STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. MODERN, INC.; FIRST OMNI SERVICE CORP.; HASLEY HART; and B. B. NELSON, Respondents, vs. DEPARTMENT OF TRANSPORTATION, Intervenor.	)	Case Nos. 97-4389 97-4390 97-4391 97-4392 97-4393
MODERN, INC., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	Case Nos. 98-0426RX 98-0427RU
FIRST OMNI SERVICE CORPORATION, Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	Case Nos. 98-1180RX 98-1181RU 98-1182RX

RECOMMENDED ORDER IN CASE NUMBERS 97-4389, 97-4390, 97-4391, 97-4392, and 97-4393

An administrative hearing was conducted on June 1-5 and 8-12, and on October 28-29, 1998, in Viera, Florida, by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings.

APPEARANCES

For Petitioner: William H. Congdon, Esquire
Mary Jane Angelo, Esquire
Stanley J. Niego, Esquire
St. Johns River Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondents: Allan P. Whitehead, Esquire
Moseley, Wallis and Whitehead, P.A.
1221 East New Haven Avenue
Post Office Box 1210
Melbourne, Florida 32902-1210

For Intervenor: Marianne A. Trussell, Esquire
Murray M. Wadsworth, Jr., Esquire
Department of Transportation
605 Suwannee Street
Mail Station 58
Tallahassee, Florida 32399-0458

STATEMENT OF THE ISSUES

The St. Johns River Water Management District (the "District") alleges in Case Number 97-4389 that Respondent, Modern, Inc. ("Modern"), excavated two ditches in wetlands without a permit, that the excavation was not exempt from a permit, and that Modern committed related acts alleged in the

Administrative Complaint. The District proposes alternative plans for corrective action.

Modern and its co-respondents ("Respondents") contend that the excavation was not required to have a permit because either it was not an activity covered by the permitting statutes or it was exempt. In addition, Respondents charge that the proposed agency action is based on an unadopted rule that does not satisfy the requirements of Section 120.57(1)(e), Florida Statutes (1997). (All chapter and section references are to Florida Statutes (1997) unless otherwise stated.)

In Case Numbers 97-4390, 97-4391, 97-4392, and 97-4393, Respondents challenge an Emergency Order issued by the District to stop the drainage of wetlands. Respondents contend that the Emergency Order is facially insufficient, that there was no emergency, and that the corrective action has worsened conditions.

The issue in each of the rule challenge cases is whether an existing rule or an agency statement is an invalid exercise of delegated legislative authority within the meaning of Sections 120.52(8) and 120.56(1). Case Numbers 98-0426RX and 98-1180RX challenge Rule 40C-4.041 pursuant to Section 120.56(3). Case Number 98-1182RX challenges Rule 40C-4.051 pursuant to Section 120.56(3). Case Numbers 98-0427RU and 98-1181RU challenge an agency statement pursuant to Section 120.56(1) and (4). (Unless

otherwise stated, all references to rules are to rules published in the Florida Administrative Code as of the date of this Recommended Order.)

The parties identify approximately 57 issues in their respective Proposed Recommended Orders and Proposed Final Orders ("PROs" and "PFOs", respectively). Those issues relevant to the proceeding conducted pursuant to Section 120.57(1), including Section 120.57(1)(e), are addressed in this Recommended Order. The remaining issues are addressed in the Final Order issued on the same date as the date of this Recommended Order.

PRELIMINARY STATEMENT

On May 14, 1997, the District issued an Emergency Order for action intended to stop the drainage of wetlands that allegedly resulted from the excavation of two drainage ditches. On May 29, 1997, First Omni Service Corp. ("Omni"), Mr. Hasley Hart, Mr. B.B. King, and Modern timely filed their respective petitions for formal review of the Emergency Order.

On August 20, 1997, the District filed an Administrative Complaint and Proposed Order alleging that Modern excavated the two ditches and proposing that Modern restore the ditches and adjacent wetlands. On September 3, 1997, Modern timely filed a Petition for Formal Administrative Hearing.

On September 17, 1997, the District referred all of the matters to the Division of Administrative Hearings ("DOAH") to

conduct an administrative hearing. DOAH assigned Case Number 97-4389 to the proceeding involving the Administrative Complaint and assigned Case Numbers 97-4390, 97-4391, 97-4392, and 97-4393 to the separate challenges to the Emergency Order filed, respectively, by Omni, Mr. Hart, Mr. Nelson, and Modern.

On October 29, 1997, the cases were consolidated over objection by Respondents. The consolidated proceeding was set for hearing during the weeks of March 9-13 and 16-20, 1998. A Prehearing Order issued on October 23, 1997, required the parties, among other things, to submit prehearing stipulations 15 days prior to the date of the final hearing.

Two motions led to the intervention of the Department of Transportation (the "Department"). On February 6, 1998, the District filed a Motion for Protective Order and a Motion in Limine. Both motions sought to preclude Respondents from discovering evidence of a mitigation plan the District had required in 1988 as one of the conditions of a permit issued to the Department to widen State Road 50 ("SR 50"). The mitigation plan was completed in 1991 in an area approximately 2.5 miles west of the excavation site and is referred to by the parties as the "Hacienda Road project."

Before initiating this proceeding, Respondents had filed an action in circuit court against the District and the Department, as co-defendants. Respondents alleged that flooding from the

Hacienda Road project had resulted in an inverse condemnation of Respondents' property. The circuit court granted defendants' motion to dismiss for failure to exhaust administrative remedies, and this proceeding ensued. In order to exhaust their administrative remedies, Respondents argued in this proceeding that it was essential for Respondents to discover evidence concerning the Hacienda Road project and its alleged impact on Respondents' property.

Without ruling on the admissibility of such evidence at the hearing, the undersigned ruled that Respondents could discover evidence of the Hacienda Road project and its role in the flooding problems allegedly experienced by Respondents on their property. On March 3, 1998, the Department filed a Petition to Intervene which was granted by an Order on Pending Motions entered on March 16, 1998.

In response to discovery requests from the District and the Department, the corporate officers of Modern asserted their Fifth Amendment protection against self-incrimination, on the ground that Section 373.430(3)-(5) exposes Modern to potential criminal penalties. The District and the Department moved for a continuance to allow additional time to either secure immunity agreements protecting the corporate officers from criminal prosecution or to discover alternative evidence to satisfy the District's burden of proof in Case Number 97-4389.

The consolidated proceeding was rescheduled for the weeks of June 1-5 and 8-12, 1998.

On January 23, 1998, Modern filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041 and a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989. DOAH assigned Case Number 98-0426RX to the former rule challenge and Case Number 98-0427RU to the latter rule challenge. Both cases were consolidated and set for hearing on March 2, 1998. They were subsequently consolidated with the earlier cases and set for hearing during the weeks of June 1-5 and 8-12, 1998.

On March 9, 1998, Omni filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041, a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989, and a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.051. DOAH assigned Case Number 98-1180RX to the first rule challenge, Case Number 98-1181RU to the second rule challenge, and Case Number 98-1182RX to the third rule challenge. On March 19, 1998, all three cases were consolidated and set for hearing on April 13, 1998. On April 8, 1998, Case Numbers 98-1180RX, 98-1181RU, and 98-1182RX were consolidated with the previously consolidated cases and set for hearing during the weeks of June 1-5 and 8-12, 1998. On May 29, 1998, the parties

filed separate prehearing stipulations in accordance with the Prehearing Order entered on October 27, 1997.

Except for three hours one afternoon that were consumed by a 911 call for medical assistance required by the ALJ, the parties used all of the time originally set for the weeks of June 1-5 and 8-12 to conclude the matters at issue in Case Numbers 97-4389 through 97-4393. Pursuant to the agreement of the parties, the rule challenge cases were set for hearing during the week of October 28, 1998. In the interim, the parties adopted substantially all of the record in consolidated Case Number 97-4389 for use in the rule challenge cases and thereby reduced to two days the time required for the hearing in the rule challenge cases. The parties agreed to submit their PROs and PFOs after the hearing was conducted on October 28-29, 1998.

At the hearing conducted during the weeks of June 1-5 and 8-12, 1998, the District presented the testimony of 11 expert witnesses and submitted 118 exhibits for admission in evidence. Respondents presented the testimony of two fact witnesses and one expert witness and submitted 76 exhibits for admission in evidence. Intervenor presented the testimony of two expert witnesses and submitted 15 exhibits for admission in evidence. The parties also submitted enlarged, demonstrative copies for many of the 209 exhibits submitted for admission in evidence. The identity of the witnesses and exhibits, and the rulings

regarding each, are set forth in the twelve-volume Transcript of the hearing filed on July 24 and August 10, 1998.

Respondent, Nelson, intermittently attempted during discovery and during the hearing to represent himself on some issues and then to reassert his representation by counsel for Respondents on other issues. Mr. Nelson's episodic self-representation created a potential for prejudice to the other respondents and a potential conflict of interest for counsel. Prior to and during the hearing, the ALJ reminded Mr. Nelson of the potential prejudice and instructed Mr. Nelson to either represent himself, obtain separate counsel, or allow counsel for Respondents to represent him. After an extended recess of the hearing one afternoon, Respondents apparently resolved the potential controversy and the issue did not arise again.

At the hearing conducted on October 28 and 29, 1998, the District presented the testimony of two fact witnesses and one expert witness and submitted three exhibits for admission in evidence. Respondents presented the testimony of no witnesses and submitted eight exhibits for admission in evidence. Intervenor attended the hearing but submitted no evidence for admission in evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the three-volume Transcript of the hearing filed on December 14, 1998.

At the hearing conducted on October 28, 1998, Respondents submitted an ore tenus motion for attorney's fees and costs pursuant to Section 120.595. The parties agreed to address the issue of reasonable fees and costs in a separate evidentiary hearing.

On December 14, 1998, the District filed its Notice of Proposed Rulemaking pursuant to Section 120.56(4)(e) which encourages an agency to proceed to rulemaking "expeditiously" and "in good faith." On February 1, 1999, the District filed a request for Official Recognition of the publication of Proposed Rules 40C-4.051(12)(b) and 40C-4.091. The request was granted without objection. The proposed rules address the District statement challenged by Respondents pursuant to Section 120.57(1)(e) and Section 120.56(4).

On February 19, 1999, Omni filed a Petition for Administrative Determination of the Invalidity of Proposed Rules 40C-4.051(12)(b) and 40C-4.091. DOAH assigned Case Number 99-0632RP to the challenge to the District's proposed rules. The case was set for hearing on March 29, 1999, and pursuant to the agreement of the parties waiving their rights to a hearing in 30 days, was rescheduled for June 29, 1999.

The District timely filed its PRO and PFO on February 12, 1999. Respondents timely filed their PRO and PFO on February 18,

1999. On February 12, 1999, Intervenor filed a notice of limited adoption of the PRO and PFO filed by the District.

The only motion that remains to be ruled on in this Recommended Order is the District's Motion in Limine. The motion seeks to preclude the admission of evidence involving the Hacienda Road project. The undersigned reserved ruling on the motion for disposition in this Recommended Order. The ruling is discussed in the Conclusions of Law.

On October 16, 1998, Modern and Omni filed a Stipulated Motion to Amend Petition, and attached amended petitions, which amended their challenges to Rule 40C-4.051 and the agency statement (the "Amended Petition"). The District agreed to the Amended Petition, and Modern and Omni agreed to limit their rule challenges to the matters included in the Amended Petition. In relevant part, the Amended Petition limits the challenge to Rule 40C-4.051 to specific provisions in Rule 40C-4.051(11)(c).

FINDINGS OF FACT

1. This proceeding arises from the excavation of two intersecting canals, or ditches, in January 1997 in Brevard County, Florida. One conveyance runs north and south and is identified by the parties as "NS1." The other conveyance runs east and west and is identified by the parties as "EW1."

2. Part of the excavation occurred inside the St. Johns National Wildlife Refuge (the "Refuge"). The Refuge is owned and

managed by the United States Fish and Wildlife Service (the "Wildlife Service"). All of the excavation occurred on property within the jurisdiction of the District and contiguous to property owned by Modern.

