Clairmont, Byron Peacock, Rebecca Purser and David Taylor, and had exhibits numbered 1-17 and 19-20 admitted. Respondent SJRWMD presented the testimony of Ralph Brown and Whitney Green, and had exhibits numbered 1-3 admitted.

The parties filed a prehearing stipulation. The prehearing stipulation, admitted as Hearing Officer's exhibit #1, is incorporated into this Recommended Order as appropriate.

The prehearing stipulation sets forth 16 remaining disputed factual issues. The issues are as follows:

1. Whether the system and dredge and fill project will include the pre-mitigation loss of a total of more than the 2.3 acres of SJRWMD wetlands stated in the Technical Staff Report.
2. Whether the system and dredge and fill project will include the pre-mitigation loss of a total of more than the 1.5 acres of waters of the state stated in the Technical Staff Report.
3. Whether the operation of the system will adversely affect any recreational development.
4. Whether operation of the system will induce pollution intrusion.
5. Whether operation of the system will adversely impact the quality of the receiving waters.
6. Whether operation of the system will adversely affect natural resources, fish and wildlife.
7. Whether construction and operation of the system will cause adverse changes in the habitat, abundance, diversity or food sources of threatened and endangered species or off-site aquatic and wetland dependent species.
8. Whether the dredge and fill project will adversely affect public health, safety and welfare.

9. Whether the dredge and fill project will adversely affect the conservation of fish and wildlife.

10. Whether modification of the existing culvert in the existing fill road crossing of Buckhead Branch will result in adverse environmental impacts.

11. Whether the system will be effectively operated. (This issue is considered relevant by Petitioners and Intervenor only.)

12. Whether adequate provisions exist for the continued and satisfactory operation and maintenance of the system. (This issue is considered relevant by Petitioners and Intervenor only.)

13. Whether the dredge and fill project will adversely affect recreational values in the vicinity of the project.

14. Whether areas affected by the proposed dredge and fill activity will be adversely impacted as to the current condition and relative value of functions being performed by those areas.

15. Whether the mitigation proposal is adequately detailed and sufficient to offset adverse impacts to wetlands resulting from construction and operation of the system and the dredge and fill project.

16. Whether the cumulative impacts from the dredge and fill project were considered and evaluated.

A transcript of the hearing was filed. The Petitioners and Respondents filed proposed recommended orders. The proposed findings of fact are ruled upon either directly or indirectly as reflected in this Recommended Order, and in the Appendix which is attached and hereby made a part of this Recommended Order.

#### FINDINGS OF FACT

1. On November 13, 1990, the St. Johns River Water Management District (SJRWMD) Governing Board voted to issue to the University of North Florida (UNF), a Management and Storage of Surface Waters (MSSW) permit #4-031-0359GM for the construction and operation of a surface water management system associated with road and parking lot construction on the UNF campus in Jacksonville. On the same day, the board also voted to issue water resource management permit #12-031-0007G authorizing dredging and filling in waters of the state related to said road and parking lot construction.

2. Petitioners timely petitioned for hearing, challenging the SJRWMD decision to award the permits. Neither the standing of the Petitioners nor the Intervenor is at issue in this proceeding.

3. The UNF campus contains approximately 1000 acres in Duval County, Florida, and lies completely within the jurisdiction of the SJRWMD. The UNF is an agency of the State of Florida, and has the apparent authority to make application for the referenced permits. The UNF campus is designated as a wildlife sanctuary. Of the 1,000 acres, wetlands constitute approximately 450 acres.

4. Prior to development of the UNF campus, the property was utilized for silviculture, with pine trees farmed and harvested on the land. The property was and continues to be crossed by numerous logging roads and trails. During the 1970's extensive alterations occurred in the property related to local development activity. Swamps and stream flows were disrupted. Wetlands headwaters were altered by the construction of lakes. Adjacent highways and office developments were constructed, borrow pits were utilized, and wetlands were filled. There is some planted pine forest, generally no more than 40 years old, remaining on the UNF campus. Much of the UNF property remains undeveloped and consists of a variety of common habitat, including pine flatwoods, oak hammocks, and various wetlands.

5. The existing UNF campus is crossed by a series of wetlands located generally north to south through the property. The wetlands include Sawmill Slough, Buckhead Branch, Boggy Branch, and Ryals Swamp. The water in the area flows to the southeast. Previous construction of UNF Drive required the crossing of Buckhead Branch and the filling of portions of Boggy Branch.

6. The UNF now proposes to construct approximately .66 miles of three lane roadway across the southern portion of the campus to connect the existing UNF access drive into a loop (the "loop" road), approximately .34 miles of two lane roadway from a point on the loop into an upland area in the southeastern part of the campus (the "eastern connector"), pave an existing parking lot near UNF nature trails, and construct related surface and stormwater management facilities.

7. The purpose of the loop road project is to enhance access around the UNF campus. The eastern connector will provide access to an undeveloped upland area of the campus. The expansion is related to and required by the anticipated continued growth of the University.

8. The on-campus silviculture logging roads and trails, which remain from the pre-development period, have long been utilized by the UNF community as nature trails. The trails bisect a substantial part of the remaining undeveloped campus. In 1978, approximately 12 miles of trails were listed by the UNF with the United States Department of the Interior as National Recreational Trails, a national collected listing of recreational trails. These named trails, (the "maintained trails" as identified below, and the White Violet, Switchcane, and Turkey Trace trails) were marked by means of paint blazing and signs. In some locations, such markings, and at least one sign remain visible, even though the paint markings have not been repainted since the original blazing occurred.

