



# St. Johns River Water Management District

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September 19, 2005

Division of Administrative Hearings  
1230 Apalachee Parkway  
Tallahassee, FL 32399-3060

AP

2005 SEP 20 P 12:57  
FILED  
ADMINISTRATIVE  
HEARINGS

**RE: Sierra Club, Inc. and St. Johns Riverkeeper, Inc., v. FCC Partners LP, Ltd., Plaza Partners Group LP, Ltd., Pyramid Partners Group LP, Ltd., and St. Johns River Water Management District;**  
**DOAH Case Nos. 05-0130, 05-0131**  
**F.O.R. 2004-110**  
**Permit application no. 4-031-17237-4**

CAS  
Closed

Dear Sir or Madam,

Pursuant to Section 120.57(1)(m), Florida Statutes, this agency is providing a copy of its final order to the Division of Administrative Hearings within 15 days of the final order having been filed with the agency clerk. The recommended order was submitted to the agency on August 5, 2005, and the final order was filed on September 14, 2005, after the Governing Board's action on September 13. Also enclosed for your convenience is an electronic copy of the District's Final Order (excluding Exhibit A and Exhibit B). The electronic version of the Final Order was created in MS Word 2000 format.

If you have any questions, please call me at (386) 329-4448.

Sincerely,

Tara E. Boonstra  
Assistant General Counsel  
Office of General Counsel

TEB/mbp

Enclosures

**GOVERNING BOARD**

Ometrias D. Long, CHAIRMAN APOPKA	David G. Graham, VICE CHAIRMAN JACKSONVILLE	R. Clay Albright, SECRETARY OCALA	Duane Ottenstroer, TREASURER JACKSONVILLE	
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**ST. JOHNS RIVER WATER MANAGEMENT DISTRICT**

SIERRA CLUB, INC., and  
ST. JOHNS RIVERKEEPER, INC.,

Petitioners,

DOAH Case Nos. 05-0130  
05-0131

v.

FCC PARTNERS LP, LTD., PLAZA  
PARTNERS GROUP LP, LTD.,  
PYRAMID PARTNERS GROUP LP,  
LTD., and ST. JOHNS RIVER WATER  
MANAGEMENT DISTRICT,

SJRWMD F.O.R. NO. 2004-110

Respondents.

2005 SEP 20 P 12:59  
ADMINISTRATIVE HEARINGS  
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

**FINAL ORDER**

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Charles Stampelos ("ALJ"), held a formal administrative hearing in the above-styled case on April 19 through 22, 26, and 27, 2005, in Jacksonville, Florida.

On August 5, 2005, the ALJ submitted to the St. Johns Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A." Petitioners Sierra Club, Inc. and St. Johns Riverkeeper, Inc. (collectively "Petitioners") and Respondent St. Johns River Water Management District ("the District") timely filed Exceptions to the Recommended Order. The District and Respondent FCC Partners LP, Ltd., Plaza Partners Group, Ltd., and Pyramid Partners LP, Ltd. (collectively "FCC") timely filed Responses to Exceptions. This

matter then came before the Governing Board on September 13, 2005 for final agency action.

**A. STATEMENT OF THE ISSUE**

The issue is whether FCC's environmental resource permit ("ERP") application No. 4-031-17237-4 for a surface water management system ("system") is consistent with the standards and criteria for issuance of a permit as set forth in Chapter 40C-4, Florida Administrative Code ("F.A.C."). The project is known as the Freedom Commerce Centre.

**B. STANDARD OF REVIEW**

The rules regarding an agency's consideration of exceptions to a recommended order are well established. The Governing Board is prescribed by Section 120.57(1)(l), Florida Statutes ("F.S."), in acting upon a recommended order. The ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5<sup>th</sup> DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1<sup>st</sup> DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the finding of fact is not based upon competent substantial evidence or that the proceedings on which the finding of fact was based did not comply with essential requirements of law. Section 120.57(1)(l), F.S.; Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept such evidence as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4<sup>th</sup> DCA 1999). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but

refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5<sup>th</sup> DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4<sup>th</sup> DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, *supra*; Heifitz, *supra*; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4<sup>th</sup> DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1<sup>st</sup> DCA 1991).

In its final order, the Governing Board may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(l), F.S. Furthermore, the Governing Board's authority to modify a recommended order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Servs., 419 So.2d 705 (Fla. 1st DCA 1982).

In issuing its final order, the Governing Board need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. Section 120.57(1)(k), F.S.

**C. EXCEPTIONS AND RESPONSES FILED**

The Administrative Procedure Act provides the parties to an administrative hearing with an opportunity to file exceptions to a recommended order. Sections 120.57(1)(b) and (k), F.S. The purpose of exceptions is to identify errors in a recommended order for the Governing Board to consider in issuing its final order. As discussed above in Section B (Standard of Review), the Governing Board may accept, reject, or modify the recommended order within certain limitations. When the Governing Board considers a recommended order and exceptions, its role is like that of an appellate court in that it reviews the sufficiency of the evidence to support the ALJ's findings of fact and, in areas where the District has substantive jurisdiction, the correctness of the ALJ's conclusions of law. In an appellate court, a party appealing a decision must show the court why the decision was incorrect so that the appellate court can rule in the appellant's favor. Likewise, a party filing an exception must specifically alert the Governing Board to any perceived defects in the ALJ's findings, and in so doing the party must cite to specific portions of the record as support for the exception. John D. Rood and Jamie A. Rood v. Larry Hecht and Department of Environmental Protection, 21 F.A.L.R. 3979, 3984 (DEP 1999); Kenneth Walker and R.E. Oswalt d/b/a Walker/Oswalt v. Department of Environmental Protection, 19 F.A.L.R. 3083, 3086 (DEP 1997); Worldwide Investment

Group, Inc. v. Department of Environmental Protection, 20 F.A.L.R. 3965,3969 (DEP 1998). To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1st DCA 1991).

In addition to filing exceptions, the parties have the opportunity to file responses to exceptions filed by other parties. Rule 28-106.217(2), F.A.C. The responses are meant to assist the Governing Board in evaluating and ultimately ruling on exceptions by providing the Governing Board with legal argument and citations to the record.

The Petitioners filed 29 exceptions to the ALJ's Recommended Order. The District filed 11 exceptions. FCC filed no exceptions. The District filed a Response to Petitioners' Exceptions that addressed all of the Petitioners' exceptions. FCC filed a response. Petitioners filed no response to the District's exceptions.

#### **D. RULINGS ON EXCEPTIONS**

Citations to page numbers in the transcript of the formal administrative hearing will be made by identifying the witness, volume, and page number (e.g., Wentzel Vol. 4: 827). Citations to exhibits admitted by the ALJ will be made by identifying the party that entered the exhibit followed by the exhibit number (e.g., Petitioners Ex. 2.). Citations to the Prehearing Stipulation will be designated by "Stip." followed by the page and paragraph number. Citations to the Recommended Order will be designated by "R.O." followed by the abbreviation "FOF" (Finding of Fact) or "COL" (Conclusion of Law) and paragraph number (e.g., R.O., FOF 13). Citations to the District's Applicant's Handbook: Management and Storage of Surface Waters (February 1, 2005) will be designated by the section number, followed by the abbreviation "A.H."

## RULINGS ON PETITIONERS' EXCEPTIONS

### Petitioners' Exception No. 1

Petitioners' Exception No. 1 states as follows:

Finding 21 is deficient in failing to note the presence on the property of fox and deer in addition to the other mammals noted. (TR. v. V McCann at 174). Similarly, the finding that migratory birds do not use the site because the canopy is too thick and the surrounding roadways cause a barrier, is contrary to the evidence. (TR V5 McCann at 174).

Petitioners take exception because FOF 21 is "deficient" and "contrary to the evidence."

Because Petitioners did not identify the legal basis for the exception, the Governing Board need not rule on the exception. Section 120.57(1)(k), F.S. However, we have tried to provide rulings where feasible, and, therefore, we assume that the legal basis for the exception is that there is no competent substantial evidence in the record to support the finding. For the reasons described below, we find such evidence, and the exception is, therefore, rejected.

FOF 21 states as follows:

The level of wildlife utilization of the Site is lower than expected. This may be explained in part by the reduced connectivity because of the surrounding roads and development. No federally or state listed species have been identified on the Site. See § 2.0(cc), A.H. Wildlife found on the Site is limited primarily to those in a typical urbanized forest such as snakes, armadillos, rabbits, raccoons, moles, possums, and frogs. Invertebrate species can be found. Amphibians and reptiles have been seen primarily in the center of the Site. There is evidence of feral hogs being on-site. Small birds, such as doves, blue jays, cardinals, and mocking birds, can be seen along the perimeter of the Site although few migratory birds use the Site because of the thick canopy and the "very mature forest" which permeates the Site. Also, I-95 and US-1 are natural deterrents to these migratory birds.

The finding is supported by competent substantial evidence in the record. (Melko Vol.1:196, 199-201, 209-212; Wentzel Vol.4:764-766; FCC Ex. 24).

In the first part of their exception, Petitioners allege that the finding is deficient because it fails “to note the presence on the property of fox and deer.” Although there was testimony at the hearing that fox and deer tracks had been observed on the project site (McCann Vol. 5:1115), the ALJ’s failure to make certain findings cannot be addressed by the Governing Board. The ALJ is the fact-finder, and the Governing Board has no authority to make additional findings of fact. Boulton v. Morgan, 643 So.2d 1103 (Fla. 4<sup>th</sup> DCA 1994).

In the second part of their exception, Petitioners allege that “the finding that migratory birds do not use the site because the canopy is too thick and the surrounding roadways cause a barrier, is contrary to the evidence.” It appears that Petitioners have misread this finding, which does not state that migratory birds do not use the site. Rather, FOF 21 states that “few migratory birds use the Site.” With respect to the effect of the surrounding roadways, we note that Petitioners’ witness testified that the roads surrounding the site provide a constraint to wildlife use. (McCann Vol.5:1117; Petitioners’ PRO FOF 13).

### **Petitioners’ Exception No. 2**

Petitioners’ Exception No. 2 states as follows:

Petitioners take exception to Finding 41, that there are no adverse impacts to the St. Johns River in terms of fish or marine productivity. The evidence was that the loss of detrital export will adversely impact Julington and Pottsburgh Creeks and will have attendant effects on the St. Johns River. (Lewis T at 1186-98; Lowe T at 1281).

Because Petitioners did not identify the legal basis for the exception, the Governing Board need not rule on the exception. Section 120.57(1)(k), F.S. However, we assume that the legal basis for the exception is that there is no competent substantial evidence



in the record to support the finding. For the reasons described below, we find such evidence, and the exception is, therefore, rejected.

FOF 41 states as follows:

There was no persuasive evidence that there are likely to be adverse impacts or affects [sic] to the St. Johns River or to fish or recreational values or marine productivity therein.

The finding is supported by competent substantial evidence in the record. (Winchester Vol.2:537-540).

We agree with Petitioners that evidence was presented that the loss of detrital export will adversely impact Julington and Pottsburg Creeks. (Wentzel Vol. 4: 840-41; District Ex. 6; Lewis Vol. 6:1192-93; Lowe Vol.6: 1282-83). In addition, evidence was presented that would have supported a finding that there would be adverse impacts to the St. Johns River in relation to detrital export. (Dobberfuhr Vol. 6: 1359-60; District Ex. 6; Lewis Vol. 6: 1192-93; Lowe Vol. 6: 1282-83). However, as noted by the ALJ in FOF 42 (to which Petitioners did not take exception), there was also "evidence that it is not likely that there will be a loss of detrital export occurring off-site and that it is not likely that hydrologic connectivity or fish or marine production on or off the Site will be adversely affected." (Winchester Vol. 2: 537-40 and Vol. 6: 1449-50). The decision to believe one expert over another is left to the ALJ as the fact-finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383 (Fla. 5<sup>th</sup> DCA 1983). As a result, this exception amounts to an attempt by Petitioners to reargue their case and have the Governing Board reweigh evidence, judge the credibility of witnesses, and interpret evidence. However, the Governing

Board is limited to determining whether any competent substantial evidence exists from which the finding may reasonably be inferred, and whether the proceedings complied with essential requirements of law. Goin v. Comm'n on Ethics, 659 So.2d 1131, 1138-39 (Fla. 1<sup>st</sup> DCA 1995); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1<sup>st</sup> DCA 1985).

### **Petitioners' Exception No. 3**

Petitioners' Exception No. 3 states as follows:

Finding 43 requires clarification. The finding that Trout Creek had less TOC than Julington Creek need not be disturbed in itself, but the implication is that Trout Creek is in need of additional detritus which is not supported by the record. The issue is whether Trout Creek is carbon limited. That is, whether it needed any additional detrital input. The District's Dr. Dobberfuhr testified unequivocally that Trout Creek had relatively high carbon in the constellation of North Florida Streams. (Dobberfuhr Vol 6 at 01388). The point being that there has been no showing that the proposed mitigation to provide additional detrital export to Trout Creek will have any benefit whatsoever. (TR V6 Dobberfuhr at 1389). Ultimately this means the Trout Creek detrital mitigation is valueless.

Petitioners take exception to FOF 43 because it "requires clarification." Because Petitioners did not identify a legal basis for the exception, the Governing Board need not rule on the exception. Section 120.57(1)(k), F.S. However, we assume that the legal basis for the exception is that there is no competent substantial evidence in the record to support the finding. For the reasons described below, we find such evidence, and the exception is, therefore, rejected.

FOF 43 states as follows:

It was asserted that detrital export areas were unnecessary in Trout Creek, also known as Whites Ford Creek, (the receiving waters for the Rood/Rayland mitigation tracts discussed below). Actual empirical evidence demonstrated that 49 (mgC/L) TOC [total organic carbon] in

Trout Creek is less than the 54 mgC/L TOC found in Julington Creek. FCC Exs. 70-72.

The finding is supported by competent substantial evidence in the record. (Winchester Vol.2:531-32; FCC Ex. 70, 71, and 72). Because Petitioners take issue with the implication of the finding (rather than to the finding itself), it appears that Petitioners are requesting the Governing Board to make additional findings of fact, which it cannot do.

Boulton v. Morgan, 643 So.2d 1103 (Fla. 4<sup>th</sup> DCA 1994).

#### **Petitioners' Exception No. 4**

Petitioners' Exception No. 4 states as follows:

Finding 44, stating salinity differences between Julington and Trout Creeks are not sufficient to warrant a finding that marine productivity is diminished, is not supported by competent evidence. There was no dispute that oligohaline zones differ substantially in their attributes, productivity, and life forms from the more freshwater areas at Trout Creek. It is further established that mitigation is not adequate if freshwater mitigation is used to replace losses in oligohaline zones. (Lewis, Tr. at 1189-98; Dennis, Tr. at 653).

Petitioners take exception to FOF 44 on the grounds that there is no competent evidence in the record to support the finding. For the reasons described below, we find such evidence, and the exception is, therefore, rejected.

FOF 44 states as follows:

The alleged salinity differences noted by the Petitioners in the St. Johns River between Trout Creek and Julington Creek do not warrant a finding that marine productivity is diminished.

Stated another way, from our review of the record, the ALJ concluded that there was insufficient evidence to warrant a finding that marine productivity would be diminished if the proposed project were developed and the mitigation plan were implemented, even if the salinities in the St. Johns River at Julington Creek (associated with the project site)

and at Trout Creek (associated with mitigation sites) are different in the manner alleged by Petitioners. There is competent substantial evidence to support such a finding. (Winchester Vol. 2: 510-17, 540 and Vol. 6: 1449). We note that in COL 200 (to which Petitioners did not take exception), the ALJ found that “even assuming such a localized loss at Julington or Pottsburg Creeks, the weight of the evidence showed that there was no adverse impact to the St. Johns River or fish or the marine productivity therein.”

At the administrative hearing, Petitioners asserted that the proposed mitigation is not adequate because it is located in freshwater rather than oligohaline (low salinity) zones of the St. Johns River system. (Lewis Vol. 6: 1189-91). Julington Creek is in the oligohaline zone of the river. (Lewis Vol.6:1189-91). There is conflicting testimony about whether Trout Creek is located within the oligohaline or the freshwater zone of the St. Johns River. Petitioners’ witness testified that the mouth of Trout Creek is in the freshwater portion of the St. Johns River. (Lewis Vol.6:1192-93). FCC’s witness testified that Trout Creek is in the oligohaline zone with intervening freshwater periods. (Winchester Vol.6:1444-45). The decision to believe one expert over another is left to the ALJ as the fact-finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383 (Fla. 5<sup>th</sup> DCA 1983). Even if the Governing Board had the authority to resolve this conflict in the testimony, such resolution would not change the ALJ’s finding, which is that marine productivity will not be diminished, whether or not there are salinity differences.

**Petitioners’ Exception No. 5**

Petitioners’ Exception No. 5 states as follows:

Finding 46 is excepted. The District's required 4:1 mitigation ratio for detrital export mitigation is not reasonable because adequate studies have not been done to make the determination of its adequacy, because there is no demonstrated improvement to be gained in Trout Creek, and no offset as to oligohaline zone detrital losses. (Dobberfuhr at 1386. See also, citations for exceptions 3 and 4).

Petitioners take exception to FOF 46 because the mitigation ratio for detrital export is "not reasonable." Because Petitioners did not identify a legal basis for the exception, the Governing Board need not rule on the exception. Section 120.57(1)(k), F.S. However, we have tried to provide rulings where feasible. For the reasons described below, we reject the exception.

FOF 46 states as follows:

The District's required four-to-one detrital export mitigation was reasonable and has been satisfied by FCC.

Although labeled as a finding of fact, this finding is an ultimate finding of fact that is akin to a conclusion of law. The mitigation ratio is related to the determination of whether mitigation is sufficient to offset a project's impacts to wetlands and other surface waters, which is a conclusion of law within the Governing Board's substantive jurisdiction. Fla. Power Corp. v. State, Dept. of Environmental Regulation, 638 So.2d 545, 561 (Fla. 1<sup>st</sup> DCA 1994); 1800 Atlantic Developers v. Department of Environmental Regulation; 552 So.2d 946, 955 (Fla. 1<sup>st</sup> DCA 1989). In FOF 46, the ALJ correctly concluded that the four-to-one detrital export mitigation ratio is reasonable and that FCC's mitigation satisfies that ratio. Moreover, there is competent substantial evidence in the record to support the factual underpinnings that form the basis for the ALJ's conclusion. (Wentzel Vol.4:827, 833; Lowe Vol.6:1294-95).

District staff evaluated the mitigation plan and made calculations to assess the

ability of the mitigation plan to specifically offset the loss of detrital export functions. (R.O. FOF 99-104; Wentzel Vol. 4:827-833, 915; Petitioner's Ex. 85 [p.26]). In making those calculations, the District used a four-to-one ratio, which is the mitigation ratio for created wetlands in this case and takes into account the time lag and risk in replacing the lost functions. (Wentzel Vol.4:823-24, 827, 923-34; Lowe Vol.6:1294-95). The selection of mitigation ratios involves a professional judgment of the reduction in quality and relative value of the functions of the areas adversely impacted as compared to the expected improvement in quality and value of the functions of the mitigation area. (Wentzel Vol.4:822-23; Section 12.3.2, A.H.) District staff testified that the ratios were appropriate. (Wentzel Vol.4:881). In the end, District staff determined that the mitigation plan more than offsets the detrital export functions that would be lost by impacting 126.8 acres of wetlands. (R.O. 103-104; Wentzel Vol. 4:833; Petitioner's Ex. 85 [p.26]).

#### **Petitioners' Exception No. 6**

Petitioners' Exception No. 6 states as follows:

Finding 75 is excepted. That the Rayland Tract will be placed under a conservation easement that will prohibit a road from being constructed across it is not supported by competent evidence. The Rayland Tract will not and cannot be placed under a conservation easement prohibiting roads to the extent FCC has already agreed to convey the right-of-way for proposed St. Johns County Road 2209 across the Rayland Tract. (See, Petitioners' exhibit number 16; and testimony of Joseph Stevenson, Tr. V. 6 at 1248-60).

Petitioners' exception is rejected for the reasons set forth below.

FOF 75 provides as follows:

The Rayland Site includes wetland and upland preservation, wetland enhancement, and wetland creation. The entire Rayland Tract will be

placed in a conservation easement, which among other things, will prohibit roads. T. 64-65. This should be a required condition of the ERP.

The finding is supported by competent substantial evidence, as explained herein. The conservation easement over the Rayland Tract is part of FCC's mitigation plan. (Dowd Vol. 1: 46-49, 64-65; Wentzel Vol. 4: 791; FCC Ex. 4 and 13A; District Ex. 6). Pursuant to Other Condition 24 of the proposed ERP:

[w]ithin 30 days of permit issuance, the permittee shall record a conservation easement over the Rayland Tract which shall include restrictions on the real property pursuant to section 704.06, Florida Statutes, and be consistent with section 12.3.8, Applicant's Handbook, Management and Storage of Surface Waters (February 1, 2005).

(District Ex. 6.) Section 704.06, F.S., defines a "conservation easement" as a right or interest in real property which may prohibit, among other things, the "[c]onstruction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground." Section 704.06(1)(a), F.S.

In accordance with section 704.06, F.S., the subject conservation easement expressly prohibits the construction of all new roads. (FCC Ex. 4, Tab 2). It provides, in pertinent part:

2. Prohibited Uses. Any activity on or use of the Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the generality of the foregoing and except as otherwise authorized by the Permit, the following activities and uses are expressly prohibited:

(a) Constructing or placing buildings, roads, signs, billboard or other advertising, utilities or other structure on or above the ground except that trail roads may be maintained only in accordance with a management plan for the White's Ford Mitigation Area as approved in writing by the Grantee . . . .

Section 12.3.8(a), A.H., states in relevant part that: "All conservation easements shall be granted in perpetuity without encumbrances, unless such encumbrances do not

adversely affect the ecological viability of the mitigation.” The purpose of section 12.3.8, A.H., is not to adjudicate the actual legal interests in real property. Rather, section 12.3.8(a), A.H., is intended to provide reasonable assurance that the ecological viability of a proposed conservation easement will not be adversely affected by an existing encumbrance. If the applicant provides this assurance, then compliance with the rule occurs.

In this case, FCC entered into evidence a warranty deed showing that it was the owner of the Rayland Tract. (FCC Ex. 3, Tab 6). To provide reasonable assurances that the Rayland Tract conservation easement would be free of encumbrances that adversely affect the ecological viability of the mitigation, FCC also entered into evidence a Quitclaim Deed Releasing Timber and Oil and Gas Reservations and a Release of Right to Relocate Easement for the Rayland Tract. (FCC Ex. 3, Tabs 10 & 11). Proposed Other Condition 22 of the ERP requires that these releases be recorded prior to commencement of construction of the project. (District Ex. 6). FCC also submitted a draft conservation easement, dedicating a conservation easement over the Rayland Tract to the District in perpetuity. (FOF 156; FCC Ex. 4).

Petitioners’ contention that the Rayland Tract cannot be placed under a conservation easement because FCC has agreed to convey the right-of-way for proposed St. Johns County Road 2209 (“CR 2209”) across the Rayland Tract is actually not related to the above finding of fact, but instead, disputes COL 216 that the settlement agreement does not create an encumbrance that would prevent FCC from recording the conservation easement. (See also, FOF 158, which is more in the nature of a conclusion of law.) This conclusion of law must be accepted by the District



because it is not within the District's substantive jurisdiction to adjudicate the real property law question of whether the settlement agreement creates an encumbrance that takes precedence over the conservation easement. Section 120.57(1)(l), F.S. There is, therefore, no jurisdictional basis for the District to overturn COL 216.

In addition, however, it is worth noting that the settlement agreement does not prohibit FCC from recording the subject conservation easement or implementing its mitigation plan on the Rayland Tract. The agreement expressly contemplates that the mitigation plan will be in place when St. Johns County applies for a District permit to construct the roadway. Paragraph 2(a) of the agreement provides:

2. To provide for and secure the added costs the County will incur as a consequence of implementation of FCC's mitigation plan on the Rayland Tract the parties agree as follows:
  - a. Attached hereto as Exhibit "A" is the County's consultant's listing of the elements that will have to be included in any County permit application for construction of CR 2209, if FCC's mitigation plan is in place at the time County makes application for the road.

(Petitioners' Ex. 16). In addition, there is a condition precedent to any conveyance to St. Johns County of FCC's underlying fee interest in the right-of-way for CR 2209.

