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AGENCY FINAL ORDER

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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

FRIENDS OF THE WEKIVA and)	
FLORIDA AUDUBON SOCIETY,)	
)	
Petitioners,)	DOAH CASE NO. 91-6823
v.)	SJRWMD FILE OF RECORD
)	NO. 91-1107
JIM SABOFF 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 March 18-19, 1992 in Orlando, Florida.

APPEARANCES

For Petitioner Friends of the Wekiva:	EDMUND T. BAXA, JR. Foley and Lardner 111 North Orange Avenue Suite 1800 Orlando, Florida 32801
For Petitioner Florida Audubon Society:	CHARLES LEE The Greater Mall 460 Highway 436, Suite 200 Casselberry, Florida 32707
For Respondent Jim Saboff:	MICHAEL D. JONES Post Office Box 3567 Winter Springs, Florida 32708
For Respondent St. Johns River Water Management District:	KATHRYN L. MENNELLA Post Office Box 1429 Palatka, Florida 32178-1429

BACKGROUND

Mr. Saboff submitted Management and Storage of Surface Waters ("MSSW") permit application no. 4-117-0298A to the District seeking approval to construct a single-family residence, including related structures, on his lot abutting the

Little Wekiva River. Following a review of the application, District staff prepared a technical staff report ("TSR") dated May 28, 1991, recommending approval of the application with certain conditions. "Other Condition No. 2" in the TSR contained specifications for a deed restriction or conservation easement on the Saboff lot which would prohibit all construction including clearing, dredging, or filling, except that specifically authorized by the permit.

On June 11, 1991, the District Governing Board approved the permit application consistent with the District's published June 2, 1991 intended action as contained in the TSR, except that the Board deviated from the intended action in one relevant respect. The Governing Board modified Condition No. 17 (formerly "Other Condition No. 2" of the TSR), making it somewhat more flexible as to potential activities which could occur by adding the following sentence: "The easement may allow for some limited vegetation removal of trees less than four inches in diameter and of underbrush, to be agreed upon by District staff and the permittee."

Although Mr. Saboff filed no Section 120.57, Florida Statutes (F.S.) petition challenging the District's intended action or its action on June 11th, the Petitioners responded to the June Board action by filing a Petition for Formal 120.57(1) Hearing on July 16, 1991. This petition challenged issuance of the MSSW permit and stated that notice of the revised District action had been received on July 2, 1991.

On August 5, 1991, the District served a Motion to Strike all allegations of the petition except those challenging the propriety of the revised permit condition, on the ground that all other issues had been waived.

On November 20, 1991, Petitioners filed an Amended Petition for Formal 120.57(1) Hearing limiting the scope of their challenge.

Thereafter, the parties entered into a Partial Settlement Agreement in this case, in which they stipulated that Mr. Saboff could undertake the construction of his proposed residence within a previously cleared area of the lot and within certain specified other areas, under the terms of a District Interim Order Authorizing Limited Construction. Under this agreement and order, no other construction was authorized on the remainder of the lot. The Partial Settlement Agreement also stated:

The parties agree that the only matter at issue in this administrative proceeding is the modification to permit condition no. 17 approved by the St. Johns River Water Management District ("District"), on June 11, 1991 (permit no. 4-117-0298).

On March 18-19, 1992, a formal administrative hearing was held in Orlando, Florida. A Motion in Limine filed by Petitioners was argued at the beginning of the formal hearing. In his Recommended Order, the Hearing Officer granted the Motion except as to the relief requested regarding the clearing within the conservation easement.

Petitioners and St. Johns River Water Management District filed Proposed Recommended Orders.

On June 26, 1992, Mr. Meale submitted to the St. Johns River Water Management District, and all parties to this proceeding, a Recommended Order, a copy of which is attached as Exhibit "A". No

Exceptions were due July 13, 1992. No exceptions were filed. This matter then came before the Governing Board on August 7, 1992, for final agency action.

STATEMENT OF THE ISSUES

The issue in this case is the sufficiency of the language of condition 17 of the St. Johns River Water Management District permit to be issued to Jim Saboff for the management and storage of surface waters.