3. On May 14, 1997, the District issued an Emergency Order authorizing the Wildlife Service to construct temporary weirs in NS1 and in EW1. The District intended the weirs to restore the bottoms of NS1 and EW1 to elevations which the District claims to have existed in NS1 and EW1 prior to the excavation. The Wildlife Service completed construction of the weirs on May 27, 1997.

1. Excavation Site

4. NS1 runs parallel to Interstate 95 ("I-95"). EW1 runs parallel to SR 50 and lies approximately 25 feet inside the southern boundary of the Refuge.

5. The point where NS1 and EW1 intersect is west of I-95 by approximately .25 miles, or about 1100 feet, and north of SR 50 by approximately one-half mile plus 25 feet, or 2,665 feet. NS1 and EW1 intersect at a point that is approximately 2,903 feet northwest of the intersection of I-95 and SR 50.

6. NS1 bisects a marsh ("Marsh-1") approximately 800 feet south of EW1. EW1 bisects a pond ("Pond-1") approximately 300 feet east of NS1. Pond-1 spans north and south of both EW1 and

the southern boundary of the Refuge. Marsh-1 is south of the Refuge boundary and spans east and west of NS1.

7. NS1 continues south of Marsh-1 and intersects SR 50 and an adjacent east-west canal immediately north of and parallel to SR 50 known as the Indian River City Canal ("IRCC"). NS1 proceeds south of the IRCC approximately 1.5 miles to a larger east-west canal, identified as both the Addison Canal and the Ellis Canal (the "Addison Canal"). The Addison Canal flows west from that point approximately four miles into the St. Johns River.

8. NS1 runs north across EW1 approximately 1.5 miles from SR 50 to an east-west road known as Satterfield Road. An adjacent, parallel canal immediately south of Satterfield Road is identified as the Satterfield Road Canal.

9. EW1 continues west from I-95 approximately 2.75 miles until it intersects Hacienda Road. EW1 runs east of I-95 for some distance.

10. The excavation in January 1997 included both NS1 and EW1. NS1 was excavated from its intersection with SR 50 north approximately 2,687 feet to a point approximately 22 feet north of EW1. EW1 was excavated approximately 30 feet east of NS1.

2. Contested Area

11. The excavation site is in the southeast corner of a "rectangular tract" of land west of I-95 and north of SR 50 which comprises approximately 4.13 square miles. The rectangular tract and a "smaller parcel" east of I-95 make up the "contested area" in this proceeding.

2.1 Rectangular Tract

12. The rectangular tract measures approximately 2.75 miles from I-95 west to Hacienda Road and approximately 1.5 miles, from SR 50 north to Satterfield Road. The intersection of I-95 and SR 50 forms the southeast corner of the rectangular tract.

13. The rectangular tract is bounded on the east by I-95; on the south by SR 50; on the west by Hacienda Road, which is about a mile or so east of the St. Johns River; and on the north by Satterfield Road. Satterfield Road is approximately three miles south of the boundary between Brevard and Volusia counties (the "county line").

2.2 Smaller Parcel

14. A substantially smaller parcel abuts the east side of I-95. The smaller parcel is bounded on the west by I-95; on the south by SR 50; on the east by State Road 405 ("SR 405"); and on the north by the Satterfield Road Canal and what would be Satterfield Road if Satterfield Road extended east of I-95. SR

405 runs north and south parallel to and approximately .25 miles east of I-95 and approximately 2.7 miles west of the Indian River.

3. Tribulation Harbor

15. In this proceeding, legal interests from five separate sources flow into the contested area like separate rivers flowing into an inland harbor. The confluence of divergent legal interests results in a turbulent mix of the statutory responsibilities of state and federal agencies and the constitutional rights and business interests of private property owners.

16. Respondents own over 4,500 acres of land in and around the contested area and have legitimate business or personal interests in the development or other use of their property. The District is statutorily charged with responsibility for the hydrologic basin of the St. Johns River (the "River Basin"), including the contested area.

17. The contested area is circumscribed by a five-mile by four-mile area platted in 1911 as the Titusville Fruit and Farm Subdivision ("Titusville Farm"). The recorded plat of Titusville Farm established a drainage system of intersecting east-west and north-south canals. Some of the conveyances, including NS1 and EW1, run through the contested area.

18. Federal law charges the Wildlife Service with responsibility for managing the Refuge. A substantial portion of the Refuge lies in that part of the contested area west of I-95. The contested area also includes portions of the Hacienda Road project.

3.1 Private Property

19. Modern is a Florida corporation owned principally by Mr. Charles Moehle who is also the president of the company and the father of Mr. Michael Moehle. Omni is a Florida corporation wholly owned by the younger Moehle.

20. Modern owns two parcels of land in the contested area ("Modern-1" and "Modern-2"). The northern boundary of Modern-1 is just south of EW1 and the Refuge boundary. Modern-1 is bounded on the west by NS1, on the south by SR 50, and on the east by I-95.

21. Modern-2 is inside the contested area in the smaller parcel east of I-95. Modern-2 comprises a substantial portion of the smaller parcel.

22. Modern owns a third tract of land comprising approximately 4,500 acres west and south of Fox Lake ("Modern-3"). Modern-3 is within the District's jurisdiction and includes approximately three miles of land from Satterfield Road

north to the county line, including one mile in Titusville Farm immediately north of Satterfield Road.

22. Modern-3 is bounded on the south by Satterfield Road; on the north by the county line; on the east by a north-south section line parallel to and approximately .75 miles west of I-95; and on the west by a section line that is approximately one mile west of what would be Hacienda Road if Hacienda Road extended north of Satterfield Road. A square mile section is carved out of the western half of Modern 3 in Section 10, Township 22 South, Range 34 East.

24. Omni, Mr. Hart, and Mr. Nelson own separate parcels of land outside the contested area but proximate to the contested area. They claim that their property is directly impacted by the action taken in the Emergency Order and by the action proposed in the Administrative Complaint.

25. Omni owns property on the east side of SR 405. Although the Omni parcel is outside of the contested area, it is adjacent to the smaller parcel and within both the River Basin and Titusville Farm.

26. Mr. Hart owns property which is south of SR 50 approximately one mile west of the intersection of SR 50 and I-95. Although the Hart property is outside of the contested area, it abuts the southern boundary of the rectangular tract and is within the River Basin and Titusville Farm.

27. Mr. Nelson owns property located a little more than a half-mile southeast of the intersection of SR 405 and SR 50. Although the Nelson property is outside of and not adjacent to the contested area, the property is within the River Basin and Titusville Farm.

3.2 The District

28. The District was created in 1972 as the state agency responsible for carrying out the provisions of Chapter 373 and for implementing the programs delegated in Chapter 403. Section 373.069(1)(c) describes the geographical jurisdiction of the District. The jurisdiction of the District includes all of the contested area.

29. The River Basin includes all or part of 19 counties from south of Vero Beach to the border between Florida and Georgia. The counties entirely within the River Basin include Brevard, Clay, Duval, Flagler, Indian River, Nassau, Seminole, St. Johns, and Volusia counties. The counties partially within the River Basin are Alachua, Baker, Bradford, Lake, Marion, Okeechobee, Orange, Osceola, Polk, and Putnam.

3.3 Titusville Farm

30. Titusville Farm contains approximately 20 sections of land, plus an out-parcel to the southeast which has relatively little materiality to the issues in this proceeding (the "out-

parcel"). Each of the 20 sections of land contains approximately 640 acres and, together, total approximately 12,800 acres.

31. The exact dimensions of Titusville Farm are recorded in Plat Book 2, page 29 of the Public Records of Brevard County, Florida. With the exception of the out-parcel, Titusville Farm is bounded on the east by a section line approximately 1.25 miles east of I-95 and approximately 1.7 miles west of the Indian River; on the south by a section line approximately 1.5 miles south of SR 50 at what is now the Addison Canal; on the north by a section line approximately one mile north of what are now Satterfield Road and the Satterfield Road Canal; and on the west by the St. Johns River, which flows north at a point about a mile or so west of and parallel to what is now Hacienda Road.

3.3(a) History

32. Titusville Farm was originally designed so that each quarter section of 160 acres was surrounded by intersecting east-west and north-south drainage canals intended to drain water westerly toward the St. Johns River and southerly toward what is now the Addison Canal. The original designers intended to create a dry and fertile land for farming and fruit groves.

33. The original design for Titusville Farm called for a series of parallel east-west canals approximately .25 miles apart on quarter section lines. The canals ran parallel to the north

and south boundaries of Titusville Farm from the east boundary approximately five miles to the St. Johns River to the west.

34. The parties use the label EW1 in this proceeding to designate the first east-west canal north of SR 50. EW1.5 refers to the second east-west canal north of SR 50. EW2 refers to the Satterfield Road Canal in some exhibits and to an intervening canal in others.

35. The original design for Titusville Farm also called for a series of parallel north-south manifold canals, approximately .25 miles apart on quarter section lines. Each canal ran parallel with the east and west boundaries of Titusville Farm from the north boundary approximately four miles to the Addison Canal at the south boundary.

36. The parties use NS1 in this proceeding to designate the first north-south canal approximately .25 miles west of I-95. NS2 identifies the next north-south canal west of NS1. The numbering identification continues west in this proceeding to Hacienda Road.

37. From 1911 through 1916, the original developers of Titusville Farm constructed some of the canals and farmed the area, predominantly with fruit groves. Sometime after 1916, the developers began selling off land to third-party purchasers.

38. Subsequent purchasers altered, expanded, or abandoned the canals in and around their property. By 1943, the canals

originally constructed in Titusville Farm remained in place but only one orange grove remained in the southeast corner of Titusville Farm near what is now the excavation site. Other farming within the contested area was sparse.

39. The canals actually constructed by the developers of Titusville Farm continue to be depicted as existing systems on several current maps. They are also evidenced in drainage easements of record.

3.3(b) Drainage Easements

40. The chain of title from Titusville Farm shows that purchasers took title subject to existing easements for "canals and/or ditches, if any." In 1971, when the United States Government established the Refuge, it took fee simple title to approximately 4,163 acres of former Titusville Farm land subject to:

> . . . permanent easement granted to Florida Power and Light Company . . . and subject to other rights outstanding for existing roads, lines, pipe lines, canals, and/or ditches, if any. (emphasis supplied)

OR Book 1580, page 810, Brevard County.

3.4 The Refuge

41. The Refuge is located within the River Basin and within Titusville Farm. The vast majority of the Refuge is located inside the rectangular tract in the contested area. However, the

Refuge also extends west of Hacienda Road to the St. Johns River and contains a small "out-parcel" north of Hacienda Road.

42. Except for the out-parcel, the Refuge is more or less rectangular, bounded on the east by I-95, on the south by SR 50, on the north by Satterfield Road, and on the west by the St. Johns River. The distance between the east and west boundaries of the Refuge is approximately 3.75 miles. The distance between the north and south boundaries is approximately 1.5 miles. The Refuge contains approximately 4,163 acres and includes much of the area from I-95 west to Hacienda Road and from Satterfield Road south to SR 50.

43. The federal government established the Refuge in 1971 to protect the endangered dusky seaside sparrow. The sparrow became extinct in 1990.

44. After 1971, the Refuge became part of a national system for the conservation, management, and restoration of lands for fish, wildlife, plants, and their habitats. The federal government manages the Refuge under the Emergency Wetlands Restoration Act of 1986, which Congress reaffirmed in 1997, as a wetland to provide habitat protection for threatened and endangered species of special concern.

45. The authorized methods for protecting wetlands include a National Wetlands Inventory that identifies wetlands nationally. The Refuge is a particularly important wetland in

the sense that it is a high floodplain. A high floodplain is a type of wetland that is diminishing, especially in Florida.

46. The federal government manages the Refuge as an ecosystem. The government attempts to mimic what happens naturally in the area with fire and water. It attempts to restore and maintain the sheet flow of water across natural marshes and to use fire as a means of maintaining marshes in their natural state.