9. The UNF is fiscally unable to maintain all twelve miles of trail for general public use. The UNF concentrates maintenance and education efforts on three of the trails, the Blueberry, the Red Maple and the Goldenrod (hereinafter referred to as the "maintained trails"). The maintained trails, approximately 6 miles in total length, are signed and marked to provide clear and safe direction through the area. For public use, the UNF provides educational materials related to the maintained trails. Approximately 17,000 persons use the maintained trails annually. Two rangers are employed to supervise the maintained trails. In the most recent two year fiscal period, about \$21,000 has been spent rebuilding and upgrading parts of the maintained trails.

10. The UNF provides no security for the logging trails (hereinafter the "unmaintained trails") which are not part of the maintained trail system, and does not encourage the use of the old logging roads as trails. The proposed road construction project will adversely affect the use of the unmaintained trails because the road projects will intersect and overlap several of the trails.

11. The evidence fails to establish that the UNF is without authority to amend, alter, relocate or abandon trails listed with the United States Department of the Interior as National Recreational Trails, or that notice need be provided to the Department prior to such action.

12. There are additional recreational facilities available on the UNF campus, including two jogging trails, as well as a multi-sport facility in the north part of the campus. Approximately 10 total miles of trails exist (including the maintained trails and excluding the unmaintained logging trails).

13. Persons who travel to the maintained trails by automobile currently park in an unpaved lot. The proposed roadway construction for which permits are being sought includes expansion and paving of the nature trail parking lot. This improvement will provide for better access to, and increased utilization of, the maintained trails and eliminate maintenance problems experienced in relation to the unpaved parking area.

14. Notwithstanding the adverse impact on current use of the unmaintained logging trails, the project will enhance recreational development. Operation of the stormwater system, which will result in improved water quality discharged into the receiving waters, will not adversely affect recreational development. Although the recreational values of the impacted unmaintained trails will be adversely affected, on balance the additional access to the maintained trails and the recreational opportunities presented elsewhere on the UNF campus negate the impact on the unmaintained trails.

15. Construction of the roadway will adversely impact portions of the Boggy and Buckhead Branches, which contains wetlands (as defined by, and under the jurisdiction of, the SJRWMD) and waters of the State of Florida (as defined by, and under the jurisdiction of, the Florida Department of Environmental Regulation, which has authorized the SJRWMD to review projects on the DER's behalf). The extent of the wetland impact was determined by the UNF and corroborated by the SJRWMD in a reliable manner. The wetlands impact areas are identified as follows: Area 1, at the upper margin of Boggy Branch, includes slash pine canopy and mixed bay trees; Area 2 is primarily second growth loblolly bay canopy, dense undergrowth, swamp. The loblolly is approximately 20 years old; Area 3 is a west flowing connection between Boggy and Buckhead Branches; Area 4, (the Buckhead Branch crossing), is bay canopy and bottomland hardwood.

16. Areas 1, 2 and 4 will require filling for the construction of the loop road. Area 3 requires filling for the construction of the eastern connector. A total of approximately 2.3 total acres of forested wetlands are included within the impacted area. Of the 2.3 acres identified as wetlands for MSSW permitting purposes, 1.5 acres are classed as waters of the state for purposes of dredge and fill permitting. The wetlands are generally classified as fair to poor quality, although there is a limited wetland area classified as fair to good quality. The wetlands impact of the project on wetland dependent and off-site aquatic species would, without mitigation, be unpermissible.

17. The loop road project includes three drainage areas. Accordingly to plans, drainage area #1 is served by curbs and gutters into storm sewers and discharging into wet detention pond E, drainage area #2 is served by curbs and gutters into storm sewers and discharging into wet detention pond F, and drainage area #3 is served by curbs and gutters discharging into a dry retention swale located adjacent to the road.

18. Stormwater management and treatment for the eastern connector will be provided by a swale system located adjacent to the eastern connector. The western portion of the loop road and the newly paved nature trail parking lot will be separately served by a dry swale system and two retention ponds at the newly paved nature trail parking lot.

19. Wet detention ponds retain the "first flush" stormwater runoff and discharge the water at a reduced rate through a "bleed down" structure. Pollutant removal occurs when first flush runoff is retained and mixed with additional water. Pond and soil organisms and littoral plants provide additional treatment. Such ponds are effective and require minimal maintenance, generally involving removal of nuisance species and cleaning of the "bleed down" structure. Oil skimmers will prevent the discharge of oils and greases from the site. The wet detention ponds have side slopes no steeper than a 4 to 1 horizontal to vertical angle and will be mulched or vegetated to prevent erosion.

20. Dry retention facilities retain the "first flush" runoff and attenuate peak stormwater discharge. The water within the dry swale is filtered as it percolates down through the soil. Maintenance of dry swale systems requires mowing and removal of silt buildup.

21. The design of the system provides that the post development peak rate of discharge will not exceed the pre-development peak rate of discharge for a 24 hour duration storm with a 25 year return frequency. The project will not cause a reduction in the flood conveyance capabilities provided by a floodway. The project will not result in flows and levels of adjacent streams, impoundments or other water courses being decreased so as to cause adverse impacts. The projects detention basins will provide the capacity for the specified treatment volume of stormwater within 72 hours following a storm event.