ACCORDINGLY, IT IS HEREBY ORDERED:

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

2. The following typographical errors are corrected:

a. In Paragraph 32, the reference to the drawing received by the District on May 28, 1992 should read May 28, 1991.

b. In the Recommendation, referenced to the drawing received by the District on May 28, 1992 should read May 28, 1991 and reference to Section 704.05, F.S. should read Section 704.06, F.S.

DONE AND ORDERED this 7th 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

Copies to:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FRIENDS OF THE WEKIVA and)
FLORIDA AUDUBON SOCIETY,)
)
Petitioners,)
)
vs.) CASE NO. 91-6823
)
JIM SABOFF and ST. JOHNS)
RIVER WATER MANAGEMENT)
DISTRICT,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, final hearing in the above-styled case was held in Orlando, Florida, on March 18-19, 1992, before Robert E. Meale, Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner

Friends of the Wekiva: Edmund T. Baxa, Jr.
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Orlando, Florida 32801

For Petitioner

Florida Audubon Society: Charles Lee, Sr. Vice-President
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460 Highway 436
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For Respondent

Jim Saboff: Michael D. Jones
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P.O. Box 3567
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For Respondent

St. Johns River Water
Management District: Attorney Kathryn L. Mennella
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STATEMENT OF THE ISSUE

The issue in this case is the sufficiency of the language of condition 17 of the St. Johns River Water Management District permit issued to Jim Saboff for the management and storage of surface waters.

PRELIMINARY STATEMENT

On July 16, 1991, Petitioners filed a Petition for Formal 120.57(1) Hearing. Petitioners objected on several grounds to the issuance of a permit to Respondent Saboff for the management and storage of surface waters.

Following receipt of a Motion to Strike filed by the St. Johns River Water Management District, Petitioners filed an Amended Petition for Formal 120.57(1) Hearing on November 20, 1991. Like the original petition, the amended petition sought the denial of the permit. In the alternative, however, the amended petition requested that the permit bear a condition imposing a conservation easement without an exception allowing the clearing of underbrush and vegetation up to 4" in diameter.

On January 9, 1992, Respondent St. Johns River Water Management District filed a Motion for Partial Relinquishment of Jurisdiction to Effectuate Partial Settlement by Allowing Entry of an Interim Order. In the motion, the District sought leave to enter an interim final order allowing Respondent Saboff to proceed with the construction of a residence on the land subject to the permit. The motion describes the amended petition as "limiting the scope of the . . . challenge to the MSSW permit to the modification in the conservation easement condition." Although an inaccurate description of the relief sought by the amended petition, the motion accurately discloses that Petitioners, from that point forward, have limited the issues to the sufficiency of the language of condition 17 in the permit.

A Partial Settlement Agreement is attached to the January 9 motion. Signed by all of the parties, the agreement states that the above-styled proceeding involves the validity of a permit for the construction of a home by Respondent Saboff in the Riparian Habitat Protection Zone of the Little Wekiva River. The agreement identifies the property in and immediately around the building pad that was cleared of natural vegetation prior to August 1, 1991, and will be the location of the house, mulched driveway, pool, and sidewalk. The agreement identifies the remaining portion of the property as "undisturbed, and . . . to be encumbered by a conservation easement pursuant to the permit." A proposed stormwater berm is to be located on the undisturbed portion of the property.

The Partial Settlement Agreement states:

The parties agree that the only matter at issue in this administrative proceeding is the modification to permit condition No. 17 approved by [the District] on June 11, 1991 The parties stipulate that the permit conditions no. 1-16 and 18 approved by the District and the appropriateness of the design and location of the proposed house and other parts of the proposed water management system, as limited by permit conditions no. 1-16 and 18, are not at issue in this administrative proceeding. . . . Inasmuch as

the focus of the amended petition is the sufficiency of the modification to permit condition No. 17 (as opposed to the construction of the residence), and Saboff is desirous of beginning construction of his residence, the parties agree that Saboff may proceed to construct the single family residence (house, mulched driveway, pool, and sidewalk) pursuant to the terms of the District order attached hereto as Exhibit "B". . . .