3.4(a) Species of Special Concern

47. The Refuge provides a habitat for species of special concern to both state and federal governments. The Refuge is one of the most important breeding areas in the country for the black rail. The black rail is a migratory species that uses the Refuge for nesting during the summer and for a winter habitat during the fall and winter.

48. Several species use portions of the Refuge near the excavation site. The least bittern uses the area for feeding and nesting. The northern harrier is a migratory species that uses the area for feeding during the fall, winter, and early spring.

49. The Refuge provides habitat for bald eagles, wood storks, otters, and alligators. It also provides habitat for: long-legged wading birds, such as great blue herons and great egrets; shorter-legged wading birds, such as little blue herons,

snowy egrets, and little green herons; aerial diving species, such as terns and seagulls; submergent diving species, such as pie billed grebes, mergansers, and cormorants; and red-winged blackbirds and wrens that nest in emergent vegetation.

3.4(b) Wetland Communities

50. The majority of the contested area contains five different wetland community types. There are open-water areas, such as Pond-1; shallow marsh, such as Marsh-1; wet prairies; hydric hammocks; and transitional shrub systems.

51. Shallow marsh contains shallow water and emergent wetland vegetation. Water levels fluctuate throughout the year. The predominant vegetation is cattail and sawgrass.

52. Wet prairie is slightly higher in elevation and somewhat drier than shallow marsh. The primary vegetation found in wet prairie is cord grass.

53. Transitional shrub systems are areas in transition from uplands to wetlands or from wetlands to uplands. The vegetation in these areas typically is wax myrtle.

3.4(c) Pre-Excavation Site

54. In January 1996, Mr. Charles Moehle complained to the District that the Hacienda Road project caused flooding on his property. District staff investigated the matter and concluded that the Hacienda Road project was not the cause of the flooding.

The investigation included physical inspection and elevation readings for what became the excavation site in 1997.

3.4(c)(1) Physical Inspection

55. Before the excavation in January 1997, there was no water connection from EW1 to NS1. NS1 and EW1 had been filled-in at various junctures with sediment and wash-outs from rain. Vegetation growth and aquatic vegetation further occluded NS1 and EW1.

56. The east and west banks of NS1 from SR 50 north to Marsh-1 were similar and appeared undisturbed. The west bank of NS1 disappeared at the point where NS1 intersected Marsh-1. Both banks of NS1 were very low through Marsh-1.

57. Marsh-1 had standing water in it. The predominant vegetation was spartina baderi, a marsh grass found in wetland areas ("spartina").

58. Approximately 500 feet of NS1 between Marsh-1 and EW1 was dry and shallow. This portion of NS1 was only one-half to one-foot deep. It was more characteristic of a swale than a ditch and was heavily vegetated with spartina.

59. The bottom elevation of a portion of NS1 between EW1 and Marsh-1 was approximately 2.5 feet higher than the remainder of NS1. This high spot functioned as an elevation control within NS1.

60. EW1 east of NS1 appeared very similar to that portion of NS1 north of Marsh-1. It was dry and vegetated with spartina. There was no water connection between NS1 and EW1 so that Pond-1 did not routinely drain west through EW1. EW1 also contained a high spot just west of NS1.

61. Pond-1 was a healthy open-water community surrounded by green cattails. Pond-1 was deeper than five feet in some areas.

62. A berm on the west side of NS1 north of Marsh-1 was one to two feet high and three to five feet wide. It served as a fire-break trail and resembled a road. The berm was slightly higher south of Marsh-1 and heavily vegetated with cabbage palms and other vegetation near the intersection of NS1 and SR 50.

3.4(c)(2) Elevations

63. On February 28, 1996, in response to complaints from Modern, District staff took spot readings of bottom elevations within NS1 from Marsh-1 north to EW1 and within EW1 east of NS1. They also took water elevation readings in Pond-1 and at the intersection of NS1 and SR 50.

64. The elevation readings revealed respective control elevations in NS1 and EW1 of 12.9 and 12.79 feet. Other elevations in NS1 were 12.26 feet at a point just north of

Marsh-1, 12.9 and 12.7 feet at two points south of EW1, and 12.9 feet at the intersection of NS1 and EW1. The bottom elevation in EW1 varied from 12.4 to 12.79 feet.

65. District staff also reviewed bottom elevation readings in various pre-excavation surveys made between 1995 and January 1997 and referred to by the parties as the Lowe's Report, the Cracker-Barrel survey, the McCrone survey, and the Titusville survey. The McCrone survey recorded bottom elevations for NS1 which were consistent with those taken by District staff. However, elevations varied by as much as a foot for EW1. Water elevation readings varied with seasonal water conditions and other factors.

66. The McCrone survey found respective control elevations in NS1 and EW1 of 12.7 and 11.7 feet. The bottom elevation for NS1 was 12.7 feet at a point just south of EW1. Bottom elevations for EW1 ranged from 10.5 to 11.7 feet. The investigation by the District established respective high spots in NS1 and EW1 at 12.9 and 12.79 feet.

67. The Titusville survey recorded a water elevation of 10.54 feet in NS1 at SR 50. The water elevation in EW1 east and west of the I-95 culvert was 12.55 feet.

68. The variation in water elevations of 12.55 feet in EW1 at I-95 and 10.54 feet in NS1 at SR 50 suggest high spots in EW1 or NS1. The high spots prevent water from flowing from the

culvert at I-95 west through EW1 to NS1 and south through NS1 to SR 50.

3.4(c)(3) Topography

69. A slight ridge exists south of EW1 and supports a more shrubby type of vegetation consistent with transitional wetlands. The topography north of EW1 is lower and characteristic of a deep marsh system. The bottom elevations in NS1 north of EW1 are lower than bottom elevations elsewhere in NS1 and are consistent with surrounding topography.

70. The topography surrounding NS1 south of EW1 is higher and provides a greater source of sediment than does the lower topography north of EW1. More sediment erodes into NS1 south of EW1 because there is more sediment south of EW1.

71. The portion of NS1 north of EW1 is in a marsh and under water most of the year. The submerged topography north of EW1 provides less opportunity for material to erode into NS1 north of EW1.

3.5 Hacienda Road Project

72. The Department widened SR 50 between 1988 and 1991 by adding two east-bound lanes on the south side of SR 50. The District required the Department to obtain a permit for the widening of SR 50 and to offset the adverse impacts to wetlands through a plan of mitigation.

73. The Wildlife Service actually performed the mitigation work for the Department and completed the mitigation plan in 1991. West of Hacienda Road, the Wildlife Service placed fill from adjacent berms in the IRCC, EW1, and EW1.5, which had pre-mitigation depths at that location ranging from 1.5 to 2.0 feet. The Wildlife Service planted spartina on the fill. The Wildlife Service also replaced six 30-inch culverts under Hacienda Road with nine 36-inch culverts. The new culverts were located at the same elevation as the elevation of the pre-mitigation culverts.

74. The Wildlife Service placed riser boards in the new culverts under Hacienda Road. Riser boards are used to facilitate the cleaning of culverts. However, they can also raise the water level above which water must rise before it can pass through the culverts.

75. Respondents contend that the fill west of Hacienda Road eliminated floodplain storage. They also claim the riser boards in the new culverts under Hacienda Road cause water to back-up in the contested area by preventing flow from the contested area through the new culverts into the marsh west of Hacienda Road.

3.5(a) Floodplain Storage

76. The Hacienda Road project did not decrease floodplain storage capacity west of Hacienda Road. The project used only fill from existing berms and did not bring in additional fill

from outside the marsh. The fill did not reduce floodwater capacity of the IRCC, EW1, and EW1.5. Their capacity before the mitigation had already been reduced by groundwater from the high groundwater table close to the St. Johns River. The fill displaced high groundwater in the IRCC, EW1, and EW1.5, rather than floodwater capacity. The fill taken from existing berms reduced the size of the berms that had previously displaced floodwater capacity.

3.5(b) Water-flow

77. Neither the mitigation west of Hacienda Road, the new culverts under Hacienda Road, nor the riser boards in the new culverts caused water to back-up and flood Respondents' property. The Hacienda Road project does not prevent water-flow during either low-flow or high-flow conditions.

3.5(b)(1) Low-flow

78. A low-flow condition occurs when water rises above the control elevation that is impeding its flow. The water stages-up in lower areas until it flows over the high spot that operates as a control elevation.

79. During low-flow conditions, neither the mitigation west of Hacienda Road, the culverts, nor the riser boards in the culverts control the flow of water from I-95 west to Hacienda Road. Rather, bottom elevations in the canals, or ditches, east

of Hacienda Road ("upstream") control the flow of water from I-95 west to Hacienda Road. Water that does not exceed the control elevations will pond in the adjacent wetlands and not reach Hacienda Road.

80. Water that ponds behind control elevations during low-flow conditions is also influenced by two basins and a ridge in the contested area. One basin is north of SR 50 and south of EW1, and the other basin is north of EW1. Water from the former basin flows south while water from the latter basin flows toward Hacienda Road.

81. The water elevation at Hacienda Road is approximately 11.0 feet. High spots in the canals, or ditches, upstream from Hacienda Road range from 12.1 feet to 13.3 feet.

82. A control elevation of 12.6 feet exists in EW1 east of Hacienda Road. Water stands behind the high spot at 12.3 feet. Closer to I-95, the bottom elevation in EW1 ranges from 12.1 to 12.6 feet and effectively controls water elevation at 12.0 feet. Water in EW1 west of I-95 and east of Hacienda Road must rise to an elevation of 12.6 feet before it can flow west toward Hacienda Road.

83. Water in EW1.5 near I-95 has an elevation of 13.3 feet. Water in EW1.5 must rise above that elevation before it can flow west toward Hacienda Road. Water in EW-2 at I-95 is above 13.0 feet.

84. The bottom elevations and water elevations measured by District staff in the contested area between Hacienda Road and I-95 are consistent with the I-95 construction plans and the Lowe's Drainage Report used for the construction of the Lowe's store at the intersection of SR 50 and SR 405. The I-95 plans show a design high-water elevation of 14.0 feet for the culvert where EW1 crosses I-95. The Lowe's Drainage Report shows that the 100-year, 24-hour storm event flood elevation east of I-95 is 14.0 feet. In addition, a pre-construction survey for the Lowe's store shows elevations in the wetlands north of EW1 to be approximately 13.0 feet.

3.5(b)(2) High-flow

85. A high-flow condition occurs when there is a storm event that creates significant run-off. The run-off overwhelms the high spots that operate as control elevations during low-flow conditions. Run-off is controlled by other factors including culverts such as those at Hacienda Road.

86. During high-flow conditions, the culverts at Hacienda Road are the controlling factors for the flow of water in the contested area from I-95 west to Hacienda Road. The high-flow conveyance capacity for the new culverts is equal to or greater than that of the old culverts. The replacement culverts do not cause water to back-up in the contested area during high-flow

conditions. Riser boards in the new culverts under Hacienda Road do not raise elevation levels to a point that causes water to flood Respondents' property during high-flow conditions.

3.5(c) Collateral Improvements

87. During either low-flow or high-flow conditions, the possibility that the Hacienda Road project could cause water to back-up in the contested area has been significantly reduced by improvements in drainage capacity to nearby canals, or ditches. The Department improved several north-south canals, or ditches. Brevard County improved the capacity of the IRCC.

88. When the Department widened SR 50, the Department increased the capacity of NS3 and NS4, where each crosses under SR 50, by replacing old culverts with new culverts at the same invert elevation. The Department replaced one 24-inch culvert in NS3 with an elliptical pipe with the effective capacity of a 36-inch pipe. The Department replaced one 24-inch culvert in NS4 with two 18-inch culverts. The Department also replaced the box culvert in NS1 with a culvert of the same size and invert elevation.

89. Brevard County improved the capacity of the IRCC in several ways. The county cleaned out the canal, installed a

36-inch elliptical culvert under Hacienda Road, and replaced a driveway that had previously blocked the canal with a 36-inch culvert.

