STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT C. ERNST and THE NEIGHBORS FOR CLEAN CANALS,	)	
Petitioners,	)	
vs.	)	
SOUTH FLORIDA WATER MANAGEMENT DISTRICT and DEPARTMENT OF TRANSPORTATION,	)	CASE NO. 86-4533
Respondents,	)	
and	)	
FUTURE DIRECTION OF MARATHON COMMITTEE and GREATER MARATHON CHAMBER OF COMMERCE,	)	
Intervenor/Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in the above case before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on February 9 and 10, 1987 in Key Colony Beach, Florida, and on May 27, 1987 in Marathon, Florida.

APPEARANCES

For Petitioners:	Robert C. Ernst, pro se 7525 Gulfstream Boulevard Marathon, Florida 33050 and Thomas W. Reese, Esquire 123 Eighth Street North St. Petersburg, Florida 33701 (May 27 hearing only)
For Respondent: South Florida Water Management District	Frances Jauquet-Mann, Esquire Post Office Box 24680 West Palm Beach, Florida 33416-4680
For Respondent: Department of Transportation	James W. Anderson, Esquire Haydon Burns Building, Mail Station 58 Tallahassee, Florida 32399-0450
For Intervenor/ Respondents:	Alfred 0. Bragg, Esquire Post Office Box 938 Marathon, Florida 33050

INTRODUCTION

This proceeding began when respondent/applicant, Department of Transportation (DOT), filed an application on July 25, 1986 with respondent, South Florida Water Management District (SFWMD), seeking the issuance of a general highway permit to construct a stormwater drainage system for a four-laning project on U.S. Highway 1 in Marathon, Florida. The application was subsequently reviewed by the agency staff, and pursuant to staff request, additional information was furnished by DOT. On October 21, 1986, the SFWMD staff filed a report recommending favorable action on the application. This prompted the filing of a petition for formal proceedings by petitioners, Robert C. Ernst and The Neighbors for Clean Canals, who own property in or near the water bodies into which the drainage will discharge. The request was forwarded by SFWMD to the Division of Administrative Hearings on November 19, 1986, with a request that a Hearing Officer be assigned to conduct a formal hearing. By notice of hearing dated December 26, 1986, the final hearing was scheduled for February 9 and 10, 1987, in Marathon, Florida. The location was subsequently changed to Key Colony Beach. A continued hearing was scheduled for March 16 and 17, 1987, but, at the request of petitioners, was continued until April 20 and 21. Upon intervenors' request, the matter was again continued to May 27, 1987, in Marathon, Florida.

On January 30, 1987, intervenor/respondents, Future Direction of Marathon Committee and Greater Marathon Chamber of Commerce, petitioned to intervene. The petition was granted during a telephonic motion hearing held on February 5, 1987. At that time, the parties stipulated to the standing of petitioners and intervenor/respondents.

At final hearing, respondent/applicant presented the testimony of Jeffrey H. Marcus, a DOT environmental administrator, Albert G. Carter, a DOT drainage engineer and accepted as an expert in stormwater facility design, R. S. Murali, accepted as an expert in hydrology, Gaspar Lobaina, a DOT district drainage engineer, Edward J. McCollough, project engineer and accepted as an expert in drainage engineering, civil engineering and hydrology, and Dr. Marty Wanielista, accepted as an expert in hydrology and environmental engineering. It also offered respondent/applicant's exhibits 1-5. All were received in evidence. The agency presented the testimony of Michael G. Cullum, a SFWMD environmental engineer and accepted as an expert in the field of stormwater management, and Edward W. Yawn, a SFWMD civil engineer and accepted as an expert in stormwater management, hydrology and hydraulics. It also offered respondent's exhibits 1-5. All were received in evidence. Intervenor/respondents presented the testimony of Charles Pattison, Monroe County director of planning, Robert W. Higgens, accepted as an expert in the field of surface water management engineering, Edward B. Hall, and Dr. Harvey H. Harper, III, accepted as an expert in biology, chemistry, hydrology, and environmental engineering. They also offered intervenors' exhibits 1-4. All were received in evidence. Petitioners presented the testimony of Dr. Brian LaPoint, accepted as an expert in water quality, nutrients, pollutant loading and effects on filter medians and marine ecosystems, Arnie Steinmetz, Eric Steinmetz, Cynthia Larson, Dr. Robert Squibb, accepted as an expert in zoological science, biochemistry, chemistry, microbiology and public health, Lt. E. W. Lawrence, a State Game and Fresh Water Fish Commission officer, Robert C. Ernst, Sally Mishmash, Henry Shaner and Richard K. Agnew. They also offered petitioners' exhibits 3-9. All were received in evidence. Finally, several members of the general public testified pursuant to Subsection 120.57(1)(b)4., Florida Statutes (Supp. 1986).

The transcripts of hearing (six volumes) were filed on June 15, 1987. Proposed findings of fact and conclusions of law were filed by petitioners and intervenors on July 6, and by respondent and respondent/applicant on July 7, 1987. A ruling on each proposed finding of fact has been made in the Appendix attached to this Recommended Order.

The issue is whether respondent/applicant's application for a surface water management permit to construct and operate a stormwater drainage system in Marathon, Florida, should be approved.

Based upon all evidence, the following findings of fact are determined:

FINDINGS OF FACT

A. Background

1. Respondent/applicant, Department of Transportation (DOT), filed an application for a general highway permit with respondent, South Florida Water Management District (SFWMD or District), on July 25, 1986. If granted, the permit would authorize DOT to construct and operate a stormwater drainage system in Marathon, Florida 1/ The system will store and dispose of stormwater runoff from a road-widening project in Marathon, Florida. The project involves expanding U.S. Highway 1 from two lanes to four lanes. According to the application, stormwater drainage from the completed project will initially flow into two retention ponds. There, through the use of underdrain granular filters, the particulate matter will be filtered out of the water, and the water will percolate into the ground within twelve hours through perforated underdrain pipes. Any runoff in excess of one-half inch will be discharged from the ponds directly into Dodge Lake (Lake), which lies north of U.S. 1, or into the 100th Street Canal (Canal), which lies south of the highway project. Both the Lake and Canal are artificial bodies of water classified as Class III waters of the State. The application has been assigned number 07256-F by the agency.

2. After reviewing the application, the District requested additional information and clarification of certain items. When this information was submitted and found to be responsive and in compliance with SFWMD rules and criteria, the SFWMD staff recommended to the District Governing Board on October 21, 1986 that the application be approved subject to fifteen special conditions. Under SFWMD procedure, this recommendation constituted the equivalent of proposed agency action. The precise effective date of this action is not known. In any event, notice of the staff's intended recommendation was publicly disseminated on October 28, 1986, and interested persons were advised that protests had to be filed no later than November 6, 1986.