This stipulation does not agree to any construction, including additional clearing, removal of underbrush, or cutting of vegetation, at any location on the lot outside the previously cleared area, with the exception as set forth in Exhibit "B".

* * *
This Partial Settlement Agreement is not and shall not be interpreted in any way to be a consent to or a waiver of defenses to any matters complained of in any proceeding by Saboff. Furthermore, by this agreement Saboff does not concede to DOAH's jurisdiction over this matter.

By Order entered January 10, 1992, the undersigned relinquished jurisdiction to the extent necessary to allow the District to enter the interim final order pursuant to the partial settlement agreement.

At the hearing, Petitioners filed a Motion in Limine. The motion sought an order limiting evidence to the modification of permit condition 17, which provides: "The easement may allow for some limited vegetation removal of trees less than 4 inches in diameter, and of underbrush, to be agreed upon by district staff and the permittee." The motions states: "The adequacy of this permit condition (including the above language) as mitigation for development activities on the lot in the Riparian Habitat Protection Zone is the sole issue relative to the permit which is raised in the Amended Petition"

The motion also sought an order limiting Respondent Saboff's position and evidence by two responses contained in Requests for Admission. In the responses, Respondent Saboff admitted that he wanted to be able to clear underbrush and vegetation up to four inches in diameter from the entire area of the conservation easement and he was unwilling to specify what areas within the conservation easement would be subject to such clearing.

The undersigned granted the motion except as to the relief requesting in the immediately preceding paragraph.

At the beginning of the hearing, Charles Lee was accepted as a qualified representative of the Florida Audubon Society.

Petitioners called eight witnesses and offered into evidence 11 exhibits. Respondent District called three witnesses and offered into evidence 13 exhibits. Respondent Saboff called no witnesses and offered into evidence no exhibits. All exhibits were admitted.

The transcript was filed April 16, 1992. Petitioners and Respondent District each filed a proposed recommended order. All of Petitioners' proposed findings are adopted or adopted in substance except 34 and 39 (unnecessary) and 40--last sentence (unsupported by the evidence as to the sandbox and swing set). All of the District's proposed findings are adopted or adopted in substance except 26--second sentence (unsupported by the evidence).

FINDINGS OF FACT

1. Respondent Jim Saboff (Saboff) and his wife own lot 39, Springs Landing, Unit 2, as recorded in Plat Book 24, pages 24-29, public records of Seminole County, Florida. The lot, which contains both wetlands and uplands vegetative communities, abuts the Little Wekiva River for 135 feet. No part of the entire lot is more than 250 feet from the river.

2. By virtue of an Interim Final Order issued by Respondent St. Johns River Water Management District (District), Saboff has built, or commenced the construction of, a house, pool, mulched driveway, and sidewalk on the lot. The house is within 100 feet of the wetlands adjacent to the river, and the pool, which is between the house and the river, is within 100 feet of the Little Wekiva River.

3. On March 8, 1991, the District received from Saboff a Management and Storage of Surface Waters Individual Permit Application for the construction of a retention/detention pond with filtration. Saboff's lot, which is at the corner of Springs Landing Boulevard and River Isle Court, is in a single-family subdivision. The back or east side of the lot abuts the Little Wekiva River.

4. By letter dated April 4, 1991, the District requested additional information with respect to the application for a Management and Storage of Surface Waters (MSSW) permit. Among 12 items of information requested was the following: "Please demonstrate that the proposed activities will not have a harmful effect on the functions provided by the Riparian Habitat Protection Zone" and "Please submit any mitigation proposed to compensate for encroachments into the Riparian Habitat Protection Zone."

5. In a response received by the District on May 1, 1991, Aquatic Symbiotics, Inc., on behalf of Saboff, responded to the two requests for information set forth in the preceding paragraph. In their entirety, the responses are:

The proposed upland residence will not negatively impact any off site wetland dependent species as none are known to exist within this 0.72 Ac. building lot, exclusive of the 0.05 Ac. eastern portion of the lot which constitutes wetlands and is proposed for conservation. Additionally due to the developed nature of the surrounding subdivision, it is not likely any significant natural resources reside within the subject lot.