22. The project is not located in and does not discharge directly to Class I or Class II waters, to Class III waters approved for shellfish harvesting, or to Outstanding Florida Waters. The receiving waters for the system are Boggy and Buckhead Branches, both Class III surface waters. Operation of the system will not cause or result in violation of state water quality standards for the receiving waters. The discharge from the system will meet Class III water standards. There is no evidence that operation of the system will induce pollution intrusion.

23. The design and sequence of construction includes appropriate Best Management Practice provisions for erosion and sediment control, including silt barriers and hay bales. Such provisions are required by the SJRWMD permit conditions. Silt barriers will completely enclose the dredging locations. The bottoms of silt curtains will be buried and will extend 3.5 to 4 feet above the land surface. Slopes will be stabilized by sodding or seeding.

24. The locations of the wet ponds and dry swales, nearby the roadways, will facilitate maintenance activities. Maintenance requirements are included within the SJRWMD permit conditions and are sufficient to ensure the proper operation of the facilities. Although the Petitioners asserted that prior violations of SJRWMD rules related to water quality discharge by the UNF indicate that the UNF is not capable of effectively and adequately operating and maintaining the system, the evidence establishes that the permit conditions are sufficient to provide for such operation and maintenance.

25. The project also includes replacement of an existing culvert at a connection between Boggy and Buckhead Branches. The existing culvert is impounding water during the wet season. The replacement culvert will be installed at the connection floor elevation and will serve to restore the natural hydrology. The new culvert will also be substantially larger than the existing pipe, and can allow fish and wildlife passage under the road.

26. In order to mitigate the impact of the project on wetland dependent and off-site aquatic species, the UNF has proposed to create a 6.3 acre freshwater forested wetland at a site contiguous to Buckhead Branch. The wetlands creation project includes 2.9 acres of submerged wetlands and 3.4 acres of transitional wetlands. Of the 6.3 acres, 4.1 acres of the created wetlands are designated to mitigate the adverse impacts related to the dredge and fill activities. The mitigation proposal constitutes a ratio of 2.7 acres of wetlands creation for every acre of wetland impact.

27. The mitigation site is a low upland pine flatwood and mesic flatwood area surrounded on three sides by wetlands related to Buckhead Branch. The mitigation area will be scraped down to a suitable level and over-excavated by six inches. The elevation of the proposed wetland creation area is based upon water table data and surveying of the Buckhead Branch, located adjacent to the proposed mitigation area, which serves as the wetlands reference area. The UNF monitors surface and ground water elevation in the proposed mitigation area and in Buckhead Branch, and records rainfall amounts. The hydrology of the proposed wetland creation area is based upon the connections of the created wetlands with Buckhead Branch and is sufficient to assure an appropriate hydroperiod.

28. The six inch over-excavation will receive muck soils removed from the impacted wetland areas. The subsurface soils in the wetland creation area are, because of the existing water table level, compatible with the wetland creation. The muck soil will naturally contain seeds and tubers of appropriate vegetation. Additionally, wetland trees, based upon trees in adjacent wetland areas, will be planted in the wetland creation. Prior to planting, the UNF will be required to submit an as-built survey demonstrating that the hydrology and elevation newly-created wetland is proper.

29. The UNF proposal to monitor and maintain the created wetland includes physical and aerial examination of the site, which will be protected by a deeded conservation easement. The monitoring and maintenance plan will continue for three years. The mitigation effort must achieve a ground cover of not less than 80% to be considered successful. Nuisance species will comprise less than 10% of the site's vegetation, and excessive nuisance species will be removed. The UNF is required to periodically report the status of the site to the SJRWMD.

30. The mitigation proposal is adequately detailed and sufficient to offset adverse impacts to wetlands resulting from construction and operation of the system and the dredge and fill project. The wetland creation permit conditions indicate that the wetlands will function as designed and approved by the SJRWMD. The wetland creation is greater in size than the impacted wetlands, will replace the habitat and function of the impacted wetlands and will offset the adverse impacts of the loss of existing wetlands.

31. There will be no impact on any threatened or endangered animal species. The evidence that such species utilize impacted sites is limited. Existing utilization of the impacted site will be accommodated by the remaining wetlands and the created wetland mitigation area. There is no evidence that fish will be adversely affected by the project. Construction and operation of the system will not cause adverse changes in the habitat, abundance, diversity or food sources of threatened and endangered species or off-site aquatic and wetland dependent species.

32. More than five years ago, a bald eagle, listed as endangered by the State of Florida, was observed perched on an upland tree in an area where a retention pond will be constructed. The eagle was not nesting or feeding at the time of observation. The closest known eagle's nest is more than four miles away from the site. None of the impacted area provides appropriate feeding ground for a bald eagle.

33. Colonies of red-cockaded woodpeckers exist between one and one half to ten miles away from the UNF campus. Red-cockaded woodpeckers have been observed on the UNF campus but not in the vicinity of the areas to be impacted by the project. Red-cockaded woodpeckers habitat pine trees at least 50 years old. While the existing pine may provide red-cockaded woodpecker habitat in the future, the pine trees to be impacted by this project are not suitable habitat for red-cockaded woodpeckers at this time. There are no pines on the UNF campus which would currently provide suitable red-cockaded woodpecker habitat.

34. Woodstorks have been sighted on the UNF campus, but not in the impacted area or the mitigation area. Woodstorks feed in areas dissimilar to the impacted areas, therefore there should be no impact on the species.

35. Gopher tortoises have been observed on the UNF campus, but not in the impacted wetland areas or in the mitigation areas. There is no evidence that gopher tortoises would be impacted by this project.