3. On November 6, 1986 petitioners, Robert C. Ernst, a homeowner on the Lake, and The Neighbors for Clean Canals (TNCC), an unincorporated association of property owners on or around the Lake and Canal, filed a petition to contest the proposed agency action. In general terms, petitioners have alleged the system will diminish the water quality in the Canal and Lake and cause harm to the surrounding marine environment. Because of this protest, and the potential controversy surrounding the activity, the SFWMD converted the type of permit being sought from a general highway permit to an individual highway permit. This change resulted in DOT having to meet the more stringent criteria in Chapter 40E-4 rather than those in Chapter 40E-40.

4. On January 30, 1987, intervenor/respondents, Future Direction of Marathon Committee (FDMC), an unincorporated association, and Greater Marathon Chamber of Commerce (GMCC), a nonprofit corporation, petitioned to intervene in support of the agency action. Their petition was granted on February 5, 1987. The parties have stipulated to the standing of petitioners and intervenors.

B. The Project in General Terms

5. The District authorizes applicants for construction and operation permits to use one of three types of water management systems: wet detention system, dry detention system, and retention system. Of the three, the latter is clearly the best available method by which to treat stormwater runoff. In this case, DOT proposes to use a retention system. As the name implies, a retention system is designed to prevent storm runoff from directly discharging into receiving waters. The system proposed by DOT is similar in design to other systems already in operation in other parts of the state and which meet all relevant state standards.

6. If approved, the application will authorize the construction of a surface water management system handling stormwater runoff from approximately five or six miles of U.S. Highway 1 in Marathon. By adding two lanes of roadway, there will be around 24.53 acres of new roadway contributing runoff to the system. To a limited extent, the drainage system will accept flows from properties adjacent to the road right-of-way at the eastern end of the project. However, approximately ninety percent of the property adjacent to the roadway will drain away from U.S. Highway 1. The project begins to the west of Marathon at the 7 Mile Bridge on Knight Key and extends eastward to Vaca Cut, which is on the east side of the Marathon Airport. For purposes of this application, the project is divided into eastern and western portions with the airport being the apparent dividing line for those sections.

7. The highway is graded so that there is a longitudinal slope to the road profile. Water falling on the roadway will follow this slope to an inlet. The inlets will pick up the water runoff which will flow through buried culvert pipes by gravity to the two retention areas.

8. Consistent with SFWMD rules, the retention areas are designed to store the first one-half inch of runoff from a storm event regardless of the frequency of the storms. Runoff from the eastern portion of the project will initially drain into a 1.76 acre dry retention area located just east-southeast of the airport runway. A 226' wide weir has been constructed in the pond with a crest at an elevation of two and one-half feet. If the water level exceeds the height of the weir, any overflow will go into a box inlet and then to a 54" drainage pipe which discharges into the Canal. The western portion of the project will initially drain into a 5.5 acre dry retention area just west-southwest of the airport runway. This area has a 150' wide weir with a two and one-half foot crest. Any overflow will go into a box inlet and then into the Lake via a 54" drainage pipe.

9. Once the water reaches the two retention areas, it is distributed evenly throughout the pond. It will then filter downward by force of gravity through a filter system into a six inch diameter perforated pipe. Although SFWMD rules do not require a filter system, DOT nonetheless proposed to use one to assure compliance with water quality standards. After filtration treatment, the water will enter culvert pipes leading to outfalls in the Lake and Canal. Through normal evaporation and the underdrain system, the ponds are expected to drain within twelve hours after the storm event. DOT will use activated carbon

in the filter system and place a fabric around the pipe in order to capture and remove highway generated pollutants prior to the water's infiltration into the ground.

C. Retention Areas

10. Retention is defined in section 2.13 of the SFWMD Permit Information Manual as "the prevention of storm runoff from direct discharge into receiving waters." Examples of such a system are those which discharge through percolation, exfiltration, filtered bleed-down and evaporation processes. All are used to provide water quality for road runoff from new pavement. In this case, DOT has proposed to use a filtered bleed-down system. Bleed-down will occur through percolation to the groundwater table, by evaporation and through the underdrain system.

11. According to SFWMD rules, and in general terms, the percentage of imperviousness of the soils and volume of rainfall in the area dictate the size of the ponds. 2/ Therefore, the miles of roadway being expanded are not a consideration in determining the ponds' size. Further, through uncontradicted testimony, it was established that SFWMD construes its rules to consider only new pavement in determining capacity requirements of retention ponds. As to the rainfall in the Florida Keys, the record reflects that approximately ninety percent of storms in the Keys are less than one inch in depth, and that there are, on average, twenty-three storm events per year in the Marathon area with at least one-half inch of rainfall. The total annual rainfall in the Florida Keys is around 38.5 inches. At the same time, cap rock, a fairly impervious soil, is the predominate soil in the Marathon area. Given these considerations, the size of the ponds exceeds SFWMD capacity requirements and is adequate to handle the contemplated runoff.

12. The two retention areas are located at opposite ends of the Marathon Airport. Appropriate proceedings have either been initiated or completed to acquire the land on which the ponds are located. The bottom elevations of the ponds are two feet above mean sea level (MSL) so that flooding will not occur during high tide. Their design is similar, the only difference being their size.

13. As required by SFWMD rules, each pond is designed to store the first half-inch of runoff from the contributing drainage area since more that ninety percent of pollutants are found in this part of the runoff. Therefore, the excess "spillover" will contain less than ten percent of the total quantity of pollutants. The first surge of stormwater entering the detention ponds will undergo filtration treatment. The last water entering the pond will overflow the weir, and then only to the extent that it exceeds 3/4 inch of rainfall. 3/ If the pond is already full of water from a previous storm, additional runoff will remain in the drainage pipes or swale areas until the pond recedes. This is because of the head (weight of water) in the pond which prevents other water from entering. It is expected that the ponds will have water in them around sixteen percent of the time.

14. After the water reaches the retention areas, very little, if any, will exfiltrate through the bottom. This is due to the impervious characteristics of cap rock found in the area. The retained water will eventually drain through an underdrain filter system designed to meet Department of Environmental Regulation (DER) standards, and then into perforated collection pipes that are connected to the outfall system. These pipes will be wrapped in filter material and buried in a filter made of granular, activated carbon. The filter cloth will prevent

particulate matter from entering the piping system. In addition, the use of the filter medium will prevent the phenomenon known as "tunneling." Because of the impervious cap rock which surrounds the piping, there should be no mixing of stormwater with groundwater. However, as an added precaution to avoid mixing, DOT plans to place an impermeable membrane lining in the ponds. It also intends to modify its original proposal by raising the piping six inches (to 1.0' NGVD) so that the water can filter from the side of the piping rather than vertically downward. By doing so, the drainage rate should be improved. After completion, the drain rate in the retention areas will be ten to twenty times faster than in natural areas.