Due to the lack of impacts inherent in the proposed residence on the 0.72 A mitigation is proposed. Please note the

large retention pond is an impact due solely to the requirements of the District, it was not proposed by either the applicant nor the consulting engineers.

6. After receiving additional information from Saboff concerning drainage, District staff issued, on May 28, 1991, the MSSW Technical Staff Report (TSR) for the proposed project. Describing the application as a request to construct a single family residence and on-site surface water management system to serve the residence, the TSR notes that the lot is within the Wekiva River Basin, Wekiva River Protection Area, and Riparian Habitat Protection Zone.

7. The TSR describes the lot in detail as follows:

Lot 39 contains forested uplands and forested wetlands. The upland forest is dense and consists of live oak, southern magnolia, laurel oak, long leaf pine, and slash pine. No previous encroachments have been made into the upland or wetland portions of the lot.

The wetland portion (0.05 acre) of the lot is densely forested. The canopy species include loblolly bay, sweet bay, bald cypress, black gum, red maple, sweet gum, cabbage palm, pond cypress, ironwood, and water oak. The subcanopy contains fetterbush, button bush, wax myrtle, and juvenile wetland trees. The ground cover consists of a variety of wetland fern species, lizard tail and sabal palmetto. The wetlands are contiguous to the Little Wekiva River and adjacent to the "Springs Landing Bridge." The river, in the vicinity of this project, is vegetated with herbaceous vegetation (ludwidia, elephant ears).

The Little Wekiva River, forested wetlands, and uplands within the project site provide habitat and food sources primarily for off-site aquatic and wetland dependent bird species, which forage within the herbaceous vegetation in the river and perch for resting, and cover in the trees.

The lot is a small undeveloped parcel, within a highly developed residential area. A single family residence is located adjacent to Lot 39 on the western boundary. Springs Land Boulevard and a retention pond are adjacent to the eastern lot boundary. The lot is narrow and elongated (100 feet wide and 240 feet long). The adjacent land uses, and lot configuration have affected the use of the habitat on this lot by off-site aquatic and wetland dependent species to some extent. The construction of the house and berm will necessitate the removal of 0.3 acres

of forested uplands. Staff recommends that the undeveloped portions of the lot be placed into a conservation easement, and be maintained in a forested condition to mitigate for the impact of the residential development within the riparian habitat protection zone.

Although a 0.3 acre loss of forested riparian habitat protection zone will occur, the species currently using the area will have habitat available to use on the undeveloped portion of the lot, provided that an easement or deed restrictions prohibit alteration of this habitat. These uplands and wetlands abut a larger slough contiguous to the river and will provide cover and resting habitat for off-site aquatic and wetland dependent species.

For the reasons stated above the construction of a single family residence on 0.3 acres of forested uplands within this lot is not anticipated to cause significant adverse effects to the habitat or food sources of the off-site aquatic and wetland dependent species, within the riparian habitat protection zone.

A small stabilized earthen berm, approximately 6 ft wide at the base, is to be constructed along the length of the lot, to be located upstream of seepage slopes and wetlands adjacent to the river. The berm will be located to minimize impact to existing trees. The berm will serve to provide stormwater treatment for runoff from the developed portion of the lot, with total retention storage of 3/4 inch of runoff from the impervious area, which is limited to the house, pool and sidewalk. Staff believes that this retention area, along with a conservation easement/deed restrictions preventing any alterations in the remaining ground cover, will provide stormwater treatment equivalent to the requirements in Chapters 40C-42 F.A.C. for direct discharge into an OFW [Outstanding Florida Water].

Staff believes that this project, with recommended permit conditions is in conformance with the overall goals and objectives of the District set forth in Chapter 40C-4, 40C-41 and 40C-42, F.A.C.

8. The key condition suggested in the TSR states:

Prior to initiating any construction, the permittee must record a deed restriction or

conservation easement on the real property pursuant to Section 704.06, F.S., prohibiting all construction including clearing, dredging or filling, except that which is specifically authorized by the permit, within the conservation area as delineated on plans received by the District on 5/29/91.