Paragraph 1 of the Settlement Agreement, states as follows:

The conveyance will be at no cost to the County and shall occur no later than 180 days prior to commencement of construction on CR 2209, or one hundred and eighty (180) days following issuance of all permits (regardless of the entity to which such permits are issued) needed to commence construction on the road, whichever occurs first. [Emphasis added]

Paragraph 2(h) of the agreement also states as follows:

FCC's obligations hereunder are contingent on issuance of the permits for Freedom Commerce Centre and the County's receipt of all permits for County Road 2209.

One of the permits that would be required for the potential CR 2209 is a District-issued ERP. (Dennis Vol. 3: 629-31; Wentzel Vol. 4: 887, 893, Lowe Vol. 6: 1310). No ERP application has been submitted to the District for CR 2209. (Wentzel Vol. 4: 857; Stephenson Vol. 6: 1259-69).<sup>1</sup>

**Petitioners' Exception No. 7**

Petitioners' Exception No. 7 states as follows:

Finding 86 is excepted to the extent it asserts detritus from the Hunt Farm Tract will benefit the ecology of the St. Johns River. (Lowe, Tr. 1295-1297).

Because Petitioners did not identify a legal basis for the exception, the Governing Board need not rule on the exception. Section 120.57(1)(k), F.S. However, we assume that the legal basis for the exception is that there is no competent substantial evidence in the record to support the finding. For the reasons described below, we find such evidence, and the exception is, therefore, rejected.

FOF 86 states as follows:

The proposed enhancement of this site will create viable wildlife habitat. The detritus produced from this Site will, in time, benefit the ecology of the St. Johns River. The water quality improvements implement and are consistent with the District's Surface Water Improvement and Management (SWIM) Plan for the area, although they are not part of the SWIM Plan. See Findings of Fact 118-120.

The mitigation at the Hunt Farm Tract consists of: (1) preserving 15.5 acres of mixed hardwood wetlands associated with a tributary of Deep Creek, (2) preserving 40 acres of adjacent mixed forested uplands, and (3) preservation and enhancement of 147.8

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<sup>1</sup> See Petitioners' Exception No. 11 for a discussion of the assurances the District will have in the permitting process for CR 2209 that any adverse impacts to the Rayland Tract conservation easement are addressed.

acres of mixed forested uplands that are currently in use as a potato farm. (R.O. FOF 83; District Ex.6 [p.9]). The enhancement involves filling ditches, filling surface furrows, and planting trees. (FCC Ex.13A [mitigation plan]; District Ex.6 [p.4]). The evidence showed that the upland enhancement at the Hunt Farm Tract will produce detritus in the form of particulate and dissolved organic carbon. (Wentzel Vol.4:816). A portion of the Hunt Farm Tract will drain towards a drainage ditch that eventually flows into the St. Johns River. (Wentzel Vol.4:815-16; Lowe Vol.6:1301). Another portion of the site will discharge into Deep Creek and eventually into the St. Johns River. (Kocur Vol.2:316-17; Lowe Vol.6:1301). Both the particulate and dissolved organic carbon will be transported downstream to the St. Johns River by the drainage ditch and Deep Creek. (Wentzel Vol.4:816). The detritus produced from the site will benefit the ecology of the St. Johns River. (District Ex. 6 [p.9]).

**Petitioners' Exception No. 8**

Petitioners' Exception No. 8 states as follows:

Finding 103 is contrary to the competent evidence. The detrital functions of the wetlands will not be offset because of the distance from the area impacted and because it will take years and years before any detrital export is actually manufactured by any of the mitigation sites. (Lowe, Tr. 1295-97)

Petitioners take exception to FOF 103 because it is "contrary to the competent evidence." We assume that the legal basis for the exception is that there is no competent substantial evidence in the record to support the finding. For the reasons described below, we find that there is competent substantial evidence to support the finding, as modified by our ruling on District's Exception No. 3. Therefore, the exception is rejected.

FOF 103 in the Recommended Order states as follows:

The total detrital export offset was 606.5 acres versus proposed detrital export impacts of 507.2 acres. P Ex. 85 at 26.

In our ruling on District's Exception No. 3, we have modified FOF 103 as follows:

The total detrital export offset was 606.5 acres versus proposed detrital export impacts ~~of~~ requiring 507.2 acres of mitigation. P Ex. 85 at 26.

As explained below and in our ruling on District's Exception No. 3 (which incorporates our ruling on District's Exception No. 2), there is competent substantial evidence to support the modified finding.

First, to determine the amount of mitigation that would be needed to offset the loss of detrital functions, District staff applied a creation ratio of 4:1 to the acreage of direct impacts. (Wentzel Vol.4:827). In other words, the mitigation plan would need to provide four times the number of acres of wetland impacts in order to offset the detrital export functions of the impacted wetlands and account for time lag and risk ( $4 \times 126.8 = 507.2$  acres of mitigation). (Wentzel Vol.4:833, Petitioners Ex. 85 [p.26]). In this exception, Petitioners argue that the detrital functions will not be offset because of the time for the mitigation areas to develop and produce detritus. However, in FOF 96 (to which Petitioners did not take exception), the ALJ specifically found that the mitigation ratio reflects a consideration of time lag (among other things).

Next, to assess whether the mitigation plan provides 507.2 acres of mitigation sufficient to offset detrital export impacts, District staff made calculations to convert the various elements of the mitigation plan into the number of acres providing detrital export functions. (Wentzel Vol.4:827-33). The acres of wetland preservation and wetland enhancement were multiplied by 15 percent, which is the amount of ecological lift or

improvement in detrital production that is associated with converting pine plantation wetlands that are periodically harvested to preserved hardwood wetlands. (Wentzel Vol.4:831; Petitioners Ex. 85 [p.26]; Dobberfuhr Vol.5:955; District Ex. 33). In other words, once those wetlands are preserved and enhanced, they will provide 15 percent more detrital production than they do currently. (District Ex. 33). The acres of upland preservation, upland enhancement, and wetland creation were multiplied by 100 percent because those areas are uplands that may be developed, which would be a complete loss of detrital export. (Wentzel Vol.4:833; Petitioners Ex. 85 [p.26]). These calculations yielded 606.5 acres of mitigation for detrital export functions, which is more than the 507.2 acres of mitigation that was needed. (Wentzel Vol.4:833; Petitioners Ex. 85 [p.26]).

#### **Petitioners' Exception No. 9**

Petitioners' Exception No. 9 states as follows:

Finding 111 through 116 are excepted on the ground that the mitigation plans do not provide for regional ecological value and the "out" provision is not applicable. (Wentzel, Tr. at 830; Lewis, Tr. at 1207-1210).

Petitioners' exception is rejected for the reasons set forth below.

Petitioners generally dispute FOFs 111 through 116, whereby the ALJ concludes that: "[t]he location of the mitigation and improvements are regionally significant and the perpetual easements ensure greater long-term ecological significance than is associated with the wetlands to be impacted." (FOF 112). In so concluding, the ALJ determined

that the requirements of the “out provision” at section 12.2.1.2(b), A.H., have been met.<sup>2</sup>

This provision provides in pertinent part that:

The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

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b) the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long-term ecological value than the area of wetland or other surface water to be adversely affected.

The subject mitigation involves five tracts, referred to by the parties as the: (1) on-site mitigation, (2) Rood Tract, (3) Rayland Tract, (4) Tupelo Mitigation Bank, and (5) Hunt Tract. In order to qualify for the “out provision,” all of the aforesaid tracts had to be of regional ecological value, with the total mitigation plan providing a greater long-term ecological value than the wetlands to be impacted by the development. The above five tracts were determined to comprise four plans of regional ecological value, being: (1) the Julington/Durbin Creek preservation corridor; (2) the Rood/Rayland preservation corridor; (3) the Tupelo Mitigation Bank, and (4) the Lower St. Johns River Basin SWIM Plan. (Wentzel Vol. 4: 820). In order to provide a greater long-term benefit, the total number of mitigation acres was increased by ten percent from 134.2 acres to 147.62 acres. (FOF 97). The 134.2 acres of wetland impacts consists of 126.8 acres of direct impact (FOF 27) and 7.4 acres of secondary impact (FOF 28).

There is competent substantial evidence in the record to support the ALJ's factual findings that the various components of the mitigation plan have regional

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<sup>2</sup> If neither of the two “out provisions” is applicable, an ERP applicant must eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed system, by implementing practicable design modifications as described in section 12.2.1.1, A.H.

ecological value. As to the on-site preservation, the 393.1 acres of wetlands and 8.8 acres of uplands to be preserved (FOF 94) are a part of the Julington/Durbin Creek corridor. (Wentzel Vol. 4: 783-790). This preservation adds to 124.4 acres that are already being preserved on-site as a result of prior District permits. Other District permits in the corridor have resulted in approximately 1,000 acres of preservation. (Wentzel Vol. 4: 783-790; District Ex. 6, 16 and 29). In addition, the City of Jacksonville purchased two parcels within the Julington Creek Basin, comprising 610 acres, with Florida Community Trust money, which is subject to restrictions that limit future development. (Wentzel Vol. 4: 784-785). The District, in coordination with other agencies, has also purchased approximately 2,006 acres of the Julington/Durbin Creek peninsula. (Wentzel Vol. 4: 786). These areas, totaling between 3,000 and 4,000 acres, form a preservation corridor that provides good habitat and hydrology. (Wentzel Vol. 4: 789-90). Thus, there is competent substantial evidence in the record to support the ALJ's conclusion that the on-site preservation is part of a plan that provides regional ecological value.

The regional ecological value of the mitigation plan for the Rayland and Rood Tracts consists of: (1) the proposed mitigation for this project; (2) the mitigation required by prior District permits for other projects; and (3) lands under public ownership. (District Ex. 6 & 19; Wentzel Vol. 4: 794-801). The mitigation required by prior District permits accounts for approximately 520 acres of existing conservation easements adjacent to the Rayland Tract. (District Ex. 19 & 30; Wentzel Vol. 4: 798). The mitigation is also adjacent to publicly owned lands or conservation easements, including the Cummer Trust (or "12-Mile Swamp") property and the Sylvan Tract. (Wentzel Vol.

4: 795). The Cummer Trust property is over 21,000 acres and is located on the east side of I-95. (Wentzel Vol. 4: 795). The Sylvan Tract, which is approximately 1,000 acres, is located on the west side of I-95, adjacent to the Rayland Tract. (District Ex. 30; Wentzel Vol. 4: 870-71). The total preservation area west of I-95 includes approximately 3,100 acres. (Wentzel Vol. 4: 798). There are large boxed culverts between 12 and 15 feet wide underneath I-95, which connect the Cummer Trust property with the mitigation preservation lands on the west side of I-95. (Wentzel Vol. 4: 799-800). These boxed culverts serve as a wildlife crossing for smaller mammals. (Wentzel Vol. 4: 799). Thus, there is competent substantial evidence in the record to support the ALJ's conclusion that the Rayland and Rood Tracts are part of a plan that provides regional ecological value.

As to the Tupelo Mitigation Bank, in issuing a permit therefor, the District determined the mitigation bank project to be a plan that provides regional ecological value. (Wentzel Vol. 4: 810; District Ex. 6 & 21).<sup>3</sup>

As to the Hunt Farm Tract, the mitigation plan proposes to preserve 15.5 acres of wetlands and 40.0 acres of uplands, and preserve and enhance 147.8 acres of uplands by converting a potato farm from row crops to upland forest (FOFs 94, 120). This mitigation is consistent with the goals of the Surface Water Improvement Management Plan for the Lower St. Johns River Basin ("SWIM Plan"). (Wentzel Vol. 4: 818). The SWIM Plan is a District plan to improve water quality in the lower St. Johns River. (Wentzel Vol. 4: 819). It is basically an environmental enhancement and preservation

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<sup>3</sup> Section 373.4136(1)(a), F.S., establishes standards for mitigation banks, including the amount of mitigation credits awarded. To obtain a mitigation bank permit an applicant must show, among other things, that "[t]he proposed mitigation bank will improve ecological conditions of the regional watershed." Section 373.4136(1)(a), F.S. In issuing the mitigation bank permit, the Governing Board found that the Tupelo Mitigation Bank provides regional ecological value.



plan for the lower St. Johns River. (Elledge Vol. 5: 987; District Ex. 26). One of the objectives of the SWIM Plan is to increase the value of functions performed by uplands, wetlands, or other surface waters to the abundance, diversity and habitats of fish, wildlife, or listed species by improving the water quality of the St. Johns River. (Wentzel Vol. 4: 818; Elledge Vol. 5: 987). One water quality issue the plan identifies is pollution from agricultural stormwater runoff. (Elledge Vol. 5: 990). The District has several strategies for improving water quality, including development of best management practices, construction of stormwater management facilities, and the purchase of easements over some farms and the re-forestation of those farms. (Elledge Vol. 5: 990). The FCC mitigation plan for the Hunt Farm Tract is consistent with the SWIM Plan to purchase conservation easements and reforest lands currently in row crop agriculture. (Elledge Vol. 5: 997). Thus, there is competent substantial evidence in the record to support the ALJ's conclusion that the Hunt Farm Tract mitigation is part of a plan that provides regional ecological value. In addition, it is worth noting that the Petitioner's have failed to take exception to the underlying findings of fact that support the aforesaid findings by the ALJ. (FOF 58 through 74, 76 through 93, and 117 through 119).

**Petitioners' Exception No. 10**

Petitioners' Exception No. 10 states as follows:

Findings 120 and 121 are deficient in that it notes that the Hunt Farm Tract is located within the Hastings Drainage District, but fails to note that it is outside the Districts' designated drainage basin for purposes of mitigation. (Lewis, Tr. at 1215; Dobberfuhl, Tr. 1365). The proposed mitigation was inadequate prior to the time that FCC went out of basin to get the Hunt Farm mitigation – meaning the mitigation was and is inadequate. (Lowe, Tr. 1295-96).

Petitioners' exception is rejected for the reasons set forth below.

FOF 120 and 121 state as follows:

120. The FCC mitigation plan for the Hunt Farm Tract is consistent with the District's SWIM Plan to purchase conservation easements and reforest lands currently in row crop agriculture. By converting the property from row crops to upland forest, there will be less drainage off of the property and the water quality draining off of the property is expected to improve significantly. (The Hunt Farms Tract is located within the Hastings Drainage District. This drainage district maintains a number of large ditches with substantial drainage. The St. Johns River is the eventual outlet for all of these ditches in the vicinity of the Harm Farm Tract.)

121. Furthermore, notwithstanding the ecological value on the Site, FCC's mitigation will provide greater long-term ecological value because FCC has proposed significantly more mitigation than is needed to offset the project's adverse impacts to fish and wildlife caused by the proposed wetland alteration. FCC provided mitigation to offset an additional 13 acres of wetland impacts that are not being proposed.<sup>4</sup> In addition, the mitigation plan, when implemented, will provide more ecological resources above that are currently on the Site and that are expected on the Site in the future.

Initially, it should be noted that, as a matter of law, there is no basis for asserting by means of an exception that the ALJ has failed to make a requested finding of fact.

Boulton v. Morgan, 643 So.2d 1103 (Fla. 4<sup>th</sup> DCA 1994). In addition, Petitioners do not dispute any of the factual content within FOF 120. This finding is, therefore, upheld on this basis.

Petitioners also assert that: "[t]he proposed mitigation was inadequate prior to the time that FCC went out of basin to get the Hunt Farm mitigation – meaning the mitigation was and is inadequate." This assertion appears to be directed toward FOF 121, which finds that FCC's mitigation will provide greater long-term ecological value than the impacted area of the project site. Petitioners essentially assert that the Hunt Farm Tract should not be given any credit in the calculation of long-term ecological

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<sup>4</sup> This sentence appears to be incorrect as a result of clerical error. It appears that "that are not" should be corrected to read "than are now."

value for the purpose of the “out provision” of section 12.2.1.2(b), A.H., because it is outside Basin 5, which is the basin in which the development activity will occur. Figure 12.2.8-1, A.H. The Hunt Farm Tract is located in Basin 8. (FOF 81). Petitioners’ argument fails because there is no requirement in the District’s rules that mitigation be limited to the same drainage basin as the development activity. The only limitation as to drainage basins involves the cumulative impact analysis pursuant to section 12.2.8, A.H. (discussed in Petitioners’ Exception No. 17). The cumulative impacts analysis is a separate analysis from consideration of whether a project’s impacts have been adequately mitigated.

For the reasons stated above with regard to Exception No. 9, there is competent substantial evidence in the record to support FOF 121, including testimony that directly supports the ultimate conclusion that the proposed mitigation will offset and even exceed the project’s adverse impacts to wetlands. (Wentzel Vol. 4: 820-21; District Ex. 6). Moreover, this finding is supported by numerous underlying findings of fact that have not been the subject of exceptions. See, e.g., FOF 58 through 74, 76 through 93, 117 through 119.

**Petitioners’ Exception No. 11**

Petitioners’ Exception No. 11 states as follows:

Finding 130 is excepted as to the last sentence regarding the type of adverse impacts from County Road 2209. As a starting point, the Rayland mitigation property’s size and contiguity will be adversely impacted. There is no dispute that there will be substantial adverse impacts as a result of the road that will go into the Rayland Tract. It is not feasible to construct the road in a way that eliminates adverse impacts. (Elledge, Tr. at 1012, 1023; Tr. at 1118-20; Lowe, Tr. at 1313-14).

Petitioners’ exception is rejected for the reasons set forth below.

FOF 130 provides:

The envisioned CR 2209 was not considered by the District in determining whether the mitigation at the Rood and Rayland Tracts would provide greater long-term ecological value than the wetlands to be impacted. Such a roadway would require a District ERP, and all direct and secondary impacts to wetlands and surface waters would have to be offset. No ERP application has been submitted to the District for CR 2209. The specific road alignment and design are needed to determine the type and nature of any impacts that may result from the construction of CR 2209.

Although Petitioners dispute the last sentence of FOF 130, they do not claim the sentence lacks any evidentiary support. There is competent substantial evidence in the record to support the finding that the impacts of construction of CR 2209 cannot be assessed in the absence of a specific road alignment and design. (Wentzel Vol. 4: 867, 890-91; Lowe Vol. 6: 1310). In addition, a road “could be designed that would have extremely minimal impacts.” (Wentzel Vol. 4: 890-91).

Moreover, although Petitioners argue that “[i]t is not feasible to construct the road in a way that eliminates adverse impacts,” the ALJ found, on the basis of competent substantial evidence, that those impacts would be offset in the permitting process. (Dennis Vol.3 629-30; Wentzel Vol. 4: 890-91; Lowe Vol. 6: 1310, 1314-15). This would include both direct and secondary impacts. (Dennis Vol. 3: 629-31; Wentzel Vol. 4: 887, 893; Lowe Vol. 6: 1310). Such a roadway would also be subject to the District’s proprietary interest under the conservation easement. (Wentzel Vol. 4: 825; Elledge Vol. 5: 1012-13; Lowe Vol. 6: 1307, 1323-24). The District has discretionary authority in the release of conservation easements. (Elledge Vol. 5: 1021; Lowe Vol. 6: 1307-08; section 373.096, F.S.). Even if St. Johns County were to seek to condemn a right-of-way, and it were determined that the county had such condemnation authority, section 704.06(11), F.S., requires the court to “consider the public benefit provided by the

conservation easement and linear facility in determining which land may be taken and the compensation paid.” Consequently, these dual protections would address any potential loss of the long-term regional ecological value of the Rayland Tract associated with such a road.

Lastly, if actual legal encumbrances affecting the ecological viability of the Rayland Tract mitigation are later determined to exist, the District has enforcement authority to take action against the permittee to address that loss of mitigation.

### **Petitioners’ Exception No. 12**

Petitioners’ Exception No. 12 states as follows:

Finding 135 is excepted in its entirety. There was no evidence that County Road 2209 was speculative or that there was any chance it would not be built. The evidence is that St. Johns County is so certain of the road’s construction across the Rayland Tract that it commenced eminent domain proceedings to take the Rayland right-of-way. Eminent domain proceedings were only terminated after agreement was reached for FCC to convey fee simple title to the Rayland right-of-way to the County. (Stephenson, Tr. 1252-54). Labeling the road as speculative and refusing to consider its impacts on the proposed mitigation is contrary to the statewide policy of requiring reasonable assurances that the mitigation will be successful. District policy as embodied by the rules is designed to peer into the future to see if the mitigation will successfully provide sustainable ecological and hydrological functions. The District has a myriad of such rules which cover a wide range of areas designed to assist the district to assess whether the mitigation will or can be effectively implemented. (Lowe, Tr. at 1318). Ignoring the impacts of the road on the ground it is speculative is the epitome of deliberate blindness. The policy of looking to the future for reasonable assurances is completely eviscerated by the make-believe game that the road will not be constructed across the Rayland mitigation site.

Petitioners’ exception is rejected for the reasons set forth below.

FOF 135 provides as follows:

Petitioners’ theory that CR 2209 and Silverleaf will in some manner affect FCC’s proposed mitigation in the future is based on speculation and conjecture.

It is in the nature of a finding of ultimate fact that rests upon the underlying factual findings as to effects of CR 2209 and the Silverleaf development, most of which have not been the subject of exceptions. See FOFs 123 through 134 (excepting the last sentence of FOF 130). Petitioners focus their exception upon the contention that there is evidence in the record to show that CR 2209 will be constructed sometime in the future, and that it will have some adverse impact upon the conservation easement. However, the ALJ's finding is not directed toward whether CR 2209 will be constructed, but rather, the effect such construction might have on the mitigation value of the conservation easement on the Rayland Tract. In this regard, he found Petitioners' assertion that the road would dramatically reduce the conservation value of the easement to be speculative and based upon conjecture. For the reasons stated with regard to Petitioners' Exception No. 11, there is competent substantial evidence demonstrating that: the effect of CR 2209 upon the conservation easement cannot be determined until a specific plan is developed; that such effect could be minimal, depending upon the road's design and alignment; and that, in any case, the adverse impacts would have to be fully mitigated in issuing a permit for this road.

In addition to the competent substantial evidence discussed regarding Petitioners' Exception No. 11, there is competent substantial evidence to show that the actual road alignment, which was never presented at hearing, is necessary to determine the type and nature of impacts. (Dennis Vol. 3: 629-30; Wentzel Vol. 4: 867, 890-91; Stephenson Vol. 6: 1259; Lowe Vol. 6: 1310, 1314; Brown Vol. 6: 1420). The District has not received a permit application for the roadway. (Wentzel Vol. 4: 857; Stephenson Vol. 6: 1259-69). At the conclusion of the hearing, it was not known exactly

where the roadway would be located, what the actual design of the roadway may entail, and what mitigation would be proposed.

Although Petitioners generally object to FOF 135, they do not offer any argument or citations to the record in opposition to the ALJ's finding that the impact of the Silverleaf development is speculative. Nevertheless, there is competent substantial evidence in the record to support this aspect of FOF 135. Documentation regarding the Silverleaf Application for Development Approval (ADA) was not placed into evidence, nor proffered. The Silverleaf ADA and the land uses contained therein have not been approved. (Brown Vol. 6: 1418-19). Moreover, it is typical that frequent changes are made to ADA's during the review process. (Lehman Vol. 6: 1427). Thus, the specific impacts of the Silverleaf ADA are speculative.

Although the District did not consider the Silverleaf ADA due to its speculative nature when applying the "out provision" of section 12.2.1.2(b), A.H., the ALJ found as follows at FOF 133, which was not excepted to by Petitioners:

The District did not evaluate the Silverleaf proposed development, but its analysis assumed that the upland areas surrounding the mitigation areas would eventually be improved similar to the single-family residential development that is occurring in the area surrounding the Reed and Rayland Tracts. This assumption did not diminish the long-term regional ecological value of the mitigation areas.

There is, therefore, sufficient competent substantial evidence in the record to support the ALJ's finding of ultimate fact that the impact of the possible construction of CR 2209 within the conservation easement area and the adjacent Silverleaf development is too speculative and conjectural to support a finding on the impact of such developments on the conservation easement's ecological value.

### Petitioners' Exception No. 13

Petitioners' Exception No. 13 states as follows:

Finding 137 is excepted to the extent it asserts the mitigation plan will offset adverse impacts to fish and wildlife. It is acknowledged that the fish and wildlife in Julington and Pottsburgh Creek will be adversely affected. Moreover, the mitigation being provided will continue to fail to provide any offset to the damage being done to Julington and Pottsburg Creek because it is nowhere near Julington and Pottsburg Creek, being at least 10 or more miles away. (Lewis, Tr. at 1186-98, 1212-13; Lowe, Tr. 1281, 1268-69; Meyer, 709-710; Wentzel, 840-41, 888; Dobberfuhl, Tr. 1354, 1401).