15. Three types of pollutants are generally found in stormwater runoff: organics, heavy metals and nutrients. Untreated, they can cause harm to the marine environment. Because organics are not normally associated with urban runoff, they are not an important consideration. In any event, vertical baffles have been installed near the entrance to the retention areas to trap and prevent suspended solids and other floating objects (organics) that might be in the runoff. Prior to entering the underdrain piping system, the water runs through a filter system designed to remove undesirable pollutants. In the original application DOT proposed to use fine sand. As noted above, it now intends to use the more efficient activated carbon as a filter material. Through reliable and credible testing, carbon has been shown to remove more than ninety percent of metals and carcinogenic materials from highway runoff. This more than satisfies applicable water quality standards in Chapter 17-3, Florida Administrative Code. In addition, the filter will remove around fifty percent of nitrogen compounds and between eighty and ninety percent of phosphorus. DOT also proposes to plant vegetation in the ponds which is capable of removing phosphates, nitrates and other nutrients from the stormwater prior to filtration. It is undisputed that the underdrain system meets all District technical criteria and improves the efficiency of the project. Finally, the addition of a sodded swale to augment the capacity of the eastern retention pond for holding stormwater is a reasonable modification to the project.

16. The filter system will be cleaned periodically by DOT to ensure that it operates properly and does not clog. In this regard, DOT agrees that the filter fabric and activated carbon must be changed semi-annually and bi-annually, respectively. Further, the treatment system should be inspected by DOT every three months to ensure that it is operating as intended. Finally, the record establishes that all necessary maintenance can be accomplished without contaminating the surrounding groundwater.

D. Water Quality

17. The Canal is a dead-end canal, much like others found in the Florida Keys. It is not now a part of the local drainage system. The Lake is a former borrow pit that measures around one thousand feet in length and five hundred feet in width. Its average depth is some ten to twelve feet although parts of it are as deep as fifteen to twenty feet. The Lake is connected tidally to the Florida Bay, while the Canal discharges into the Atlantic Ocean. These downstream discharge points are approximately 1,000 feet from the point of DOT's proposed discharge into the Lake and Canal. Both Florida Bay and the Atlantic Ocean are classified as Outstanding Florida Waters (0FW). At the present time, untreated stormwater runoff enters the Lake through a pipe in the airport area, and from Harbor Drive and Aviation Boulevard, two roads adjacent to the airport. This has been occurring for as long as forty years.

18. Both the Lake and Canal are habitats to various marine life species. The Lake's bottom and sides contain dense seagrass which is indicative of stress or nutrient-rich waters. This may be due to effluent leaking from septic tanks installed around the Lake. Nonetheless, the testimony establishes that both the Lake and Canal are now used for swimming and other recreational purposes.

19. In order to obtain a permit, an applicant must give "reasonable assurances" that the system will not cause adverse water quality impacts on receiving waters, nor cause discharges which result in any violation of the standards and criteria contained in Chapter 17-3, Florida Administrative Code.

20. To analyze the existing water quality and to determine the project's impact, if any, on the Lake and Canal, DOT had various tests performed to ascertain the flushing characteristics of the two receiving water bodies, their current dissolved oxygen (DO) levels, and their salinity values. In addition, profiles have emerged from stormwater runoff studies conducted over a number of years which reflect the efficiencies in removal of pollutants from runoff. These profiles are both predictable and statistically reliable.

21. Flushing studies determine how rapidly waters of the Lake and Canal will exchange and mix with the Atlantic Ocean and Florida Bay. More precisely, they determine how many tidal cycles would be required to flush a hypothetical pollutant to ten percent of its original concentration. In response to an August 21, 1986, SFWMD request, DOT conducted a revised flushing study on the Canal and Lake on August 26, 1956.

22. According to the flushing study, the flushing characteristics of the Lake and Canal are "very poor." Indeed, the study indicates that under "best" conditions, it now takes around two weeks or so to flush the Lake to ten percent of the original concentration. The study also indicated that under ideal conditions it would take thirty-two tidal cycles (sixteen days) and under adverse conditions one hundred fourteen cycles (fifty-seven days) to obtain ninety percent flushing in the Canal. All parties agree that it is not a good practice to discharge untreated stormwater into a dead-end, poorly flushed canal. However, flushing times in both the Lake and Canal will improve once the retention areas are completed due to the introduction of additional volumes of treated water.

23. To assist in its evaluation of water quality, DOT engaged the services of Environmental Quality Laboratory (EQL) to measure DO levels in the Lake and Canal. State standards provide that DO levels should not be lower than four parts per million. These values fluctuate from season to season, and from daylight to darkness. According to one expert, no Florida water ever meets the state DO standard at all times in all places. This is why averages are used.

24. Of the total readings taken by EQL, approximately fifty to sixty percent of the readings were above the minimum DO standards. In the case of the Lake, "most" of the readings met the minimum state standards. However, there were others that did not, but this is not unusual given the fact that the Lake is in an enclosed area. Similarly, EQL observed some readings in the Canal which met state standards but others that were as low as two parts per million, which is considered very low. As might be expected, this indicated the Canal was very sensitive to nutrients and had very poor flushing characteristics. However, the introduction of discharged clean fresh water will cause the DO levels of the Lake and Canal to rise.

25. The saline (salt) values for the Lake are in the range of 37 or 38 parts per million on average, but fall to values of 34 or 35 in the winter months. These values are less than those found in the waters of Florida Bay, the water body that is tidally connected to the Lake.

26. Petitioners contend that by introducing fresh water into saline (salt) water, hypo-osmotic shock will occur causing harm to marine flora and fauna. However, the influx of fresh water into the Lake and Canal should not have a material impact on the saline values due to the large volumes of water already present in the receiving bodies. Although some stratification of fresh and salt water may occur, it will only be for short periods of time. Indeed, to have complete mixing of fresh and salt water, there would have to be a continual flow of fresh water into the bodies for one hundred straight days, something which will not occur.

27. The system is designed to eliminate or detain between ninety-five and ninety-eight percent of the total pollutant mass before it is discharged into the receiving waters. This was confirmed through the expert testimony of Drs. Wanielista and Harper, which has been accepted as being the most credible and persuasive, and corroborated by statistically reliable profiles. Therefore, there will be no significant increase in nutrient loading into receiving waters. The remaining three to five percent would be in the excess flow (water spilling over the weir). However, this pollutant load is insignificant and will not adversely affect the Canal or Lake. Even if there are back-to-back storms which result in two first flushes, the proposed system will still meet District water quality standards. Finally, although no "direct" discharge into OFW's will occur, uncontradicted testimony established that the system would still meet all applicable water quality standards even if a direct discharge was contemplated. Therefore, applicant has given reasonable assurances that the proposed system will not cause violations of Chapter 17-3 standards in the Lake, Canal or other waters.