9. On or about June 2, 1991, the District published notice of intended action, at least insofar as the TSR constitutes intended agency action. The condition set forth in the preceding paragraph evidently was described in the notice.

10. Following receipt of the TSR, Mrs. Saboff sent the District a letter on June 5, 1991. She indicated that she wanted the right to enjoy her backyard and to be able to do whatever other homeowners could do in their backyards. The letter mentions the possibility of constructing decking, a boardwalk to the river, a fence, a treehouse, a sand box, and a swing.

11. At the June 11, 1991, meeting, the District Board approved the issuance of the MSSW permit to the Saboffs (the Permit). In response to the desires of the Saboffs, the Board added the following sentence to the above-described TSR condition, which became Condition 17 to the Permit: "The easement may allow for some limited vegetation removal of trees less than 4 inches in diameter and of underbrush, to be agreed upon by District staff and the permittee." 1/

12. The Saboffs never challenged administratively the action of the District in requiring and issuing the MSSW. However, by Petition for Formal 120.57(1) Hearing filed July 16, 1991, Petitioners objected to the issuance of the Permit on several grounds.

13. Petitioners filed an Amended Petition for Formal 120.57(1) Hearing on November 20, 1991. Like the original petition, the amended petition sought the denial of the Permit. In the alternative, however, the amended petition requested that the Permit bear a condition imposing a conservation easement without an exception allowing the clearing of underbrush and vegetation up to 4" in diameter.

14. At some point prior to January 9, 1992, the parties entered into Partial Settlement Agreement, which acknowledges that the above-styled proceeding involves the validity of a permit for the construction of a home by Respondent Saboff in the Riparian Habitat Protection Zone of the Little Wekiva River. The agreement identifies the property in and immediately around the building pad that was cleared of natural vegetation prior to August 1, 1991, for the siting of the house, mulched driveway, pool, and sidewalk. The other "distinct area" of Saboff's property identified by the agreement is the "remainder of the lot, which is undisturbed, and which is to be encumbered by a conservation easement pursuant to the permit." The agreement adds: "A proposed berm for stormwater treatment was also approved to be located on a portion of the remainder of the lot which is undisturbed." Partial Settlement Agreement, Paragraph 2.

15. Paragraph 3 of the Partial Settlement Agreement provides:

The parties agree that the only matter at issue in this administrative proceeding is

the modification to permit condition No. 17 approved by [the District] on June 11, 1991. . . . The parties stipulate that the permit conditions no. 1-16 and 18 approved by the District and the appropriateness of the design and location of the proposed house and other parts of the proposed water management system, as limited by permit conditions no. 1-16 and 18, are not at issue in this administrative proceeding. . . . Inasmuch as the focus of the amended petition is the sufficiency of the modification to permit condition No. 17 (as opposed to the construction of the residence), and Saboff is desirous of beginning construction of his residence, the parties agree that Saboff may proceed to construct the single family residence (house, mulched driveway, pool, and sidewalk) pursuant to the terms of the District order attached hereto as Exhibit "B"

This stipulation does not agree to any construction, including additional clearing, removal of underbrush, or cutting of vegetation, at any location on the lot outside the previously cleared area, with the exception as set forth in Exhibit "B".

* * *

This Partial Settlement Agreement is not and shall not be interpreted in any way to be a consent to or a waiver of defenses to any matters complained of in any proceeding by Saboff. Furthermore, by this agreement Saboff does not concede to DOAH's jurisdiction over this matter.

16. Each Petitioner is a Florida non-profit corporation organized for the protection and preservation of natural resources. Petitioner Friends is organized specifically for the protection and preservation of the Wekiva River and its tributaries, such as the Little Wekiva River. Members of each organization, including many members residing in the vicinity of the Little Wekiva River, regularly use the Little Wekiva River for recreational activities, especially canoeing. These persons would personally suffer from the loss of aquatic and wetland habitats and species dependent upon such habitats that could result from unlawful land uses within the Riparian Habitat Protection Zone.