4. The Excavation

90. Modern, through its President, Mr. Charles Moehle, caused and directed the excavation of NS1 and EW1. In December 1996, Mr. Charles Moehle contracted with Total Site Development, Inc. ("Total Site") to perform the excavation. Modern also supervised the excavation.

91. Total Site is a Florida corporation wholly owned by Mr. Daniel McConnell and Mr. Randy McConnell, his brother. Both men, through their attorney, obtained immunity from criminal prosecution and testified at the administrative hearing.

92. In 1996, Total Site was a subcontractor in the construction of the Cracker Barrel near the intersection of I-95 and SR 50. The superintendent for the Cracker Barrel project gave Mr. Daniel McConnell the telephone number of Mr. Charles Moehle.

93. After several telephone conversations, Mr. McConnell met with Mr. Moehle. The two men walked the length of NS1 from SR 50 north just past EW1. Mr. Moehle directed Mr. McConnell where to excavate NS1 and EW1, how wide and deep to excavate each, and where to place the spoil material.

94. Mr. Moehle showed Mr. McConnell a paper which Mr. Moehle represented to be a permit to perform the excavation. However, neither Mr. Moehle nor Modern ever applied for or obtained a permit to perform the excavation. The District never received an application or issued a permit for the excavation.

95. On January 10, 1997, Mr. McConnell began excavating NS1 and EW1 and completed the excavation in 2.5 days. Mr. McConnell began work on a Friday, worked Saturday, and completed the work on Monday, January 13, 1997.

96. Mr. McConnell excavated NS1 and EW1 in accordance with the instructions of Mr. Moehle. Mr. McConnell began the excavation at SR 50 and worked north in NS1 approximately 2,687 feet to a point about 22 feet north of EW1. Mr. McConnell also excavated EW1 approximately 30 feet east of NS1. Mr. McConnell placed the spoil material on the west bank of NS1 and did not move the spoil material thereafter.

97. When Mr. McConnell reached the intersection of NS1 and EW1, he excavated EW1 sufficiently to complete a water connection from EW1 to NS1. He placed the spoil material on the banks surrounding the intersection of EW1 and NS1 and did not move the spoil material thereafter.

98. During the excavation, Mr. Moehle frequently visited the excavation site, observed the work, and provided instructions to Mr. McConnell. Mr. Moehle visited the site approximately once

or twice a day during the excavation to check on the progress of the work. On a few occasions, Mr. Moehle instructed Mr. McConnell to dig deeper.

99. Mr. Moehle paid Total Site $2,500 when Mr. McConnell completed the excavation on January 13, 1997. Mr. Moehle paid in cash.

5. Post-excavation Site

100. After the excavation, water flowed from EW1 to NS1. NS1 was approximately 10 feet wider and approximately 3-4 feet deeper. NS1 was open with water flowing through it from EW1 south through Marsh-1 to SR 50. The bottom elevation for NS1 was 7.5 and 9.5 feet at points where District staff and the McCrone survey previously found bottom elevations of 12.7 and 12.9 feet.

101. After the excavation, the water elevation at the intersection of NS1 and SR 50 was 12.09 feet. The pre-excavation water level had been 10.54 feet.

102. After the excavation, a large spoil pile existed on the west bank of NS1. The spoil pile filled approximately one-half acre of wetlands.

103. The height of the spoil pile ranged from three to eight feet, with the highest points at the intersection of NS1 and EW1. The spoil pile just north of EW1 had been flattened by the weight of equipment used for the excavation. The width of

the spoil pile at its base ranged from 20 to 35 feet for the entire length of NS1.

104. The spoil material was primarily white, sandy material without much vegetation in it. The lack of organic material in the spoil pile indicates that the excavation extended beyond the depth necessary to remove surface vegetation.

6. Emergency

105. The excavation of NS1 and EW1 by Modern in January 1997 created an emergency within the meaning of Section 373.119(2). The excavation created short-term effects that adversely impacted adjacent wetlands and required immediate action to protect the health of animals, fish, or aquatic life; and recreational or other reasonable uses. If left uncorrected, the excavation would have created long-term effects that would have had additional adverse impacts.

6.1 Short-Term Effect

106. The excavation created numerous short-term effects that adversely impacted wetlands. Short-term effects included a reduction in the water level of approximately 600 to 800 acres of wetlands, a vegetation and fish kill, an alteration of the existing hydroperiod for the affected area, and an increase in the water level south of the intersection of NS1 and SR 50.

6.1(a) Water Levels

107. The excavation lowered the water level in approximately 600 to 800 acres of wetlands. The reduction in the control elevation in NS1 from 12.9 feet to 10.5 feet increased water flow capacity in NS1 and EW1 by 15 to 25 cubic feet per second. The increased water flow lowered water levels in the surrounding wetland from one to two feet.

108. When the excavation was completed, Mr. Randy McConnell was standing on the head-wall at SR 50. He saw a three or four-foot wave flow south down NS1 toward him and hit the head-wall before passing through the culvert south to the Addison Canal.

109. Sometime after the excavation, a substantial water flow out of NS1 caused water levels to drop in the adjacent area, including the Refuge. Pond-1 drained one to two feet.

6.1(b) Vegetation and Fish

110. The excavation killed vegetation in the affected area. The cattail marsh adjacent to Pond-1 became stressed, turned brown, and began dying. The dying cattails consumed oxygen in the open water in Pond-1.

111. The excavation killed fish in the affected area. In March 1997, a fish kill occurred in Pond-1. Wildlife Service personnel observed approximately 75 to 100 dead fish. Other dead fish were likely consumed by other species. The fish kill

resulted from oxygen depletion caused by the drainage of Pond-1, dying vegetation, and the concentration of animal populations in the Pond-1 community.

6.1(c) Hydroperiod

112. The excavation altered the natural hydroperiod for the affected area. The hydroperiod for a wetland is the natural fluctuation in water levels that result from dry periods followed by periods of recovery. Water levels drop and are replenished by rain.

113. Precipitation in the Titusville area averages approximately 54 inches in a normal year. Evaporation in Florida for a wetland such as the Refuge is about 48 to 50 inches a year. In a normal year, rainfall and evapo-transpiration would be approximately equal.

114. There are wet and dry seasons for a wetland within a normal year. Approximately 60 percent, or more, of the annual rainfall in a normal year in peninsular Florida occurs in the months of June through October.

115. There are also wet and dry years within longer periods. In the Titusville area, annual rainfall ranges from 35 inches to 80 inches.

116. The adverse impact of any excavation is least during wet months in a normal year and during wet years. During wet

conditions, when rainfall generally exceeds evapo-transpiration, the drainage effect of excavation is overwhelmed by rainfall.

117. The adverse impact of any excavation is greatest during dry months in a normal year and during dry years. During dry conditions, the drainage effect of excavation lowers water levels lower than they otherwise would be by lowering elevation controls. The excavation of NS1 and EW1 occurred during dry months in a normal hydroperiod in January 1997.

6.1(d) Stop-loss Ancillaries

118. The adverse impact caused by the excavation was limited by two ancillary factors. One factor was the reduced function of the IRCC, which runs parallel to SR 50, at the time of the excavation. The other factor was the limitation placed on the drainage capacity of NS1 by two culverts through which NS1 must flow south of SR 50.

119. At the time of the excavation, the IRCC was not functioning to full capacity. Plugs in a driveway crossing SR 50 and fill from the Hacienda Road project contributed to the dysfunction.

120. The capacity of NS1 to drain water approximately 1.5 miles south to the Addison Canal was limited by two 18-inch culverts located approximately 2,000 feet south of SR 50. The flow rates for the two culverts are approximately 15 to 25 cubic

feet per second, depending on the difference in water levels across the culverts.

121. The dysfunction of the IRCC and the limit imposed by the two culverts combined to prevent more egregious impacts from the excavation of NS1. However, the same limitations increased water in the area south of SR 50 and north of the two culverts.

122. After the excavation, the water level at the intersection of NS1 and SR 50 increased by approximately two feet. The increased water level exacerbated flooding problems in the retention ponds and parking lot of the Cracker Barrel.

6.2 Long-Term Effect

123. The short-term adverse impacts of the excavation, if left uncorrected, would have had a cumulative effect over several years and would have caused separate long-term adverse impacts. Drainage caused by the excavation differs from natural fluctuations in the hydroperiod. An uncorrected excavation becomes a permanent feature that continues to alter the hydroperiod by permanently lowering water levels and shortening the time that water stands on the surface and saturates the soil.

124. Once the hydroperiod is changed, the change affects the structural integrity of the entire system. Changes to the hydroperiod result in adverse impacts to vegetation, predator-

prey relationships, and the suitability of the habitat for a large number of species.

125. Changes in the hydroperiod caused by reduced water levels can change wet prairie area to a shrubby type vegetation dominated by wax myrtle. Wax myrtle can affect the amount and rate of run-off of water and further dry-out the area over time. It can reduce emergent vegetation used as nesting sites for species like red-winged blackbirds and wrens.

126. A reduction in open water area can reduce the habitat for fish and the type of invertebrates that provide food sources for fish. It can also reduce the suitability of the habitat for other species dependent on fish as a food source.

127. A change in the hydroperiod caused by a draw-down of one to two feet can adversely impact various types of wading birds including little blue herons, snowy egrets, little green herons, great blue herons, and great egrets. It can adversely impact other birds such as bald eagles, wood storks, black rails, least bitterns, terns, seagulls, pie billed grebes, mergansers, cormorants, red winged blackbirds, and wrens. An altered hydroperiod can also adversely impact larger animals such as otters and alligators.

128. It is possible to restore habitat after a draw-down. However, such a restoration does not prevent adverse impacts on

the health of fish and wildlife during the hiatus that precedes the restoration.

6.3 District Investigation

129. On March 31, 1997, the District received a letter from the Wildlife Service dated March 27, 1997. The Wildlife Service expressed concern that rapid daily drainage caused by the excavation of NS1 and EW1 was creating adverse impacts on fish and wildlife in the Refuge.

130. The District conducted a sufficient and appropriate investigation. District staff investigated the extent of the excavation and its impact on surrounding wetlands. Neither the investigation nor the Emergency Order was rendered insufficient or inappropriate by the refusal of the District: to wait until 1998 when it could more fully ascertain the effects of the excavation based on whether annual rainfall made 1997 a dry, normal, or wet year; or to re-investigate the effects of the Hacienda Road project on Respondents' properties.

131. The excavation occurred during the dry season of the normal hydroperiod in January 1997. The District reasonably assumed that 1997 was going to be a normal year and could not delay appropriate action until 1998 to see if 1997 turned out to be a wet year.

132. Sometime in 1998, the District determined that 1997 was an extremely wet year. However, the subsequent rainfall in 1997 could not have been reasonably anticipated by District staff and did not eviscerate a reasonable basis for either the Emergency Order on May 14, 1997, or the corrective action taken. An uncorrected excavation would have had long-term cumulative impacts on wetlands irrespective of annual rainfall in 1997.

133. The District investigation leading up to the Emergency Order properly excluded another investigation of the effects of the Hacienda Road project. Such an investigation would have duplicated the investigation conducted in the preceding year. Even if the District had conducted another investigation, the weight of the evidence shows that the results of such an investigation would not have altered the reasonableness of the Emergency Order or the corrective action that ensued.

134. At the time of the Emergency Order, the District reasonably concluded that the excavation caused immediate short-term effects that had significant adverse impacts on water levels in approximately 300 acres of wetlands, on fish and vegetation, and on wildlife in the refuge. Later, the District found that the excavation actually affected 600 to 800 acres of wetlands.

7. Emergency Order

135. Pursuant to Section 373.119(2), the District issued an Emergency Order on May 14, 1997. The Emergency Order authorized the Wildlife Service to construct earthen weirs in NS1 and EW1 to prevent further drainage in the River Basin and the Refuge. The findings and conclusions in the Emergency Order are sufficient and correct. The weirs are reasonably necessary to protect the health of fish, animals, and aquatic life in the River Basin, management objectives and reasonable uses of property in the River Basin, and other reasonable uses of property within the River Basin.