28. Petitioners' experts opined that state water quality standards would not be met. More specifically, Dr. LaPointe believed that DO levels would be adversely affected, that salinity values would be reduced, and that the nutrient criteria in Chapter 17-3 would not be met. He estimated the removal efficiency of the system to be around thirty percent, a much lower number than was used by the other parties' witnesses. He conceded that he had never seen or designed a stormwater management system. He also assumed that the filters would clog, and that the system would receive no water quality treatment. Both of these are incorrect assumptions. Having weighed the conflicting testimony of the experts on the issue of water quality, the testimony of the applicant, agency and intervenors is deemed to be the more credible and persuasive.

E. Water Quantity Requirements

29. Through expert testimony, it was established that all applicable SFWMD water quantity requirements will be met. Among other things, it is uncontradicted that the receiving waters are tidal in nature, and as such, have the capacity to accept essentially unlimited discharges from the project without causing flooding downstream or to surrounding lands. Therefore, it is found the proposed system provides reasonable assurances of adequate flood control and drainage.

F. Miscellaneous Requirements

30. Petitioners have contended that the creation of fresh water retention ponds near the ends of the airport runway will attract "wading birds" such as gulls, doves, pigeons and blue heron, and ultimately cause a hazardous situation for air traffic at the local airport. It is undisputed that fresh water is scarce in the Florida Keys and birds are naturally attracted to any standing or retained fresh water. It is noted that wading birds are already attracted to standing water between the taxiway and runway which forms after rainfall. The standing water generally drains in a period of from eight to twenty-four hours. Bird strikes by aircraft occasionally occur. To what extent the retention ponds will attract additional birds is speculative at this point. Indeed, it is reasonable to believe that the detention ponds may draw the birds further away from the airport. In any event, should air safety ever become a concern, the Federal Aviation Administration (FAA) is the appropriate regulatory agency to deal with this matter. It is noted that the FAA published a permanent notice to airmen concerning bird activity some five years ago and it has remained in effect on a year-round basis since that time.

31. Monroe County adopted a new comprehensive zoning plan effective September 15, 1986. However, any projects on which applications for permits were filed prior to that date were processed under a 1973 zoning ordinance. Therefore, DOT's application is subject to the "old" regulations, and not the current land use plan. There was no evidence that DOT's application did not conform with the "old" regulations.

32. The SFWMD rule provision requiring that applications be consistent with requirements of other public agencies was repealed by the SFWMD's Governing Board in a proceeding initiated on January 8, 1987. Even so, no other agency has lodged a formal protest against this application.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction of the subject matter and the parties thereto pursuant to Subsection 120.57(1), Florida Statutes (Supp. 1986).

34. Initially, several evidentiary and procedural matters should be addressed. First, petitioners contend that DOT is precluded from making any modifications to its original proposal, since any deviation therefrom would violate their due process rights. However, the judicially sanctioned test is whether the changes proposed constitute a substantial deviation from the original application. Hopwood v. State, Department of Environmental Regulation, 402 So.2d 1296, 1299 (Fla. 1st DCA 1981). If they do not, they are clearly permissible. Here DOT has proposed several minor modifications to enhance the performance of the filter system by (a) using a granulated, activated carbon (rather than a sand) filter system, (b) installing an impermeable lining in the ponds, (c) raising the drainage pipes by six inches, (d) installing baffles at the outfalls leading from the treatment system, and (e) adding sod (vegetation) to the ponds and a sodded swale at the eastern pond. None constitute a "substantial deviation from the original application." Hopwood, supra. Moreover, such changes were discussed at the February 9 and 10 hearing, and petitioners had over three months (until May 27) in which to prepare their response, if any, to such modifications. Further, petitioners do not deny that the proposed modifications will enhance the system's efficiency and performance. Therefore, petitioners' objection is without merit.

Secondly, during DOT's rebuttal case, and after they had rested their case, petitioners contended for the first time that compliance with the Outstanding Florida Water (OFW) criteria was in issue. They asserted that it became an issue by virtue of one of their witnesses having raised the subject during a response to a question by their qualified representative on direct examination. It is noted the matter was not raised in petitioners' pleadings nor during the case-in-chief of DOT, SFWMD and intervenors. Further, at no time during the free-form process was DOT advised by SFWMD that it was an issue or a requirement that required further proof. In addition, the parties stipulated at the outset of the hearing that the Lake and Canal were not OFW's. Since petitioners "must identify the areas of controversy" in their initial pleadings, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778, 789 (Fla. 1st DCA 1981), or give timely notice of their intent to raise the issue, they can hardly now claim that a passing reference to the subject during their witness' response to a question is sufficient to bring that subject into issue. The matter is accordingly irrelevant. 4/

Third, by post-hearing motion petitioners have requested that the undersigned take official and/or judicial notice of a laundry list of items including: a federal regulation concerning bird hazard reduction at airports (14 CFR s. 139.67); a letter dated February 25, 1987, purportedly written by an inspector for the FAA and sent to the Monroe County administrator; Section 19-151 of the 1973 Monroe County Code; an in-house opinion drafted by the DER General Counsel on April 24, 1980; and a December 1985 report prepared by an outside consultant for DER and entitled "An Assessment of Stormwater Management Programs. 5/

To begin with, petitioners misconstrue the purpose and intent of the doctrine of judicial notice. A matter judicially noticed must be of common and general knowledge or presumed by law to be so. Furthermore, it must be authoritatively settled and free from doubt or uncertainty, Makos v. Prince, 64 So.2d 670 (Fla. 1953). Finally, it takes the place of proof and is of equal force. What petitioners seek is to have a myriad of technical materials submitted after the hearing with the right to use the same as substantive evidence. 6/ Even assuming the request is timely, the items in question are either irrelevant, or are not authoritatively settled and free from doubt and uncertainty. Therefore, for the reasons stated below, they do not qualify for official/judicial notice.

The FAA regulation is a matter that may be noticed under Subsection 90.202(3), Florida Statutes (1985). Even so, it is irrelevant since it prescribes certain requirements for persons seeking an airport operating certificate from the FAA, a matter not in issue in this proceeding. As to item two, this document is a letter purportedly written by an airport safety certification inspector (presumably employed by the FAA) and addressed to the Monroe County administrator. Petitioners theorize that the document qualifies for recognition under Subsection 90.202(5), Florida Statutes (1985), as an "official action of the . . . executive . . . department of the United States." But, aside from the lack of authentication, there has been insufficient information furnished to the undersigned to show that the item should be noticed, or that it represents an "official action" of FAA. Item three is a section of a 1973 Monroe County Ordinance, and while clearly a matter which may be noticed under Subsection 90.202(10), Florida Statutes (1985), it is irrelevant to this proceeding. This is because (a) the cited provision does not apply to the application, and (b) the agency rule which brings local zoning requirements into play has been repealed. The next item is an in-house legal opinion prepared by DER's general counsel in February 1980. Petitioners suggest

the document is the equivalent of an "official action" of an executive department of a state, and as such, may be recognized under Subsection 90.202(5), Florida Statutes (1985). However, the opinion is just that, and not an expression of fact. As such, it is subject to dispute and is not intrinsically accurate. Moreover, it relates to Outstanding Florida Waters, a matter not in issue in this proceeding. Lastly, petitioners request official recognition of a report prepared for DER in December 1985 by an outside consulting firm concerning stormwater management programs. Again, petitioners assert the report is an "official action" of the state in that it was prepared pursuant to law, and is self-authenticated under Subsection 90.902(5), Florida Statutes (1985). Even if it is self-authenticated as petitioners claim, the contents of the document are subject to dispute, and can hardly be characterized as being authoritatively settled. Finally, petitioners have cited no authority to support their contention that the document qualifies as an "official act" of the executive department. Indeed, a review of prior decisional law suggests otherwise. 7/ Therefore, the motion is denied in all respects.