17. The Little Wekiva River flows generally from south to north and empties into the Wekiva River about three or four miles downstream from Wekiva Springs, which, together with Rock Springs and Rock Springs Run, are the sources of the Wekiva River. The confluence of the Wekiva River and Little Wekiva River is just upstream from the point at which the Wekiva River terminates at the St. Johns River, just west and downstream of Lake Monroe near Sanford. The Little Wekiva River in the vicinity of Saboff's lot and the Wekiva River are Outstanding Florida Waters.

18. The Little Wekiva River runs through some heavily urbanized areas in south Seminole County until it passes State Road 434. During the first mile

downstream (i.e., north) of State Road 434, there are residential land uses, such as the subdivision containing Saboff's lot. About a mile downstream from State Road 434, the riverbanks regain their natural condition, highlighted by about four miles of relatively undisturbed wetlands upstream from the junction of the Little Wekiva River and Wekiva River.

19. Little of the vegetation along the banks of the Little Wekiva River has been disturbed in the vicinity of Saboff's lot. The west bank, where Saboff's lot is located, is less disturbed than the east bank. The actual habitat found on Saboff's lot is of average quality for habitat along this portion of the river. The underbrush on the lot is mostly saw palmetto and covers from half to three-quarters of the area between the house and the river. Between the house and the river, about half of the 240 trees are less than four inches in diameter at breast height.

20. The navigability of the waterway changes at the Springs Landing Bridge, which allows Springs Landing Boulevard to span the river. The bridge is just downriver from Saboff's backyard. Due to the bridge's low clearance, the ability of groups such as Petitioner Friends to clear the river channel of undesirable vegetation choking the flow of the river has been hampered. The Army Corps of Engineers formerly sprayed herbicide upstream of the bridge. Due to the inability of most boats to pass under the bridge, interested persons, such as members of Petitioner Friends, are largely left to manual means of eradicating undesirable vegetation.

21. The landclearing required for the construction of the house, pool, mulched driveway, and sidewalk, as well as the additional landclearing allowed by Condition 17, as modified by the Board on June 11, adversely affects the abundance, food sources, and habitat of aquatic and wetland dependent species of the Riparian Habitat Protection Zone. The removal of underbrush and trees represents a direct loss of habitat and food sources for aquatic and wetland-dependent species.

22. The removal of underbrush and trees also represents an indirect loss of habitat and food sources due to deteriorated drainage, increased stormwater runoff and nutrient loading into the river, and erosion and sedimentation of the river. The drainage of stormwater runoff and nutrients, such as fertilizer, into the river adversely affects existing aquatic habitats and food sources. The erosion and sedimentation directly displaces aquatic habitat by, among other things, filling in deeper holes in the river and altering its geomorphology.

23. Various strategies exist to mitigate the loss of abundance, food sources, and habitat of aquatic or wetland dependent species. With respect to the direct loss of habitat resulting from landclearing, new habitat may be created or existing habitat may be enhanced. However, these alternatives are impractical here due to the relatively small size of the parcel involved and the generally good condition of the habitat on the lot.

24. With respect to the loss of habitat from the drainage of stormwater runoff and nutrients into the river, a retention/detention pond often can capture the first, most polluted runoff accompanying a storm event. Again, due to the small area involved, this solution is typically impractical for a single residential lot.

25. Mitigation of the loss of abundance, food sources, and habitat of aquatic and wetland dependent species from landclearing, stormwater runoff, and erosion is best achieved, in this case, by the creation of a conservation

easement. The conservation easement can preserve functionally significant areas of underbrush and canopy to allow various wildlife species to continue to pass along the river safely, as well as to continue to occupy the area to rest and roost. The conservation easement can simultaneously preserve the existing vegetative buffer, which, together with the stormwater berm, can remove most of the pollutants associated with the first runoff during a storm event before the water reaches the river. The vegetative buffer would also arrest erosion and, thus, sedimentation.

26. In its undisturbed state, Saboff's property is densely vegetated. The four-inch diameter benchmark for trees is based on the fact that trees of such a diameter, at breast height, generally provide a canopy that serves as effective cover for wildlife. About half of the trees on the lot are of such a size. However, many of the smaller trees are needed as underbrush habitat and for reforestation as larger trees die.