136. Pursuant to the Emergency Order, the Wildlife Service constructed two earthen weirs in NS1 and EW1. The Wildlife Service constructed: an earthen weir in NS1 at a crest elevation of 12.7 feet; and an earthen weir in EW1 at a crest elevation of 11.7 feet. The weir in NS1 is located at the southernmost end of NS1 inside the Refuge. The weir in EW1 is inside the Refuge at the west end of EW1 just east of the eastern edge of NS1.

137. The Wildlife Service used spoil material from NS1 and EW1 to construct the weirs. The weirs in NS1 and EW1 span the width of NS1 and EW1 and are approximately five feet from front to back at the height of each weir. The north-south sides of the weir in NS1 and the east-west sides of the weir in EW1 have a 4:1

slope. The top sides of each weir are stabilized with concrete bags.

138. Neither of the weirs caused flooding or other adverse impacts on nearby property. Both weirs in NS1 and EW1 have the same effect on water levels, up and downstream, as the high-elevation areas had in NS1 and EW1 prior to the excavation. The weir in NS1 re-creates the two-foot head difference in NS1 that existed prior to excavation.

139. No county rights-of-way exist in the location of NS1 and EW1. Brevard County never accepted the right-of-way adjacent to NS1 and EW1.

8. Permitting Requirements

140. Pursuant to Sections 373.413 and 373.416, the District requires an environmental resource permit (a "permit") to assure that activities such as construction, alteration, maintenance, or operation, will not be harmful to the water resources of the state and will be consistent with the overall objectives of the District. A permit is required for such activities unless a particular activity qualifies for an exemption authorized by applicable statutes and rules.

8.1 Stormwater Management System or Works

141. The permitting provisions in Sections 373.413 and 373.416, in relevant part, apply to the excavation of NS1, EW1,

and the larger system of which each is a part (the "larger system") only if NS1, EW1, and the larger system satisfy the definitions of either a "stormwater management system," "works," or a "surface water management system." Each term is defined by statute or rule.

142. The definitions of a "stormwater management system" in Section 373.403(10) and in Rule 40C-4.021(25) are substantially the same. NS1, EW1, and the larger system are each:

> . . . designed and constructed or implemented to control discharges . . . necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, [or] inhibit . . . water to prevent or reduce flooding, overdrainage, environmental degradation . . . or otherwise affect the quantity and quality of discharges from the system.

Section 373.403(10).

143. NS1, EW1, and the larger system are "works" within the meaning of Section 373.403(5) and Rule 40C-4.021(31). NS1 and EW1, and the larger system, are each:

> . . . artificial structures, including . . . ditches, canals, conduits, channels . . . and other construction that connects to, draws water from, drains water into . . . waters in the state.

Section 373.403(5).

144. NS1, EW1, and the larger system are each a "surface water management system" defined in Rule 40C-4.021(26). Each is a system which, in relevant part, is:

> . . . a stormwater management system . . . or works, or any combination thereof. . . . [and] include areas of dredging or filling . . . .

Rule 40C-4.021(26).

145. The definition of a "surface water management system" includes elements not found in the definition of either a "stormwater management system" or "works." The broader scope of a surface water management system creates the potential that the permit requirement in Rule 40C-4.041(2)(b) may require a permit for elements not subject to Sections 373.413 and 373.416.

146. As applied to the facts in this proceeding, the permit requirement in Rule 40C-4.041(2)(b) for the construction, alteration, maintenance, or operation of a "surface water management system" or "works" does not exceed the statutory authority in Sections 373.413 and 373.416. NS1 and EW1, and the larger system fall within the definition of a stormwater management system in Section 473.403(10) and Rule 40C-4.021(25) and within the definition of "works" in Section 373.403(5) and Rule 40C-4.021(31).

8.2 Thresholds

147. The requirement for a permit in Rule 40C-4.041(2)(b) does not apply if the construction, alteration, maintenance, or operation of a surface water management system does not meet one

or more threshold requirements. NS1 and EW1 meet two threshold requirements found in Rule 40C-4.041(2)(b) 2 and 8.

148. Rule 40C-4.041(2)(b) 2 and 8 require a permit for the construction, alteration, maintenance, or operation of a "surface water management system" if the system either:

> 2. Serves a project with a total land area equal to or exceeding forty acres; or
>
> * * *
>
> 8. Is wholly or partially located in, on, or over any wetland or other surface water.

149. NS1 and EW1 each serve a project with a total land area equal to or exceeding forty acres. NS1 and EW1 each are located wholly or partially in "wetlands" or other "surface water" defined, respectively, in Rule 40C-4.021(30) and Section 373.019(16). The excavation work placed spoil material in wetlands. The larger system also exceeds each of the threshold requirements in Rule 40C-4.041(2)(b) 2 and 8.

8.3 Maintenance

150. None of the parties claim that the excavation of NS1 and EW1 in 1997 was "construction" for which a permit is required in Section 373.413. The District alleges in paragraphs 24-25 and 31-33 of the Administrative Complaint that the excavation satisfies the definitions of maintenance, alteration, or operation.

151. The term "maintenance" is defined in Section 373.403(8) and Rule 40C-4.041(20), in relevant part, to mean:

> . . . remedial work of a nature as may affect the safety of any . . . works . . . but excludes routine custodial maintenance. (emphasis supplied)

Section 373.403(8).

In order for the excavation of NS1 and EW1 to be maintenance, it had to be, inter alia, "remedial work" that was not "routine custodial maintenance."

8.3(a) Remedial Work

152. The term "remedial" is not defined by applicable statutes or rules. The term must be defined by its common and ordinary meaning.

153. Work is "remedial" if it rectifies or corrects a fault or error. The excavation of NS1 and EW1 was remedial. It rectified and corrected a fault or error caused by occlusions from high spots, or elevation controls, vegetation, and other causes. The high spots, in particular, reduced flow capacity in low-flow conditions.

154. There is no evidence that the excavation of NS1 and EW1 in January 1997 was of a nature that affected the safety of NS1 and EW1. The lack of such evidence, however, does not preclude a finding that the excavation was remedial work.

155. Section 373.403(8) and Rule 40C-4.021(20) provide that work is remedial if it is of a nature that "may" affect the safety of works such as NS1 and EW1. The statute and rule do not define remedial work to require that work "shall" affect the safety of NS1 and EW1 in order for the work to be remedial. Thus, work is remedial if it is of a nature that affects either the function or safety of NS1 and EW1.

8.3(b) Routine Custodial Maintenance

156. If the excavation of NS1 and EW1 was routine custodial maintenance, it was excluded from the definition of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20). If the excavation was not defined as "maintenance," it was neither "maintenance" that is subject to the maintenance permitting requirements nor "maintenance" that must satisfy the requirements for a "maintenance" exemption.

157. The terms "routine" and "custodial" are not defined by applicable statutes or rules. They must be defined by their common and ordinary meanings.

8.3(b)(1) Routine

158. The excavation of NS1 and EW1 was not routine. The excavation was not incident to work performed on a regular basis, according to a prescribed and detailed course of action, a standard procedure, or a set of customary activities. The

excavation was not part of a course of action performed on a continuous or periodic basis.

159. Any excavation that occurred prior to 1997 occurred only sporadically or episodically and not pursuant to any discernible interval or course of action. No excavation in prior years occurred at the level or to the extent of the excavation in 1997.

160. From 1951 through 1996, neither NS1 nor EW1 were excavated in and around the excavation site. Experts examined aerial photographs taken between 1943 and 1997 for evidence of changes in water flow, vegetation, canal definition, and new spoil material that would indicate the occurrence of maintenance in and around the excavation site. Experts examined aerial photographs taken in 1958, 1969, 1972, 1975, 1979, 1980, 1984, 1986, 1989, 1994, and 1995.

161. In 1943, there was a small interruption of water flow in NS1. The width of NS1 ranged from 10 to 14 feet. In 1951, the width of NS1 ranged from 16 to 20 feet.

162. In 1958, there was some water in NS1 south of EW1. However, the same area in NS1 was predominantly covered with dirt and free-floating wetland vegetation.

163. In 1979, intermittent water appeared in NS1 south of EW1. In 1980, water flowed freely in NS1 north of EW1, but no water flowed in NS1 south of EW1.

164. In 1983, much of the definition of NS1 was lost north of Marsh-1. Water was intermittent. In 1984, the same area was seriously occluded. About 75-80 percent of the capacity of NS1 had been lost.

165. In 1986, NS1 south of EW1 and north of Marsh-1 was losing definition. Sometime before 1993, some of the vegetation was cleaned out of NS1 south of Marsh-1.

166. In 1986, a ditch appears next to EW1 from NS1 east to Pond-1. The ditch is not man-made because it is irregular and does not flow in a straight line. The ditch leading out of Pond-1 next to EW1 appears in the 1986 aerial photographs because a controlled fire in 1984 burned much of the free-floating vegetation.

167. In 1989, the ditch next to EW1 was still present but was starting to become overgrown with vegetation. The vegetation included cattails west of Pond-1.

168. In 1994, vegetation had been cleaned out of NS1 from a point approximately 400 feet south of EW1 to SR 50, but no water was present in that part of NS1. In 1994, the ditch next to EW1 contained cattails and some shallow marsh species.

8.3(b)(2) Custodial

169. The excavation of NS1 and EW1 in January 1997 was not custodial. The excavation exceeded the level of work that was

reasonably necessary to preserve, or care for, the condition or status of NS1 and EW1 immediately before the excavation.

170. The spoil material next to NS1 and EW1 after the excavation in January 1997 was not consistent with custodial care. The spoil material differed in quantity and content from that which would evidence custodial care.

171. The large quantity of spoil material produced by the excavation in 1997 far exceeded any reasonable amount that would evidence custodial care. The spoil material consisted primarily of sandy soil. The spoil material from custodial care would have consisted primarily of vegetation and possibly some organic soils that would have accumulated at or just beneath the bottom of NS1 and EW1.

8.4 Alteration

172. The term "alter" is defined in Section 373.403(7) and Rule 40C-4.041(2), in relevant part, as meaning:

> . . . to extend . . . works beyond maintenance in its original condition, including changes which may increase . . . the flow or storage of surface water which may affect the safety of . . . such . . . works.

Section 373.403(7); 40C-4.021(2).

8.4(a) Original Condition

173. Respondents contend that the term "original condition" means the condition prescribed in the original design specifications for NS1 and EW1 before 1916. If the excavation in 1997 was not so extensive that it exceeded the original design specifications for NS1 and EW1, Respondents argue that the excavation was not an "alteration" of NS1 and EW1.

174. Respondents are correct. The common and ordinary meaning of the term "original" means first in time. The legislature and the District consistently use the term "original design specifications" as a requirement in Section 403.813(2)(f) and (g) and Rules 40C-4.051(11)(b) and 40C-4.051(11)(c).

175. Original design specifications offer the most reliable standard for defining the "original condition" of NS1 and EW1 and should be used for that purpose whenever the original design specifications are established by the evidence of record. If the evidence is insufficient to establish the original design specifications, however, it does not follow that Respondents are free to excavate NS1 and EW2 to any extent. An "alteration" of NS1 and EW1 occurs in the absence of original design specifications if the excavation exceeds the "original condition" of the NS1 and EW1 defined by the weight of the evidence.

176. The literal meaning of the terms "original design specifications" and "original condition" are not coterminous.

The former term conveys a relatively specific connotation. The latter term is broad enough to be defined by means other than evidence of the "original design specifications" whenever the "original design specifications" cannot be established.

177. The District must show that the excavation in 1997 satisfied the essential requirements of an "alteration" in Section 373.403(7) and Rule 40C-4.021(2). The District must prove the "original condition" of NS1 and EW1 by evidence of the "original design specifications" or, in the absence of such evidence, by evidence of "original condition" before the excavation.