Petitioners do not explain the legal basis for their exception, and, therefore, the District need not rule on it. Section 120.57(1)(k), F.S. Nevertheless, the exception is rejected for the reasons set forth below.

FOF 137 states as follows:

The proposed mitigation plan offsets any adverse impacts to fish and wildlife caused by the project's proposed wetland impacts. The evidence also showed that the project will not cause the hydroperiod of wetlands or other surface waters to be altered so as to adversely affect wetland functions or surface water functions. This criterion is satisfied.

Petitioners take exception to a portion of FOF 137 that is actually a conclusion of law.

The determination of whether mitigation for a proposed project is sufficient is a conclusion of law and rests with the agency. Fla. Power Corp. v. State, Dept. of Environmental Regulation, 638 So.2d 545, 561 (Fla. 1<sup>st</sup> DCA 1994); 1800 Atlantic Developers v. Department of Environmental Regulation; 552 So.2d 946, 955 (Fla. 1<sup>st</sup> DCA 1989). FOF 137 appears in the section of the Recommended Order that deals with the criteria in Rule 40C-4.301(1)(d), F.A.C., and sections 9.1.1(d), 12.1.1(a), and 12.2, et. seq., A.H. These criteria require that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed



species by wetlands and other surface waters. We agree with Petitioners that evidence was presented that the project will adversely affect wildlife. (District Ex. 6 [p.5]). However, there also was evidence that the mitigation more than replaces the functions provided by the wetlands to be adversely affected by the project. (Wentzel Vol.4:840). Also, there is competent substantial evidence to show that the project will not cause the hydroperiod of wetlands or other surface waters to be altered so as to adversely affect wetland or surface water functions. (R.O. FOF 55; Kocur Vol.2:265-67; Wentzel Vol.4:767-68, 777; FCC Ex. 13D). Therefore, the record contains competent substantial evidence to support the factual underpinnings that form the basis of the ALJ's correct conclusion that the mitigation will offset adverse impacts to fish and wildlife.

We note that the portion of FOF 137 to which Petitioners take exception – that the mitigation offsets the impacts – is the conclusion reached after making a number of individual factual determinations that are set forth in the Recommended Order (see, e.g., FOFs 56 through 104), and that Petitioners did not take exception to most of those individual determinations. To the extent that a party fails to file written exceptions to a recommended order regarding specific issues, the party has waived such specific objections. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212, 1213 (Fla. 1<sup>st</sup> DCA 1991).

#### **Petitioners' Exception No. 14**

Petitioners' Exception No. 14 states as follows:

Finding 145 is excepted based upon the adverse impacts to fish and wildlife. (See citations for exception 13).

Petitioners do not explain the legal basis for the exception, and therefore the District need not rule on it. Section 120.57(1)(k), F.S. Nevertheless, for the reasons set forth below, the exception is rejected.

FOF 145 is one sentence and states as follows:

This factor is considered to be positive.

FOF 145 is more in the nature of a finding of ultimate fact, which, in combination with the six other factors involved in the public interest test, results in a conclusion of law as to whether a project is “contrary to the public interest.” This conclusion of law is infused with policy considerations resulting from balancing the seven factors of the public interest test. Sheridan v. Deep Lagoon, Inc., 22 F.A.L.R. 2358, 2387 (DEP 2000); Altman v. Kavanaugh, 15 F.A.L.R. 1558, 1562 (DER 1993); Fla. Power Corp. v. Fla. Dep’t of Env’tl. Regulation, 14 F.A.L.R. 4159, 4163 (DER 1992), aff’d, 638 So.2d 545 (Fla. 1st DCA 1994). FOF 145 appears in the section of the Recommended Order that deals with Rule 40C-4.302(1)(a)2., F.A.C., which is one of the seven factors to be balanced in the public interest test. This factor looks at “whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats.” District staff testified that, without mitigation, the project would adversely affect the conservation of fish and wildlife and their habitats. (District Ex. 6; Wentzel Vol.4:840). However, when considered with the mitigation plan, which more than offsets the proposed impacts, the factor is considered to be positive. (District Ex. 6; Wentzel Vol.4:840). The evidence showed that the mitigation plan will enhance Basin 5 in the long-term. (Wentzel Vol.4:840). Therefore, we find that the

ALJ's conclusion that this factor is positive is proper and that there is competent substantial evidence in the record to support this conclusion.

**Petitioners' Exception No. 15**

Petitioners' Exception No. 15 states as follows:

Finding 150 is excepted. The impacts to the wetlands on the FCC site will be permanent. This factor should not be analyzed in light of any proposed mitigation. (Lewis, Tr. 1213-14).

Petitioners do not explain the legal basis for the exception, and, therefore, the District need not rule on it. Section 120.57(1)(k), F.S. Nevertheless, this exception is rejected for the reasons set forth below.

FOF 150 states as follows:

FCC's development and impact to the wetlands on the FCC Site will be permanent. Even though the project is permanent, this factor is considered neutral because the proposed mitigation will offset the permanent adverse impacts.

FOF 150 appears in the section of the Recommended Order that deals with Rule 40C-4.302(1)(a)5., F.A.C., which is one of the seven factors to be balanced in the public interest test. This factor looks at "whether the activity will be of temporary or permanent nature." Although Petitioners do not dispute the conclusion that this factor is neutral, we note that there was competent substantial evidence in the record to support the ALJ's conclusion that this factor is neutral. (Wentzel Vol.4:841; District Ex. 6).

Instead, Petitioners take issue with the manner in which this factor is analyzed. Specifically, Petitioners argue that the mitigation component of the project should not be considered. However, in light of section 373.414(1)(b), F.S.<sup>5</sup>, it is the well-established

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<sup>5</sup> Section 373.414(1)(b), F.S. provides: If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny

precedent of the District that this public interest test factor is considered in light of proposed mitigation that offsets the permanent adverse impacts of a project. Griffin v. St. Johns River Water Management District, Case Nos. 98-0818 and 98-0819 (DOAH Nov. 2, 1998; SJRWMD Dec. 11, 1998) (FOF 91); Lee v. St. Johns River Water Management District, Case No. 99-1913, 1999 WL 1486620 (DOAH Sept. 1, 1999; SJRWMD Sept. 24, 1999) (FOF 60); Billie v. St. Johns River Water Management District, Case Nos. 00-2230 and 00-2231, 2001 WL 362658 (DOAH April 9, 2001; SJRWMD June 14, 2001) (FOF 53); Billie v. St. Johns River Water Management District, Case No. 03-1881, 2004 WL 283505 (DOAH Feb. 9, 2004; SJRWMD April 13, 2004) (FOF 90). Therefore, the ALJ's conclusion is consistent with the Governing Board's interpretation of this rule.

We also note that Petitioners did not take exception to the fact that the mitigation component of the project was considered when the other public interest test factors were evaluated.

#### **Petitioners' Exception No. 16**

Petitioners' Exception No. 16 states as follows:

Finding 151 is excepted. The current condition and relative value of the property adversely affected when offset by mitigation becomes a negative factor for the public interest tests. (Lewis, Tr. 1214).

Petitioners do not explain the legal basis for the exception, and, therefore, the District need not rule on it. Section 120.57(1)(k), F.S. Nevertheless, this exception is rejected for the reasons set forth below.

FOF 151 states as follows:

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a permit shall consider measures proposed by or acceptable to the applicant to mitigate adverse impacts that may be caused by the regulated activity.

The District assessed the value and functions of the wetlands on the FCC Site as "high" value and initially considered this factor to be negative. However, because the implementation of the mitigation plan will offset the wetland impacts, this factor is considered positive.

FOF 151 appears in the section of the Recommended Order that deals with Rule 40C-4.302(1)(a)7., F.A.C., which is one of the seven factors to be balanced in the public interest test. This factor looks at "the current condition and relative value of functions being performed by areas affected by the proposed activity." We find that the ALJ's conclusion was proper and that the record contains competent substantial evidence to support the factual underpinnings that form the basis of the ALJ's conclusion that this factor is positive. (Wentzel Vol.4:841-42; District Ex. 6).

#### **Petitioners' Exception No. 17**

Petitioners' Exception No. 17 states as follows:

Finding 153 is excepted. The testimony was consistent from the District that the amount of mitigation was insufficient until the Hunt Farm Tract, which is out of basin, was added. (Lowe, Tr. at 1295-97). There is no principled way to justify a finding that the mitigation within the basin is sufficient to offset direct and secondary impacts under the circumstances.

Petitioners' exception is rejected for the reasons set forth below.

FOF 153 states as follows:

The proposed mitigation for the project will result in the improvement of approximately 1,800 acres of wetlands within Basin 5, sufficient to offset the direct and secondary impacts in Basin 5.

Initially, it should be noted that the District need not rule on this exception because Petitioners have failed to provide requisite legal basis therefore. Section 120.57(1)(k), F.S. In addition, this finding is in the nature of a conclusion of law regarding the overall acceptability of the mitigation plan. It is based upon numerous predicate findings of fact pertaining to the nature of the impacts associated with the project and the mitigation that

is proposed to offset those impacts. Petitioners have failed to take exception to the majority of the underlying findings of fact that support this finding.<sup>6</sup>

Nevertheless, in considering this finding on the merits, it must first be noted that this finding was made in the context of the ALJ's analysis regarding the project's compliance with the cumulative impact criterion set forth in Rule 40C-4.302(1)(b), F.A.C, which requires that a project "[w]ill not cause unacceptable cumulative impacts upon wetlands and other surface waters." As will be further explained below, the analysis of mitigation to offset cumulative impacts under Rule 40C-4.302(1)(b), F.A.C, and section 12.2.8, A.H., is different from the analysis of mitigation that is required for the overall permit pursuant to the conditions for issuance set forth in Rule 40C-4.301, F.A.C. In particular, because a cumulative impact analysis is intended to consider the long-term impact of development within a drainage basin in conjunction with the long-term benefits associated with the mitigation plan, there is no factor applied in the cumulative impact mitigation analysis for time lag and risk. (Wentzel Vol. 4: 837-38, 911-13; Elledge Vol. 5: 1002-03). In contrast, mitigation for direct and secondary impacts under 12.2.2 and 12.2.7, A.H., must account for the present day value of the mitigation and, therefore, includes consideration of time lag and risk. (Wentzel Vol.4: 911-13). Therefore, the exclusion of the mitigation afforded by the Hunt Tract from the cumulative impact analysis did not result in a conclusion that the mitigation was inadequate for purposes of this analysis.

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<sup>6</sup> In addition, FOF 153 should be read in light of a similar finding in COL 209 that "[t]here was persuasive evidence that in the long term, the mitigation proposed within Basin 5 off-sets the proposed impacts because the project will have approximately 1,800 acres of wetland mitigation within Basin 5." This statement was not excepted to by Petitioners.

The cumulative impact doctrine considers the cumulative impacts on wetlands and surface waters of similar projects that exist or are reasonably expected in the future. See, e.g., Florida Power Corp. v. Dep't. of Env'tl. Regulation, 638 So.2d 545 (Fla. 1<sup>st</sup> DCA 1994), rev. denied, 650 So.2d 989 (Fla. 1994). The evaluation assumes that "reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications." Section 12.2.8, A.H. "The analysis asks the question whether the proposed system, considered in conjunction with past, present and future activities, would be the proverbial 'straw that breaks the camel's back' regarding the above referenced water quality or wetland and other surface water functions in the basin." Section 12.2.8.1, A.H.

Section 12.2.8, A.H., further provides:

If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the conditions for issuance in paragraph 12.1.1(g) will be satisfied.

As noted by the ALJ in Sierra Club, Inc. v. SJRWMD, DOAH Case No. 01-0583RP (rendered June 18, 2001):

If a project causes impacts to water quality or biological functions that are not offset in some fashion within the same drainage basin as the project, and other projects with similar impacts were likewise permitted by the District in the future, then these adverse impacts to the environment of the drainage basin could 'cumulate.'

(Final Order at 13-14). If, on the other hand, the mitigation offsets the project's adverse impacts within the same drainage basin as the project, no further cumulative impact analysis is needed because there would be no adverse impacts to cumulate with similar

future projects. Id. at 14; Sierra Club, Inc. v. SJRWMD, 816 So.2d 687, 689 (Fla. 5<sup>th</sup> DCA 2002).

Under the standard analysis that applies to the conditions for issuance, the wetland review criteria in sections 12.2.2 through 12.2.7, A.H., in conjunction with the mitigation criteria set forth in section 12.3, A.H., require that the mitigation offset the impacts to wetland functions that are lost from a present value perspective. In other words, there is an analysis of the present value of the impacted wetland and the present value of the proposed mitigation to determine whether the mitigation offsets the adverse impacts to wetlands at the point in time when the impacts occur. As such, there is consideration of the time lag and risk for the mitigation to be successfully achieved. In this case, additional mitigation located outside of Basin 5 was required to address time lag and risk and to ensure that the functions provided by the wetlands to be impacted would be offset in the present. (Wentzel Vol. 4: 912-13).

In contrast, the cumulative impact criterion considers the current project in conjunction with past, present and future projects to evaluate the long-term cumulative effect of multiple permitted projects within a drainage basin upon the water resources. Because this analysis looks at the resource from a long-term perspective, rather than a present time perspective, the time lag and risk components of the mitigation evaluation are no longer relevant. Time lag is considered to be irrelevant because the temporal loss of ecological value, when considered over the breadth of time, is extremely small in comparison with the permanent improvement in ecological value associated with the perpetual preservation, enhancement and creation of wetlands and upland ecosystems. (Wentzel Vol. 4: 837-38, 911-13; Eilledge Vol. 5: 1002-03).



An overall conclusion was reached at FOF 153 that the improvement of approximately 1800 acres of wetlands within Basin 5 was sufficient to offset the impacts within that Basin from the standpoint of cumulative impact. Therefore, pursuant to section 12.2.8, A.H., a cumulative impact analysis was not required because the adverse impacts within Basin 5 were fully mitigated within that basin. Expert testimony established that, in the long term, the mitigation located within Basin 5 offsets the proposed impacts because the project will have approximately 1,800 acres of mitigation located within that basin. (Wentzel Vol. 4: 837; District Ex. 6).

In addition to direct testimony regarding the above finding, there is competent substantial evidence in the record to support the factual underpinnings of FOF 153. The Rood Tract, the Rayland Tract, and the Tupelo Mitigation Bank are in Basin 5 -- the same regulatory drainage basin as the project site. (Wentzel Vol. 4: 836). The on-site preservation at the project site is also obviously within Basin 5. The Hunt Farm Tract, which is the only mitigation outside Basin 5, is located within Basin 8, immediately adjacent to Basin 5. (District Ex. 6). As explained above, mitigation at the Hunt Farm Tract was not needed for the cumulative impact analysis, but was needed to offset adverse direct and secondary impacts under sections 12.2.2 and 12.2.7, A.H. (Wentzel Vol. 4: 912-13).

The project will result in 126.8 acres of direct wetland impacts and 7.4 acres of secondary wetland impacts within the Basin 5. (District Ex. 6). Mitigation for the project will result in 121.5 acres of wetland creation, 363.6 acres of wetland enhancement, 937.7 acres of wetland preservation and 42.7 acres of upland preservation within Basin 5. (FCC Ex. 13A; District Ex. 6). In addition, 114.9 mitigation bank credits, equivalent

to approximately 379 acres, will be purchased from a mitigation bank located within Basin 5. (Kocur Vol. 2: 324; District Ex. 6).<sup>7</sup> Therefore, the net long-term result of this project within Basin 5 will be the improvement of approximately 1,800 acres of wetlands, including wetland creation at almost a 1:1 ratio to offset the loss of 134.2 acres of direct and secondary impacts. (Wentzel Vol. 4: 837). When compared to the 126.8 acres of direct wetland impacts, the net effect of the project over time will be to gain ecological value in the basin. (Wentzel Vol. 4: 837). In the long term, the adverse wetland impacts are fully offset within the same drainage basin as the impacts. (Dennis Vol. 3: 600-601; Wentzel Vol. 4: 837; Elledge Vol. 5: 1002-1003).

Lastly, to the extent Petitioners' exception could be interpreted as relating to water quality impacts, the parties have stipulated that this is not at issue. Section 12.2.8, A.H., provides:

Pursuant to paragraph 12.1.1(g), an applicant must provide reasonable assurances that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought. The impact on wetlands and other surface waters shall be reviewed by evaluating the impacts to water quality as set forth in subsection 12.1.1(c) and by evaluating the impacts to functions identified in subsection 12.2.2.

Paragraph 12.1.1(c), A.H., is the same as Rule 40C-4.301(1)(e), F.A.C. (water quality impacts). The parties stipulated that, as to Rule 40C-4.301(1)(e), the introduction of the application for a permit would establish a prima facie case of compliance with this provision. The application was introduced as Exhibits 13 A through E and 14 A and B. (Stip. 25; 12(d))

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<sup>7</sup> The 114.9 mitigation bank credits are "equivalent to the ecological value gained by the successful creation of one acre of wetland." (District Ex. 6; section 12.4.5(b), A.H.).

### **Petitioners' Exception No. 18**

Petitioners' Exception No. 18 states as follows:

Finding 154 that there will be no adverse cumulative impact is excepted. There was no proper cumulative impact analysis performed. FCC's analysis failed to consider the like-kind mitigation necessary. (See Dennis, Tr. at 614-15).

Petitioners' exception is rejected for the reasons set forth below.

Finding of Fact 154 states as follows:

Notwithstanding, FCC performed a cumulative impact analysis. After the District issued its preliminary intent to issue the ERP, Dr. Dennis performed a cumulative impact analysis and evaluated all of the reasonably foreseeable impacts in Basin 5, including Silverleaf and CR 2209. In accordance with that analysis, he opined that no more than seven percent of the "at risk" forested wetlands (FLUCCS Code numbers 611/617/630, FCC Ex. 46) would be impacted in the basin.

Petitioners do not provide a requisite legal basis for their exception and the District need not rule thereon. Section 120.57(2)(k), F.S. Nevertheless, Petitioners' exception is misplaced in contending that the cumulative impact analysis was not adequate in that FOF 154 does not make any finding as to the adequacy of such analysis. This finding simply describes the analysis that was done and the opinion that was offered by Dr. Dennis. FOF 155 is the finding in which the ALJ concludes that FCC's cumulative impact analysis was adequate. To the extent Petitioners' misplaced exception may be the result of a clerical error, the District would note that FOF 155 is dicta in that a cumulative impact analysis was not required in this case, as discussed above with regard to Petitioners' Exception No. 17. In addition, the last sentence of FOF 155 has been deleted pursuant to our ruling regarding District Exception No. 5.

### **Petitioners' Exception No. 19**

Petitioners' Exception No. 19 states as follows:

Finding 158 is more correctly characterized as a conclusion of law. Nevertheless, as a factual matter there is an agreement between FCC and the County of St Johns by which right-of-way for County Road 2209 across the Rayland Tract must be conveyed to St. Johns County. There is no dispute about those facts and consequently the Rayland Tract will not be able to have a conservation easement placed across it "in perpetuity."

Petitioners' exception is rejected for the reasons set forth below.

FOF158 states:

The settlement agreement does not create an encumbrance that prevents the recording of a conservation easement on the Rayland Tract. The settlement agreement does not impede the placement of a conservation easement on the Rayland Tract.

The District agrees with Petitioners that FOF 158 is more in the nature of a conclusion of law. The reasons stated with regard to rejection of Petitioners' Exception No. 6 are applicable to this exception as well. In addition, Petitioners do not provide a requisite legal basis for this exception. Section 120.57(1)(k), F.S.

**Petitioners' Exception No. 20**

Petitioners' Exception No. 20 states as follows:

Conclusion 177 is excepted because the mitigation does not provide greater longterm value and is not regionally significant. Additional reasons are set forth in Petitioners' Proposed Recommended Order at paragraphs 89, 90, 104-109.

Petitioners' exception is rejected for the reasons set forth below.

COL 177 states as follows:

The requirements of Section 12.2.1.2 b., A.H., have been met in this case. The persuasive evidence shows that FCC is implementing parts of four "plans of regional ecological value." The four plans are: 1) the Julington/Durbin Creek preservation corridor; 2) the Rood/Rayland preservation corridor; 3) the Tupelo Mitigation Bank ERP; and 4) the Lower St. Johns River Basin SWIM Plan.

To the extent Petitioners rely upon references to paragraphs in their Proposed Recommended Order as a basis for this exception, the District need not rule on this exception. An agency head's review of a recommended order is analogous to appellate court review. Charlotte County v. IMC Phosphates Co., 824 So.2d 298, 301 (Fla. 1<sup>st</sup> DCA 2002). Merely making reference to arguments in a document presented below without further elucidation does not suffice to preserve issues, and these claims are, therefore, deemed waived. See Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990). In addition, generally incorporating arguments contained in a prior memorandum of law fails to meet the requirement of section 120.57(1)(k), F.S., in providing a legal basis for the exception in that the specific points of law constituting the basis for the exception are not clearly identified. Although not obligated to do so, paragraphs 89, 90, and 104 through 109 of Petitioners' Proposed Recommended Order have been reviewed. Petitioners assert therein proposed findings of fact and ultimate fact that were reviewed by the ALJ and rejected. Proposed conclusions of law are also asserted, which have been addressed herein.

Petitioners' exception generally challenges the ALJ's finding of ultimate fact that the requirements of the "out provision" at section 12.2.1.2 b., A.H., as to "regional ecological value" have been met.<sup>8</sup> This determination of ultimate fact is infused with policy considerations and is, therefore, akin to a conclusion of law. Lee v. St. Johns River Water Management District, Case No. 99-1913, 1999 WL 1486620 (DOAH Sept. 1, 1999; SJRWMD Sept. 24, 1999). However, it is dependent upon numerous predicate findings of fact pertaining to the nature of the mitigation that has been proposed. The

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<sup>8</sup> Contrary to Petitioner's exception, section 12.2.1.2(b), A.H., contains no "regionally significant" criterion. Rather, it requires mitigation having "regional ecological value."

competent substantial evidence that supports the ALJ's conclusion of ultimate fact that the mitigation proposals are of regional significance is set forth in the ruling as to Petitioners' Exception No. 9. As noted therein, Petitioners have failed to take exception to the majority of factual findings that underlie this finding of ultimate fact.

**Petitioners' Exception No. 21**

Petitioners' Exception No. 21 states as follows:

Paragraphs 179 through 183 are excepted for the reasons set forth in paragraphs 89, 90, 104-109 of Petitioners' Proposed Recommended Order.

Petitioners' exception is rejected for the reasons set forth below.

In COLs 179 through 183, the ALJ made findings pertaining to the regional ecological value of the mitigation plan (COLs 179 through 182) and the greater long-term ecological value of the mitigation plan in relation to the wetlands to be impacted (COL 183). The ALJ applied the criteria set forth in Billie v. St. Johns River Water Management District, Case No. 03-1881, 2004 WL 283505, at \*9 (DOAH Feb. 9, 2004; SJRWMD April 13, 2004)(COL 178).<sup>9</sup> These findings largely incorporate previous findings of fact pertaining to the mitigation sites and are supported by competent

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<sup>9</sup> In Billie, the following factors were considered: 1) whether the mitigation area is part of a larger ecological system; 2) whether the mitigation area is part of an intact wetland system; 3) whether the impacted wetlands will be unlikely to maintain its functions in the long term; and 4) whether the mitigation area provides additional habitat for animal species not present in the impacted wetlands. The mitigation plan therein consisted of three parts: (1) preservation of certain wetlands and uplands on-site, as required by the DRI development order; (2) creation, enhancement and preservation of certain wetlands on-site and the preservation of certain uplands on-site, as required by prior District permits; and (3) the mitigation proposed for the project. Id. at 10-12. The plan was found to provide regional ecological value because the land encompassed therein was either adjacent to or in close proximity to certain regionally significant ecological resources or habitats, including the Cummer Trust property, and would provide a wildlife corridor between those resources, preserve their habitat, and ensure protection of water quality for those resources. Id. at 10-12.

substantial for the reasons stated with regard to Petitioners' Exception No. 9. As to the conclusion that the mitigation plan is of greater long-term regional ecological value, we find this conclusion was proper and that the record contains competent substantial evidence to support the factual underpinnings of this conclusion..<sup>10</sup>

### **Petitioners' Exception No. 22**

Petitioners' Exception No. 22 states as follows:

Paragraph 184 is excepted for the reasons set forth in exception 12 above. Additionally, Petitioners incorporate the points made in their memorandum of law on the FC/County Settlement agreement. The allegedly speculative road 2209 is more likely to be constructed than the FCC mitigation.