35. By stipulation of the parties, petitioners and intervenors are deemed to have standing to participate in this proceeding.

36. Rule 40E-4.301, Florida Administrative Code (1987), is pertinent to this proceeding and prescribes the conditions for issuance of stormwater permits. Although a number of provisions are inapplicable to this proceeding, the rule reads in full text as follows:

> 40E-4.301 Conditions for Issuance of Permits.
> (1) In order to obtain a permit under this chapter, an applicant must give reasonable assurances that the surface water management system:
> (a) provides adequate flood protection and drainage,
> (b) will not cause adverse water quality and quantity impacts on receiving waters and adjacent lands regulated pursuant to Chapter 373, Florida Statutes,
> (c) will not cause discharges which result in any violation, in surface waters of the state, of the standards and criteria of Chapter 17-3,
> (d) will not cause adverse impacts on surface and groundwater levels and flows,
> (e) will not cause adverse environmental impacts,
> (f) can be effectively operated and maintained,
> (g) will not adversely affect public health and safety,
> (h) is consistent with the requirements of other public agencies,
> (i) is consistent with the State Water Policy, Chapter 17-40, F.A.C.,
> (j) will serve a proposed land use which:
> 1. for conceptual approvals, is compatible with the land use element of the affected local government's comprehensive plan, except when a conceptual approval has been filed concurrently with a Development of Regional

Impact (DRI) Application for Development Approval (ADA) and a local government comprehensive plan amendment, pursuant to section 380.06(9)(a)1, Florida Statutes,

2. for construction and operation permits, is compatible with:

a. the affected local government's comprehensive plan, and

b. the existing zoning for the site, and

c. for any DRI, the final approval (all appeals resolved or all appeal times expired) local government Development Order (DO),

3. for a DRI with a signed Preliminary Development Agreement with the Florida Department of Community Affairs, pursuant to section 380.06(8), Florida Statutes, which allows a specified portion of the proposed development to proceed prior to the issuance of a local government DO:

a. is compatible with the affected local government's comprehensive plan and the existing zoning for the site, and

b. provides a surface water management system for that portion of the site approved for development which is able to operate separately from the surface water management system for the balance of the project site and still meet applicable District criteria,

(k) meets any applicable basin criteria in Chapter 40E-41.

(l) will not otherwise be harmful to the water resources of the District, and will not interfere with the legal rights of others, as defined in Rule 17-40.070,

(m) is not against public policy,

(n) will meet the general and specific criteria in the document described in rule 40E-4.091(1)(a)

(o) will meet the criteria for isolated wetlands, which are found in Appendix 7 of the document described in rule 40E-4.091(1)(a) and,

(p) will meet the criteria for above ground impoundments, which are found in Appendix 6 of the document described in rule 40E-4.091(1)(a)

(2) The surface water management system design plans must be signed and sealed by a Florida Registered Professional Engineer, if required by Chapter 471, Florida Statutes.

(3) In evaluating construction and/or operation permits requested pursuant to Rule 40E-4.331(1)(b) or (c) (Modification of Permits), each particular subject of the application will be evaluated based upon the degree of detail submitted with prior approved application(s). Subsequent phases will be reviewed based on the detail submitted at the time of conceptual approval or previously approved construction and operation permits.

> For detail not provided, the criteria in effect at the time of the application will apply. This rule shall apply to all Surface Water Management applications which are reviewed for groundwater discharges of stormwater pursuant to section 403.812(1)(c), Florida Statutes, regardless of when the conceptual approval was issued and shall apply to all other applications received and/or found to be complete after the effective date of this rule.

37. Of particular significance to this proceeding are the requirements in section (1) of the rule that an applicant provide reasonable assurances: (a) that the system will not violate the water quality standards in Chapter 17-3, Florida Administrative Code, (b) that the system will provide adequate flood protection and drainage, (c) that the system will not cause adverse water quantity impacts on the receiving waters and adjacent lands, (d) that the system will not cause adverse impacts on surface and groundwater levels and flows, (e) that the system is in compliance with the criteria set forth in the Basis of Review, a document adopted by reference in the rule, and (f) that the system is consistent with the requirements of other public agencies.

38. Taking the last requirement first, it is noted that the language in the rule which requires consistency with other public agency requirements has been repealed as of July 9, 1987. Florida Administrative Weekly, Vol. 13, No. 15, April 10, 1987. Since the rules in effect when the agency disposes of the application are controlling, Grove Isle, Ltd. v. Bayshore Homeowners' Association, Inc., 418 So.2d 1046 (Fla. 1st DCA 1982), rev. den. 430 So.2d 451 (Fla. 1983), Turro v. Department of Health and Rehabilitative Services, 458 So.2d 345 (Fla. 1st DCA 1984), the former requirements of Rule 40E-4.301(1)(h) need not be met. Even if they did apply, contrary to petitioners' assertion, there is no evidence that other "public agency" requirements have not been satisfied.

39. As to compliance with the requirements of Chapter 40E-4, there is conflicting testimony by the various witnesses on this issue. The undersigned has accepted the expert testimony of the applicant, intervenors and the agency as being the most credible and persuasive. Their testimony supports a conclusion that applicant has given reasonable assurances that all relevant requirements of Chapter 40E-4, including Rule 40E-4.3 01, Florida Administrative Code, have been met.

40. In so concluding, two matters bear discussion. First, petitioners suggest that Rule 17-3.011(5), Florida Administrative Code, proscribes the proposed activity because the system will contribute to the continuation of a water quality violation. That rule provides as follows:

> (5) Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed.

However, recent decisional law teaches us that additional discharges of pollutants into water bodies where the effect on water quality is found to be negligible is permissible. Caloosa Property Owners Association, Inc. v. Department of Environmental Regulation, 462 So.2d 523, 526 (Fla. 1st DCA 1986).