8.4(a)(1) Original Design Specifications

178. The parties submitted considerable evidence in an attempt to show that the "original condition" of NS1 and EW1 was evidenced, alternatively, by original design specifications or by other evidence, including evidence of the condition of NS1 and EW1 immediately before the excavation in January 1997. The evidence included data and other information from:

> (a) approximately 78 aerial photographs taken in 1943, 1951, 1958, 1969, 1972, 1979, 1980, 1983, 1984, 1986, 1989, 1993-1995, and 1997;
>
> (b) construction plans for I-95, from the 1960s, and for the widening of SR 50 by the Department;
>
> (c) various reports and surveys, including those identified in this proceeding as the

Cofield, Powell, McCrone, and Titusville surveys or reports;

(d) the results of investigations or surveys conducted by the District in 1996 and 1997;

(e) official maps, including the recorded plat of Titusville Farm, the U.S. geologic survey quadrangle map, the map used by the Wildlife Service, the Department's drainage basin map, and the District's basin map;

(f) the record chain of title that includes recorded drainage easements;

(g) approximately 51 pages of local newspaper articles from the early 1900s describing the work at Titusville Farm; and

(h) expert testimony based on the examination of the evidence of record.

179. The evidence does not establish the original design specifications for NS1 and EW1 or the larger system. The evidence does not establish invert elevation; bottom width; side slopes; top width; ditch bottom profile or slope; hydraulic capacity; or hydrologic function.

180. From the early 1900s through the 1970s, various plans proposed the construction of ditches that would discharge water into the Indian River approximately three miles east of I-95. The lower elevation of the River presented an efficient outfall for drainage. However, neither NS1, EW1, nor the larger system contains an outfall to the Indian River.

181. Survey information is not available for the original construction of NS1, EW1, and the larger system. Information

contained in more recent surveys does not show that NS1 and EW1 were originally designed to a depth of five to seven feet as Respondents contend.

182. Newspaper articles from the early 1900s do not provide sufficient detail to establish the original design specifications for NS1, EW1, and the larger system. Most of the articles refer to a system constructed to the southeast of what is now the intersection of I-95 and SR 50. A few references describe canals that are four to five feet deep.

183. Old newspaper articles show photographs of dredging equipment constructing a canal from Bird Lake to the Indian River. Bird Lake is southeast of I-95 and SR 50.

184. The only evidence of the "original condition" of NS1 and EW1 before the excavation is evidence of the condition of each on the date of a particular piece of evidence. The evidence shows that the "original condition" of NS1 and EW1 between 1951 and the date of excavation was seriously degraded from the condition to which they were restored after the excavation.

8.4(a)(2) Condition Before Alteration

185. After 1951, the canals constructed within that portion of Titusville Farm that is in the contested area lost their original design function. Due to a lack of maintenance and to

occlusions through vegetation growth, aquatic vegetation, and sediment, the canals deteriorated over time.

186. Since 1966, the canals have exhibited only sporadic signs of maintenance. Little, if any, new spoil material has been present. Water flow has been intermittent and insignificant. The increased growth in vegetation is consistent with decreased water flow and itself further impedes water flow.

187. Since 1951, the canals in the rectangular parcel have filled with sediment in random locations, producing irregular ditch bottom elevations. High spots in bottom depths create control elevations that impede the flow of water during low-flow conditions west toward the St. Johns River and south toward the Addison Canal.

188. Numerous high spots in bottom elevations create control elevations that impede water flow. The construction plans for I-95 reveal bottom depths in the rectangular parcel that vary from one to two feet. The construction plans for Hacienda Road show bottom depths ranging from 1.5 to 2.0 feet. Other surveys show natural ground elevations of 11.0 to 11.1 feet and bottom elevations of 8.5 to 9.8 feet resulting in bottom depths ranging from 1.3 to 2.5 feet.

189. A survey conducted by the District in 1997 of high spots in bottom elevations between Hacienda Road and I-95 is consistent with the findings of previous surveys. Large sections

of east-west ditches are high and reduce the flow of water west to the St. Johns River.

190. Those canals constructed in Titusville Farm which are located in the smaller parcel east of I-95 have experienced a degradation in function similar to that experienced by the canals in the rectangular parcel. In addition, many of the existing drainage ditches discharge into swamps instead of their intended drainage outlets.

191. During periods of high water, the canals constructed in Titusville Farm and now located in the contested area overflow and flood. During such periods, the natural sheet flow of water occurs from east to west and from north to south.

8.4(b) Safety

192. Section 373.403(7) and Rule 40C-4.021(2) provide that work is an alteration if it includes changes which "may" affect the safety of works such as NS1 and EW1. The statute and rule do not say that work "shall" affect the safety of NS1 and EW1 before the work can be considered to be an alteration. Thus, work can be an alteration if it includes changes which affect either the function or safety of NS1 and EW1. The excavation of NS1 and EW1 affected their function.

8.5 Operation

193. The term "operation" is not defined in applicable statutes or rules and must be defined by its common and ordinary meaning. The term "operation" has two meanings.

194. One meaning for an "operation" is a process or series of acts performed to effect a certain purpose or result, such as a surgical procedure. This definition creates the potential that the excavation of NS1 and EW1 will qualify simultaneously as an operation, maintenance, and an alteration. An "operation" would be neither maintenance nor an alteration only if: the operation was a process or series of acts, other than remedial work; was performed to effect a purpose or result other than the extension of works beyond maintenance in their original condition; and was not routine custodial maintenance.

195. The second definition of "operation" is more easily distinguished from a single event that may also qualify as "maintenance" or "alteration." Under the second definition, an "operation" means an "act," process, or "way of operating" over time. Under this definition, a person can engage in the operation of a stormwater management system, or works, after completing a single event that is defined as either "maintenance" or "alteration."

196. NS1 and EW1 were operating at some level of function and capacity before their excavation in 1997. Section 373.416

could not reasonably be construed as requiring Modern to obtain a permit for allowing NS1 and EW1 to continue their existing operation when Modern became the owner of the property. Modern would have committed no "act" which brought about a "way of operating" NS1 and EW1 that did not already exist at the time of acquisition.

197. The excavation of NS1 and EW1 was an "act" by Modern that brought about a new and different "way of operating" NS1 and EW1. The new "way of operating" would not have occurred but for the act of Modern. After the excavation, Modern operated NS1 and EW1, albeit passively, in a way that Modern did not operate NS1 and EW1 before the excavation.

198. Under either definition, the excavation in January 1997 involved the operation of NS1 and EW1. Pursuant to Section 373.416, the District requires a permit for either type of operation.

8.6 Integrated Transaction

199. The excavation of NS1 and EW1 in January 1997 consisted of three separate steps integrated into a single transaction referred to by the parties as excavation. The first step was maintenance; the second step was alteration; and the third step involved a new operation.

200. In the first step, maintenance removed vegetation and minor occlusions; restored NS1 and EW1 to their original condition immediately before the excavation; and was neither routine nor custodial. In the second step, alteration extended the excavation beyond maintenance of NS1 and EW1 in their original condition; increased the flow of water in each; increased the depth and width of each; and increased the function and capacity of each. The third step in the transaction involved a new way of operating NS1 and EW1 after the first two steps.

201. Even if the new operation were not a step within the excavation, because it arguably did not occur until after the excavation was completed, the transaction consisted of the two steps in the excavation and a third step after the excavation. In either case, the new operation of NS1 and EW1 is a separate activity for which a permit is required pursuant to Section 373.416.

202. The separate permitting requirements in Sections 373.413 and 373.416 apply to each separate step in the transaction. If excavation had ceased after the maintenance step, no alteration or new operation of NS1 and EW1 would have occurred. Nevertheless, permitting requirements would have required a permit for the maintenance performed in the completed step unless that step qualified for a maintenance exemption.

203. Once the excavation progressed beyond maintenance, it involved the additional, but separate, steps of "alteration" and "operation" for which a permit is required and for which no exemption is claimed by Respondents. If each separate step were separated in time, separate permitting requirements would have applied to each step. Modern does not avoid the separate permitting requirements in Sections 373.413 and 373.416 by integrating three separate steps into a single transaction.

9. Estoppel

204. The weight of the evidence does not show that the District is estopped from enforcing applicable permitting and exemption requirements. The evidence does not show that the District represented to Respondents that the excavation of NS1 and EW1 did not require a permit or qualified for an exemption.

9.1 Factual Representations

205. Prior to the excavation of NS1 and EW1, District staff met with Mr. Charles Moehle, Mr. Michael Moehle, Mr. Nelson, and a number of others. The meeting was held to discuss the proposed cleaning of the IRCC.

206. A number of issues were discussed at the meeting. One issue involved a driveway that had been constructed in the IRCC without culverts. The District determined that the driveway did not create a substantial adverse impact on area property owners

because the IRCC did not carry enough water. Most of the water draining south out of the contested area drained south of the IRCC to the Addison Canal.

207. The District told attendees at the meeting that the District would clean out most of the vegetation in the IRCC. Brevard County subsequently installed culverts in the IRCC where the driveway had been constructed originally without culverts.

208. At the southeast corner of the smaller parcel east of I-95, the IRCC turns obliquely northeast for about a half mile and then resumes its eastward direction toward Indian River City. Respondents claim the IRCC turns north at NS1, at a right angle, and then turns east at EW1, at another right angle, and resumes its eastward direction to Indian River City.

209. The District did not represent to Respondents that the IRCC follows NS1 and EW1 and flows under I-95 to Indian River City. The District never indicated that NS1 and EW1 could be cleaned out under a maintenance exemption as part of the IRCC or otherwise.

210. Mr. Frank Meeker, the Ombudsman for the District, met with Mr. Michael Moehle at least three times between February 14 and April 22, 1996, to discuss the problems of high water on Modern property. Mr. Meeker indicated that a culvert needed to be placed under the driveway in the IRCC, which was later done by Brevard County, and that NS1 needed to be cleaned out to

eliminate the blockage south of SR 50 in the vicinity of the Titusville Waste Water Treatment Plant.

211. NS1 was cleaned out south of SR 50. Mr. Meeker reviewed the work and indicated to Mr. Michael Moehle that the work constituted borderline maintenance.

212. Mr. Meeker never indicated that the excavation of NS1 and EW1 north of SR 50 would be exempt from statutory permitting requirements. Mr. Meeker has neither the actual nor apparent authority to rule on permit requirements. Mr. Meeker sent a letter to Mr. Charles Moehle in April 1996. Nothing in that letter suggests that the excavation of NS1 and EW1 would be exempt from statutory permitting requirements.

9.2 Disparate Treatment

213. Respondents claim that the District treated them unfairly. The weight of the evidence shows that the action taken by the District did not result in disparate treatment.

9.2(a) Cracker Barrel-1, Cracker Barrel-2, and Lowe's

214. Since 1996, the District has issued three permits for construction of different projects on property owned by Modern or Omni in the area of NS1 and EW1. The three projects involved significant impacts to wetlands. The three projects are referred to in this proceeding as Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

215. In determining whether a particular piece of property contains wetlands, the District relies on a statewide wetland delineation rule described in Section 373.421 and Rule 62.340. The District considers vegetation, soils, and hydrology to delineate wetlands. The District utilized this delineation rule when it issued permits for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

216. The District determines a mitigation ratio for construction on wetlands through a balancing process. The District weighs the quality of the wetlands on a particular construction site against the quality of the mitigation plan. The District relied on this same process when it issued permits for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

217. Cracker Barrel-1 involved approximately 4.5 acres of wetlands on a 5-acre site just south of Modern-1. The District issued a permit for the construction of Cracker Barrel-1 approximately two months after receipt of the application.

218. Cracker Barrel-2 involved approximately 11 acres of wetlands on a 15-acre site. The District issued a permit for the construction of Cracker Barrel-2 approximately two months after receipt of the application.