Petitioners' exception is rejected for the reasons set forth below.

Conclusion of Law 184 states as follows:

Petitioners' argument that FCC's proposed mitigation will be adversely affected by the proposed Silverleaf project, as well as potential CR 2209, is too speculative to be considered with respect to the regional significance and greater long-term ecological value of the mitigation proposed for impact. See Billie, 2004 WL 283505, at \*17, ¶ 81.

Petitioners incorporate by reference their Exception No. 12 and the argument presented therein, which addressed FOF 135. Finding of Fact No. 135 is no different in substance than COL 184. Both address the speculative nature of Petitioners' arguments as to the impact of the potential proposed CR 2209 and the proposed Silverleaf development on the Rayland mitigation tract. The grounds stated with regard to rejection of Petitioners' Exception No. 12 are, therefore, equally applicable with regard to this exception.

It is also worth noting that COL 184 cites to the case of Billie v. St. Johns River Water Management District, Case No. 03-1881, 2004 WL 283505 (DOAH Feb. 9, 2004;

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<sup>10</sup> As with Petitioners' Exception No. 20, Petitioners' proposed finding Nos. 89, 90, and 104-109 have been reviewed and do not provide any basis for rejecting or modifying the ALJ's findings.

SJRWMD April 13, 2004) at \*17, wherein it was determined that the filing of an application for development does not disqualify a mitigation plan from being a plan of regional ecological value. In that case, the ALJ stated:

81. The petitioners contend that a chan[g]e in circumstances has occurred which would adversely affect the mitigation plan as a plan of regional ecological value. They claim its efficacy will be reduced because of a proposed development to a tract of land known as the Ball Tract which would, in the Petitioners' view, sever connection between the Marshall Creek site and the 22,000-acre Cummer Trust Tract also known as "Twelve mile swamp." Although a permit application has been submitted to the Florida Wildlife Commission for the Ball Tract property, located northwest of Marshall Creek and across U.S. Highway 1 from Marshall Creek and the EV-1 site, no permit has been issued by the District for that project. Even if there were impacts proposed to wetlands and other surface waters as part of any development on the Ball Tract, mitigation would still be required for those impacts, so any opinion about whether the connection would be severed between the project site, the Marshall Creek site and the Cummer Trust Tract is speculative.

Petitioners also seek to incorporate by reference arguments that were made in a memorandum that was filed in these proceedings. The District need not address these contentions for the reasons stated as to Petitioners' Exception No. 20. Nevertheless, a review of said memorandum fails to provide any basis for rejection of COL 184, especially considering the fact that the legal question at issue regarding whether the subject settlement agreement constitutes an encumbrance that would take precedence over the conservation easement to be granted to the District is a matter that is not within the substantive jurisdiction of the District. Section 120.57(1)(l), F.S.

### **Petitioners' Exception 23**

Petitioners' Exception No. 23 states as follows:

Conclusion 201 that there is sufficient detrital export mitigation misses the point that Julington and Pottsburg Creek will not be obtaining any of the mitigating detrital export – ever. Moreover, the portion of the mitigation



from the Hunt Farm is not even in the same basin and therefore does not offset adverse impacts. Fla. Stat. § 373.41 4(8)(b).

Petitioners do not explain the legal basis for the exception, and, therefore, the District need not rule on it. Section 120.57(1)(k), F.S. Nevertheless, this exception is rejected for the reasons below.

COL201 states as follows:

Notwithstanding such evidence and assuming some detrital export will be lost to Julington and Pottsburg Creeks, the detrital export loss is being mitigated on a four-to-one ratio. Thus, even assuming a detrital export loss and some potential impacts off-site, the loss is off-set through the mitigation.

COL 201 appears in the section of the Recommended Order that deals with Rule 40C-4.302(1)(a)4., which is one of the seven factors to be balanced in the public interest test. This factor looks at “whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.” COL 201 relates to the ALJ’s overall conclusion in COL 202 (to which Petitioners did not take exception) that this public interest factor is negative to neutral. Much of the six-day administrative hearing was devoted to presenting evidence related to the sufficiency of the mitigation for offsetting the detrital export functions of the wetlands and other surface waters proposed to be impacted. There is evidentiary support for COL 201, which concludes that the detrital export losses will be offset through mitigation, as we have cited in our rulings on Petitioners’ Exceptions 2, 3, 4, 5, 7, and 8.

#### **Petitioners’ Exception No. 24**

Petitioners’ Exception No. 24 states as follows:

The Conclusion of Law in paragraph number 203 is faulty. When the proposed activity causes adverse impacts that are permanent the factor is considered negative regardless of mitigation proposed. Rule 40C-4.302,

A.H. does not include analysis of mitigation to determining of the activity (sic) is permanently offset.

COL 203 states as follows:

In accordance with Florida Administrative Code Rule 40C-4.302(1)(a)5., it must be considered whether the activity will be of a temporary or permanent nature. Although the wetland impacts are permanent, the mitigation is also permanent in alleviating any adverse impacts. This factor is therefore a neutral.

Petitioners' exception is rejected for the reasons explained in our ruling on

Petitioners' Exception No. 15.

**Petitioners' Exception No. 25**

Petitioners' Exception No. 25 states as follows:

Conclusion of Law number 205 is completely inside out. There is no evidence or likelihood of further urbanization or encroachment of the FCC proposed site. Consequently, that is not a matter that can or should be considered for purposes of determining whether the mitigation will compensate for the loss. Notwithstanding the Administrative Law Judge's decision to consider further encroachments at the FCC site, he has refused to consider the proven impacts and encroachments on the mitigation parcels such as roads and DRI's even though those issues determine whether or not the mitigation will be sufficient. Conclusion 205 additionally erroneously finds the water quality of the St. Johns River will be improved. There is no evidence for improvement. The parties stipulated there would be no adverse water quality impacts, but that is not the same as saying there will be an improvement.

Petitioners' exception is rejected for the reasons set forth below.

COL 203 states as follows:

The proposed mitigation will compensate for and maintain the current conditions and relative values and functions of the wetlands to be impacted by the Project and will provide additional wetland functions not existing on the Site. The functions that the impacted wetlands currently provide will continue to be diminished by encroaching development pressure from the highly urbanized surroundings. The proposed mitigation is part of an overall plan that will provide regional ecological value, which

enhances wildlife corridors, preserves the integrity of wetland and upland communities within the basin despite development pressures, improves the water quality of the St. Johns River, and increases the value of wetland habitat available for fish, wildlife, and listed species in the long term. The proposed mitigation will provide greater long-term benefits than the on-site wetlands being impacted can provide because development around the wetland to be impacted would continue to diminish its existing functional value, while the proposed mitigation will permanently preserve impacted wetlands through creation, enhancement, and conservation. Thus, this factor is considered positive.

Petitioners contend that the ALJ's finding regarding further urbanization or encroachment of the FCC site is not supported by competent substantial evidence. To the contrary, there is competent substantial evidence that the functions the impacted wetlands currently provide will be diminished by encroaching development pressure. (Kocur Vol. 2: 336; 341). Petitioners also contend that there is no evidentiary foundation for the finding that the mitigation will improve the water quality of the St. Johns River. Here too, there is competent substantial evidence that the mitigation will improve the water quality of the St. Johns River. (Wentzel Vol. 4: 818-20; Elledge Vol. 5: 999). Lastly, Petitioners contend that development pressures at the mitigation sites, such as roads and DRIs, should have been considered in determining whether the mitigation is "sufficient." As previously noted, however, failure to make a proposed finding of fact is not grounds for an exception. In any event, there is competent substantial evidence in the record to support the finding that the implementation of the mitigation plan is more than adequate to offset the wetland impacts. (Wentzel Vol. 4: 841-842). The competent substantial evidence supporting the conclusion of law that the mitigation plan is sufficient to address project impacts has been discussed in ruling upon Petitioners' Exceptions Nos. 13 & 16.

As to Petitioners' contention that CR 2209 and the Silverleaf ADA should have been considered in terms of whether the mitigation is sufficient, the District has addressed this contention in its rulings as to Petitioners' Exceptions Nos. 6, 11, 12, 19, 22 and 28.

**Petitioners' Exception No. 26**

Petitioners' Exception No. 26 states as follows:

Conclusion 206. Based on arguments made previously, paragraph number 206 is excepted because the balance of the factors weighs contrary to the public interest.

Petitioners' exception is rejected for the reasons set forth below.

COL 206 states as follows:

All factors of the public interest "balancing test" are determined to be positive (two) or neutral (four), except one which is negative to neutral. Overall, the portions of the project located in, on, or over wetlands or other surface waters are not therefore considered to be contrary to the public interest.

Pursuant to section 120.57(1)(k), F.S., the District need not rule on this exception in that Petitioners have failed to provide a sufficient legal basis therefor. Nevertheless, we have provided rulings to the extent feasible.

Whether a project is contrary to the public interest is determined by balancing the seven statutory criteria set forth in section 373.414(1)(a), F.S. Pursuant to Rule 40C-4.302(1)(a), F.A.C., and section 12.2.3, A.H, FCC must provide reasonable assurance that the parts of its surface water management system located in, on, or over, wetlands are not "contrary to the public interest." It was not required to meet the more stringent criterion that these parts of the project are clearly in the public interest because no part

of the system will significantly degrade or be located within an Outstanding Florida Water. See, paragraph 40C-4.302(1)(a), F.A.C. (District Ex. 6). Ultimately, whether a project meets the public interest test is a policy matter to be decided by the District -- not a factual matter to be decided by the ALJ. Florida Power Corp. v. Dept. of Env'r. Reg., 638 So.2d 545, 561 (Fla. 1<sup>st</sup> DCA 1994).

COL 206 is a conclusion of law that is infused with policy considerations. It applies statutory and rule criteria to the underlying factual elements pertaining to the project's impacts, the mitigation plan, and considerations of public policy to reach the ultimate conclusion as to whether the project is contrary to the public interest. There is competent substantial evidence in the record to support the factual underpinnings of the ALJ's conclusion.

The direct findings pertaining to the public interest elements at issue herein are delineated in FOFs 140 through 151. Of those, Petitioners did not take exception to FOFs 140 through 144, and 146 through 149. They filed exceptions only to FOFs 145, 150 and 151 (Exception Nos. 14, 15 and 16), which have been denied for the reasons stated herein. Petitioners have, therefore, failed to provide any factual predicate for overturning COL 206.

There is competent substantial evidence in the record to support the ALJ's finding that that four of the public interest factors are neutral, two are positive, and one is negative to neutral. The project will be of a permanent nature. (Wentzel Vol. 4: 841). Even though permanent, this factor is considered neutral because the proposed mitigation will offset the permanent adverse impacts. (Wentzel Vol. 4: 841). Further, it was stipulated that project would not adversely affect the public health, safety, or

welfare, or property of others, navigation, the flow of water, or significant historic or archeological resources. (Stip. 20-21, 25-26). In addition, the project will not cause harmful erosion or shoaling. (Stip. 20). The evidence showed that the factors concerning conservation of fish and wildlife and the current condition and relative value of functions being performed were positive because implementation of the mitigation plan is more than adequate to offset the wetland impacts. (Wentzel Vol. 4: 841-42). Although the mitigation plan will improve detrital production and primary productivity within the basin in which it is located, the project will decrease the acreage of contiguous wetlands providing detrital production and primary productivity in the vicinity of the project in the downstream waters of Julington and Pottsburg Creeks. (Wentzel Vol. 4: 841). Therefore, District staff considered that this factor to be negative. (District Ex. 6). In COL 202, the ALJ determined this factor to be negative to neutral, but stated that even if the factor were considered negative, the project would still not be contrary to the public interest.

After balancing all of these factors, the Governing Board upholds the ALJ's conclusion that the project is not contrary to the public interest.

**Petitioners' Exception No. 27**

Petitioners' Exception No. 27 states as follows:

Conclusions 211 and 212 are excepted because, as stated above, the impacts are not offset within the basin. If the Hunt Farm was not included, the testimony of the District personnel was that there was inadequate mitigation. Furthermore, the cumulative impact analysis provided by the applicant was never provided prior to the hearing and the analysis provided at the hearing was inadequate and without the proper analysis of proposed like-kind mitigation.

Petitioners' exception is rejected as to COL 211 and granted as to COL 212 for the reasons set forth below.

COLs 211 and 212 provide as follows:

211. The evidence demonstrated that the adverse impacts to the functions of wetlands within Basin 5 are off-set within Basin 5, the same drainage basin. Accordingly, the project will not cause adverse cumulative impacts and no cumulative impact analysis is required for the impacts occurring in Basin 5. See § 373.414(8), Fla. Stat.

212. Even assuming a cumulative impact analysis was required, FCC performed an analysis that demonstrated no unacceptable cumulative impacts would occur.

As to COL 211, the first sentence is identical in its conclusion to FOF 153, which was addressed with regard to Petitioners' Exception No. 17. This exception is, therefore, rejected for the reasons stated with regard to Petitioners' Exception No. 17. The second sentence of COL 211 is a conclusion of law that follows as a matter of law based upon the conclusion that the wetland impacts within Basin 5 are offset within Basin 5. See section 373.414(8)(b), F.S, and section 12.2.8, A.H.

It is also worth noting that Petitioners have not objected to COLs 209 and 210, which support COL 211. Moreover, FOFs 56 through 105 provide factual support for COL 211. With the exception of FOFs 75, 86, and 103, Petitioners have not taken exception to these findings (see Petitioners' Exception Nos. 6 through 8). Inasmuch as Exceptions 6 through 8 have been rejected, there is no basis for rejecting COL 211.

As to COL 212, this finding is dicta and immaterial to the result in this case inasmuch as there was no requirement that a cumulative impact analysis be prepared, due to the fact that the mitigation proposed within Basin 5 will offset the project impacts

within that basin.<sup>11</sup> The District also takes exception to COL 212 (District Exception No. 7) and concurs with Petitioners that COL 212 should be rejected because the FCC cumulative impact analysis was inadequate for the grounds set forth in District Exception No. 5, which pertains to FOF 155. For the reasons set forth in response to District Exception Nos. 5 and 7, this portion of the exception is granted.

Without citation to the record, Petitioners also object that the FCC cumulative impact analysis was never provided prior to hearing. Such matter relates to the conduct of the hearing and the application of the rules of evidence, which lie outside the substantive jurisdiction of the District to address and are not ruled upon by the granting of this exception. Section 120.57(1)(l), F.S.; Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1<sup>st</sup> DCA 2001).

#### **Petitioners' Exception No. 28**

Petitioners' Exception No. 28 states as follows:

Conclusion 216 that the settlement agreement between St. Johns County and FCC does not grant St. Johns County any right, or interest, in the Rayland property, nor create an encumbrance is wrong as a matter of law on all three points. For the reasons set forth in petitioners' Memorandum of Law on this issue, this conclusion is excepted. Additionally, FCC has not shown a "substantial likelihood" the mitigation over the Rayland Tract will be successfully implemented. e.g., Dade Cty. v. Coscan, FL, Inc., 609 So.2d 644, 648 (Fla. 3rd DCA1992).

Petitioners' exception is rejected for the reasons set forth below.

COL 216 provides as follows:

The settlement agreement, however, does not create or grant St. John's County any right or interest in the Rayland property. Thus, no encumbrance is created by the settlement agreement that will prevent FCC from recording the conservation easements.

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<sup>11</sup> See discussion, Petitioners' Exception No. 17.



COL 216 relates to the same legal question that has been raised in Petitioners' Exception Nos. 6 and 19. This exception must be rejected for the reasons stated above with regard to those exceptions.

**Petitioners' Exception No. 29**

Petitioners' Exception No. 29 states as follows:

Conclusions 218-221 are disputed for all the foregoing reasons, and the permit should be denied.

Petitioners' exception is rejected for the reasons set forth below.

Petitioners object to COLs 218 through 221 without any delineation of error as required by section 120.57(1)(k), F.S. The District is not obligated to sift through the Petitioners' Exceptions to pick and discard those it thinks Petitioners are referring to in this exception. Therefore, the District need not rule on this exception. To the extent a ruling may be required as to this exception, this exception is rejected based upon a determination that the findings of fact and conclusions of law that have been heretofore accepted by this Final Order provide sufficient competent substantial evidence and sufficient predicate findings of fact to support the ultimate conclusions of law and fact contained therein.

**RULINGS ON DISTRICT'S EXCEPTIONS**

**District's Exception No. 1**

District staff take exception to FOF 75 to the extent that it could be read as a recommendation to the Governing Board to add a permit condition requiring that the conservation easement over the Rayland Tract prohibit the construction of roads. For the reasons discussed below, we agree with District staff that no additional permit condition is warranted. Therefore, the exception is granted.

FOF 75 states as follows:

The Rayland Site includes wetland and upland preservation, wetland enhancement, and wetland creation. The entire Rayland Tract will be placed in a conservation easement, which among other things, will prohibit roads. T. 64-65. This should be a required condition of the ERP.

We note that from reading FOF 75, it is not clear that the ALJ is, in fact, recommending an additional permit condition. However, even if the ALJ is making a recommendation, there is competent substantial evidence in the record that an existing permit condition addresses the recording of a conservation easement on the Rayland Tract that prohibits road construction. (District Ex. 6 [Other Condition 24]). The permit condition requires that the conservation easement include restrictions pursuant to section 704.06, F.S., which in turn defines a conservation easement as a right or interest in real property which may prohibit the “[c]onstruction of ...roads...” Section 704.06(1)(a), F.S. As part of its permit application, FCC submitted a proposed conservation easement for the Rayland Tract. (FCC Ex. 4, Tab 2). The language in section 2(a) of the proposed conservation easement prohibits the construction of roads. Id. The proposed conservation easement allows for the maintenance of existing trail roads, but it does not allow any type of new road to be constructed. Id. The existing permit condition and the proposed conservation easement accomplish the ALJ’s finding that the “entire Rayland Tract will be placed in a conservation easement, which among other things, will prohibit roads.” No additional conditions prohibiting road construction are necessary.

**District’s Exception No. 2**

District staff take exception to the second sentence of FOF 99 on the grounds that there is no competent substantial evidence to support the finding as written. For the reasons discussed below, we agree with District staff that the finding is not

supported by competent substantial evidence. Therefore, the exception is granted, and FOF 99 is modified as follows:

The District also determined that detrital export impacts should also be mitigated and used a four to one wetland creation ratio. *Id.* at 25. The direct impact number of 126.8 acres was multiplied times four to equal 507.2 acres of mitigation needed for total detrital export impacts. (Although the Applicant's Handbook does not provide a ratio for detrital export, the District considered a range for the ratio and concluded a four-to-one ratio was appropriate. The ratio chosen is reasonable.)

Modifying this finding will not change the outcome of this proceeding. Moreover, the modification is consistent with FOF 45 in which the ALJ correctly stated that there were "507.2 acres of mitigation" (as opposed to 507.2 acres of detrital export impacts).

There is no competent substantial evidence that there would be 507.2 acres of detrital export impacts associated with the project. However, there is competent substantial evidence that District staff calculated that 507.2 acres of mitigation were needed to offset the loss of detrital export functions provided by the 126.8 acres of wetlands proposed to be impacted. In calculating the number of acres of mitigation needed to provide the offset, District staff assumed that all 126.8 acres of wetlands to be impacted were exporting detritus. (R.O. FOFs 45 and 99; District's PRO FOF 40; Wentzel Vol. 4:827-833). Next, District staff determined that a four-to-one ratio would be appropriate for mitigation to offset the loss of detrital export functions being provided by the wetlands to be impacted. (R.O. FOFs 45-46, 99-100; District's PRO FOF 40; Wentzel Vol. 4:827). Then, District staff multiplied the 126.8 acres of impact by 4 (due to the 4:1 ratio) to yield 507.2 acres of mitigation needed to offset detrital export functions. (R.O. FOFs 45-46, 99-104; Wentzel Vol. 4:827).

District staff made these calculations for the purpose of evaluating the ability of the mitigation plan to specifically offset the loss of detrital export functions. (R.O. FOFs 99-104; Wentzel Vol. 4:827-833; Petitioners' Ex. 85 [p.26]). In the end, District staff determined that the mitigation plan more than offsets the detrital export functions that would be lost by impacting 126.8 acres of wetlands. (R.O. FOF 103-104; Wentzel Vol. 4:833; Petitioners' Ex. 85 [p.26]).<sup>12</sup>

### **District's Exception No. 3**

District staff take exception to FOF 103 on the ground that there is no competent substantial evidence to support the finding as written. For the reasons discussed above in our ruling as to District Exception No. 2, we agree that the finding is not supported by competent substantial evidence. Therefore, the exception is granted, and FOF 103 is modified as follows:

The total detrital export offset was 606.5 acres versus proposed detrital export impacts of requiring 507.2 acres of mitigation. P Ex. 85 at 26.

Modifying this finding will not change the outcome of this proceeding.

### **District's Exception No. 4**

District staff take exception to a portion of FOF 139<sup>13</sup> on the ground that there is no competent substantial evidence to establish a mitigation monitoring period that differs from the five-year monitoring period recommended by District staff. For the reasons discussed below, we agree that no change to the monitoring period is warranted. Therefore, the exception is granted.

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<sup>12</sup> For more explanation of these calculations, see our ruling on Petitioners' Exception No. 8.

<sup>13</sup> At the conclusion of the Recommended Order, the ALJ states that the permit should be issued with "conditions set forth in the Technical Staff Report dated April 4, 2005, and as suggested herein. FOF 138." It appears that the ALJ intended to refer to FOF 139, which recommends consideration of extending the monitoring period, because FOF 138 contains no recommendation.

FOF 139 states as follows:

FCC presented evidence that its mitigation plan was fully capable of being performed and functioning as proposed, based on generally accepted engineering and scientific principles. However, the District should consider whether the monitoring period of five years should be extended as a result of the extensive mitigation proposed, including wetland creation. This criterion is satisfied.

On the one hand, the finding states that the applicable criterion is satisfied. On the other hand, the finding suggests that the District consider extending the monitoring period beyond five years. Having reviewed the record, it appears that the ALJ's suggestion is based on testimony that the monitoring duration is too short given the 50 years or more that it will take for the wetland creation sites to achieve functional attributes. (Petitioners' PRO FOF 54; Lewis Vol. 6:1225-26).

The ALJ recommended issuance of the ERP with the conditions set forth in the Technical Staff Report. (R.O. p.74). The Technical Staff Report contains "Special Conditions" that are referenced by number, including Special Conditions 15, 17, and 18. (District Ex. 6 and 8). Those Special Conditions state as follows:

15. The Permittee must furnish the District with two copies of an annual monitoring report in the month of August on District form EN-55 for the time period stated in this permit's success criteria condition.

17. Successful establishment of the wetland mitigation area will have occurred when:

- A. At least 80 percent of the planted individuals in each stratum have survived throughout the monitoring period and are showing signs of normal growth, based upon standard growth parameters such as height and base diameter, or canopy circumference; and,
- B. At least 80 percent cover by appropriate wetland herbaceous species has been obtained; and,
- C. Hydrologic conditions generally conform to those specified in the mitigation plan; and,
- D. The above criteria have been achieved by the end of a 5 year period following initial planting.

18. If successful establishment has not occurred as stated above, the permittee must apply to the District for a permit modification no later than 30 days following the termination of the monitoring period. The application must include a narrative describing the type and causes of failure and contain a complete set of plans for the redesign and/or replacement planting of the wetland mitigation area so that the success criteria will be achieved. Within 30 days of District approval and issuance of the permit modification, the permittee must implement the redesign and /or replacement planting. Following completion of such work, success criteria as stated above or modified by subsequent permit must again be achieved. In addition, the monitoring required by these conditions must be conducted.

In addition, the mitigation plan, which is incorporated as a condition of the permit, contains details on the monitoring that will take place during the five-year period. (FCC Ex. 13A [mitigation plan]; District Ex. 6 [Other Condition 16]).

These permit conditions require annual monitoring reports for five years. If the success criteria are not met within five years, then the permittee is required to apply for a permit modification to redesign and/or replace the planting, and the new work must itself be monitored for five years. Therefore, the existing permit conditions provide a mechanism for ensuring mitigation success if the success criteria are not met within five years.