27. Various aquatic and wetland dependent species travel along the river corridor, especially along the west bank, and rely upon the underbrush and canopy to escape predators and for food. Species such as limpkins, red shouldered hawks, little blue herons, great blue herons, ospreys, egrets, and green backed herons use the on-site wetlands for feeding and use the upland and wetland forest for escape cover. Turtles use the wetlands for feeding and uplands for breeding. Marsh rabbits nest and feed at the junction of the wetlands and uplands. Snakes and green tree frogs also use the site.

28. The health of the river itself, which is an amenity upon which Saboff's lot draws, is vital to the abundance, food sources, and habitat of aquatic and wetland dependent species. This critical natural resource is dependent upon maintaining flow and controlling erosion, sedimentation, and nutrient loading. The removal of underbrush on Saboff's lot will hasten erosion and sedimentation of the river. The vegetation problem in the river will be exacerbated by erosion and sedimentation, as well as by the introduction of runoff-borne fertilizers.

29. The stormwater berm is located between the river and the pool. The 25-foot contour runs generally about 30 feet riverward of the point of the house closest to the river, although the line can be hard to locate because the 25-foot contour line and the house do not run exactly parallel to each other. The 25-foot contour line marks the beginning of a relatively rapid slope down to the river.

30. The efficacy of the mitigation provisions is dependent upon the degree of specificity in Condition 17 in terms of identifying the conservation area and describing the permitted uses within the conservation area. The Permit is unclear as to the extent of area covered by the conservation easement. However, the TSR and Partial Settlement Agreement indicate that the conservation area was intended to extend over the entire lot except for the portion cleared for the house, pool, mulched driveway, and sidewalk. This interpretation was borne out by the testimony of Glen C. Lowe, Chief Environmental Specialist of the District. Tr., pp. 302-03.

31. In the testimony of Mr. Lowe, as well as the proposed recommended orders of the District and Petitioners, however, it is evident that the conservation area may be defined more narrowly, provided that the permitted uses are defined more specifically than they are in Condition 17 of the Permit.

32. The evidence establishes that adequate mitigation of the loss of abundance, food sources, and habitat of aquatic and wetland dependent species resulting from the landclearing for the house, pool, mulched driveway, and sidewalk may be achieved by the use of a conservation easement over the portion of the lot riverward of a line running 25 feet from the point of the house closest to the river and parallel to the east side of the house. The conditions of the conservation easement must prohibit any uses that would disturb the underbrush or trees except as follows: underbrush and trees may be removed as necessary for the construction of the stormwater berm shown on the drawing of Land Engineering, Inc. received by the District on May 28, 1992, and identified as District Exhibit 4; trees less than four inches in diameter at breast height and underbrush may be removed as necessary for the construction of an elevated boardwalk no more than four feet wide and woven, to the extent possible, through the existing trees to connect the house or pool to a point on the river (but not to travel laterally along the river); branches of existing trees may be trimmed for the installation of a treehouse; underbrush may be disturbed by the placement and use of a sandbox, swing set, picnic table, and freestanding hammock. No other items, such as a fence or decking, may be installed, placed, or constructed in the conservation area without an amendment to the conservation easement and Permit.

CONCLUSIONS OF LAW

33. 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.)

34. Petitioners have standing. Section 403.412(5).

35. The District has jurisdiction to require and issue MSSW permits within the geographical boundaries of the District. Sections 373.413(1), 373.415, and 373.069(2)(c).

36. Saboff's proposed project and application for an MSSW permit is governed by Sections 373.413, 373.415, and 373.416 and Chapters 40C-4, 40C-41, and 40C-42, as well as the portions of the Applicant's Handbook: Management and Storage of Surface Waters incorporated by reference by Rule 40C-4.091. Section 373.413(1) allows the District to require a permit "to assure that the construction . . . of any . . . works will comply with [Chapter 373, Part IV] and applicable rules promulgated thereto and will not be harmful to the water resources of the district." Section 373.403(5) defines "works" as "all artificial structures, including, but not limited to, . . . construction that . . . drains water into . . . the waters in the state." The landclearing and construction proposed by Saboff will drain water into the waters in the state.