36. A number of animal species identified as wetland dependent have been observed on the campus. However, the evidence of actual utilization of impacted areas by such species is unclear as to frequency and manner of utilization. Such wetland-dependent species are capable of utilizing proximal habitat and will be absorbed by the unimpacted wetland acreage on the UNF campus. Further, the impact on potential habitat caused by the project will be effectively mitigated through the created wetland area.

37. Five hooded pitcher plants are located within the wetland impact area and will be destroyed by construction activities. The hooded pitcher plant is listed by the State of Florida as a threatened species, however, the plant is common in wet areas throughout Duval, Clay, St. Johns and Nassau Counties. Because the muck soils removed from the area will contain seeds, roots and rhizomes from existing vegetation, the plants will likely reproduce in the created wetland area which will contain the muck soil removed during the permitted construction activity.



38. There is no evidence that the dredge and fill project will adversely affect public health, safety and welfare.

39. There are no significant secondary impacts resulting from the proposed project. The SJRWMD considered the environmental impacts expected to occur related to the construction of the roadways for which the permits are sought. In this case, the anticipated secondary impact of the project relates to the effect of automobiles on existing wildlife. The evidence does not establish that there will be such an impact. The road poses no obstacle to wildlife migration. The replacement of the existing culvert with a new culvert at the proper ground elevation may provide enhanced access for some wildlife.

40. The cumulative impacts of the project include the potential expansion of the eastern connector which would require the crossing of Boggy Branch, and future building construction in the southeast portion of the UNF campus. There is no evidence that such impacts, which would require additional permitting, could not be offset with additional mitigation at such time as the permitting is sought.

#### CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

42. The prehearing stipulation sets forth four issues of law for the Hearing Officer's consideration. The issues are as follows:

1. Whether the applicant, UNF, has provided reasonable assurances of its entitlement to permit NO. 4-031-0359GM for the management and storage of surface waters system.

2. Whether the applicant, UNF, has provided reasonable assurances of its entitlement to permit NO. 12-031-0007G for the dredging and filling in waters of the state.

3. Whether hearing for attorney's fees should be awarded to Respondent, UNF, pursuant to Section 120.59(b), Florida Statutes, or 120.57(1)(b), Florida Statutes.

4. Whether UNF or its agent are required to have the power or authority to apply for the subject permits. (This issue is considered relevant by Petitioner and Intervenor only)

43. The SJRWMD is responsible for the permitting of construction and operation of surface water management systems, Chapter 373, Florida Statutes, and for the permitting of dredge and fill activities in waters of the state, pursuant to Chapter 403, Florida Statutes, and by agreement with the Department of Environmental Regulation.

44. As the applicant for the permits, the UNF has the burden of proof in demonstrating entitlement to the permits sought. *Department of Transportation v. J.W.C. Company, Inc.* 396 So.2d 778 (Fla. 1st DCA 1981). In this case, the burden has been met.

45. In order to receive a permit for construction of a surface water management system, the UNF must demonstrate that the system will not be harmful to the water resources of the SJRWMD, Section 373.413(1), Florida Statutes, and demonstrate that the operation and maintenance of the system will not be inconsistent with the overall objectives of the SJRWMD and will not be harmful to the water resources of the SJRWMD, Section 373.416(1), Florida Statutes.

46. Chapter 40C-4.301, Florida Administrative Code, sets forth the conditions for issuance of a MSSW permit, as follows:

- (1)(a) To obtain a general or individual permit for operation, maintenance, removal or abandonment of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity will not:
1. Adversely affect navigability of rivers and harbors;
  2. Adversely affect recreational development or public lands;
  3. Endanger life, health or property;
  4. Be inconsistent with the maintenance of minimum flows and levels established pursuant to Section 373.042, Florida Statutes;
  5. Adversely affect the availability of water for reasonable beneficial purposes;
  6. Be incapable of being effectively operated;
  7. Adversely affect the operation of a work of the District established pursuant to Section 373.086, Florida Statutes, and Chapter 40C-6, F.A.C.
  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;
  11. Induce saltwater or pollution intrusion;
  12. Increase the potential for damages to off-site property or the public caused by:
    - a. Floodplain development, encroachment or other alteration;
    - b. Retardance, acceleration, displacement or diversion of surface water;
    - c. Reduction of natural water storage areas;
    - d. Facility failure;
  13. Increase the potential for flood damages to residences, public buildings, or proposed and existing streets and roadways; or
  14. Otherwise be inconsistent with the overall objectives of the District.
- (b) Because a proposed system may result in both beneficial and harmful effects in terms of various individual objectives, in determining whether the applicant has provided evidence of reasonable assurance of compliance with Rule 40C-4.301(1)(a), F.A.C., the District may consider a balancing of

specific effects to show the system is not inconsistent with the overall objectives of the District.

(2)(a) To obtain a general or individual permit for construction, alteration, operation or maintenance of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity meets the following standards:

1. Adverse water quality 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;
4. The system must be capable of being effectively operated;
5. The activity must not result in adverse impacts to the operation of works of the District established pursuant to Section 373.086, Florida Statutes;
6. Hydrologically-related environmental functions will not be adversely affected;
7. Otherwise not be harmful to the Water Resources of the District.

(b) If the applicant has provided reasonable assurance that the design criteria specified in Applicant's Handbook Part II "Criteria for Evaluation" adopted by reference in Rule 40C-4.091(1), F.A.C., have been met, then it is presumed that the standards contained in subsection (2)(a) above have been satisfied.