**District's Exception No. 5**

District staff take exception to a portion of FOF 155 to the extent that the ALJ concludes that the cumulative impact analysis provided at the administrative hearing complies with section 373.414(8), F.S., and section 12.2.8, A. H. For the reasons discussed below, we agree with District staff that the cumulative impact analysis was not properly performed. Therefore, the exception is granted, and FOF 155 is modified as follows:

Approximately 25,000 (roughly 20 percent of 139,051) acres of FLUCCS Code 611/617/630 forested wetlands are already in some form of public ownership and control. FCC Exs. 30 and 46. Approximately 952 acres of the similar FLUCCS Code forested wetlands would be the applicable cumulative impact to consider (13,600 x .07). ~~Thus, after applying the guidance contained in Section 373.414(8), Florida Statutes, and Section 12.2.8, A.H., there was persuasive evidence that the project will not cause adverse cumulative impacts.~~

Even though the cumulative impact analysis was not properly performed, the analysis was not required. Therefore making this modification will not change the outcome of the proceeding. Indeed, we uphold the ALJ's conclusion in COL211 that "no cumulative impact analysis is required" and that "the adverse impacts to the functions of wetlands within Basin 5 are off-set within Basin 5." However, we think it is necessary to modify this finding, because otherwise we leave the impression that FCC's cumulative impact analysis was sufficient under our interpretation of applicable law.

Although labeled as a finding of fact, this portion of FOF 155 is a conclusion of law. Battaglia Properties v. Fla. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5<sup>th</sup> DCA 1994). The conclusion of law is within the Governing Board's substantive jurisdiction and, therefore, may be rejected or modified in accordance with section 120.57(1)(l), F.S.

The ALJ incorrectly concluded that the cumulative impact analysis complied with section 373.414(8), F.S., and section 12.2.8, A.H. An agency has the primary responsibility for interpreting statutes and rules within its regulatory jurisdiction and expertise. Pub. Employees Relation Comm'n v. Dade County Police Benevolent Ass'n, 467 So.2d 987, 989 (Fla. 1985). Great deference is accorded to an agency's interpretation of the statutes and rules that it enforces, and such an interpretation should not be overturned unless it is clearly erroneous. Gross v. Dep't of Health, 819 So.2d 997,

1002 (Fla. 5<sup>th</sup> DCA 2002). The agency's interpretation of such statutes and rules does not have to be the only interpretation, or even the most desirable interpretation, as long as the interpretation is a permissible one. Stuart Yacht Club & Marina v. Dep't of Natural Resources, 625 So.2d 1263, 1267 (Fla. 4<sup>th</sup> DCA 1993). The interpretation of section 373.414(8), F.S., and section 12.2.8, A.H., is within the regulatory jurisdiction and expertise of the Governing Board.

Section 373.414(8), F.S., provides:

- (a) The governing board or the department, in deciding whether to grant or deny a permit for an activity regulated under this part shall consider the cumulative impacts upon surface water and wetlands, as delineated in s. 373.421(1), within the same drainage basin as defined in s. 373.403(9), of:
1. The activity for which the permit is sought.
  2. Projects which are existing or activities regulated under this part which are under construction or projects for which permits or determinations pursuant to s. 373.421 or s. 403.914 have been sought.
  3. Activities which are under review, approved, or vested pursuant to s. 380.06, or other activities regulated under this part which may reasonably be expected to be located within surface waters or wetlands, as delineated in s. 373.421(1), in the same drainage basin as defined in s. 373.403(9), based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.
- (b) If an applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets these adverse impacts, the governing board and department shall consider the regulated activity to meet the cumulative impact requirements of paragraph (a). However, this paragraph may not be construed to prohibit mitigation outside the drainage basin which offsets the adverse impacts within the drainage basin.

Section 12.2.8, A.H., provides, in relevant part:

If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the conditions for issuance in paragraph 12.1.1(g) will be satisfied.



In cases where the adverse impacts to the functions of wetlands and other surface waters are not fully offset within the same drainage basin as the impacts, section 12.2.8, A.H., provides:

[A]n applicant must provide reasonable assurance that the proposed system, when considered with the following activities, will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters, within the same drainage basin:

(a) projects which are existing or activities regulated under part IV, chapter 373 which are under construction or projects for which permits or determinations pursuant to section 373.421 or 403.914 have been sought.

(b) activities which are under review, approved, or vested pursuant to section 380.06, or other activities regulated under part IV, chapter 373 which may reasonably be expected to be located within wetlands or other surface waters, in the same drainage basin, based upon the comprehensive plans, adopted pursuant to chapter 163, of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations.

Only those activities listed in paragraphs (a) and (b) which have similar types of impacts (adverse effects) to those which will be caused by the proposed system will be considered. (emphasis added)

As District staff explained in its Exceptions to Recommended Order, and as FCC's witness testified, when performing a cumulative impact analysis pursuant to section 373.414(8), F.S., and section 12.2.8, A.H., it is necessary to consider the "like kind of project," "like kind of impact," and "like kind of mitigation." (Dennis Vol. 3:614). The analysis presented by FCC did not consider the "like kind of mitigation" that is required to perform the cumulative impact analysis. Instead, FCC used a blended mitigation ratio of 14:1 that was calculated by dividing the number of acres of mitigation within Basin 5 (1,800) by the number of acres proposed to be impacted (126.8). (R.O. FOF 153; Dennis Vol.3:613-614). Because the mitigation plan proposed for this project

includes different types of mitigation (preservation, enhancement, creation, and mitigation bank credits), the cumulative impact analysis should have considered the kinds of mitigation included in the mitigation plan rather than a simplified, blended mitigation ratio. (R.O. FOF 94-95).

In accordance with section 120.57(1)(l), F.S., for the reasons discussed herein, we find that the last sentence of FOF 155 is actually a conclusion of law that is within our substantive jurisdiction and that modifying FOF 155 by deleting the last sentence results in a conclusion that is as or more reasonable than the one provided by the ALJ.

**District's Exception No. 6**

District staff take exception to a portion of footnote 7 to COL171 because the 2001 case cited in the footnote has been superceded by a recently decided 2005 case and, therefore, the footnote incorrectly describes current law. For the reasons discussed below, we agree with District staff that the footnote does not reflect the District's interpretation of section 12.2.1.2, A.H. (the elimination or reduction "out provisions"). The exception is granted, and footnote 7 to COL171 is modified as follows:

In Billie, Case Nos. 00-2230 and 00-2231, 2001 WL 362658 (DOAH April 9, 2001; SJRWMD June 14, 2001), the District explained that "section 12.2.1.1, A.H., only requires an elimination and reduction analysis when: (1) a 'proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of subsection 12.2.2 through 12.2.3.7,' or (2) neither exception within section 12.2.1.2, A.H., applies." SJRWMD Final Order at 7-8. A subsequent case supercedes that final order and explains that section 12.2.1.2(b), A.H., is not an exemption. See The Sierra Club and St. Johns Riverkeeper, Inc. v. St. Johns River Water Management Dist., DOAH Case No. 05-814RX, ¶ 70, 102, 103 (DOAH May 3, 2005), appeal pending, Case No. 1D05-2607.

Modifying this footnote will clarify that sections 12.2.1.2(a) and (b), A.H., are not “exceptions” or “exemptions,” but rather, “alternatives.” We note that the ALJ correctly referred to sections 12.2.1.2(a) and (b), A.H., as “alternatives” to elimination or reduction in COL 171 where this footnote appears, and he cited to the 2005 case in COL 176. Therefore, modifying the footnote will bring consistency to the Final Order.

In accordance with section 120.57(1)(l), F.S., for the reasons discussed below, we find that the statement in the footnote that is supported by the 2001 case involves legal issues that are within the Governing Board’s substantive jurisdiction and that modifying the footnote by adding the 2005 case results in a conclusion that is as or more reasonable than the one provided by the ALJ. The modification will not change the outcome of the proceeding.

Rule 40C-4.301(3), F.A.C., requires compliance with “the provisions for elimination or reduction of impacts” contained in the Applicant’s Handbook.<sup>14</sup> Applicants may comply with the provisions for elimination or reduction of impacts by satisfying section 12.2.1.1, A.H. (implementing practicable design modifications to reduce or eliminate impacts) or by satisfying either of the two alternatives or “out provisions” in section 12.2.1.2, A.H. Thus, there are three possible ways to meet the elimination or reduction part of Rule 40C-4.301(3), F.A.C.

Section 12.2.1, A.H., is entitled “Elimination or Reduction of Impacts” and has three subsections. The first subsection, section 12.2.1.1, A.H., requires the District to consider whether the applicant has implemented practicable design modifications to

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<sup>14</sup> Rule 40C-4.301(3), F.A.C., provides as follows: “The standards and criteria, including the mitigation provisions and the provisions for elimination or reduction of impacts, contained in Applicant’s Handbook: Management and Storage of Surface Waters adopted by reference in Rule 40C-4.091, F.A.C., shall determine whether the reasonable assurances required by subsection 40C-4.301(1) and Rule 40C-4.302, F.A.C., have been provided.”

reduce or eliminate adverse impacts, except as provided in section 12.2.1.2, A.H. The second subsection, section 12.2.1.2, A.H., contains the two alternatives that are often referred to as “out provisions:”

The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

- a. the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site specific analysis using the factors in subsection 12.2.2.3, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or
- b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

The third subsection, section 12.2.1.3, A.H., requires the District to deny an application where the modifications and mitigation do not result in a permissible system.

In the 2001 case, the District’s Final Order stated that section 12.2.1.2, A.H., is an “exception” to section 12.2.1.1, A.H. Bobbie C. Billie, Shannon Larsen, and The Sierra Club v. St. Johns River Water Management District and Hines Interests Limited Partnership, Case Nos. 00-2230 and 00-2231, 2001 WL 362658 (DOAH April 9, 2001; SJRWMD June 14, 2001 at 6-9). Courts have often used the terms ‘exception’ and ‘exemption’ interchangeably. Id. Thus, under the reasoning in Billie, section 12.2.1.2, A.H., could also arguably be considered an “exemption” from section 12.2.1.1, A.H.

However, section 12.2.1.2(b), A.H., was the subject of a recent rule challenge, and the ALJ concluded that “the Out Provision [section 12.2.1.2(b)] is not an exemption from permitting.” The Sierra Club and St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District, DOAH Case No. 05-814RX, p. 35, ¶ 70 (DOAH May 3,

2005), appeal pending, Case No. 1D05-2607. Therefore, section 12.2.1.2 contains two alternatives to section 12.2.1.1, A.H. (rather than being exemptions or exceptions).

#### **District's Exception No. 7**

District staff take exception to COL 212 wherein the ALJ concludes that the cumulative impact analysis that was presented at the administrative hearing demonstrated that no cumulative impacts would occur. For the reasons discussed in our ruling on District Exception No. 5, we agree that the cumulative impact analysis provided by FCC did not satisfy section 373.414(8), F.S., and section 12.2.8, A.H. Therefore, the exception is granted, and COL 212 is rejected:

~~Even assuming a cumulative impact analysis was required, FCC performed an analysis that demonstrated no unacceptable cumulative impacts would occur.~~

Because no cumulative impact analysis was required, rejecting this conclusion will not change the outcome of the proceeding.

#### **District's Exception No. 8**

District staff take exception to the inclusion of Special Condition 20 as a requirement of the ERP because Special Condition 20 and Other Condition 24 are duplicative. Both conditions require the recording of conservation easements over the proposed mitigation areas. (District Ex. 6 and 8). Of the two conditions, Other Condition 24 more specifically addresses the conservation easements to be recorded in accordance with the mitigation plan. Id. Therefore, District staff recommend that Special Condition 20 be removed. Neither FCC nor the Petitioners responded to this exception, and removing Special Condition 20 will not change the outcome of the proceeding. Therefore, the

exception is granted, and the concluding paragraph of this final order will state that Special Condition 20 is deleted.

**FINAL ORDER**

**ACCORDINGLY, IT IS HEREBY ORDERED:**

The Recommended Order dated August 5, 2005, attached hereto as Exhibit "A", is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the ruling on Petitioners' Exception No. 27 and District's Exception Nos. 1 through 8. FCC's application number 4-031-17237-4 for an environmental resource permit is hereby issued under the terms and conditions contained in the Technical Staff Report dated April 4, 2005, attached hereto as Exhibit "B," except that Special Condition 20 is hereby deleted.

**DONE AND ORDERED** this 13<sup>th</sup> day of September, 2005, in Palatka, Florida.

ST. JOHNS RIVER WATER  
MANAGEMENT DISTRICT

BY: Kirby B. Green III  
KIRBY B. GREEN III  
EXECUTIVE DIRECTOR

**RENDERED** this 14<sup>th</sup> day of September, 2005.

BY: Sandra Bertram  
SANDRA BERTRAM  
DISTRICT CLERK

Copies to:

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Management District  
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### Notice of Rights

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedure, by filing an action within 90 days of rendering of the final District action.
2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.
3. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board, or his delegate, on behalf of the District and is filed by the District Clerk.
4. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 will result in waiver of that right to review.

### CERTIFICATE OF SERVICE

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

Peter T. Belmont, Esq.  
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on this 14th day of September, 2005.

Veronika Thieback for  
Tara E. Boonstra  
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STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SIERRA CLUB, INC., )  
)  
Petitioner, )  
)  
vs. ) Case No. 05-0130  
)  
FCC PARTNERS LP, LTD, PLAZA )  
PARTNERS GROUP LP, LTD, PYRAMID )  
PARTNERS GROUP LP, LTD, and ST. )  
JOHNS RIVER WATER MANAGEMENT )  
DISTRICT, )  
)  
Respondents. )  
)  

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ST. JOHNS RIVERKEEPER, INC., )  
)  
Petitioner, )  
)  
vs. ) Case No. 05-0131  
)  
FCC PARTNERS LP, LTD, PLAZA )  
PARTNERS GROUP LP, LTD, PYRAMID )  
PARTNERS GROUP LP, LTD, and ST. )  
JOHNS RIVER WATER MANAGEMENT )  
DISTRICT, )  
)  
Respondents. )  

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RECOMMENDED ORDER

Pursuant to notice, the final hearing in the above-styled case was held on April 19-22 and 26-27, 2005, in Jacksonville, Florida, before Charles A. Stampelos, Administrative Law Judge of the Division of Administrative Hearings (Division).

APPEARANCES

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For Respondents FCC Partners LP, LTD, Plaza Partners Group, LTD, and Pyramid Partners LP, LTD:

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STATEMENT OF THE ISSUE

The ultimate legal and factual issue in this matter is whether FCC Partners LP, LTD, et al. (collectively FCC) has provided the St. Johns River Water Management District (District) with reasonable assurances that the activities it proposes to conduct for construction and operation of a surface water management system for a commercial and residential project and alteration of two surface water management systems to

implement a wetland mitigation plan pursuant to Environmental Resource Permit (ERP) Application No. 4-031-17237-4 (the Permit), meet the conditions for issuance of permits established in Chapter 373, Florida Statutes, Florida Administrative Code Rules 40C-4.301 and 40C-4.302 and the District's Applicant's Handbook: Management and Storage of Surface Water (A.H.).

#### PRELIMINARY STATEMENT

On December 3, 2004, the District issued a notice of final agency action for approval of the ERP. Once approved by the District's Governing Board, the ERP will authorize FCC to construct a surface water management system for additional office, residential, light industrial, retail, and hotel space within the existing Freedom Commerce Centre, a mixed-use Development of Regional Impact (DRI) in Duval County (the Project). Additionally, the ERP authorizes the alteration of two surface water management systems to implement parts of a wetland mitigation plan.

On December 28, 2004, Petitioners filed timely petitions requesting an administrative hearing. On or about January 12, 2005, the District referred this matter to the Division and on January 21, 2005, the cases were consolidated.

On April 14, 2005, the District filed a Motion for official Recognition. Over Petitioners' objection to two of nine documents, the motion was granted. (Transcript (T.) 7-8).

On April 18, 2005, the parties agreed to a Prehearing Statement and, in part, that the substantial interests of Petitioners and/or a substantial number of their members will be determined in this proceeding and that the interests of those members will be adversely affected. Prehearing Statement at 20.

At the final hearing, FCC presented the testimony of John W. Dowd, III, representative of FCC; Lee A. Alford, the Professional Engineer who supervised the project and an expert in the field of civil engineering and the design of surface water management systems; Harvey H. Harper, III, Ph.D., an expert in engineering, hydrology, limnology, water chemistry, and water quality; John B. Melko, an expert in wetland ecology; Charles L. Kocur, Jr., an expert in wetland ecology, mitigation, and functional assessment of wetlands; Brian Winchester, an expert in wetland ecology and wetland hydro-ecology and water quality; and William Michael Dennis, Ph.D., an expert in wetland ecology, fish and wildlife, mitigation, and cumulative impact analysis. On rebuttal, FCC re-called Mr. Winchester.

FCC Exhibit (FCC Ex.) Numbers 1-8, 12A-F, 13A-E, 14A-B, 15, 17-20, 22-24, 28-30, 31B-D, 32-39, 40-42, 44 (photograph 11), 46, 49-51, 53-59, 60 (0112, 0114, 0119, 0125, 0126, 4956, 4953) and 60B, 61-64, 66, 69-72, 82-83, and 86 were admitted into evidence.

The District presented the testimony of Christine L. Wentzel, a senior regulatory scientist and an expert in wetland and wildlife ecology, mitigation, wetland delineation, and ERP permitting and regulation; Jeffrey C. Elledge, P.E., an expert in civil engineering, water resources engineering, hydrology, surface and groundwater hydrology and administration of the management and storage of surface water, the dredge and fill permitting program, stormwater management and water quality associated with stormwater management, and the environmental resource permitting program; and Dean R. Dobberfuhl, Ph.D., an environmental scientist and an expert in detrital export, limnology, and aquatic ecology. District Exhibit (D Ex.) Numbers 1-3, 6-8, 16 (items A-C and E-S), 19-21, 24-26, 28 (cover and second pages and pages 9-11), 29-31, and 33 were admitted into evidence.

Petitioners presented the testimony of Judith L. Meyer, Ph.D., an expert in microbial food webs, blackwater streams, detrital export, and stream ecosystems; Linda C. Duever, an expert in natural area identification and wetlands vegetation; Roy Robert (Robin) Lewis, III, an expert in fresh and marine wetlands, restoration and mitigation for wetlands, marine ecology, and natural area planning; Dr. Dobberfuhl with the District; Glenn C. Lowe, Jr., Division Director for the District; Joseph P. Stephenson, Jr., public works director for

the St. Johns County Board of County Commissioners; Rick McCann, a biologist employed with the Florida Fish and Wildlife Conservation Commission; Mark Middlebrook, a consultant; Edward Lehman and Michael Brown, both with the Northeast Florida Regional Planning Council; and Ben Williams, involved locally in the retail and wholesale seafood business. Petitioners' Exhibit (P Ex.) Numbers 5-6, 16, 80A-C, and 85 were admitted into evidence.

Public comments were received during the final hearing. The record contains a sign-in sheet and several documents.

The final hearing multi-volume Transcript was filed with the Division on May 19, 2005. The one-volume Transcript on the public comment portion of the final hearing was also filed on May 19, 2005. On June 6, 2005, FCC, the District, and Petitioners filed proposed recommended orders and memoranda of law and FCC and the District filed closing arguments.

#### FINDINGS OF FACT

##### I. The Parties

1. The Sierra Club, Inc., is a national environmental group whose purpose is to preserve, protect, and enhance the natural environment. The Sierra Club, Inc., through its Northeast Florida Group, uses the St. Johns River. It was stipulated that the substantial interests of the Sierra Club, Inc., and/or of a substantial number of its members will be determined in this

proceeding and that the interests of those members will be adversely affected.

2. The St. Johns Riverkeeper, Inc., is a Florida non-profit corporation whose mission is to protect, preserve, and restore the ecological integrity of the St. Johns River watershed. It was stipulated that the substantial interests of the St. Johns Riverkeeper, Inc., and/or a substantial number of its members will be determined in this proceeding and that the interests of those members will be adversely affected.

3. Respondents, FCC Partners LP, LTD, Plaza Partners Group, LTD, and Pyramid Partners LP, LTD, collectively hold title to the property that is the subject of the Permit and have not previously violated any District rules.

4. The District is a special taxing district created by Chapter 373, Florida Statutes, charged with the responsibility to conserve, protect, manage, and control water resources within its boundaries pursuant to Chapter 373, Florida Statutes, and the rules promulgated as Florida Administrative Code Chapter 40C.

## II. The FCC Site

5. FCC owns an 853-acre parcel in Duval County, Florida, on which the Project is to be located (the Site).<sup>1</sup>

6. The Site is bounded by Interstate 95 (I-95), a six-lane highway, on the east and south, Phillips Highway (US-1), a four-

lane highway, on the west, and Baymeadows Road on the north. FCC Ex. 2. Baymeadows Road includes an assortment of retail properties and office parks. A patchwork of industrial and commercial development exists adjacent to US-1 and the Site. US-1 and I-95 meet at the southern end of the project Site near the Avenues Mall.

7. Based on prior approvals, 600,000 square feet of office space, 352 residential units, and an 83,500 square foot cinema have already been constructed on the southern part of the Site. In addition, approximately 124.4 acres of on-site wetlands are currently preserved under a conservation easement. FCC Ex. 14B.

8. Aside from the previously developed area on the Site of over 100 acres, the Site is comprised of undeveloped, mature forested uplands and wetlands. The upland and wetland areas have the following classifications under the Florida Land Use Cover and Classification System (FLUCCS): 434 (mixed forested uplands, pine, hardwood), 610 (wetland hardwood forest), 611 (bay swamp), 615 (bottomland hardwood), 617 (mixed wetland hardwood), and 630 (wetland forested mix). FCC Ex. 30.

9. The wetland communities include depressional pockets, shallow wetland sloughs, and seepage slopes that drain into the bottomland swamp, known as Pottsburg Creek Swamp.

10. The Site slopes from east to west coming from I-95 down into the bottomland swamp and west to east coming from US-1



down into the Pottsburg Creek Swamp, which serves as the headwaters to Julington and Pottsburg Creeks, which are tributaries of the St. Johns River. FCC Ex. 20.

11. The on-site wetlands in the center of the property (Pottsburg Creek Swamp), during certain rainfall conditions, contribute to both Julington Creek (which runs to the south) and Pottsburg Creek (which starts to the north of the Site). FCC Ex. 17.

12. In addition to rainwater which falls on the Site, stormwater is routed from nearby urbanized areas onto the Site through seven culverts. This water generally flows from the eastern and western sides of the property in conveyance channels and through sheet flow toward the center of the property.

13. Approximately 2,000 acres of off-site drainage enter the Site from the east through five large-boxed culverts. This drainage flows westerly underneath I-95 and into natural conveyances, natural ditches and unnamed tributaries to the Pottsburg Creek Swamp. The area to the east is urbanized and developed with residential, commercial, and light industrial property.

14. Approximately 1,000 acres of off-site drainage enter the Site from the west via two boxed culverts. The water passes through these two culverts and drains from west to east through natural conveyances also into the Pottsburg Creek Swamp. See

FCC Exs. 14B, 15, 17, and 20. This area includes US-1 and the Florida East Coast Railroad. It is an urbanized and developed area with light industrial, residential, and retail/office/cinema property.

15. On-site drainage comes from rainwater that actually falls onto the Site and drains into the Pottsburg Creek Swamp. Once in the Pottsburg Creek Swamp, depending on the hydrologic conditions, the water drains either north into Pottsburg Creek or south into Julington Creek. The wetlands in the center of the Site form a channelized area running north and south on the Site, which is at a lower elevation by approximately 15 feet from the perimeter areas. See FCC Exs. 17, 19, and 59; see also Finding of Fact 11.

16. Land to the north of the Site is generally developed as office parks and apartments.

17. The northern portion of the channelized flow from the swamp toward Pottsburg Creek (north and south of Freedom Crossing Trail, FCC Exs. 1, 14B, 18, and 59) has already been preserved under a conservation easement. This flow runs north into a green corridor then under J. Turner Butler Boulevard, the start of Pottsburg Creek, approximately two miles north of the project Site. Pottsburg Creek is a small creek that flows north and then west, becoming larger as it discharges to the Arlington River, which eventually flows into the St. Johns River. FCC Ex.

17. Pottsburg Creek is approximately five miles long with a drainage basin of approximately 12,000 acres. The basin includes both developed and undeveloped areas. See FCC Ex. 63.

18. To the south of the Site, the land is used for I-95 and a mixture of office park, residential, and retail (including the Avenues Mall).