Moreover, where as here, the new discharge will actually improve the existing water quality, it is permissible to permit the activity even if periodic natural violations occur. Friends of the Everglades, Inc. v. State, Department of Environmental Regulation, 496 So.2d 181, 183 (Fla. 1st DCA 1986). Therefore, the above rule is no impediment to licensure.

Next, petitioners contend the DOT system fails to meet SFWMD's design capacity criteria. This contention is based on the fact that the system is designed only to handle runoff from the new pavement plus an additional twelve acres, and thus cannot handle all runoff from existing U.S. Highway 1. But, through uncontradicted testimony, the SFWMD established that the design capacity criteria in its rules contemplate a capacity that will accommodate runoff from new pavement only, and not other existing sources. Therefore, the design of the system meets all SFWMD criteria, and actually exceeds relevant size requirements.

41. There being reasonable assurances that all criteria have been met, and that all other conditions for issuance of a permit have been satisfied, the application should be granted, subject to the fifteen special permit limiting conditions outlined in the SFWMD staff report and a new condition 16 to incorporate all other modifications and increased efficiencies proposed by DOT, SFWMD and intervenors at final hearing.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that application number 07256-F be APPROVED subject to the special conditions set forth above.

DONE AND ORDERED this 15th day of July 1987, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32399-1550
904/488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of July 1987.

ENDNOTES

1/ A more precise description of the location of the project is Sections 1, 6, 9, 10 and 11, Township 66 South, Ranges 32 and 33 East, Monroe County, Florida.

2/ More specifically, the size of dry retention areas is determined bye multiplying the percentage or impervious area by the design storm volume of 2.5 inches of stormwater and by dividing the product by two to account for fifty percent credit assigned to dry retention areas. With the fifty percent credit for dry retention, the water quality treatment required is 1.25 inches.

3/ Rainfall data indicates that only one rainfall event out of every nine is capable of filling the ponds. Put another way, only one cat of every nine storm events is capable of overflowing the weir. The statistical probability of two such consecutive rainfall events within a twelve hour interval is extremely remote. It is also noted that the culvert pipes leading to the retention ponds will accommodate a quantity of water equal to 2.2 inches of rainfall. A rain event with that quantity of rainfall occurs only once every three years.

4/ Petitioners do not contend that a direct discharge into an OFW will take place. Instead, they contend an "indirect" discharge will occur by reason of actual discharges occurring in two artificial water bodies (the Lake and Canal) around 1,000 feet away. They further posit that no assurance was given that significant degrading of OFW's would not occur because of such indirect discharges. But this argument must fail for several reasons. First, the issue is irrelevant, secondly, the authority cited for such a requirement is based on a document not in evidence (DER General Counsel Opinion 80-20-A), and lastly, applicant and SFWMD made prima facie cases that all water quality standards would be met, a showing not controverted by petitioners.

5/ Petitioners actually made an ore tenus motion at the end of their case-in-chief on May 27 requesting the undersigned to take official notice of these items. Their counsel was instructed to furnish a copy of the items to opposing counsel, as required by Section 120.61, Florida Statutes (1985), so that they might examine and respond to the material. The material was not furnished to opposing counsel until June 1. The relevant statute contemplates that the materials sought to be noticed "have been (made) available to the parties for rebuttal at some stage of the agency proceedings." Peoples Bank of Indian River County v. State, Department of Banking and Finance, 395 So.2d 521, 525 (Fla. 1981). By raising the issue after the other parties had completed their cases-in-chief, and requesting that lengthy and technically complicated documents be officially noticed, petitioners have arguably failed to satisfy this requirement. While a continuance could be granted to respond to the newly raised matters, this is patently unfair to the applicant who is entitled to have its application adjudicated in an expeditious manner. Cf. Collier Medical Center, Inc. v. State, Department of Health and Rehabilitative Services, 462 So.2d 83, 86 (Fla. 1st DCA 1985) (request for official notice of facts made four months after final hearing properly denied).

6/ For example, petitioners have relied extensively on matters taken from the DER report to support their proposed findings.

7/ "Official action" of the government has been construed to include such things as legislative journals, judicial forms of publication, time of passage of bills, amendments to statutes, terms of office, the creation of political subdivisions, and duties of trustees of the internal improvement fund.

APPENDIX

Petitioners:

1. Covered in finding of fact 8.
2. Covered in finding of fact 8.
3. Covered in finding of fact 17.
4. Covered in finding of fact 17.
5. Covered in finding of fact 8.
6. Covered in finding of fact 17.
7. Covered in finding of fact 17.
8. Covered in finding of fact 6.
9. Covered in finding of fact 6.
10. Rejected as being irrelevant since the SFWMD's calculations are based on new pavement (impervious) areas and not roadway mileage.
11. Rejected for the same reason given in the prior ruling.
12. Rejected as being contrary to the evidence.
13. Covered in finding of fact 11 and footnote 2.
14. Covered in finding of fact 6.
15. Rejected since the retention areas need only handle runoff from the new pavement and the evidence clearly establishes that the size of the ponds exceeds SFWMD capacity requirements.
16. Covered in finding of fact 6.
17. Rejected as irrelevant since witness Higgens stated that although "precise" numbers were not known the system would nonetheless adequately handle the drainage basin.
18. Rejected as irrelevant since SFWMD rules do not require the system to handle runoff from other contributing areas.
19. Rejected as being contrary to the more credible and persuasive evidence.
20. Covered in finding of fact 15.
21. Covered in finding of fact 15.
22. Covered in finding of fact 15.
23. Covered in finding of fact 15.
24. Rejected as being contrary to the more credible and persuasive evidence.
25. Rejected as being contrary to the more credible and persuasive evidence.
26. Rejected as irrelevant since the language in Rule 40E-4.301(1)(h) has been repealed.
27. Covered in finding of fact 31.
28. Covered in finding of fact 31.
29. Rejected as irrelevant for the reason given in ruling number 26.
30. Rejected as irrelevant for the reason given in ruling number 26.
31. Rejected as irrelevant for the reason given in ruling number 26.
32. Rejected as unnecessary.
33. Covered in finding of fact 22.
34. Covered in finding of fact 22.
35. Covered in finding of fact 24.
36. Partially covered in finding of fact 22. That portion referring to a DER manual is rejected since the manual is not in evidence.
37. Rejected as irrelevant since SFWMD rules require only that the system handle the runoff from the newly paved areas.
38. Rejected as being contrary to the evidence.
39-50. Rejected as being irrelevant since OFW criteria are not in issue. The proposed findings are also based upon matters not in evidence (DER General Counsel Opinion 80-20-A).

51. Rejected as unnecessary.

52. Covered in finding of fact 24.

53. Partially covered in finding of fact 24. That portion suggesting that all DO readings in the Lake and Canal "frequently" fall below 4.0 is rejected as being contrary to the evidence.

54. Rejected since the stormwater DO readings were taken at one point only (Scotty's), and the witness incorrectly assumed that the detention ponds utilized sand (and not activated charcoal) filters.