47. The evidence establishes that the applicant, UNF, has provided reasonable assurances that the requirements of Sections 373.413(1) and 373.416(1), Florida Statutes, and Chapter 40C-4.301, Florida Administrative Code, have been met and that UNF is otherwise entitled to receive MSSW permit #4-031-0359GM.

48. In order to receive a permit to dredge and fill in waters of the state, the UNF must provide the SJRWMD with reasonable assurance that water quality standards will not be violated. Section 403.918(1), Florida Statutes. The Department of Environmental Regulation has, by rule, established water quality criteria for wetlands within its jurisdiction which give appropriate recognition to the water quality of such wetlands in their natural state. Further, a fill permit may not be issued unless the applicant provides the Department with reasonable assurance that the project is not contrary to the public interest. For a project which significantly degrades or is within an Outstanding Florida Water, as provided by Department rule, the applicant must provide reasonable assurance that the project will be clearly in the public interest. Section 403.918(2), Florida Statutes. In this case, there are no Outstanding Florida Waters impacted by the project.

49. As set forth in Section 403.918(2)(a), Florida Statutes, in determining whether a project is not contrary to public interest, or is clearly in the public interest, the Department shall consider and balance the following criteria:

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

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

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

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

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

6. Whether the project will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

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

50. Pursuant to Section 403.919, Florida Statutes, in deciding whether to grant or deny a permit for an activity which will affect waters, the SJRWMD shall consider cumulative or secondary impacts of the project, including the impact of the project for which the permit is sought, the impact of projects which are existing or under construction or for which permits or jurisdictional determinations have been sought, and the impact of projects which are under review, approved, or vested pursuant to 380.06, or other projects which may reasonably be expected to be located within the jurisdictional extent of waters, based upon land use restrictions and regulations. The SJRWMD appropriately considered such cumulative or secondary impacts of the project.

51. The evidence in this case establishes that the project, including the wetlands creation designed to mitigate the loss of function of the existing wetlands impacted by the project, will not violate water quality standards. The project, including the created wetlands mitigation, is not contrary to public interest. The evidence fails to establish that the project will adversely affect the public health, safety, or welfare or the property of others, that the project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats, that the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling, or that the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project. The current condition and relative value of functions being performed by impacted areas are adequately addressed by the mitigation.

52. The Petitioners assert that the information provided by UNF to the SJRWMD was inaccurate and incomplete and thus prevented the SJRWMD from properly balancing the public interest criteria set forth at section 403.918, Florida Statutes. However, the evidence establishes that the applicant, UNF, has provided reasonable assurances that the requirements of Sections 403.918 and 403.919, Florida Statutes, have been met and that UNF is otherwise entitled to receive dredge and fill permit #12-031-0007G.

53. As to the issue of whether hearing for attorney's fees should be awarded to Respondent, UNF, pursuant to Section 120.59(b), Florida Statutes, or 120.57(1)(b), Florida Statutes, the UNF, in it's proposed recommended order filed in this case, states: "[n]o evidence was presented as to the issuance of attorney's fees, and therefore none are granted."

54. Finally, as to the issue of whether UNF or its agent are required to have the power or authority to apply for the subject permits, the evidence in this case includes a lease from the Board of Trustees of the Internal Improvement Trust Fund to the Board of Regents on behalf of the University of North Florida. With no evidence presented to the contrary, it is concluded that the UNF has the necessary authority to make application for the permits.

#### RECOMMENDATION

Based on the foregoing, it is hereby

RECOMMENDED that the St. Johns River Water Management District enter a Final Order granting MSSW permit #4-031-0359GM and water resource management permit #12-031-0007G to the University of North Florida.

DONE and RECOMMENDED this 5th day of September, 1991, in Tallahassee, Florida.

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WILLIAM F. QUATTLEBAUM  
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 5th day of September, 1991.

APPENDIX  
CASE NO. 90-8083

The following constitute rulings on proposed findings of facts submitted by the parties.

Petitioners

The Petitioners proposed findings of fact are accepted as modified in the Recommended Order except as follows:

1. Rejected, unnecessary. The standing of the parties is not at issue in this proceeding.

9. Rejected, unnecessary. The location was accurately identified during the hearing, which is designed to formulate the SJRWMD's final action.

12. Rejected, contrary to the greater weight of evidence. Although the area may be "unique" as it related to the UNF campus, it is not when the basis for comparison includes the larger area surrounding the campus.

13. Rejected, contrary to the greater weight of evidence, which indicates, not that such is "likely", but that the pine could potentially provide habitat for red-cockaded woodpecker.

17. Rejected, irrelevant. The evidence fails to establish that the proposed construction will reduce the number of bird species observable on campus.

19. Rejected, contrary to the greater weight of the evidence, which establishes that affected species can be accommodated in proximal habitat, including the substantial remaining wetland areas on the campus.

20-21. Rejected, contrary to the greater weight of the evidence, which establishes that the mitigation plan can be reasonably expected to succeed.

22. Rejected, immaterial. The monitoring period complies with state requirements established by administrative rules which are not challenged in this proceeding.

28-32. Although the relevant proposed facts are included in the Findings of Fact contained herein, the proposed findings are recitation of testimony or address the weight of the testimony of certain witnesses, and are unnecessary.

33. Rejected as to the "extensiveness" of use of trails, unsupported by greater weight of the evidence.

35. Rejected, contrary to the greater weight of the uncontradicted evidence related to the maintenance and supervision provided for the maintained trails. The lack of documentation is immaterial.