219. Lowe's is located east of I-95, north of SR 50, west of SR 405, outside the contested area, but adjacent to the contested area. Lowe's involved approximately 22 acres of

wetlands on a 25-acre site. Lowe's was not an easy project to permit due to the extensive acreage and wetlands impacts. The District issued a permit for the construction of Lowe's approximately four months after receipt of the application.

9.2(b) Unnecessary Delay and Expense

220. Respondents complain that the District unfairly increases the time and expense associated with permit applications through pre-application negotiations intended to resolve issues that typically arise when formulating a mitigation plan for construction on wetlands. Respondents contend that the delay before an application can be submitted is unreasonable.

221. Respondents point to a delay of almost a year between the time Modern first complained in 1996 of flooding and the refusal of the District to approve any corrective action. Respondents also cite delays in pre-application negotiations for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

222. The District did not delay its investigation of the flooding allegedly caused by the Hacienda Road project. The District conducted an appropriate investigation and reasonably determined that the flooding was not attributable to the Hacienda Road project. The delays complained of by Respondents are reasonable incidents of good faith attempts by the District to

effectuate its statutory responsibilities through mutual agreement.

223. The weight of the evidence does not show that the delays complained of by Respondents constitute disparate treatment. The delays were not de jure delays that resulted from a design or intent on the part of the District to delay Modern and Omni in their construction and development ventures. The weight of the evidence shows that the delays were reasonably necessary to formulate mitigation plans for each construction project and to carry out the statutory obligations of the District prescribed in Sections 373.413 and 373.416.

9.2(c) Selective Exemption

224. Respondents claim that the District is unfairly applying certain maintenance exemptions to the excavation carried out by Modern. Respondents complain that the District previously granted maintenance exemptions for projects carried out by entities unrelated to Respondents but denied any maintenance exemption for the excavation of NS1 and EW1.

225. Activities covered by applicable permitting requirements either do or do not qualify for a maintenance exemption. No separate application is required for such an exemption. A person who performs work based on the assumption that the work qualifies for an exemption assumes the risk that

the work does not qualify for the exemption. If the work is performed in violation of applicable permitting requirements, it may qualify for an after-the-fact permit or corrective action may be required.

226. The District has previously granted relevant maintenance exemptions for a number of different projects carried out by entities unrelated to Respondents and has also denied maintenance exemptions in other instances including the excavation of NS1 and EW1. The weight of the evidence shows that the District is not applying maintenance exemptions to the excavation of NS1 and EW1 in a manner that results in disparate treatment of Modern or its co-respondents.

227. Brevard County cleaned out a portion of NS1 south of SR 50 based on the mistaken conclusion that the work qualified for a maintenance exemption. After the District began this enforcement action against Modern, the District determined that the work did not qualify for a maintenance exemption and required Brevard County to apply for a permit.

228. Brevard County applied for a permit, albeit belatedly. The District granted the permit because the work complied with applicable criteria and did not result in adverse impacts to wetlands or the Refuge.

229. In another instance, the District discovered some ditch plugs in ditches adjacent to property owned by a person

named "Dr. Broussard." The District requested Dr. Broussard to remove the plugs, and Dr. Broussard complied.

9.2(d) Selective Enforcement

230. Respondents allege disparate treatment from the District on the ground that the District did not file an administrative complaint in the foregoing instances but filed such an action against Modern. However, the weight of the evidence shows that enforcement action was not reasonable in other instances because the District reached mutually agreeable resolutions with the regulated parties. The evidence shows that enforcement action was reasonably necessary in this proceeding.

231. The District first became aware of the significance of the impacts of the excavation of NS1 and EW1 when the District received a letter from the Wildlife Service in March 1997. The District brought the matter to the attention of Modern. The District informed Modern of the seriousness of the situation, notified Modern that the excavation required a permit, and made Modern aware of the need to correct the situation by restoring the wetlands to their original condition. The District and Modern discussed various options for constructing weirs without reaching any agreement.

232. Time was of the essence. When the District concluded that the parties were not going to reach agreement, the District

undertook emergency action in May 1997 and filed the Administrative Complaint later in August 1997.

233. The action taken by the District in this proceeding is consistent with the District's historical practice. When the District becomes aware of a potential violation, the District does not immediately file an administrative complaint. The District investigates the matter to confirm the existence and extent of a violation, if any, and makes reasonable efforts to resolve the matter informally.

234. The District has not issued an emergency order prior to the excavation of NS1 and EW1 because an emergency order was not the most appropriate solution in other cases. However, the District has sought injunctions in circuit court against persons unrelated to Respondents. In this proceeding, an emergency order better served applicable statutory mandates to the District because the Wildlife Service was willing to perform the work needed to rectify the condition that existed within the Refuge. This combination of factors made an emergency order particularly well suited and practicable for carrying out the statutory responsibilities of the District.

235. The weight of the evidence does not show that the District threatened criminal prosecution against Modern or its individual shareholders. The District has not referred this matter for criminal prosecution.

236. However, the issue of whether a threat of criminal sanctions occurred is fairly debatable, even if it is immaterial to estoppel, the permitting requirements, and the exemption requirements. Paragraph 27 in the Administrative Complaint does put Modern on notice that Sections 373.129(5) and 373.136 authorize the District to file a cause of action in circuit court in which the District may seek civil penalties up to $10,000. Section 373.430(3)-(5) puts Modern on notice of the potential for criminal penalties in circuit court.

237. In any event, Modern failed to prove that the District is estopped from requiring a permit or applying applicable exemption requirements to the excavation of NS1 and EW1. Modern neither applied for nor obtained a permit for the excavation of NS1 and EW1. Unless Modern qualifies for one of the exemptions authorized by statute or rule, Modern violated Section 373.430(1)(b) and is subject to the actions and penalties authorized in Sections 373.119 and 373.129(1), (3), (6), and (7).

10. Exemptions

238. Modern claims it is entitled to six exemptions from the permitting requirements in Sections 373.413 and 373.416. Four of the exemptions are found in Rules 40C-4.051(2)(a)1, 40C-4.051(2)(a)3, 40C-4.051(11)(b), and 40C-4.051(11)(c). The other two exemptions are found in Section 403.813(2)(f) and (g).

10.1 Two Grandfather Exemptions

239. Rule 40C-4.051(2)(a) 1 and 3, in relevant part, authorizes exemptions for systems such as NS1, EW1, and the larger system, if they are: located in prescribed areas; and were constructed and operating prior to December 7, 1987, and March 2, 1974, respectively. NS1, EW1, and the larger system are located in the areas described in each rule. On the requisite dates, however, they were not constructed and operating.

240. Rule 40C-4.051(2)(c), in relevant part, provides that the exemptions in Rule 40C-4.051(2)(a) apply only to those systems set forth in plans, specifications, and performance criteria existing on or before December 7, 1983, or March 2, 1974, as the case may be, and then only to the extent:

> 2. Such system is maintained and operated in a manner consistent with such plans, specifications and performance criteria.

Rule 40C-4.051(2)(c) 2.

241. Rule 40C-4.051(3), in relevant part, provides that the exemptions listed in Rule 40C-4.051(2) "shall not apply" to those systems which on either December 7, 1983, or March 2, 1974, as the case may be:

> . . . have ceased to operate as set forth in such system's plans, specifications and performance criteria.

242. Modern does not qualify for either of the exemptions in Rule 40C-4.051(2)(a) 2 or 3. As a threshold matter, the

weight of the evidence does not establish plans, specifications, or performance criteria (the "original criteria") for NS1, EW1, or the larger system on either December 7, 1983, or March 2, 1974. Even if the evidence did establish the original criteria and if the excavation merely restored NS1 and EW1 to the original criteria, the evidence clearly shows that neither NS1, EW1, nor the larger system were constructed and operating in accordance with the original criteria on the prescribed dates. Rather, the evidence shows that NS1, EW1, and the larger system had become seriously degraded and no longer operated at their post-excavation levels.

10.2 Two Maintenance Dredging Exemptions

243. Modern claims that it qualifies for the exemption in Rule 40C-4.051(11)(b). That rule, in relevant part, exempts from the permitting requirements in Sections 373.413 and 373.416:

> The . . . maintenance dredging of existing manmade canals [and] channels . . . where the spoil material is . . . removed and deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material and return water from the spoil site into wetlands or other surface waters, provided no more dredging is performed than is necessary to restore the canal [and] channels . . . to original design specifications and provided that control devices are used at the dredge site to prevent . . . deleterious substances from discharging into adjacent waters during maintenance dredging. . . . This exemption shall not apply to the removal of a natural . . . barrier separating a canal . . . or

system from adjacent wetlands or other surface waters.

244. Prior to the amendment of Section 403.813(2)(f) in October 1997, the maintenance exemption in the statute was substantially similar to that in the quoted rule. The two exemptions are first discussed together as they existed prior to the statutory amendment in 1997. The exemption requirements created by the 1997 amendments are discussed separately.

10.2(a) Requirements Before 1997

245. The excavation of NS1 and EW1 in January 1997 was "dredging" within the meaning of Section 373.403(13). It was excavation by any means in surface waters defined in Section 373.019(16) or wetlands delineated in Section 373.421(1). The excavation also connected Pond-1, a water body, to surface waters or wetlands.

10.2(a)(1) Canals, Channels, or Ditches

246. The maintenance dredging exemptions authorized in Section 403.813(2)(f) and Rule 40C-4.051(11)(b) apply only to canals or channels. The exemptions do not apply to drainage ditches.

247. Neither Section 373.403 nor Rule 40C-4.021 define the terms "canals, channels, or ditches." However, the terms are defined in Section 403.803(2),(3), and (7).

248. The definitions in Section 403.803 may be used to define the terms of the exemptions in Rule 40C-4.051(11)(b). In October 1995, the legislature consolidated the dredge and fill permitting provisions in Chapter 403 with the permitting provisions for the management and storage of surface waters in Chapter 373, Part IV.

249. Section 403.813(2) expressly provides that the exemptions authorized in Section 403.813(2) apply to the permit requirements in Chapter 373. Section 373.413(9) directs water management districts in the state to incorporate the provisions of Rule 62-312.050 into the rules of the districts and to rely on the existing provisions governing the dredge and fill program when implementing the rules of the districts.

250. Neither NS1 nor EW1 is a canal within the meaning of Section 403.803(2). Although each is a manmade trench, the bottom of neither NS1 nor EW1 is normally covered by water within the meaning of Section 403.803(2).

251. Portions of NS1 and EW1 which are upstream from high spots or elevation controls are "normally" covered by water. However, portions which are downstream of high spots are "normally" not covered by water during low-flow conditions and dry conditions in a normal or wet year, and during dry years.

252. Neither NS1 nor EW1 is a channel as defined in Section 403.813(3). Although each is a trench, the length of NS1 and EW1

are not "normally" covered "entirely" with water during low-flow conditions and dry conditions in a normal year or wet year, and during dry years. Neither is the bed of a stream or river.

253. NS1 and EW1 are each a drainage ditch or irrigation ditch within the meaning of Section 403.803(7). Each is a man-made trench created to drain water from the land or to transport water for use on the land, and neither is built for navigational purposes. NS1 and EW1 satisfy the definition of a drainage ditch or irrigation ditch irrespective of the degree to which the bottom of each is "normally" covered by water: upstream or downstream of high spots or control elevations; during low-flow conditions and dry conditions in normal or wet years; and during dry years.

10.2(a)(2) Additional Requirements

254. Even if NS1 and EW1 were canals or channels, their excavation in 1997 does not qualify for the exemption in Rule 40C-4.051(11)(b). The excavation fails to satisfy several additional requirements for the exemption.

255. The spoil material from the excavation was not placed on an upland spoil site which prevented the escape of spoil material and return water into wetlands and surface waters within the meaning of Section 373.019(16). Rather, Modern placed the spoil material in wetlands. Modern placed approximately 1.5

acres of fill in wetlands in the form of spoil material from the excavation. Modern placed approximately .75 acres of such fill in the wetlands and surface waters north of Marsh-1.