55. Not used since the carbon filter system will remove at least fifty percent of nitrogen compounds, which satisfies 17-3 standards.

56. Rejected as being contrary to the more credible and persuasive evidence.

57. Rejected as irrelevant since the DOT design meets all SFWMD capacity requirements.

58. Partially covered in footnote 3. The remainder is rejected as being irrelevant since the DOT design meets all SFWMD capacity requirements.

59. Rejected as being irrelevant and contrary to the more credible and persuasive evidence.

60. Covered in finding of fact 13.

61. Rejected since Dr. Harper qualified this statement by saying the DOT design was appropriate given the low elevation in the Keys.

62. Rejected as irrelevant since the more credible evidence reflects no water quality violations will occur.

63. Rejected as being contrary to the more credible and persuasive evidence.

64. Rejected as being contrary to the evidence. Dr. Wanielista stated that after treatment, around 1.140 pounds of nitrogen per year would be discharged into the Lake, but even so, this would not violate 17-3 standards. As to phosphorus, the numbers are irrelevant since the more persuasive testimony by Dr. Harper and others was that the negligible amounts of phosphorus being discharged would have no adverse effect on the receiving waters.

65. Rejected for the reasons given in ruling 64.

66. Rejected for the reasons given in ruling 64.

67. Covered in finding of fact 28.

68. Rejected since Dr. Harper's testimony has been accepted as "useful information" by the undersigned.

69. Rejected, as not being supported by the evidence. The finding is based on a matter not in evidence (DER report).

70. Rejected as irrelevant since the more credible and persuasive evidence reflects the introduction of small amounts of nitrate and nitrite nitrogen will not cause 17-3 violations.

71. Rejected for the reasons given in ruling 70.

72. Rejected for the reasons given in ruling 70.

73. Rejected as irrelevant since the more credible and persuasive evidence reflects no 17-3 violations will occur.

74. Rejected for the reasons given in ruling 73.

75. Covered in finding of fact 18.

76. Covered in finding of fact 18.

77. Rejected as irrelevant since the more credible and persuasive evidence reflects no 17-3 violations will occur.

78. Rejected as unnecessary.

79. Rejected as contrary to the evidence.

80. Rejected as irrelevant.

81. Rejected as not being credible.

82. Rejected as irrelevant since 17-3 standards will be met.

83. Rejected as irrelevant since an activated carbon filter will provide sufficient filtration to achieve 17-3 standards.

84. Rejected as irrelevant since an activated charcoal system has been tested on other non-DOT systems.

85. Rejected as irrelevant since the more credible and persuasive evidence reflects the filter system will meet SFWMD standards.

86. Rejected as being contrary to the more persuasive evidence.

87. Rejected as not being supported by credible and persuasive evidence.

88-93. Rejected as being contrary to the more credible and persuasive evidence that no material impact on the receiving waters will occur.

94. Covered in findings of fact 9 and 13.

95-100. Covered in finding of fact 30.

101. Rejected as irrelevant since DOT is not threatening or harassing birds at the airport.

102. Rejected as irrelevant since the FAA, and not the SFWMD, has jurisdiction over air safety.

103. Rejected as being contrary to the more credible and persuasive evidence.

104. Covered in finding of fact 18.

105. Rejected as being irrelevant to the issues.

106. Rejected as being contrary to the more credible and persuasive evidence.

Respondent SFWMD:

1. Covered in finding of fact 1.
2. Covered in finding of fact 1.
3. Covered in findings of fact 2 and 20.
4. Covered in findings of fact 6 and 11.
5. Covered in finding of fact 11.
6. Covered in finding of fact 10.
7. Covered in finding of fact 11.
8. Covered in finding of fact 10.
9. Covered in finding of fact 13.
10. Covered in finding of fact 31.
11. Covered in finding of fact 30.
12. Covered in finding of fact 32.
13-19. Covered in findings of fact 14, 15 and 28.
20. Covered in finding of fact 28.
21. Covered in findings of fact 14 and 15.
22. Covered in findings of fact 14 and 15.
23. Covered in finding of fact 15.
24. Covered in finding of fact 27.
25. Covered in finding of fact 15.
26. Covered in finding of fact 24.
27. Covered in finding of fact 26.
28. Covered in finding of fact 28.
29. Covered in finding of fact 27.

Respondent/Applicant:

1. Covered in finding of fact 1 except that the date of July 25, 1986 has been used.
2. Covered in finding of fact 6.
3. Covered in finding of fact 2.
4. Covered in finding of fact 2.
5. Covered in finding of fact 8.
6. Covered in findings of fact 8 and 11.
7. Covered in finding of fact 9.

8. Covered in finding of fact 6.
9. Covered in finding of fact 5.
10. Covered in findings of fact 27 and 29.
11. Covered in finding of fact 9.
12. Covered in finding of fact 30.
13. Covered in finding of fact 26.
14. Covered in finding of fact 31.
15. Covered in finding of fact 24.
16. Covered in finding of fact 15.
17. Covered in finding of fact 27.
18. Covered in finding of fact 27.
19. Covered in finding of fact 14.
20. Covered in finding of fact 5.
21. Covered in finding of fact 16.
22. Generally covered in numerous findings.
23. Rejected as unnecessary.
24. Covered in finding of fact 14.
25. Covered in finding of fact 30.
26. Covered in finding of fact 30.

Intervenors:

1. Covered in finding of fact 1.
2. Covered in finding of fact 3.
3. Covered in finding of fact 4.
4. Covered in finding of fact 4.
5. Covered in finding of fact 2.
6. Covered in finding of fact 1.
7. Covered in finding of fact 6.
8. Rejected as unnecessary.
9. Covered in finding of fact 1.
10. Covered in finding of fact 7.
11. Covered in findings of fact 7 and 8.
12. Covered in findings of fact 7 and 8.
13. Covered in finding of fact 14.
14. Covered in finding of fact 12.
15-19. Covered in findings of fact 14 and 15.
20. Covered in finding of fact 1.
21. Covered in finding of fact 17.
22. Covered in finding of fact 17.
23-25. Covered in finding of fact 18.
26. Covered in finding of fact 18.
27-30. Covered in finding of fact 11.
31-34. Covered in finding of fact 13.
35. Covered in finding of fact 9.
36-40. Covered in finding of fact 13.
41. Rejected as unnecessary.
42. Covered in finding of fact 13.
43. Covered in finding of fact 14.
44. Covered in finding of fact 15.
45. Covered in finding of fact 14.
46. Covered in finding of fact 14.
47. Covered in finding of fact 16.
48-50. Covered in finding of fact 15.
51. Covered in finding of fact 20.
52. Covered in finding of fact 20.
53. Covered in finding of fact 27.