36. Rejected. This is a de novo proceeding, designed to formulate final agency action. Whether the SJRWMD previously considered the impact of the project on the unmaintained logging trails is immaterial. The impact of the project on the unmaintained logging trails has been considered in this proceeding.

37. Rejected, immaterial.

39-43. Rejected, contrary to the greater weight of the evidence which establishing that the SJRWMD appropriately considered reasonably anticipated secondary and cumulative impacts of the project. The evidence fails to establish that potential impacts not considered by the SJRWMD, if any, would result in the project being unpermittable or that additional mitigation would have been required.

44-48. Rejected, contrary to the greater weight of the evidence, which establishes that there will be no adverse impact on animal or plant wildlife, which is not addressed by the mitigation plan.

50-52. Rejected. The existence of such violations does not alone establish doubt as to the UNF's ability to meet the permit conditions set forth by the SJRWMD. References as to the candor of UNF witnesses is rejected as argumentative.

Respondent University of North Florida

The Respondent University of North Florida's proposed findings of fact are accepted as modified in the Recommended Order except as follows:

11. Rejected, as to recitation of testimony, unnecessary.

23. Rejected, conclusion of law.

39-42, 45. Rejected, unnecessary.

Respondent St. Johns River Water Management District

1. The Respondent St. Johns River Water Management District's proposed findings of fact are accepted as modified in the Recommended Order except as follows:

2. Rejected, not supported by evidence cited. The prehearing stipulation, cited as support the proposed finding of fact, does not reflect that the SJRWMD issued a Notice of Intended Agency Action on November 3, 1991.

COPIES FURNISHED:

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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 ten 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.



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AGENCY FINAL ORDER

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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Richard Eckler and Denise Hok,  
Petitioners,

and

The Florida Wildlife Federation,  
Inc.,

vs.

DOAH Case No. 90-8083  
F.O.R. No. 90-1003

University of North Florida and  
St. Johns River Water Management  
District,

Respondents.

\_\_\_\_\_ /

FINAL ORDER

On September 9, 1991, the St. Johns River Water Management District ("District") received a Recommended Order in the above captioned matter from William F. Quattlebaum, a duly appointed hearing officer from the Division of Administrative Hearings. A copy of that Recommended Order is attached hereto as Exhibit "A". Exceptions to the Recommended Order were filed by the Petitioners in a timely manner. No other parties hereto filed exceptions to the Recommended Order. Respondent University of North Florida filed its response to Petitioners' exceptions on October 2, 1991.

PRELIMINARY STATEMENT

The exceptions filed by the Petitioner herein contest several findings of fact and conclusions of law made by the DOAH hearing officer. Subsection 120.57(1)(b)10, F.S. prohibits the Governing Board from rejecting or modifying a hearing officer's finding of fact unless it finds, from reviewing the entire record, there is no competent substantial evidence to support the finding. The Governing Board is not authorized to weigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. *Heifetz v. Dept. of Business Regulation*, 475 So. 2d. 1277 (Fla. 1st D.C.A. 1985). *Accord, Smith v. Dept. of Health and Rehabilitative Services*, 555

So. 2d 1254 (Fla. 3d D.C.A. 1989); *Howard Johnson Co. v. Kilpatrick*, 501 So. 2d. 59, 60 (Fla. 1st D.C.A. 1987).

## RULING ON EXCEPTIONS

The Governing Board rules as follows on Petitioners' exceptions:

### Exception No. 1

Exception is taken to Finding of Fact No. 7 which relates to the purpose of the project under review. Petitioners contend they were precluded from presenting testimony on the subject of the purpose of the project and therefore are somehow prejudiced by this finding. There is competent substantial evidence in the record to support the finding. (Transcript-hereinafter "T"-page 363). The testimony supporting this finding was elicited from a witness (Herbert) presented by Petitioners and was in response to a question from Petitioners counsel. Petitioner can therefore hardly claim to be prejudiced by this finding. Further, the "purpose" of a project is not a part of the permitting criteria applicable to this project (see generally Chapter 40C-4 F.A.C. and Chapter 17-312 F.A.C. ), therefore whether Petitioner should have been allowed to adduce competing evidence regarding the purpose for the project is immaterial to resolution of this proceeding. This exception is rejected.

### Exception No. 2

Petitioner takes exception to that portion of finding of fact number 9 wherein the hearing officer states that the University of North Florida (UNF) is "fiscally" unable to maintain 12 miles of trails on campus for general public use. There is competent substantial evidence in the record to support this finding. (Purser T. 191-192). This exception is rejected.

### Exception No. 3.

Petitioner takes exception and requests "modification" to that portion of finding of fact number 10 which states that UNF does not provide security for the unmaintained trails on the campus and does not encourage the use of the unmaintained trails. There is competent substantial evidence in the record to support this finding. (Purser T. 188-89). The existence of other testimony cited by Petitioners indicating that the unmaintained trails are in fact used by various persons neither contradicts this finding of fact nor is it a-basis for modifying this finding of fact. This exception is rejected.

### Exception No. 4.

Petitioner correctly points out that the parenthetical portion of the second sentence of finding of fact number 12 fails to clearly state that the 10 miles of trails that are maintained by UNF includes jogging trails. Petitioners exception is accepted to the extent that this sentence should be clarified to show that the aforementioned ten total miles of maintained trails includes jogging trails.