19. Julington Creek exits the Site to the south and runs south under US-1 and underneath the Florida East Coast Railroad then west where it joins Durbin Creek and then becomes larger and ultimately discharges to the St. Johns River. FCC Exs. 17, 58, and 61.

20. Julington Creek is approximately eight miles long and has a drainage basin of approximately 23,000 acres. This drainage basin comprises both developed and undeveloped areas. Furthermore, there are approximately 3,000 to 4,000 acres of wetlands and upland preservation in the Julington Creek corridor running south of the project Site. D Exs. 16 and 29.

21. The level of wildlife utilization of the Site is lower than expected. This may be explained in part by the reduced connectivity because of the surrounding roads and development. No federally or state listed species have been identified on the Site. See § 2.0(cc), A.H. Wildlife found on the Site is limited primarily to those in a typical urbanized forest such as snakes, armadillos, rabbits, raccoons, moles, possums, and

frogs. Invertebrate species can be found. Amphibians and reptiles have been seen primarily in the center of the Site. There is evidence of feral hogs being on-site. Small birds, such as doves, blue jays, cardinals, and mocking birds, can be seen along the perimeter of the Site although few migratory birds use the Site because of the thick canopy and the "very mature forest" which permeates the Site. Also, I-95 and US-1 are natural deterrents to these migratory birds.

### III. The Project

22. The Site is a mixed-use DRI in Duval County, known as the Freedom Commerce Centre. The approved DRI consists of approximately 853 acres, 526 acres of which are either in conservation or preservation. FCC Ex. 2.

23. FCC intends to develop approximately 208 acres of the remaining acres not previously developed or encumbered. The project includes four development pods, including a small parcel in the northwestern corner of the Site, just south of Freedom Crossing Trail; a parcel in the northeastern quadrant of the Site; a parcel at the south-southeastern end of the Site; and a small parcel in the west-central area along the border of the Site. The largest pods of impact are in the northeast and south southeastern portions of the Site. FCC proposes to dredge and fill approximately 126.8 acres of the on-site wetlands. Under the proposed plan, the developed areas will be 85 percent

impervious coverage. The identified Cypress Tree on the Site will be preserved. FCC Exs. 2, 14B, and 19.

24. FCC sought an ERP from the District for the construction of a surface water management system to support the development.

25. The Project includes a stormwater management system comprised of ten wet detention ponds natural and man-made channels to direct the flow of water settling ponds and oil skimmers to help clean the stormwater and culverts for road crossings. See FCC Exs. 18-19. There are no adverse water quality impacts expected as a result of the construction and operation of the system. See also Prehearing Statement at 24-25.

26. The Project has been reviewed in its entirety and does not include any future phases.

#### IV. Wetland Impacts

27. To develop the 208 acres on the Site, FCC proposes to directly impact 126.8 acres of wetland impacts (126.7 acres of wetland impacts and 0.1 acres of right-of-way wetland impacts, FCC Ex. 14B). Less than 17 acres within the 25-year floodplain will be impacted. Approximately 24.7 acres of mixed hardwood wetlands (617) will be impacted during the development of the northeastern and southeastern pods; 53.7 acres of mixed forested wetlands (630) will be impacted during the development of the

northeastern and northwestern pods; and 48.4 acres of wetland hardwood forest (610) will be impacted during the development of the western and southeastern pods. See FCC Exs. 14B, 19, 30, and 31D; D Ex. 6 at 5.

28. The Project will result in indirect (secondary) impacts to an additional 7.4 acres of wetlands.

29. The values of functions these wetlands provide to fish and wildlife have been evaluated using the five factors set forth within Section 12.2.2.3, A.H. These factors are condition, hydrologic connection, uniqueness, location, and fish and wildlife utilization.

#### A. Condition

30. The on-site wetlands being impacted have impaired functions from the perspective of hydrology, although, in general, the overall condition of the wetlands to be impacted is good. The wetlands have a good canopy and diversity of community types. The hydroperiods vary with both saturated and inundated areas. The hydrology of the Site has been altered through a series of culverts and man-made stormwater conveyance systems. The historical sheet flow has been disrupted and channelized by construction and development surrounding the Site. For example, there is evidence of subsidence or hydrologic alterations associated with an old stormwater ditch constructed in the northeast portion of the Site. Subsidence

occurs when the soils are subject to oxidation. Oxidation removes the organic material from the soil and the soil sinks, exposing the roots of the wetland trees. Portions of the on-site wetlands also show indications of converting to uplands due to changes in hydrology as indicated by soil oxidation and the colonizing of young pine trees along with some evidence of exotic and nuisance species.

31. In addition, the wildlife function is impaired due to the Site's isolation and lack of wildlife crossings, and the surrounding urbanization. The Site has lower wildlife diversity and abundance than typically associated with a site of its size and character. See Finding of Fact 21.

#### B. Hydrologic Connection

32. All of the wetlands on the Site are hydrologically connected. There are high spots on the Site that are only saturated, meaning the water does not come above the land surface, and there are areas of the Site that are inundated, meaning that the water comes above the land surface. Under certain storm events, there may be extensive inundation into areas that are normally only saturated. The hydrologic connection leaving the Site could be better; however, water and small mammals can move through the culverts at this point under US-1 to the south and Baymeadows Road to the north.

33. The wetlands on the Site contribute to the production of detritus and detrital export. Detritus is organic material derived from dead and decaying organic material. Detritus can exist in two forms: dissolved or particulate. The dissolved form of detritus is mostly molecular, material that could dissolve and flow in water. Dissolved organic carbon (DOC) includes compounds that are both easily and slowly assimilated by bacteria and other compounds. DOC comes from leaching of stored leaf litter and from stored organic matter in soils. The particulate form of detritus is organic material that does not dissolve in water, like small leaf fragments, wood chips or branches.

34. Detrital export is the amount of organic matter being exported from a system. The microbial food web is a complicated array of natural processes in which different sized particles of organic matter are used by different components of the system. Detrital export is viewed as the base of the food web because the detritus and DOC that enters a water body is used by detritivores, macroinvertebrates, and insects as a source of food and these organisms, in turn, become food for larger organisms. See P Ex. 5. If the amount of detritus entering a waterbody is reduced, there may be a consequent reduction, e.g., in the detritivores and organisms that consume the detritivores.



35. During the hearing, there was much testimony and evidence offered regarding the potential loss of detritus and detrital export in light of evaluating the proposed project's potential impacts on and off the Site.

36. The wetlands on the Site contribute to detrital production and export because of their extensive tree canopy and their hydroperiod.

37. Based on the weight of the evidence, as a general proposition, the loss of 126.8 acres of wetlands on the Site can be expected to cause a loss of detritus. The amount of the loss of detritus and detrital export and potential off-site impacts are less certain.

38. FCC's experts performed a detrital export analysis of the wetlands to be disturbed (which at the time exceeded the current number of impacted wetlands, FCC Ex. 28) and determined that "[w]ithout [considering the offsite contribution of detrital material], the estimated detrital export from the proposed impact area is less than 8% of the total export from the [Site]." Id. FCC also provided an analysis quantifying the detrital export functional value of the mitigation proposed at the time of the analysis. FCC Ex. 29.

39. FCC conducted a comparison of actual total organic carbon (TOC) at the project Site which shows no identifiable contribution from the impacted areas to the creeks. Readings of

total organic and dissolved organic carbon in the St. Johns River are markedly higher than the readings in the creeks at and near the Site. FCC Exs. 61-62, and 64. Sampling data demonstrated that Julington and Pottsburg Creeks and the St. Johns River had an over-abundance of organic carbon. FCC's experts opined that there is no evidence of a significant site-specific contribution to the lower organisms necessary to the food chain and that it is not likely that a loss of detrital export will adversely affect fishing or marine productivity off the Site.

40. The scope and extent of FCC's analyses was criticized indirectly by, e.g., Dr. Meyer and Dr. Dobberfuhl.<sup>2</sup>

41. There was no persuasive evidence that there are likely to be adverse impacts or affects to the St. Johns River or to fish or recreational values or marine productivity therein.

42. With regard to impacts to Julington Creek and Pottsburg Creek, the evidence differed. The evidence offered by Petitioners, including District experts, from the standpoint of qualitative analysis, indicates that there will be a loss of detrital export which will cause adverse affects on fish and marine productivity in Julington Creek, and to a much lesser degree in Pottsburg Creek, as a result of losing 126.8 acres of wetlands on the Site. See, e.g., Endnote 2. On the other hand, based on the qualitative and limited quantitative analyses offered by FCC, there is evidence that it is not likely that

there will be a loss of detrital export occurring off-site and that it is not likely that hydrologic connectivity or fish or marine production on or off the Site will be adversely affected.

43. It was asserted that detrital export areas were unnecessary in Trout Creek, also known as Whites Ford Creek, (the receiving waters for the Rood/Rayland mitigation tracts discussed below). Actual empirical evidence demonstrated that 49 (mgC/L) TOC in Trout Creek is less than the 54 mgC/L TOC found in Julington Creek. FCC Exs. 70-72.

44. The alleged salinity differences noted by the Petitioners in the St. Johns River between Trout Creek and Julington Creek do not warrant a finding that marine productivity is diminished.

45. Notwithstanding the above, the District required FCC to provide detrital export mitigation and applied a four-to-one wetland creation ratio based on the assumption that all 126.8 on-site wetland acres were exporting detritus. Multiplying that number by four, resulted in the need for 507.2 acres of mitigation specifically for detrital export. See P Ex. 85 at 25; see also Findings of Fact 99-104.

46. The District's required four-to-one detrital export mitigation was reasonable and has been satisfied by FCC.

### C. Uniqueness

47. The vegetative communities and hydroperiods of the wetland areas to be impacted are fairly common in northeast Florida and are not considered unique. The wetlands to be impacted are not necessarily unique. The uniqueness of the wetlands to be preserved is high.

### D. Location

48. The location of the wetlands to be impacted in relation to the surrounding area is not ideal because of the extensive development that surrounds the Site. See Finding of Fact 6, regarding the roadways which border the Site.

### E. Fish and Wildlife Utilization

49. Based upon the different community types within the Site, the different hydroperiods of the Site and its overall maturity, extensive fish and wildlife utilization would be expected. However, the expected amount of fish and wildlife utilization on the Site has not been observed. See Finding of Fact 21.

### V. Secondary Impacts

50. Under the first part of the secondary impact criterion, FCC must provide reasonable assurance that the secondary impacts from construction, alteration and intended or reasonably expected uses of the project, will not adversely affect the function of adjacent wetlands or other surface

waters. See § 12.2.7(a), A.H. When evaluating the project under this part of the criterion, the District considered increased noise, night lighting, visual disturbances and other impacts that are attendant to human activity associated with the FCC project. In addition, several wetland areas will be severed as a result of the project. These secondary impacts are equivalent to the loss of the ecological value of 7.4 acres of wetlands. FCC has proposed additional mitigation within the overall mitigation plan to offset the project's anticipated adverse secondary impacts the construction and use of the site have on the remaining wetlands.

51. Under the second part of the secondary impact criterion, FCC must provide reasonable assurance that the construction, alteration, and intended reasonably expected uses of the system will not adversely affect the ecological value of the uplands to aquatic or wetland-dependent listed species for enabling existing nesting or denning by these species.

§ 12.2.7(b), A.H. There are no upland areas on the project site that are suitable for nesting or denning by listed species.

52. Under the third part of the secondary impact criterion, and as a part of the public interest test, the District must consider any other relevant activities that are very closely linked or causally related to any proposed dredging or filling which will cause impacts to significant historical

and archeological resources. § 12.2.7(c), A.H. When making a determination with regard to this part of the secondary impact criterion, the District is required by rule to consult with the Division of Historical Resources. § 12.2.3.6, A.H. The District received information from the Division of Historical Resources and FCC regarding the classification of significant historical and archeological resources. In response to the District's consultation with the Division of Historical Resources, the Division indicated that there would be no adverse impacts from the project to significant historical or archeological resources. Also, District staff did not observe any significant historical or archeological resources on the project site.

53. Under the fourth part of the secondary impact criterion, the applicant must demonstrate that any future phases of a project and certain additional project-related activities will not result in adverse impacts to the function of wetlands or result in water quality violations. § 12.2.7(d), A.H. The proposed project has been reviewed in its entirety and does not include any future phases. In an earlier application submittal, there was an internal roadway proposed on the project site that would connect the northern and southern portions of the project. This roadway is no longer a part of the application, and the

area where the roadway was proposed will be preserved as part of the on-site mitigation plan for the project.

54. The District also considered the FCC DRI Development Order and road improvements required for US-1 and Baymeadows Road. At this time, the impacts are not well defined; however, the impacts are expected to be relatively minor. These relatively minor impacts can be offset with mitigation within the drainage basin. The applicant has also conceptually shown that these road improvements can be designed in accordance with the District's rule criteria.

#### VI. Surface Water Diversion and Wetland Drawdown Impacts

55. If the water within proposed wet detention ponds is at a lower elevation than adjacent wetlands there is a concern that water would drain out of the wetlands and follow the gradient into the wet detention ponds that are at a lower elevation. Two of the wet detention ponds proposed could present this issue: Pond A2 in the northeastern portion of the Site and Pond 1 at the southern end of the Site. Those ponds will be constructed with impermeable barriers to prevent adverse impacts to adjacent wetland areas. FCC has also proposed the construction of bypass ditches. Two of these bypass ditches will be lined to prevent water from flowing from the wetlands into the stormwater management system.

## VII. Mitigation Areas

56. As compensation for the adverse direct and secondary impacts to the value of functions provided to fish and wildlife, FCC has proposed regionally significant on-site wetland and upland preservation: off-site wetland creation, enhancement, and preservation; off-site upland preservation and enhancement; and purchase of mitigation bank credits. FCC Exs. 13A and 13B.

57. The off-site portion of the overall mitigation plan includes four components: the Rood Tract, the Rayland Tract,<sup>3</sup> the Hunt Farm Tract, and credits from the Tupelo Mitigation Bank (TMB). D Ex. 6.

### A. On-site Mitigation

58. FCC proposes to preserve 393.1 acres of remaining on-site wetlands in conjunction with 8.8 acres of adjacent upland buffer and internal upland islands. With the existing preservation area of 124.4 acres, a total of approximately 517.5 acres of on-site wetlands will be preserved. FCC Ex. 14B.

59. The on-site wetlands being preserved are very mature forested areas including the bay swamp area on the east central portion of the Site. FCC Exs. 14B and 30.

60. The deep swamp area of the Site, a wide corridor running north and south, and the entire central portion of the Site, including the lowest elevations of the Site and the very narrow threads of Pottsburg and Julington Creeks, will be



preserved as part of the 393.1 acres. FCC Ex. 19. The thick canopy above the swamp and creek areas will also be preserved.

61. In addition, the mean annual floodplain (the wetter part of the Site) is almost completely preserved. Approximately 16.6 acres of the total wetland impact of 126.8 acres is within the 25-year floodplain areas in the southeastern portion of the proposed development on the Site. FCC Ex. 31D.

62. The on-site conservation/preservation area is approximately one-half mile wide at its mid-point on the Site. FCC Exs. 14B and 31D. Preservation of on-site wetland and upland areas provides an adequate wildlife corridor for habitat. These preservation areas will be encumbered under conservation easements that are consistent with Section 704.06, Florida Statutes, and dedicated to the District in perpetuity.

63. The on-site preservation area is contiguous with a conservation corridor along Julington Creek of approximately 3,000 to 4,000 acres of uplands and wetlands.

64. The District established a ratio of 30 to one for the new 393.1-acre wetland preservation along the Pottsburg Creek Swamp/Julington Creek corridor. Application of the ratio resulted in 13.1 offset acreage credits. The ratio means, for example, that for each acre of wetland preservation, FCC receives 1/30th of a credit. FCC Exs. 14B, 17, and 40; P Ex. 85 at 26.

65. The District established a ratio of ten to one for the new 8.8-acre upland preservation, for 0.9 offset acreage credits.

66. A 1.4-acre upland strip that is located between US-1 and the western project boundary and several small areas previously encumbered by easements (e.g., drainage easements) or other restrictive covenants will not be included as part of the conservation easement, and FCC has not proposed any work within these previously encumbered areas. FCC Exs. 14B and 31D; D Ex. 6 at 6.

B. Rood Tract Off-Site Mitigation

67. The Rood Tract is located approximately one mile south of County Road (CR) 210 at the terminus of Leo Maguire Road in central St. Johns County within Basin 5. (The Rood/Rayland Tracts are located approximately ten miles from the Site.) FCC proposes to preserve 248.7 acres of mixed forested wetlands (primarily bottom-land hardwood) and 6.5 acres of adjacent upland preservation under a conservation easement. This mitigation area is a streambed with surrounding wetlands and, like the FCC Site, is a headwater area. There are small basins within the Rood Tract that overflow and discharge northerly into Whites Ford Creek. Whites Ford Creek leads to Trout Creek and eventually to the St. Johns River. See FCC Ex. 35; D Exs. 6, 30, and 31.

68. The Rood Tract site is adjacent to approximately 1,400 to 2,500 acres of wetland and upland preservation that have been encumbered by conservation easement and an additional 600+ acres that have been proposed to be encumbered under a conservation easement as mitigation for other projects.

69. The Rood Tract mitigation area is a mature forest and could be timbered (although not recently) and used for silviculture. The vegetation is very mature like the vegetation on the Site and has a good hydroperiod. The presence of exotic species is minimal.

70. The preservation of wetlands provides mitigation value because it provides perpetual protection by ensuring that development will not occur in those areas as well as preventing activities, such as silviculture timbering, and other relatively unregulated activities. This in turn will allow the conserved lands to provide more forage and habitat for the wildlife that would utilize those areas.

#### C. Rayland Tract Off-Site Mitigation

71. The Rayland Tract is located within Basin 5, immediately east of the Rood Tract. The Rood and Rayland Tracts are bisected by Leo Maguire Road, a dirt roadway. The Rayland site is approximately 808 acres and bounded to the north and east by Whites Ford Creek, to the south by undeveloped uplands

and wetlands, and to the west by Leo Maguire Road. FCC Exs. 32-36.

72. The Rayland Tract is connected to the east by the Sylvan property of approximately 1,000 acres under a conservation easement, which will have silviculture activity for another 20 years. I-95 borders the Sylvan property on the east. The Cummer Trust/Twelve Mile Swamp Property (consisting of approximately 20,000 acres) is located adjacent to and east of I-95 and the Sylvan property. D Exs. 30 and 31. There are large drainage culverts under I-95 between the Sylvan and Cummer property. According to Ms. Wentzel, there are large boxed culverts between 12 and 15 feet wide that are underneath I-95 and connect the Cummer property with the mitigation preservation lands on the west side of I-95. These boxed culverts may serve as a wildlife crossing for small mammals and also maintain hydrologic connection. The Rayland/Rood Tracts, in conjunction with Whites Ford Creek, provide a wide corridor for wildlife.

73. The Rayland Site is also contiguous with areas that have been preserved, including approximately 3,100 acres from various projects.

74. A majority of this tract has been maintained for silviculture for many years and provides minimal habitat benefits or diversity to wildlife. Another part of the site includes naturally forested wetlands that have been selectively

timbered during recent operations, except along a narrow band associated with Whites Ford Creek. A majority of the planted pine areas are currently wetlands providing minimal functions.

75. The Rayland Site includes wetland and upland preservation, wetland enhancement, and wetland creation. The entire Rayland Tract will be placed in a conservation easement, which among other things, will prohibit roads. T. 64-65. This should be a required condition of the ERP.

76. FCC proposes to preserve a total of 295.9 acres of wetlands and 27.4 acres of adjacent uplands. Preservation of these upland and wetland areas will enhance the existing wildlife habitat by removing the silviculture operations and allowing the areas to naturally succeed and regenerate with indigenous species.

77. Portions of the Rayland Tract are similar to the FCC Site, and by accepting drainage from other off-site areas, these wetlands will eventually drain into Whites Ford Creek. In turn, Whites Ford Creek, later called Trout Creek, discharges to the St. Johns River. See Finding of Fact 67. The amount of nuisance and exotic species is limited. In terms of fish and wildlife utilization, bears have been observed in the immediate vicinity of the Rayland Tract.

78. FCC also proposes to create 121.5 acres of wetlands from existing upland islands scattered throughout the parcel,

and vegetatively enhance approximately 363.6 acres of existing wetlands that are currently maintained as pine plantation. In the enhancement areas, FCC proposes to remove a majority of the existing pine and replant the area with a mixture of native wetland hardwood trees and to enhance the wetland hydrology pursuant to detailed grading, planting, and monitoring plans.

79. For the wetland creation areas, FCC will grade the site to create deeper elevations to allow for more extended hydroperiods and will plant mixed hardwood trees. The geotechnical report for the site, which includes soil borings, demonstrates that the underlying soil of these areas of the Rayland Tract is similar to that of the Site.

80. Creation and enhancement of the wetland areas will provide improved species diversity and hydrology that, in turn, will enhance the habitat for wildlife. The quality of detritus is expected to be improved.

#### D. Hunt Farm Tract Off-Site Mitigation

81. The Hunt Farm Tract, approximately 203 acres, is located in southwestern St. Johns County, within an adjacent, but different drainage basin (Basin 8), and approximately 11 miles south of the TMB. FCC Exs. 32-33 and 38.

82. The Hunt Farm Tract was the site of an active potato farm.

83. FCC proposes to preserve 15.5 acres of mixed hardwood wetlands associated with a tributary of Deep Creek in conjunction with 40.0 acres of adjacent mixed forested uplands. See FCC Ex. 38 for an aerial of this site. Further, FCC proposes to enhance approximately 147.8 acres of mixed forested upland habitat from an existing potato farm and remove this acreage from active agriculture.

84. The entire Hunt Farm Tract will be placed in a conservation easement.

85. The farm provides essentially no viable wildlife habitat and has altered the historic drainage patterns in the vicinity of the Site; altered the hydrology of the adjacent wetlands; and contributed to the degradation of the St. Johns River through the discharge of untreated, pollutant-loaded runoff.

86. The proposed enhancement of this site will create viable wildlife habitat. The detritus produced from this Site will, in time, benefit the ecology of the St. Johns River. The water quality improvements implement and are consistent with the District's Surface Water Improvement and Management (SWIM) Plan for the area, although they are not part of the SWIM Plan. See Findings of Fact 118-120.

87. The proposed enhancement will also eliminate furrows so that the hydrology can be restored. A portion of the Hunt Farm Tract will drain towards a ditch or man-made canal bordering the

western boundary of the property that eventually flows into the St. Johns River. Another portion (northern) of the site will discharge into a tributary of Deep Creek and eventually into the St. Johns River. FCC Ex. 38. There is a hydrologic connection between the Hunt Farm Tract and the St. Johns River.

88. The Hunt Farm Tract will have depression areas which function similarly to the depression areas on the Site. These areas will fill up with water and then discharge. The upland preservation on the Hunt Farm Tract is different than the wetlands to be impacted on the Site. However, there are certain species that need uplands in order to fulfill their life cycles. The exotics on the Hunt Farm Tract are minimal. In terms of off-setting wildlife impacts at the Site, the wetlands and uplands at the Hunt Farm Tract are of a similar nature to the Site.

E. Tupelo Mitigation Bank Off-Site Mitigation

89. The TMB is an approximately 1,525-acre mitigation bank that was mostly in silviculture production. The TMB is located in Basin 5, east of Highway 13A and south of Highway 208 in St. Johns County and approximately eight miles south of the Rayland/Rood mitigation sites. FCC Exs. 32-33, and 39.

90. FCC proposes to purchase 114.9 credits from the TMB located in Basin 5. Each credit equals approximately 3.3 acres, meaning that the 114.9 credits represent 379.17 acres of mitigation. See Pet. Ex. 85 at 26. (One mitigation bank credit



is equivalent to the ecological value gained by the successful creation of one acre of wetland. § 12.4.5(b), A.H.)

91. A letter of reservation has been issued for these credits from the owner of the mitigation bank.

92. The overall goal of the bank is to enhance, restore, and protect wetlands and uplands within the bank, promoting conditions similar to those that existed prior to alteration. This will be accomplished by ceasing silviculture activities and eliminating most planted pines; reducing most beds and swales through re-grading; restoring hydrologic levels and patterns by filling or plugging ditches; reducing the grade of unneeded roads, and restoring altered, channelized stream sections; restoring native forest tree types through nurturing existing recruited trees and by supplemental plantings; eliminating hunting leases; implementing prescribed burning; and implementing perpetual preservation and management.