37. Section 373.415 requires the District to adopt rules

establishing protection zones adjacent to the watercourses in the Wekiva River System Such protection zones shall be sufficiently wide to prevent harm to the Wekiva River System, including water quality, water quantity, hydrology, wetlands, and aquatic and wetland-dependent wildlife species, caused by any of the activities regulated under this part.

38. Rule 40C-4.041(2)(b)9. requires an individual or general permit prior to the construction . . . of a surface water management system which . . . is wholly or partly located within the Wekiva River Hydrologic Basin's Riparian Habitat Protection Zone" Rule 40C-4.021(9) defines a "surface water management system" as . . . "works that provide. . . drainage, water storage, conveyance, stormwater management, or other surface water management capabilities."

39. Rule 40C-41.063(3)(e)1. identifies the Wekiva River Hydrologic Basin's Riparian Habitat Protection Zone as the wetlands abutting, among other rivers, the Little Wekiva River and, in the case of the Little Wekiva River, the uplands within 550 feet landward of the stream's edge.

40. Rule 40C-41.063(3)(e)1. requires the applicant to provide

reasonable assurance that the construction or alteration of a system will not adversely affect the abundance, food sources, or habitat (including its use to satisfy nesting, breeding and resting needs) of aquatic and wetland dependent species provided by the . . . Riparian Habitat Protection Zone. . . .

41. Rule 40C-41.063(3)(e)2. states that the following activities are "presumed to adversely affect the abundance, food sources, or habitat or aquatic or wetland dependent species provided by the zone: construction of buildings, . . . swales, and any land clearing which results in the creation of any system."

42. The evidence establishes that the District may issue the Permit only if it contains Condition 17 in the form substantially the same as that set forth in the Findings of Fact.

RECOMMENDATION

Based on the foregoing, it is hereby recommended that the St. Johns River Water Management District enter a final order issuing the Permit with the following Condition 17 (additions underlined and deletions stricken through):

- * Within 90 days of permit issuance, the permittee must record a deed restriction or conservation easement on the real property pursuant to Section 704.06, F.S., prohibiting all construction including clearing, dredging or filling, except that which is specifically authorized by this permit, within the *(conservation area as delineated on plans received by the District on 5/29/91) <<following-described area: riverward of a line running parallel to the east side of the house and 25 feet from the point of the house closest to the river.>> The easement must contain provisions as set forth in subsections 1(a)-(h) of Section 704.05, F.S. as well as provisions indicating that they may be enforced by the District and may not be amended without District approval. [[The easement may allow for some limited

vegetation removal of trees less than 4 inches in diameter and of underbrush, to be agreed upon by District staff and the permittee.]] <<The deed restriction or easement shall prohibit any uses that would disturb the underbrush or trees except as follows: underbrush and trees may be removed as necessary for the construction of the stormwater berm shown on the drawing of Land Engineering, Inc. received by the District on May 28, 1992; trees less than four inches in diameter at breast height and underbrush may be removed as necessary for the construction of an elevated boardwalk no more than four feet wide and woven, to the extent possible, through the existing trees to connect the house or pool to a point on the river (but not to travel laterally along the river); branches of existing trees may be trimmed for the installation of a treehouse; underbrush may be disturbed by the placement and use of a sandbox, swing set, picnic table, and freestanding hammock. No other items, such as a fence or decking, may be installed, placed, or constructed in the conservation area without an amendment to the conservation easement and Permit.>> Within 30 days of the date of issuance of this permit and prior to recording, said easement must be submitted to the District for review and approval. Within 30 days of receipt of District approval, the permittee must provide to the District a certified copy of the recorded easement showing the date it was 2/ recorded and the official records book and page number.

* Note: In the above quotation, additions recommended to the Permit is within the <<>>; deletions recommended to the Permit is within the [[]].

RECOMMENDED this 24th day of June, 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 24th day of June, 1992.

ENDNOTES

1/ The remainder of Condition 17 of the Permit, as approved by the Board, is set forth on pages 22-23 of the recommended order.

2/ Original reads: "they were".

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 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.