### Exception No. 5.

Petitioners take exception to finding of fact number 14 which states that recreational development would be enhanced by the project, despite the fact that some adverse impact will occur to the unmaintained trails, because on balance, access to UNF's main-tained trails would be enhanced. This finding is supported by competent substantial evidence. (Purser T. 185, 187, 203-04; Green T. 437). The hearing officer was in the best position to factually assess the positive and negative impacts of the project on recreational

development and given the fact that competent substantial evidence exists in the record to support the finding, it may not be overturned. *Berry v. Dept. of Environmental Regulation*, 530 So. 2d. 1019 (Fla. 4th D.C.A. 1988). This exception is rejected.

Exception No. 6.

Petitioners take exception to finding of fact number 29 which states that the wetland area to be created as mitigation will be protected by a deeded conservation easement. There is competent substantial evidence in the record to support this finding. (*Peacock T. 103, 105*). Petitioners' contention is that because UNF leases the campus site (see final paragraph "Conclusions of Law") that it does not have the legal ability to convey a conservation easement over the property. There is no evidence in the record to indicate that the lessors of the campus have not agreed to placement of a conservation easement over the area in question. Further, "Other Condition" No. 21 of the proposed permit (see UNF Exhibit No 1) requires that the conservation easement be recorded prior to initiating any construction. Therefore, no wetland impacts could legally occur prior to recordation of the conservation easement in question. This exception is rejected.

Exception No. 7.

Petitioner's take exception to finding of fact number 30 wherein the hearing officer finds the mitigation proposed by UNF for wetland impacts to be adequately detailed and sufficient to offset the wetland impacts which will occur as a consequence of construction of the project. Petitioner's assert that the District has data indicating a low probability of success for such mitigation efforts. In fact, the witness whose testimony is cited by Petitioners in support of their contention actually testified that he believed that the proposed mitigation would be successful. (*Lowe T. 299*). There is additional competent substantial testimony in the record supporting the hearing officer's finding. (*Peacock T. 106; Green T. 446, 451*). This exception is rejected.

Exception No. 8.

Petitioners take exception to finding of fact number 31. The hearing officer found that there would be no impact on threatened or endangered animal species as a result of the project; that the wetlands to be created would provide the functions that are presently being served by the wetlands to be impacted; and that the project would not adversely impact the habitat, abundance or diversity of food sources for off-site aquatic and wetland dependent species or threatened and endangered species. While Petitioner's ornithology expert testified that several aquatic and wetland dependent birds use the wetlands on the UNF campus, there was no testimony that the wetland functions being provided to those birds would not be provided by the wetlands to be created. In fact there were several expert opinions offered to support the findings of the hearing officer. (*Peacock T. 113, 114, 117, 119, 120, 125, 126; Lowe T. 299; Green T. 430, 435, 446*). Neither Chapter 17-312 F.A.C. nor Chapter 40C-4 F.A.C. as it is applicable in Duval County, Florida regulate activities in upland areas and therefore do not require mitigation for impacts to uplands. Any species which currently utilizes the wetland areas to be impacted would utilize proximal habitat (*Loftin T. 245*). Impacts to invertebrate species in the wetlands to be affected by the project will be adequately mitigated for by

the creation of new wetlands. (Peacock T. 160-167). There was no evidence that any adverse impacts would occur to any other species of invertebrates as a result of the project. This exception is rejected.

Exception No. 9.

Petitioners take exception to finding of fact number 35 in which the hearing officer found that although gopher tortoises have been observed on the UNF campus, none have been observed in the wetlands to be impacted, nor on the area where mitigation will occur. Further, the hearing officer found no evidence to indicate gopher tortoises would be impacted by the project. There is competent substantial evidence in the record to support these findings. (Green T. 435, 436; Peacock 154). Petitioners misquote the finding of the hearing officer and fail to cite to any evidence in the record to support either their misquoted version of the finding or which would contradict the actual finding of the hearing officer. This exception is rejected.

Exception No. 10.

Petitioners take exception to that portion of finding of fact number 36 wherein the hearing officer found that wet land dependent species which utilize the wetland areas to be impacted by the project could utilize proximal habitat, and that impacts on the wetland habitat were going to be effectively mitigated. The findings of fact regarding the ability to utilize proximal habitat while the mitigation area is becoming established is supported by competent substantial evidence. (Loftin T. 245). In fact the testimony of one of Petitioners' experts supports this finding. The rest of the finding regarding the effectiveness of the wetland mitigation plan is supported by competent substantial evidence as outlined under Exceptions 7 and 8 above. Petitioners assertions regarding the effects of habitat loss resulting from the project and the inability to mitigate for same are not supported by the record citations listed by Petitioners. This exception is rejected.

Exception No. 11.

Petitioners take exception to finding of fact number 40 which deals with cumulative impacts. The hearing officer found that the potential cumulative impacts which could result from this project would be the crossing of Boggy Branch and future building construction in the southeastern portion of the campus. The hearing officer further found that such impacts could be offset with additional mitigation at such time as those projects are permitted. These findings are supported by competent substantial evidence. (Green, T. 447, 448). Petitioners' argument that the hearing officer failed to take into account the "full range" of cumulative impacts finds no support in the record of the hearing. Petitioners' assertion that by virtue of a pre-hearing order they were precluded from presenting additional cumulative impact evidence specifically related to a research park is inaccurate. The pre-hearing Order precluded Petitioners from offering testimony concerning the "economic viability" of research and development parks. Petitioners presented no testimony which would contradict the testimony cited above regarding cumulative impacts. This exception is rejected.