93. Town Branch (a creek tributary to Six Mile Creek) runs through the northern portion of the TMB site and connects to Six Mile Creek, which discharges to the St. Johns River. FCC Ex. 39.

#### VIII. Mitigation Ratios and Application

94. As discussed above, the proposed mitigation includes preservation, creation, and enhancement mitigation, to offset adverse impacts of the project:

On-Site Wetland Preservation	393.10(acres)
On-Site Upland Preservation	8.80
Rood Wetland Preservation	248.70
Rood Upland Preservation	6.50
Rayland Wetland Preservation	295.90
Rayland Upland Preservation	27.40
Rayland Wetland Enhancement	363.60
Rayland Wetland Creation	121.50
Tupelo Mitigation Bank	114.90(credits)
Hunt Wetland Preservation	15.50(acres)
Hunt Upland Preservation	40.00
Hunt Upland Enhancement	147.80

See, e.g., FCC Exs. 13A, 40 at 2, and 41; P Ex. 85 at 16; D Ex. 6 at 13.

95. Mitigation ratio recommendations and guidelines are set forth in Sections 12.3.2-12.3.2.2 of the District's Applicant's Handbook. The District determined that certain mitigation ratios should be applied: ten to one for upland preservation; 30 to one for wetland preservation; 15 to one for wetland enhancement; four to one for wetland creation; ten to one for upland enhancement; three to one for mitigation bank credits; and four to one for detrital export impacts. Id.<sup>4</sup>

96. These ratios reflect a consideration of the ecological lift associated with the mitigation, time lag, and risk. Time lag accounts for the time period between incurring wetland impacts and the mitigation fully offsetting the functions that are lost as a result of the impacts. When considering the long term, accounting

for time lag results in more resources being provided by the mitigation plan than the original impact area. Risk accounts for the probability of success of the mitigation.

97. There are 134.2 acres of direct and secondary impacts which will result from the project. The District also added a ten percent factor (13.42 acres) reflecting "greater long term ecological value," which yielded total habitat impacts of 147.62 acres. D Ex. 6 at 25.

98. When the ratios are applied to the proposed mitigation acreage and credits, there are 147.65 total habitat offset acres. Id. at 26.

99. The District also determined that detrital export impacts should also be mitigated and used a four to one wetland creation ratio. Id. at 25. The direct impact number of 126.8 acres was multiplied times four to equal 507.2 acres of total detrital export impacts. (Although the Applicant's Handbook does not provide a ratio for detrital export, the District considered a range for the ratio and concluded a four-to-one ratio was appropriate. The ratio chosen is reasonable.)

100. Again, the four-to-one ratio, as well as the other ratios used, reflects a consideration of the ecological lift associated with mitigation, time lag, and risk. A similar ratio was applied for wetland creation in the habitat function offset.

101. The mitigation acreage for wetland preservation on-site (393.1), Rood (248.7), Rayland (295.9), and Hunt (15.5) were added with the wetland enhancement acreage for Rayland (363.3) and Tupelo (379.17 (114.9 credits x 3.3 acres/credit)) to yield 1695.97 acres. The District then applied an ecological lift factor of 15 percent to the 1695.97 acres of wetland preservation and enhancement components of the mitigation plan, resulting in a value of 254.40 acres. Id. at 26. (Dr. Dobberfuhl stated that the 15 percent factor is the difference in the averages over time he found in the literature for hardwood wetlands and pine silviculture.) This factor represents the ecological improvement with regard to detrital production associated with converting, e.g., a pine plantation that is subject to periodic harvesting to hardwood wetlands, i.e., more detrital production is expected from replanting hardwood wetlands. T. 956.

102. An ecological lift of 100 percent was applied to the upland preservation, upland enhancement, and wetlands creation areas resulting in 352.1 acres. Because these areas are currently uplands and may be developed, there could be a complete loss of detrital export from these areas.

103. The total detrital export offset was 606.5 acres versus proposed detrital export impacts of 507.2 acres. P Ex. 85 at 26.

104. The replanting of the wetland enhancement and creation areas on the Rayland Tract will enhance the production, the

quality and quantity of detrital material. The areas that are currently pine plantation provide less value in terms of quantity and quality of detritus as compared to hardwoods. The upland enhancement at the Hunt Farm Tract will produce detritus in the form of particulate and dissolved organic carbon. The on-site and off-site preservation areas will benefit detrital production because unregulated activities like silviculture timbering will be prevented. When areas are timbered, there is a consequent loss of detrital production. The detrital export function of the wetlands to be impacted is not only offset, but exceeded by the mitigation plan. FCC did not propose any impacts on-site that will not be offset by the proposed mitigation.

#### IX. Section 12.2.1, A.H. - Elimination and Reduction

105. "The degree of impact to wetland and other surface water functions caused by a proposed system, whether the impact to these functions can be mitigated and the practicability of design modifications for the site, as well as alignment alternatives for a linear system, which could eliminate or reduce impacts to these functions, are all factors in determining whether an application will be approved by the District." § 12.2.1, A.H. "Except as provided in subsection 12.2.1.2, if the proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of subsections 12.2.2 through

12.2.3.7, then the District in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts." § 12.2.1.1, A.H.

106. FCC has reduced the proposed wetland impacts by more than 130 acres from 258 acres to the currently proposed 126.8 acres during the course of the application review process. See generally FCC Exs. 31B-D.

107. One of the most substantial modifications to the proposed design includes the removal of an extension of an existing roadway (Sunbeam Road) from its intersection with US-1, easterly, over I-95 to Western Way. Construction of this east/west roadway across the headwater swamp would have further bisected the wetlands.

108. Another substantial modification includes the removal of a north/south connector roadway and, instead, the creation of two access roadways that terminate in cul-de-sacs and service future development in the northern and southern portions of the Site.

109. There was limited evidence produced regarding whether additional modifications (other than reducing wetland impacts from 258 acres to 126.8 acres) were appropriate or whether additional modifications, if appropriate, would be "economically viable." There is no persuasive evidence that information regarding

economic viability was produced to the District during the application process. (Ms. Wentzel testified that FCC "did not submit an economic analysis relative to 12.2.1 of the Applicant's Handbook." T. 781, 849.) However, Mr. Dowd testified that the project reached the point, where if further reductions were made, FCC (Goodman Company) would be unable to pursue the development.

110. Notwithstanding the above, during the processing of the instant ERP, the District concluded that the mitigation implemented was part of a plan that would provide regionally significant ecological value and have greater long-term value than that of the impact Site. See D Ex. 6 at 6-7. As a result, FCC would not have been required to reduce or eliminate impacts pursuant to Section 12.2.1, A.H., assuming this assessment was proven during the final hearing.

111. Based on the persuasive evidence offered on this topic, it is determined that FCC was not required to eliminate or reduce the impacts of the project as contemplated in Section 12.2.1, A.H. Stated slightly differently, FCC offered persuasive evidence that it has complied with the elimination and reduction criteria because it has proposed mitigation that implements all or part of a plan that provides regional ecological value and the proposed mitigation will provide greater long-term ecological value than the wetlands to be impacted. ("The District will not require the applicant to

implement practicable design modifications to reduce or eliminate impacts when: . . . b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected." § 12.2.1.2 b., A.H.)

X. Section 12.2.1.2 b., A.H. - The "Out Provision" - Significant Regional ecological Value of Mitigation

112. The location of the mitigation and improvements are regionally significant and the perpetual easements ensure greater long-term ecological significance than is associated with the wetlands to be impacted.

113. Under the pending application, there are four plans of regional ecological value for consideration under Section 12.2.1.2 b., A.H.<sup>5</sup> The on-site preservation is a part is the Julington/Durbin Creek corridor, which is a plan of regional ecological value. This plan includes the proposed on-site preservation; the existing on-site preservation of 124.4 acres; the mitigation required by prior District permits in the Julington/Durbin Creek corridor; and publicly-owned lands within the corridor. See D Exs. 6, 16, and 29. The on-site preservation in conjunction with the publicly-owned lands has ecological value. Almost 3,000 to 4,000 acres of wetlands and uplands form a



preservation corridor that provides good habitat and hydrology, although wildlife has been limited. See Findings of Fact 62-63.

114. The proposed mitigation plan implements a number of other plans that provide regional ecological value have been considered under Section 12.2.1.2 b., A.H.

115. The plan of regional ecological value for consideration for the Rayland and Rood Tracts consists of the proposed mitigation for this project; the mitigation required by prior District permits; and lands under public ownership.

116. The Rayland and Rood mitigation sites are contiguous with, and in the vicinity of, wetland preservation and upland preservation parcels that have been accepted as mitigation for other projects. The combination of land currently encumbered by conservation easements and lands proposed for mitigation under this application, totals approximately 3,100 acres in an area that is under significant development pressure. These mitigation areas increase the protected area provided by the District's Cummer Trust/Twelve Mile Swamp and provide significant added wildlife value to this protection plan. The overall mitigation plan provides significant regional ecological value. See Findings of Fact 67-80.

117. In its Technical Staff Report dated December 30, 2003, District staff stated, in part, that the TMB "project will result in a significant acreage of enhanced forested wetlands, a small

amount of enhanced uplands, and the improvement of wildlife habitat. In addition, the project will restore the historic hydrologic patterns to the degree possible, including Town Branch, which is a major tributary to Sixmile Creek." D Ex. 21 at 6. The project site is located within regional watershed 5 which is nested within watershed 4. Id. at 9. By virtue of receiving a permit from the District, the TMB enhances and contributes to the ecological value within a regional watershed.

118. The preservation and improvement of the Hunt Farm Tract wetlands and uplands implements the District's regional objective of improving the water quality in the Lower St. Johns River by addressing stormwater pollution associated with agricultural land use. The Lower Basin SWIM Plan is a District plan to improve the water quality in the lower St. Johns River, including the Hasting Drainage District.

119. The District SWIM plan calls for the development and implementation of best management practices, the construction of stormwater treatment systems and the acquisition/forestation of farmlands in order to accomplish this objective. The proposed mitigation is part of a larger ecological system and is part of an intact wetland system.

120. The FCC mitigation plan for the Hunt Farm Tract is consistent with the District's SWIM Plan to purchase conservation easements and reforest lands currently in row crop

agriculture. By converting the property from row crops to upland forest, there will be less drainage off of the property and the water quality draining off of the property is expected to improve significantly. (The Hunt Farms Tract is located within the Hastings Drainage District. This drainage district maintains a number of large ditches with substantial drainage. The St. Johns River is the eventual outlet for all of these ditches in the vicinity of the Harm Farm Tract.)

121. Furthermore, notwithstanding the ecological value on the Site, FCC's mitigation will provide greater long-term ecological value because FCC has proposed significantly more mitigation than is needed to offset the project's adverse impacts to fish and wildlife caused by the proposed wetland alteration. FCC provided mitigation to offset an additional 13 acres of wetland impacts that are not being proposed. In addition, the mitigation plan, when implemented, will provide more ecological resources above that are currently on the Site and that are expected on the Site in the future.

122. The proposed mitigation plan also provides additional habitat for animal species not present on the impacted wetlands on the Site.

123. Over objection and the denial of a motion in limine filed by FCC and the District, Petitioners introduced testimony and evidence related to a potential, yet speculative future road

project by St. Johns County (CR 2209) that might affect a portion of FCC's proposed mitigation on the Rayland Tract. See FCC Ex. 35 (generally showing a potential road bisecting the Rayland Tract as a single blue line and generally showing the east-west right-of-way reservation corridor leading from a proposed town center to I-95 to the east as part of the Silverleaf DRI as a jagged blue line).

124. A corridor study was completed in 2001, which explored various alternatives for and identified a corridor that led through the Rayland Tract. The complete proposed CR 2209 is expected to be about 20 miles.

125. This study was incorporated into the northwest sector plan.

126. In July 2004, St. Johns County became aware that FCC proposed to place a conservation easement over the Rayland Tract. Ultimately, an agreement was reached between FCC Partners LP, Ltd., and St. Johns County, in which FCC Partners LP, Ltd., agreed to convey to St. Johns County by warranty deed the right-of-way required to construct CR 2209 across the Rayland Tract for the right-of-way location approved by the Board of Commissioners' Resolution on February 9, 2005. P Ex. 16.

127. The alignment of the corridor has changed a "little bit" since the corridor study was conducted. Changes are

frequently made during the negotiation process to applications for development approval of DRIs.

128. In addition, Petitioners presented testimony regarding a proposed DRI named Silverleaf that allegedly would border and partially surround the Rayland Tract. Other developments near the Rayland Tract and Whites Ford Creek were also discussed.

129. Petitioners contend that if the proposed mitigation will be bisected by a road in the future, or surrounded by a future DRI and other development, the mitigation could not be considered to provide "long-term ecological value," as required by Section 12.2.1.2 b., A.H.

130. The envisioned CR 2209 was not considered by the District in determining whether the mitigation at the Rood and Rayland Tracts would provide greater long-term ecological value than the wetlands to be impacted. Such a roadway would require a District ERP, and all direct and secondary impacts to wetlands and surface waters would have to be offset. No ERP application has been submitted to the District for CR 2209. The specific road alignment and design are needed to determine the type and nature of any impacts that may result from the construction of CR 2209.

131. With respect to Silverleaf, no evidence was presented that any permit from any regulatory agency had been issued.

Rather, there was testimony that an ADA for a DRI had been submitted to the Northeast Florida Regional Planning Council.

132. There was evidence regarding the proposed development at Silverleaf. However, it is typical that frequent changes are made to ADAs during the review process. The Silverleaf DRI and the specific land uses contained therein have not been approved.

133. The District did not evaluate the Silverleaf proposed development, but its analysis assumed that the upland areas surrounding the mitigation areas would eventually be improved similar to the single-family residential development that is occurring in the area surrounding the Rood and Rayland Tracts. This assumption did not diminish the long-term regional ecological value of the mitigation areas.

134. Accordingly, it is open to speculation as to whether the Silverleaf DRI will be approved, whether it will ever apply for an ERP, and the extent to which any proposed impacts would affect the current proposed ERP for FCC.

135. Petitioners' theory that CR 2209 and Silverleaf will in some manner affect FCC's proposed mitigation in the future is based on speculation and conjecture.

XI. Florida Administrative Code Rule 40C-4.301

A. Florida Administrative Code Rule 40C-4.301(1)(d) - Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters

136. Florida Administrative Code Rule 40C-4.301(1)(d), in conjunction with portion of the Applicant's Handbook, requires that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

137. The proposed mitigation plan offsets any adverse impacts to fish and wildlife caused by the project's proposed wetland impacts. The evidence also showed that the project will not cause the hydroperiod of wetlands or other surface waters to be altered so as to adversely affect wetland functions or surface water functions. This criterion is satisfied.

B. Florida Administrative Code Rule 40C-4.301(1)(f) and Section 12.2.7, A.H. - Will not cause adverse secondary impacts to the water resources

138. Secondary impacts have been considered and quantified to be 7.4 acres and have been mitigated. This criterion is satisfied.

C. Florida Administrative Code Rule 40C-4.301(1)(i) - Will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed

139. FCC presented evidence that its mitigation plan was fully capable of being performed and functioning as proposed, based on generally accepted engineering and scientific principles.

However, the District should consider whether the monitoring period of five years should be extended as a result of the extensive mitigation proposed, including wetland creation. This criterion is satisfied.

XII. Florida Administrative Code Rule 40C-4.302(1)(a)1.-7. - Public Interest Test

140. The public interest test has seven criteria, only four of which are in dispute. See Endnote 9. It is a balancing test and each factor is evaluated on its own merit, although each factor need not be given equal weight. See also § 373.414(1)(a)1.-7., Fla. Stat.

141. The public interest test applies to the parts of the project that are in, on, or over wetlands. Those parts of the project must not be contrary to the public interest. (If they are located in, on, or over an Outstanding Florida Water (OFW) or significantly degrade an OFW, then the project must be clearly in the public interest. No part of this project is located in or near an OFW.)

142. The disputed public interest criteria are discussed below.<sup>6</sup> See Endnote 9.

A. Florida Administrative Code Rule 40C-4.302(1)(a)2. - Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats

143. The evidence demonstrated that the FCC Site is sparsely used by fish and wildlife. The weight of the evidence indicates



that, contrary to biological assumptions regarding habitat use at the Site, there was very little actual use of this Site by wildlife. See, e.g., Finding of Fact 21.

144. The abundance of wildlife was low considering the various types of habitat on the Site. In contrast, the evidence demonstrated that the off-site mitigation areas (specifically the Rayland Tract) are surrounded by lands used by listed species, including the Black Bear, American Bald Eagle, and Southeast Kestrel. The District considered this factor to be positive in light of the mitigation plan.

145. This factor is considered to be positive.

B. Florida Administrative Code Rule 40C-4.302(1)(a)4. - Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity

146. No open water exists on the Site, rather only deep swamps and creek channels. The areas proposed for development do not include the swamp or creeks. FCC Ex. 31D.

147. Although not quantified, from a qualitative analysis standpoint, there will be a loss of detrital export with the removal of 126.8 acres of wetlands on the Site, which may cause some potential adverse affects to the fish and marine production in Julington Creek, and to a much lesser degree, Pottsburg Creek, but not the St. Johns River. See Findings of Fact 35-46.

148. The District initially (and still does) considered this factor to be negative because of their determination that

the impact to the 126.8 acres of wetlands is expected to decrease detrital production and export in the vicinity of the project in the downstream waters of Julington and Pottsburg Creeks and, as a result, adversely affect the fish and marine productivity in these waters.

149. Notwithstanding, the District required detrital export mitigation. The request for four-to-one detrital export mitigation was reasonable and satisfied. This factor is considered to be negative to neutral.

C. Florida Administrative Code Rule 40C-4.302(1)(a)5. - Whether the activity will be of a temporary or permanent nature

150. FCC's development and impact to the wetlands on the FCC Site will be permanent. Even though the project is permanent, this factor is considered neutral because the proposed mitigation will offset the permanent adverse impacts.

D. Florida Administrative Code Rule 40C-4.302(1)(a)7. - The current condition and relative value of functions being performed by areas affected by the proposed activity

151. The District assessed the value and functions of the wetlands on the FCC Site as "high" value and initially considered this factor to be negative. However, because the implementation of the mitigation plan will offset the wetland impacts, this factor is considered positive.

XIII. Florida Administrative Code Rule 40C-4.302(1)(b) - Will not cause unacceptable cumulative impacts upon wetlands and other surface waters

152. During the processing of the ERP, it was the position of FCC and the District that the project offset its functional loss by providing sufficient mitigation within District Drainage Basin 5. As a result, FCC was not required to perform a cumulative impact assessment if they were correct in this assessment.

153. The proposed mitigation for the project will result in the improvement of approximately 1,800 acres of wetlands within Basin 5, sufficient to offset the direct and secondary impacts in Basin 5.

154. Notwithstanding, FCC performed a cumulative impact analysis. After the District issued its preliminary intent to issue the ERP, Dr. Dennis performed a cumulative impact analysis and evaluated all of the reasonably foreseeable impacts in Basin 5, including Silverleaf and CR 2209. In accordance with that analysis, he opined that no more than seven percent of the "at risk" forested wetlands (FLUCCS Code numbers 611/617/630, FCC Ex. 46) would be impacted in the basin.

155. Approximately 25,000 (roughly 20 percent of 139,051) acres of FLUCCS Code 611/617/630 forested wetlands are already in some form of public ownership and control. FCC Exs. 30 and 46. Approximately 952 acres of the similar FLUCCS Code forested

wetlands would be the applicable cumulative impact to consider (13,600 x .07). Thus, after applying the guidance contained in Section 373.414(8), Florida Statutes, and Section 12.2.8, A.H., there was persuasive evidence that the project will not cause adverse cumulative impacts.

#### XIV. Conservation Easements

156. FCC submitted into evidence copies of draft conservation easements that it will execute and record for all of the mitigation areas. These conservation easements are consistent with Section 704.06, Florida Statutes, and dedicate the mitigation areas to the District in perpetuity.

157. Petitioners argued at hearing that a settlement agreement between FCC and St. Johns County, which may lead to FCC conveying "fee simple" title for a proposed road right-of-way to St. Johns County at a future date, creates an encumbrance that will prevent FCC from recording a conservation easement on the Rayland Tract.

158. The settlement agreement does not create an encumbrance that prevents the recording of a conservation easement on the Rayland Tract. The settlement agreement does not impede the placement of a conservation easement on the Rayland Tract.

## XV. Public Hearing

159. Many concerned citizens testified under oath during the public hearing portion of the final hearing. Their concerns supported those raised by Petitioners. Their comments have been considered during the preparation of this Recommended Order.

### CONCLUSIONS OF LAW

#### I. Jurisdiction and Burden of Proof

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

161. The purpose of this proceeding, conducted pursuant to Section 120.57(1), Florida Statutes, is to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977).

162. The burden of proof in the proceeding is on the party asserting the affirmative in the proceeding. Department of Transportation. v. J.W.C., Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). In light of the District's preliminary decision to approve the ERP, FCC has the initial burden at the final hearing of going forward with a presentation of a prima facie case of its entitlement to the ERP. If a prima facie case was made, the burden of going forward shifted to Petitioners to rebut that prima facie case and support the allegations set forth in the

Petitions, subject to stipulations of the parties, that FCC is not entitled to the ERP. Unless Petitioners presented "contrary evidence of equivalent quality" to that presented by the FCC and District, the ERP must be approved.

163. Petitioners cannot carry the burden of presenting contrary evidence by mere speculation concerning what might occur. Chipola Basin Protective Group, Inc. v. Department of Environmental Regulation, Case No. 88-3355, 1988 WL 617997 (DOAH Nov. 14, 1988; DER 30, 1988).

164. The standard for the applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for the issuance of the permit have been satisfied. Manasota-88, Inc. v. Agrico Chemical Company and Department of Environmental Regulation, Case No. 87-2433, 1988 WL 617583, 12 F.A.L.R. 1319, 1325 (DOAH Jan. 5, 1990; DER Feb. 19, 1990).

165. "Reasonable assurance" contemplates "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992); Hamilton County Board of County Commissioners v. Department of Environmental Regulation, 587 So. 2d 1378 (Fla. 1st DCA 1991). The reasonable assurance standard requires FCC "to deal with 'reasonably foreseeable contingencies' in establishing entitlement to" the ERP.

Further, FCC is "not required to disprove all the 'worst case scenarios' or 'theoretical impacts' raised by" Petitioners.

Ginnie Springs, Inc. v. Craig Watson and Department of Environmental Protection, Case No. 98-0258, 1999 WL 1483647, at \*8 (DOAH Feb. 23, 1999; DEP April 8, 1999).

166. The issuance of a permit must be based solely on compliance with applicable permit criteria. Council of Lower Keys v. Toppino, 429 So. 2d 67 (Fla. 3d DCA 1983).

167. "The determination of whether mitigation for a proposed project is sufficient is an ultimate conclusion of law and rests with the agency." Billie v. St Johns River Water Management, Case Nos. 00-2230 and 00-2231, 2001 WL 362658 (DOAH April 9, 2001; SJRWMD June 14, 2001 at 13)(citations omitted). See also Save Anna Maria, Inc. v. Department of Transportation, 700 So. 2d 113, 116 (Fla. 2d DCA 1997); 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946, 955 (Fla. 1st DCA 1989).

168. FCC has the burden to prove by a preponderance of the evidence that its application complies with the applicable statutes and rules. § 120.57(1)(j), Fla. Stat.

## II. Applicable Statutes and Rules

169. The District's requirements applicable to FCC's ERP application are found in Florida Administrative Code Rules 40C-4.310 and 40C-4.302. These conditions are further explained in

the Applicant's Handbook, adopted by reference in Florida Administrative Code Rule 40C-4.091(1).

170. The parties stipulated that the following provisions apply in this proceeding: Florida Administrative Code Rules 40C-4.301(1)(d), (f), and (i); Florida Administrative Code Rules 40C-4.302(1)(a)2., 4., 5., 7., and (1)(b); Sections 12.2.1, 12.2.1.2 b., 12.2.7, 12.2.3.2, 12.3.4, 12.2.8, 12.2.3, and 12.3.8, A.H.; and Sections 373.414(1) and (8), Florida Statutes.