54. Covered in finding of fact 27.
55. Covered in finding of fact 24.
56. Covered in finding of fact 15.
57. Covered in finding of fact 14.
58. Covered in finding of fact 26.
59. Covered in finding of fact 26.
60. Covered in finding of fact 27.
61. Covered in finding of fact 27.
62. Covered in finding of fact 30.
63. Covered in finding of fact 30.
64. Covered in finding of fact 32.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT C. ERNST and
THE NEIGHBORS FOR CLEAN CANALS,

Petitioners, CASE NO. 86-4533

vs.

SOUTH FLORIDA WATER MANAGEMENT
DISTRICT and FLORIDA DEPARTMENT OF
TRANSPORTATION,

Respondents,

FUTURE DIRECTION OF MARATHON
COMMITTEE and GREATER MARATHON
CHAMBER OF COMMERCE,

Intervenor/Respondents.
_____/

FINAL ORDER

The Hearing Officer's Recommended Order came to be heard before the Governing Board of the South Florida Water Management District (District) at its regulatory meeting on August 13, 1987.

James E. Anderson, attorney for respondent, Florida Department of Transportation; Frances Jauquet-Mann, attorney for respondent District; and Alfred O. Bragg, attorney for intervenors/respondents were present at the Governing Board meeting. Mr. Anderson presented argument to the Governing Board on August 13, 1987.

On July 28, 1987, Petitioners served a Request for Oral Argument which indicated that a conflict prevented petitioners counsel from attending the August 18, 1987 Governing Board meeting. The District advised petitioners that the August 13 meeting was the only available date for Governing Board consideration of this matter due to the statutory forty-five day deadline and because the applicant did not waive the forty-five day requirement. Petitioners did not appear at the Governing Board meeting.

The Governing Board was advised that each party had been notified that this matter would be heard at the August 13, 1987 meeting at District headquarters in West Palm Beach. The Governing Board was further advised that it was required to enter a Final Order in this matter at the August 13, 1987 meeting in order to meet the statutory forty-five day deadline in section 120.60(2), F.S.

The Governing Board considered the Findings of Fact, Conclusions of Law, and Recommended Order of the Hearing Officer submitted on July 15, 1987; Petitioners' Exceptions to Recommended Order which were filed with the District on July 30, 1987; and the District's Response to Petitioners' Exceptions to Recommended Order which were served on August 7, 1987. The Governing Board also considered the Proposed Final Order served by the District on August 12, 1987. Because the exceptions filed by petitioners disputed the Hearing Officer's Findings of Fact, each Governing Board member was furnished a complete transcript of the Hearing of this matter, and each Governing Board member reviewed the transcript.

FINDINGS ON WRITTEN EXCEPTIONS

With regard to Petitioners' Exceptions to Recommended Order, the Governing Board acts as follows:

1. Exception Number 1 is rejected because uncontradicted testimony establishes that the stormwater management system need only account for runoff from new areas of pavement. The Hearing Officer found that credible testimony established that the applicant provided reasonable assurances of compliance with state water quality standards.

2. Exception Number 2 is rejected because petitioners raise the non-rule policy issue in an improper and untimely manner. Furthermore, there is a complete absence of competent, substantial evidence in the record to support petitioners' exception. The Hearing Officer found that uncontradicted testimony establishes that only new pavement need be considered in determining the he size of the retention areas.

3. Exception Number 3 is rejected because there is competent, substantial evidence to support the Hearing Officer's finding that 1.25 inches of storage and treatment is required for the stormwater management system.

4. Exception Number 4 is rejected because there is competent, substantial evidence to support the Hearing Officer's finding that 1.25 inches of storage and treatment is required for the stormwater management system.

5. Exception Number 5 is rejected because competent, substantial evidence supports the Hearing Officer's finding that the applicant provided reasonable assurances of compliance with water quality standards. Uncontradicted testimony establishes that only new pavement need be considered in determining the size of the retention areas.

6. Exception Number 6 is rejected because petitioners raised the Outstanding Florida Waters (OFW) issue in an improper and untimely manner. In disallowing petitioners from amending their pleading to include the OFW issue, the Hearing Officer properly exercised his discretion. The Governing Board has not been presented with any reason to overturn the Hearing Officer's finding.

7. Exception Number 7 is rejected because there is competent, substantial evidence to support the Hearing Officer's finding that the discharges of treated stormwater do not create stagnant water conditions.

8. Exception Number 8 is rejected because there is competent, substantial evidence to support the Hearing Officer's finding that the applicant provided reasonable assurances of compliance with District rules, which include compliance with state water quality standards. Petitioners failed to meet their burden of rebutting this finding of reasonable assurances.

9. Exception Number 9 is rejected because there is .competent, substantial evidence to support the Hearing Officer's finding that the applicant provided reasonable assurances of compliance with state water quality standards. Petitioners did not present evidence to rebut the Hearing Officer's finding of reasonable assurances.

10. Exception Number 10 is rejected because the Hearing Officer determined that District does not have jurisdiction over the alleged violations of the Monroe County ordinance. In addition, the Hearing Officer found that there is no competent, substantial evidence which demonstrates that the applicants failed to meet the requirements of other public agencies.

11. Exception Number 11 is rejected because competent, substantial evidence supports the Hearing Officer's finding that it is speculative to predict the extent that the retention ponds will attract additional birds. In addition, alleged adverse impacts to birds under these circumstances at the Marathon airport do not fall within the purview of the District's regulatory authority under the Water Resources Act.

12. Exception Number 12 is rejected because it is irrelevant. Competent, substantial evidence supports the Hearing Officer's finding that the culverts will accommodate 2.2 inches of rainfall.

ORDER

NOW THEREFORE, it is ordered that:

1. The Governing Board adopts the Hearing Officer's Findings of Fact, Conclusions of Law, and Recommended Order in toto, as part of its Final Order.

2. The Governing Board orders the issuance of the subject permit in accordance with this Order, and the Recommended Order of the Hearing Officer including the addition of special condition number 16 which will "incorporate all other modifications and increased efficiencies proposed by the Department of Transportation, South Florida Water Management District and intervenors at final hearing:"

> "16. Within 60 days after the completion of construction of the surface water management system, the permittee shall submit as built drawings which showing baffles, charcoal filters, filter media, raised underdrains and a plan of regular maintenance of the surface water management system."

DONE and ORDERED this 13th day of August, 1987 at a public meeting held at West Palm Beach, Florida.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

(Corporate Seal)

By_____
Vice Chairman

ATTEST:

By_____
Secretary

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Thomas W. Reese, Esquire, 123 Eighth Street North, St. Petersburg, Florida 33701, James E. Anderson, Esquire, Florida Department of Transportation, Haydon Burns Building Mail Station 58, Tallahassee, Florida 32399 and Alfred O. Bragg, Esquire, Post Office Box 938, Marathon, Florida 33050 by U.S. Mail this 25th day of August, 1987.

_____

FRANCES JAQUET-MANN