Exception No. 12.

Petitioners take exception to the hearing officer's conclusion of law that the water management district appropriately considered cumulative and secondary impacts in regard to the dredge and fill permit application. As noted above, the testimony in the record on cumulative and secondary impacts focused on other projects proposed for future development within the UNF campus. Additionally, competent substantial evidence, adduced through expert testimony, established that the project would not cause unacceptable or adverse secondary or cumulative impacts (Green T: 447, 448). Consideration of cumulative and secondary impacts is a part of the "public interest" analysis associated with issuance of dredge and fill (now wetland resource management) permits. *Caloosa Property Owners Assoc., Inc. v. Dept. of Environmental Regulation*, 462 So. 2d 523 (Fla. 1st D.C.A. 1985); *Peebles v. State of Florida, Dept. of Environmental Regulation*, 12 F.A.L.R. 1961 (Fla. Dept. of Environmental Reg. April 11, 1990); Section 403.919 F.S.

In order to balance the public interest criteria found in Section 403.918 F.S. it is appropriate to look at the actual jurisdictional area to be dredged and filled and any other relevant activities that are very closely linked or causally related to the proposed dredging and filling for the purpose of analyzing secondary impacts. *The Conservancy Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772 (Fla 1st. DCA 1991). The record in this case shows that the only "activities" that may be closely linked or causally related to the dredging and filling associated with this project are those outlined in finding of fact number 40. (See ruling on Petitioners Exception Number 11 above). In the absence of evidence in the record that would factually support the existence of other activities closely linked or causally related to the dredge and fill activities applied for herein, the Governing Board would have to engage in speculation in order to reach the conclusion advocated by Petitioners.

Petitioners presented no evidence to contradict the testimony of the District's witness that the project met the secondary and cumulative impact analysis. Therefore, they failed to sustain their burden of proof as to this issue and can not now be permitted to attack the hearing officer's conclusion through their exceptions which have no competent substantial evidentiary basis. *Florida Dept. of Trans. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 789 (Fla. 1st DCA 1981).

The record does not support the contention that Petitioners were precluded from presenting evidence in regard to purported cumulative or secondary impacts. There is further, no evidence to show the existence of such impacts beyond those noted by the hearing officer. Therefore, this exception is rejected.

Exception No. 13.

Petitioners take exception to the hearing officer's conclusions of law which state generally that the wetland impacts of the project, given the mitigation activities to be performed by the applicant, are not contrary to the public interest (See first paragraph on page 22 of Recommended Order). Petitioners' argument in support of their request that the Governing Board overturn these conclusions is based entirely on factual allegations which are at variance with the findings of the hearing officer. Those findings of fact which are disputed by Petitioners are addressed above, - (rulings on exceptions to findings of fact) and as discussed above there is competent substantial evidence in the record to support each of the findings of fact of the hearing

officer. The conclusions of law at issue in this exception are correct in light of the findings of fact as established in the Recommended Order and in the rulings on Petitioners exceptions. Therefore this exception is rejected. (See ruling on Petitioner's Exceptions number 5, 6, 7, 8, 9, 10 and 11).

Exception No. 14.

Petitioners' take exception to the hearing officers' conclusions of law indicating that UNF had sufficient power or authority to make application for the permits at issue. Although the hearing officer's conclusion is consistent with the facts established in the record of the case, proof of one's legal interest in a particular parcel of real property is not a part of the permitting criteria contained in Chapters 17-312 F.A.C. or 40C-4 F.A.C. and proof of "authority to apply" for the permits is not a pre-requisite to issuance. Although the hearing officers' conclusion is consistent with the competent substantial evidence in the record, this conclusion is immaterial to the resolution of this case. Therefore, this exception is rejected. Further, Petitioners were not precluded from presenting evidence regarding the authority of UNF to apply for these permits. The pre hearing order cited by Petitioners does not address this issue and Petitioners did not offer any proof on this issue at the hearing.

ORDER

Wherefore, having considered the Recommended Order of the hearing officer, the Exceptions thereto filed by Petitioners, and the Response to Exceptions filed by UNF, and having further reviewed the transcript of the hearing and being otherwise fully advised in the premises it is thereupon:

Ordered, that, the hearing officer's Recommended Order dated September 5, 1991, is hereby adopted in full, subject to those modifications noted hereinabove, as the final action of the St. Johns River Water Management District and it is

Ordered, that the University of North Florida is granted a Management and Storage of Surface Waters Permit and a Wetland Resource Management Permit in accordance with the District's Technical Staff Reports related thereto which were introduced into evidence before the hearing officer.

Done and Ordered at Palatka, Putnam County, Florida this \_\_8th\_\_ day of October, 1991.

ST. JOHNS RIVER WATER  
MANAGEMENT DISTRICT

BY: \_\_\_\_\_  
SAUNDRA H. GRAY  
CHAIRMAN, Governing Board

RENDERED this \_\_9th\_\_ day of October, 1991.

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PAT SCHULTZ  
DISTRICT CLERK  
St. Johns River Water  
Management District  
P.O. Box 1429  
Palatka, FL 32178-1429

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Final Order was hand delivered to the District Clerk, St. Johns River Water Management District, P.O. Box 1429, Palatka, FL 32178-1429, and that a true and correct copy of same was served by U.S. Mail this \_\_9th\_\_ day of October, 1991 to the following counsel of record:

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