III. 12.2.1 - Elimination or Reduction of Impacts

171. To qualify for an ERP, an applicant must eliminate or reduce adverse impacts to the functions of wetlands or other surface waters cause by a proposed system, by implementing practicable design modification as described in Section 12.2.1.1, A.H. That section provides:

The term "modification" shall not be construed as including the alternative of not implementing the system in come form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification which is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." Conversely, a modification need not provide the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable,



consideration shall be given to the cost of the modification compared to the environmental benefit it achieves.

§ 12.2.1.1, A.H. See Dibs v. Department of Environmental Protection, Case No. 94-5409, 1995 WL 368755, at \*20 (DOAH Feb. 20, 1995; DEP April 4, 1995). The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when either alternative set forth in Section 12.2.1.2 a. and b., A.H. applies." Id.<sup>7</sup>

172. The District did not conduct an elimination and reduction analysis prior to issuance of its notice of intent to issue the ERP to FCC because it considered the "out provision" (Section 12.2.1.2 b., A.H.) satisfied.

173. FCC has eliminated and reduced the wetland adverse impacts from the project from 258 acres to the currently proposed 126.8 acres during the course of the application review process. As noted by FCC: "The project has been revised and reduced over 20 years, and exhaustive practical design modifications have been implemented, resulting in the December 18, 2003 application submittal." See, e.g., FCC Ex. 13A at 1-3.

174. Mr. Dowd, senior vice-president for development for the Goodman Company (owner of the FCC entities), testified that in his experience with the Goodman Company, the project reached

the point that if further reductions were made that the Goodman Company would be unable to pursue the development. T. 40.

175. Notwithstanding FCC's substantial modifications of the project over time, FCC did not provide an analysis of the requirements set forth in Conclusion of Law 170, including an economic viability analysis. The testimony of Mr. Dowd and other information provided by FCC are insufficient to prove that FCC met the elimination or reduction requirements of Section 12.2.1.1, A.H.

IV. Section 12.2.1.2 b., A.H. - The "Out Provision" Significant Regional Ecological Value of Mitigation

176. Section 12.2.1.2 b., A.H., states that the District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when "the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long-term ecological value than the area of wetland or other surface water to be adversely affected." This subsection has been called the "out provision" and it applies to this application.<sup>8</sup>

177. The requirements of Section 12.2.1.2 b., A.H., have been met in this case. The persuasive evidence shows that FCC is implementing parts of four "plans of regional ecological value." The four plans are: 1) the Julington/Durbin Creek

preservation corridor; 2) the Rood/Rayland preservation corridor; 3) the Tupelo Mitigation Bank ERP; and 4) the Lower St. Johns River Basin SWIM Plan.

178. To assess whether the proposed mitigation provides a greater long-term ecological value than the wetlands to be impacted, the following factors have been considered: 1) whether the mitigation area is part of a larger ecological system; 2) whether the mitigation area is part of an intact wetland system; 3) whether the impacted wetlands will be unlikely to maintain its functions in the long term; and 4) whether the mitigation area provides additional habitat for animal species not present in the impacted wetlands. See, e.g., Billie, 2001 WL 362658, at \*9.

179. Here, the on-site preservation is a part of the Julington/Durbin Creek corridor, which is a plan of regional ecological value. This plan includes: 1) the proposed 401.9 acres of on-site preservation; 2) the existing on-site preservation of 124.4 acres for prior District permits; 3) the mitigation required by prior District permits in the Julington/Durbin Creek corridor; and 4) publicly-owned lands with the corridor. The plan provides regional ecological value because these areas, totaling approximately 3,000 to 4,000 acres, form a preservation corridor that connects the headwaters of Julington Creek to the St. Johns River.

180. The Rood and Rayland Tracts are a part of a plan of regional ecological value which includes: 1) the proposed mitigation for this project; 2) the mitigation required by prior District permits; and 3) lands under public ownership. The mitigation required for prior District permits accounts for approximately 520 acres of existing conservation easements adjacent to the proposed 1,064 acres of mitigation for this project. The project is also adjacent to publicly-owned lands or conservation easements including the Cummer Trust property and the Sylvan Tract. The plan will help establish corridors for fish, wildlife and listed species to use the resources or habitats that will be created, enhanced, and preserved.

181. The TMB is a "plan of regional ecological value." Section 373.4136(1)(a)-(i), Florida Statutes, establishes standards for mitigation banks, including the amount of mitigation credits awarded. To obtain a mitigation bank permit, an applicant must provide, in part, reasonable assurance that "[t]he proposed mitigation bank will improve ecological conditions of the regional watershed." § 373.4136(1)(a), Fla. Stat. In issuing the mitigation bank permit, the Governing Board found that the TMB provides regional ecological value.

182. The Lower Basin SWIM Plan is a plan of regional ecological value. One of the objectives of the SWIM Plan is to increase the value of functions performed by uplands, wetlands,

or other surface waters, or listed species by improving the water quality of the St. Johns River. The District SWIM Plan lists several strategies for improving water quality, including the development of best management practices, construction of stormwater management facilities and the purchase of easements over farms and the re-forestation of those farms. FCC is implementing part of this plan by purchasing the Hunt Farm Tract, encumbering it with a conservation easement and implementing re-forestation.

183. The mitigation proposed for the project also provides greater long-term ecological value than the wetlands to be adversely affected. FCC has provided more mitigation than that which is needed to offset the project's adverse impacts to fish and wildlife caused by the proposed wetland alterations. See Billie v. St. Johns River Water Management District, Case No. 03-1881, 2004 WL 283505, at \*16-17 (DOAH Feb. 9, 2004; SJRWMD April 13, 2004 at 34).

184. Petitioners' argument that FCC's proposed mitigation will be adversely affected by the proposed Silverleaf project, as well as potential CR 2209, is too speculative to be considered with respect to the regional significance and greater long-term ecological value of the mitigation proposed for impact. See Billie, 2004 WL 283505, at \*17, ¶ 81.

V. Florida Administrative Code Rule 40C-4.301(1)(d) - Will not adversely impact the value of functions provided to fish and wildlife species by wetlands and other surface waters

185. Florida Administrative Code Rule 40C-4.301(1)(d), (in conjunction with relevant portions of the Applicant's Handbook, i.e., Sections 9.1.1(d), 12.1.1(a) and 12.2 et seq., A.H.,) requires that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

186. Section 12.2.2., A.H., requires consideration of whether FCC's project will impact the values of wetlands and surface waters on the Site so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife, and listed species. Section 12.2.2.3, A.H., contains the factors that the District considers when assigning the value of functions that any wetland or other surface water provides to fish, wildlife, and listed species. They include: (a) condition; (b) hydrologic connection; (c) uniqueness; (d) location; and (e) fish and wildlife utilization. See Billie, 2004 WL 283505, at \*28, ¶ 162.

187. The evidence shows that FCC is proposing to dredge and fill 126.8 acres of wetlands on the project Site. As mitigation for these impacts, FCC proposes to preserve 1,035.9

acres of wetlands and uplands, enhance 511.4 acres of wetlands and uplands, create 121.5 acres of wetlands, and purchase 114.9 mitigation bank credits. The evidence proved that the mitigation more than replaces the functions provided by the wetlands to be adversely affected by the project.

188. The evidence also proved that the project will not cause the hydroperiod of wetlands or other surface waters to be altered so as to adversely affect wetland functions or surface water functions. Therefore, the project complies with Section 12.2.2.4, A.H., and the requirements of Florida Administrative Code Rule 40C-4.301(1)(d).

VI. Florida Administrative Code Rule 40C-4.301(1)(f) - Will not cause adverse secondary impacts to the water resources

189. The project will not cause adverse secondary impacts to water resources pursuant to Florida Administrative Code Rule 40C-4.301(1)(f). Compliance with this paragraph is determined by applying the four-part test in Section 12.2.7(a)-(d), A.H.

190. Under the first part of the secondary impact criterion, FCC must provide reasonable assurance that the secondary impacts from construction, alteration and intended or reasonably expected uses of the project, will not adversely affect the functions of adjacent wetlands or other surface waters. When evaluating the project under this part of the

test, the District considered increased noise, night lighting, visual disturbances and other impacts that are attendant to human activity. In addition, the District considered that several wetland areas will be severed as a result of the project. All of these secondary impacts are equivalent to the loss of the ecological value of 7.4 acres of wetlands.

Additional mitigation within the overall mitigation plan offsets the anticipated adverse secondary impacts the construction and use of the system will have on the remaining wetlands and, therefore, the requirements of the first part of the criterion are met.

191. No secondary impacts will occur under the second part of the criterion because there was no evidence that any aquatic or wetland dependent listed animal species use uplands for existing nesting or denning.

192. No secondary impacts will occur under the third part of the criterion because the project will not cause impacts to significant historical or archeological resources.

193. Finally, no adverse secondary impacts will occur under the fourth part of the criterion. The evidence showed both that: 1) there are no reasonably foreseeable future development phases to be constructed, and 2) the roadway improvements required by the FCC DRI Development Order can be constructed in a way that is permissible under the District's



rules and that will not result in water quality violations or adverse impacts to the functions of wetlands or surface waters. (FCC represented that the "road will not be build" [sic], FCC's PRO at 38, ¶ 122, and FCC is bound by this and other representations of record.) Thus, the project meets Florida Administrative Code Rule 40C-4.301(1)(f).

194. Notwithstanding, whether FCC can obtain a modification to its DRI Development Order eliminating the on-site road is separate and distinct from the ERP process. See generally Save the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993).

VII. Florida Administrative Code Rule 40C-4.301(1)(i) - Will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed

195. FCC's mitigation plan is fully capable of being performed and functioning as proposed, based on generally accepted engineering and scientific principles.

VIII. Florida Administrative Code Rule 40C-4.302(1)(a)1.-7., Public Interest Test

196. Pursuant to Florida Administrative Code Rule 40C-4.302(1)(a)1.-7. and Section 12.2.3, A.H., the construction and operation of those portions of the system located in, on, or over wetlands or other surface waters may not be contrary to the public interest as determined by considering and balancing seven criteria. See also § 373.414(1)(a)1.-7., Fla. Stat. (FCC was

not required to provide reasonable assurance that the project is clearly in the public interest because no part of the project will significantly degrade or be located within an Outstanding Florida Water. Id.).<sup>9</sup>

A. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats

197. Pursuant to Florida Administrative Code Rule 40C-4.302(1)(a)2. and Sections 12.2.3(b) and 12.2.3.2, A.H., the District must consider whether the activity proposed in, on, or over wetlands or surface waters will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats. Although the wetland impact results in adverse impact to certain wetland values and functions, that impact is compensated for by FCC's proposed mitigation plan as discussed in detail above. Additionally, there is no indication that endangered or threatened species use the wetlands to be impacted. In contrast, the proposed mitigation lands will provide long-term regionally significant habitat for fish and wildlife not present on the FCC Site, including listed species such as black bear and bald eagles. Thus, this factor is considered positive.

B. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity

198. Pursuant to Florida Administrative Code Rule 40C-4.302(1)(a)4. and Sections 12.2.3(d) and 12.2.3.4, A.H., the District must consider whether the activity located in or over wetlands or other surface waters "will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity." Fla. Admin. Code R. 40C-4.302(1)(a)4.

199. Section 12.2.3.4, A.H. implements the Rule and provides:

In reviewing and balancing the criterion regarding fishing or recreational values and marine productivity in [Florida Administrative Code Rule 40C-4.302(1)(a)4.], the District will evaluate whether the regulated activity in, on, or over wetlands or other surface waters will cause:

(a) adverse effects to sport or commercial fisheries or marine productivity. Examples of activities which may adversely affect fisheries or marine productivity are the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal salinity regime, reduction in detrital export, change in nutrient levels or other adverse affects on populations of native aquatic organisms.

200. At hearing, Petitioners argued that a loss in detrital export to the adjacent Julington and Pottsburg Creeks would occur, thereby resulting in a loss of fish or marine

productivity to those creeks. From a qualitative standpoint, there is evidence that there will be a loss of detrital export and may be some potential impacts off-site, although not quantified. However, even assuming such a localized loss at Julington or Pottsburg Creeks, the weight of the evidence showed that there was no adverse impact to the St. Johns River or fish or the marine productivity therein.

201. Notwithstanding such evidence and assuming some detrital export will be lost to Julington and Pottsburg Creeks, the detrital export loss is being mitigated on a four-to-one ratio. Thus, even assuming a detrital export loss and some potential impacts off-site, the loss is off-set through the mitigation.

202. Nevertheless, this factor is considered negative to neutral. (Even if this factor were considered negative, the outcome of the public interest balancing test would remain the same, i.e., the proposed activity would not be considered contrary to the public interest.)

C. Whether the activity will be of a temporary or permanent nature

203. In accordance with Florida Administrative Code Rule 40C-4.302(1)(a)5., it must be considered whether the activity will be of a temporary or permanent nature. Although the wetland impacts are permanent, the mitigation is also permanent

in alleviating any adverse impacts. This factor is therefore a neutral.

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

204. Pursuant to Florida Administrative Code Rule 40C-4.302(1)(a)7., the District is required to consider the current conditions and relative value of functions being performed in the areas affected by the proposed activity involving wetlands or other surface waters.

205. The proposed mitigation will compensate for and maintain the current conditions and relative values and functions of the wetlands to be impacted by the Project and will provide additional wetland functions not existing on the Site. The functions that the impacted wetlands currently provide will continue to be diminished by encroaching development pressure from the highly urbanized surroundings. The proposed mitigation is part of an overall plan that will provide regional ecological value, which enhances wildlife corridors, preserves the integrity of wetland and upland communities within the basin despite development pressures, improves the water quality of the St. Johns River, and increases the value of wetland habitat available for fish, wildlife, and listed species in the long term. The proposed mitigation will provide greater long-term benefits than the on-site wetlands being impacted can provide

because development around the wetland to be impacted would continue to diminish its existing functional value, while the proposed mitigation will permanently preserve impacted wetlands through creation, enhancement, and conservation. Thus, this factor is considered positive.

206. All factors of the public interest "balancing test" are determined to be positive (two) or neutral (four), except one which is negative to neutral. Overall, the portions of the project located in, on, or over wetlands or other surface waters are not therefore considered to be contrary to the public interest.

IX. Florida Administrative Code Rule 40C-4.302(1)(b) - Will not cause unacceptable cumulative impacts upon wetlands and other surface waters

207. Section 12.2.8, A.H., requires applicants to "provide reasonable assurances that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought." Mitigation that offsets a regulated activity's adverse impacts within the same drainage basin as the regulated activity for which a permit is sought is considered by the District to not cause unacceptable cumulative impacts. Id. See also § 373.414(8)(b), Fla. Stat.

208. The cumulative impact doctrine considers the cumulative impacts on wetlands and surface waters of similar

projects which exist or are reasonably expected in the future. See Florida Power Corp. v. Department of Environmental Regulation, 638 So. 2d 545 (Fla. 1st DCA 1994), rev. denied, 650 So. 2d 989 (Fla. 1994).

209. FCC has proposed mitigation in the basin where the Project is located to address all impacts to wetlands in that basin. The Rood Tract, the Rayland Tract, and the Tupelo Mitigation Bank are in the same regulatory drainage basin as the project Site, Basin 5. Only the Hunt Farm Tract is located with Basin 8. There was persuasive evidence that in the long term, the mitigation proposed within Basin 5 off-sets the proposed impacts because the project will have approximately 1,800 acres of wetland mitigation within Basin 5. The mitigation plan includes the creation of 121.5 acres of wetlands on the Rayland Tract and the use of 114.9 mitigation bank credits which are "equivalent to the ecological value gained by the successful creation of one acre of wetland." § 12.4.5(b), A.H. When compared to the 126.8 acres of wetland impacts and the 7.4 acres of secondary impacts, the net effect of the project over time will be to gain ecological value in Basin 5.

210. If the mitigation off-sets the project's adverse impacts within the drainage basin as here, no further cumulative impact analysis is needed because there would be no adverse impacts to "cumulate" due to similar future projects. See

Sierra Club v. St. Johns River Water Management District, 816 So. 2d 687, 688 (Fla. 5th DCA 2002).

211. The evidence demonstrated that the adverse impacts to the functions of wetlands within Basin 5 are off-set within Basin 5, the same drainage basin. Accordingly, the project will not cause adverse cumulative impacts and no cumulative impact analysis is required for the impacts occurring in Basin 5. See § 373.414(8), Fla. Stat.

212. Even assuming a cumulative impact analysis was required, FCC performed an analysis that demonstrated no unacceptable cumulative impacts would occur.

#### X. Conservation Easements

213. Section 12.3.8, A.H., requires all conservation easements to be granted in perpetuity without encumbrances.

214. An encumbrance is defined as a "right to or interest in the land, which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance.'" Boulware v. Mayfield, 317 So. 2d 470, 472 (Fla. 1st DCA 1974).

215. Petitioners argued at hearing that a settlement agreement between FCC and St. Johns County, which may lead to FCC conveying "fee simple" title for a proposed road right-of-way to St. Johns County at some unascertainable date in the



future, creates an "encumbrance" that will prevent FCC from recording a conservation easement on the Rayland Tract.

216. The settlement agreement, however, does not create or grant St. John's County any right or interest in the Rayland property. Thus, no encumbrance is created by the settlement agreement that will prevent FCC from recording the conservation easements.

217. The draft conservation easements that FCC submitted into evidence meet the requirements of Section 12.3.8, A.H. (FCC Ex. 4). These conservation easements are consistent with Section 704.06, Florida Statutes, and dedicate the mitigation areas to the District in perpetuity.

218. Accordingly, FCC has provided reasonable assurance that the conservation easements will comply with Section 12.3.8, A.H.

XI. Whether FCC is entitled to issuance of an ERP with conditions

219. FCC met the initial burden of proof in presenting a prima facie case that the conditions for issuance of the Permit under the relevant provisions in Florida Administrative Code Rules 40C-4.301 and 40C-4.302, the Applicant's Handbook, and Chapter 373, Florida Statutes, have been met.

220. Petitioners did not present "contrary evidence of equivalent quality" to that presented by Respondents to support

their position that FCC was not entitled to the Permit. To the extent that Petitioners attempted to present such evidence, it was not as persuasive as that presented by FCC and the District.

221. FCC has provided the District with reasonable assurances that the conditions for issuance of the Permit, under the applicable provisions contained in Florida Administrative Code Rules 40C-4.301 and 40C-4.302, the Applicant's Handbook, and Chapter 373, Florida Statutes, have been met.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the St. Johns River Water Management District issue ERP Application No. 4-031-17237-4 with conditions set forth in the Technical Staff Report dated April 4, 2005, and as suggested herein. See Finding of Fact 138.

DONE AND ENTERED this 5th day of August, 2005, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of August, 2005.

ENDNOTES

<sup>1/</sup> The District issued a conceptual permit for a portion of the Site on November 11, 1986, and modified it on November 17, 1987, and January 9, 1990.

<sup>2/</sup> For example, from a qualitative standpoint and based on her expertise and a brief visit to the Site, Dr. Meyer opined that there would be a loss of detritus, detrital export, and adverse impacts (to fish, e.g.) in Julington Creek as a result of losing 126.8 acres of wetlands on the Site. (Other witnesses, including District experts, also expressed similar, qualitative opinions.) According to Dr. Meyer, the loss of the wetlands on the Site would result in less leaf litter entering the system, less dissolved organic material entering the system, and less organic material stored in the benthic (on the bottom) and, therefore, a decline in DOC concentration and in secondary production. But, Dr. Meyer testified that "[n]o one has data to" make a judgment regarding the amount of detrital export that will be reduced by the proposed construction of the wetlands on the Site. Dr. Meyer also stated that the data is not available to determine what amount of detritus reduction would be required to cause an adverse impact to sport or commercial fisheries or marine productivity. She stated that a "potential for that adverse effect exists." Dr. Meyer would "look at the percentage change in terms of fraction of wetlands remaining and what fraction of that would be lost by the development" in order to determine whether there is a threshold impact to off-site systems in this case which could be permitted without causing an adverse effect on sport and commercial fisheries or marine productivity. Dr. Meyer would also examine other variables such as the "pulse" affect, e.g., to determine potential impacts. She did not examine this issue nor collect any quantitative data, only qualitative data, regarding FCC's project. Dr. Dobberfuhl expressed similar opinions, but stated that the only quantitative analysis he performed in this case was to determine estimates of detrital production in forest types typical of what is found on the Site and the mitigation sites. T. 953. (He determined the fifteen percent lift factor used by the District for detrital export mitigation.) Notwithstanding his analyses discussed herein, Mr. Winchester stated that the only

quantitative data he collected within the six months preceding the hearing was TOC samples. T. 577.

<sup>3/</sup> The Rood and Rayland Tracts are part of the White Ford Creek Conservation Area.

<sup>4/</sup> Petitioners have questioned the application of the number of credits allocated for mitigation of impacts. See Petitioners' PRO at 22-29. For example, Petitioners contend that the high end of the wetland preservation ratio guidelines of 60 to 1 should be applied, which would, according to Petitioners, reduce the wetlands preservation from 13.10 to 6.55 acres/credits. Petitioners also contend that the ratio for wetland creation at the Rayland Tract should be increased to be comparable to the ratio for wetland enhancement, *i.e.*, applying a 10 or 15-to-one ratio instead of a four-to-one ratio. If a fifteen to one ratio is applied rather than a four to one ratio, Petitioners suggest that it results in a reduction of credits for the Rayland Tract wetland creation from 30.28 to 8.1 acres. T. 1203-1206, 1219-1220, 1243. These reductions in mitigation acreage or increases in the ratios are based on the concerns of Mr. Lewis who opined, in part, that fewer credits should be given for wetland preservation on-site than for wetland preservation off-site because the on-site acreage is subject to protection. Petitioners also contend that two other ratios should be changed reducing the credits for the Hunt Farm Tract upland enhancement from 14.78 to 7.38 acres and from 38.30 to 25.43 acres for the TMB mitigation. According to Petitioners, the habitat function mitigation off-set should be 97.66 acres rather than 146.65 acres. Having considered Petitioners' arguments and concerns, the District's ratios and resulting mitigation acreage for these items, as well as for detrital export impacts, are within acceptable ranges and have not been shown to be unreasonable.

<sup>5/</sup> Mr. Lewis is critical of the "plans" considered by FCC and the District and opines that the various mitigation plans are not and do not implement a regional plan. T. 1208. Mr. Lewis' criticisms have been considered.

<sup>6/</sup> The parties stipulated, in part, that "[t]here are no significant archeological or historical resources recorded within the FCC project site or within any of the proposed mitigation sites" and that "the proposed project will not adversely affect navigation or cause harmful shoaling" or "the flow of water." Further, Petitioners did not challenge the statements that "[a]s required by rule 40C-4.302(1)(a), F.A.C., and section 12.2.3.1(a) of the [A.H.], the proposed project will not cause an

environmental hazard to public health or safety and, therefore, will not 'adversely affect the public health, safety or welfare or the property of others'" and "[a]s required by rule 40C-4.302(1)(a)1., F.A.C., and section 12.2.3.1(c), A.H., the proposed project will not cause flooding on the property of others and, therefore, will not 'adversely affect the public health, safety or welfare or the property of others.'" The parties also agreed that "the proposed project will not cause adverse impacts to areas classified as approved, conditionally approved, restricted or conditionally restricted for shell fish harvesting and therefore, will not 'adversely affect the public health, safety or welfare or the property of others.'" The parties also stipulated that FCC's permit application "establishes a prima facie case of fact with respect to," in part, these issues and that "no further evidence relating to these issues will be introduced into evidence." Prehearing Statement at 19-21, 25.

<sup>7/</sup> In Billie, Case Nos. 00-2230 and 00-2231, 2001 WL 362658 (DOAH April 9, 2001; SJRWMD June 14, 2001), the District explained that "section 12.2.1.1, A.H., only requires an elimination and reduction analysis when: (1) a 'proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of subsection 12.2.2 through 12.2.3.7,' or (2) neither exception within section 12.2.1.2, A.H., applies." SJRWMD Final Order at 7-8.

<sup>8</sup> The validity of the provision was challenged and upheld in Sierra Club and St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District and The Florida Homebuilders Association, DOAH Case Nos. 05-0814RX and 05-0858RX (DOAH May 3, 2005), appeal pending, Case No. 1D05-2607.

<sup>9/</sup> It was stipulated that three factors were not in dispute and FCC's application (FCC Ex. 13) satisfied FCC's burden of going forward with respect to those factors. § 373.414(1)(a)1., 3., and 6., Fla. Stat.; Fla. Admin. Code R. 40C-4.302(1)(a)1., 3., and 6. Petitioners presented no contrary evidence with regard to these factors.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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