10.2(a)(3) Original Design Specifications

256. More dredging was done than was necessary to restore NS1 and EW1 to their original design specifications. The weight of the evidence does not show the original design specifications for NS1 and EW1, including the bottom elevations, widths, slopes, and other pertinent specifications typically prescribed in original designs. However, the evidence does show the original condition of NS1 and EW1 immediately before their excavation. More dredging was done than was necessary to restore NS1 and EW1 to their original condition before the excavation.

10.2(a)(4) Natural Barrier

257. The exemptions in Section 403.813(2)(f) and Rule 40C-4.051(11)(b) do not apply to the removal of a natural barrier separating a canal from adjacent wetlands or other surface waters. The term "barrier" is not defined in Sections 373.403 or 403.803; or in Rule 40C-4.021. The term must be defined by its common and ordinary meaning.

258. A barrier is something that acts to hinder or restrict. The high spots that existed in NS1 and EW1 before their excavation functioned as control elevations. The high

spots were natural barriers during low-flow conditions, during dry conditions in normal and wet years, and during dry years. They acted to hinder or restrict the flow of water through EW1 and NS1 into adjacent wetlands and eventually to other surface water through the Addison Canal west toward the St. Johns River. The 3-4 foot wall of water that flowed down NS1 to SR 50 immediately after the excavation in 1997 provided vivid evidence of the effectiveness of the high spots that formed two-foot barriers before the excavation.

259. The excavation did not use control devices which prevented deleterious substances from discharging into adjacent waters during maintenance dredging. The term "waters" is defined in Section 403.031(13) to include wetlands. The term is also defined in Section 373.016(17) and Rule 40C-4.021(29) in a manner that includes wetlands. Spoil material was placed in adjacent waters and not contained by adequate control devices.

10.2(b) Requirements After 1997

260. Additional provisions not found in Rule 40C-4.051(11)(b) were added to Section 403.813(2)(f) in October 1997. In relevant part, the additional provisions extend the exemption in Section 403.813(2)(f) beyond canals and channels to include:

> . . . previously dredged portions of natural water bodies within drainage rights-of-way or drainage easements which have been recorded in the public records of the county . . . provided that no significant impacts occur to

> previously undisturbed natural areas, and provided that . . . best management practices for erosion and sediment control are utilized to prevent . . . dredged material . . . and deleterious substances from discharging into adjacent waters during maintenance dredging . . . . (emphasis supplied)

10.2(b)(1) Retroactivity

261. As a threshold matter, the additional provisions in Section 403.813(2)(f) did not take effect until October 1997. The excavation of NS1 and EW1 occurred in January 1997.

10.2(b)(2) Drainage Easements

262. Modern claims that it was not required to obtain a permit to excavate NS1 and EW1 because Modern possesses drainage easements for NS1 and EW1 which are recorded in the public records of Brevard County, in accordance with the requirements of Section 404.813(2)(f). Modern claims that it is entitled to maintain its drainage easements.

263. Assuming arguendo that Respondents possess drainage easements and that the drainage easements are included in the exemption, the owner of drainage easements is no less subject to statutory permitting and exemption provisions than is the owner of the fee simple estate in land through which an easement runs. The existence of drainage easements is only one of the requirements in Section 403.813(2)(f) for an exemption from a

permit. Modern must also show that it satisfies the other exemption requirements in Section 403.813(2)(f).

10.2(b)(3) Other Requirements

264. The excavation of NS1 and EW1 resulted in significant impacts to previously undisturbed natural areas. The area subject to significant impacts was not limited to the excavation site but included 600-800 acres inside the Refuge.

265. Modern failed to utilize best management practices to prevent dredged material and deleterious substances from discharging into adjacent waters during dredging. Dredged material and deleterious substances were deposited into adjacent wetlands.

10.3 Two Maintenance Exemptions

266. Rule 40C-4.051(11)(c), in relevant part, provides that no permit is required for the maintenance of "functioning . . . drainage ditches . . ." if:

> 1. The spoil material is deposited on a self-contained upland spoil site which will prevent the escape of the spoil material and return water into wetlands or other surface waters. [and]
>
> * * *
>
> 3. . . . no more dredging is . . . performed than is necessary to restore the . . . drainage ditch to its original design specifications.

267. The quoted requirements for the exemption in Rule 40C-4.051(11)(c) are substantially identical to the requirements for the exemption in Section 403.813(2)(g). However, the exemption in Rule 40C-4.051(11)(c) applies to "functioning" ditches while the exemption in Section 403.813(2)(g) authorizes an exemption for "existing" ditches.

10.3(a) Functioning or Existing

268. The terms "functioning" and "existing" are not defined in Sections 373.403, 403.803, or in Rule 40C-4.021. Each term must be defined by its common and ordinary meaning.

269. The terms "functioning" and "existing" are not equivalent terms. The statutory provision authorizing maintenance exemptions for "existing" ditches precludes a maintenance exemption for initial "construction" of ditches. Existing ditches do not function if they are totally occluded by debris, silt, or vegetation that prevent any conveyance of water. Alternatively, a ditch that is dammed by a man-made device would not function but would exist.

270. Before the excavation in January 1997, NS1 and EW1 each functioned to the extent that it performed the action for which it was particularly fitted or employed, albeit at a degraded capacity. Each existed irrespective of its level of function.

271. The culverts for NS1 under SR 50 and south of SR 50 and those for EW1 under I-95 belie the District's contention that NS1 and EW1 neither functioned nor existed before the excavation. If the contention were correct, it would mean the construction of the culverts under SR 50 and south of SR 50 was a meaningless expenditure of taxpayer dollars.

272. The District's contention suffers another internal inconsistency. If NS1, EW1, and the larger system were not functioning before the excavation, they may have failed one or more of the threshold requirements in Rule 40C-4.041(2)(b)2 because they did not "serve" 40 acres or any other area.

273. NS1 and EW1 functioned and existed before the excavation. NS1 and EW1 each conveyed water when water exceeded high spots during dry and wet conditions in dry, normal, and wet years. EW1 conveyed water into NS1. NS1 conveyed water south through several culverts into the Addison Canal and west toward the St. Johns River. The bottom line is, the works worked.

275. Even though NS1 and EW1 were "functioning" and "existing" before the excavation in January 1997, the excavation did not qualify for the exemptions in Section 403.813(2)(g) and Rule 40C-4.051(11)(c). The excavation failed to satisfy additional requirements in the statute and rule.

10.3(b) Additional Requirements

276. The excavation did not deposit spoil material on a self-contained upland spoil site which prevented the spoil material and return water from escaping into wetlands and other surface waters. The dredging was more than was necessary to restore NS1 and EW1 to their original design specifications.

11. Unadopted Rule

277. Respondents claim that the District's proposed agency action is based on a policy which satisfies the definition of a rule in Section 120.52(15) but which has not been promulgated in accordance with the rulemaking procedures prescribed in Section 120.54 (an "unadopted rule"). Respondents claim the unadopted rule restricts "maintenance" exemptions in Section 403.813(2)(g) and Rule 40C-4.051(11)(c) to routine custodial maintenance; and to existing ditches that also function.

278. Section 120.57(1)(e), in relevant part, provides:

> . . . Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge . . . .
>
> . . . The agency must demonstrate that the unadopted rule . . . [satisfies the requirements of Sections 120.57(1)(e)2a-g] . . . . (emphasis supplied)

If Respondents show that the District's proposed agency action is based on an unadopted rule and that the District has relied on

the rule to determine the substantial interests of Respondents, then the agency must prove-up its unadopted rule by demonstrating in a de novo review that the unadopted rule satisfies the requirements of Section 120.57(1)(e).

11.1 Rule Defined

279. Section 120.52(15), in relevant part, defines a rule to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and . . . includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or plan or procedure important to the public and which have no application outside the agency issuing the memorandum . . . .

280. Section 120.52(15) establishes two conjunctive requirements as a threshold test for a rule. There must be a statement; and the statement must be one that is of general applicability.

281. A statement of general applicability must also satisfy one or more disjunctive requirements. The statement must either implement, interpret, or prescribe law or policy; describe the practice requirements of an agency; amend or repeal a rule; or

impose any requirement or solicit any information not required by statute or rule.

11.1(a) Statement

282. The District published a working definition of routine custodial maintenance in a memorandum dated November 20, 1989 (the "Memorandum"). The Memorandum was authored by the District's Chief Engineer and approved by the Director of the Department of Resource Management (the "Director"). The Memorandum directs field office directors and compliance coordinators in regard to ditch work and routine custodial maintenance.

283. In relevant part, the statement expressed in the Memorandum provides:

> This memorandum serves to clarify the District policy on: 1) the type of ditch maintenance work which qualifies for exemption from . . . permitting as specified in rule section 40C-4.051(2)(a)2.a . . . and, 2) procedures for verification that the work qualifies for this exemption. (emphasis supplied)
>
> This discussion only applies to work in ditches which trips . . . [a] permit threshold. . . . In many cases, none of these thresholds would be exceeded.
>
> Section 40C-4.051(2)(a)2.1. . . . specifically exempts the "maintenance" of "systems" in existence prior to December 7, 1983. Section 403.813(2)(f) and (g) also exempts the "maintenance dredging of canals and ditches. [sic] These exemptions, however, only apply to what is defined as

"routine custodial maintenance." Work that results in the alteration of the system is not exempt and requires a permit from the District if a threshold is exceeded. Section 3.2.1 of the . . . Applicant's Handbook defines "alter" as "works beyond maintenance in its original condition." (emphasis supplied)

Working Definition of "Routine Custodial Maintenance" (emphasis not supplied)
1. Two basic criteria:

a. The proposed maintenance work must be for the purpose of restoring the ditch system to its original design specifications. Such specifications would normally include: invert elevation, bottom width, side slopes, top width, ditch lining, ditch bottom profile (slope). In addition, such specifications may include culvert structures, including culvert type, size, invert elevation, length, slope and endwall detail.

Maintenance work conducted under this exemption must not alter the hydraulic capacity or hydrologic functions of the ditch from that provided by the original design.

b. The maintenance work must occur on a regular basis. The frequency of maintenance will be variable and dependent on site specific conditions and the level of service provided by the particular ditch system. However, for maintenance work to be exempt, the ditch should have been maintained to prevent deterioration to such a degree that it no longer functions as intended. In other words, routine custodial maintenance is limited to maintaining the ditch rather than re-building the ditch. As a rule of thumb, most ditch systems require maintenance at least once every ten to fifteen years. In some cases, more frequent maintenance is required to prevent a ditch form becoming non-functional.

2. Examples of work which meet the test of "routine custodial maintenance" (provided that the ditch has been periodically maintained):

a. Removal of accumulated silt and debris.

b. Clearing of vegetation from the ditch.

c. Clearing of culverts blocked by sediment or debris.

d. Replacement of damaged culvert structures with same size culverts.

e. Regarding and revegetating ditch side slopes.

3. Examples of work which do not meet the test include:

a. increasing the hydraulic capacity by deepening the ditch bottom and/or increasing the ditch cross section;

b. lining an existing ditch with concrete or other material to improve hydraulic capacity;

c. replacing existing culvert structures with different culvert sizes or placement of new culverts at different invert elevations;

d. any maintenance dredging where spoil material is placed in wetlands;

e. dredging or other maintenance work in natural system.

Procedures for conducting maintenance work according to the . . . exemption (Section 40C-4.051(2)9a)2.a. . . . [sic] (emphasis not supplied)

If the work is not routine custodial maintenance, the entity performing the work

> is responsible for obtaining the required permits prior to starting work. (emphasis supplied) Routine custodial maintenance may be conducted without contacting the District. However, upon request, the district will provide written verification that the work is exempt after receiving sufficient information to determine that the work is routing custodial maintenance. This information must include . . . evidence of the original design specifications as described below:
>
> * * *
>
> Case 2. No Design Specifications (Plans) Exist (emphasis not supplied) this will be the case for many ditch systems prior to . . . effective date . . . or not subject to permitting. . . . In this case, it is much more difficult to determine if the work qualifies for the exemption. The following may be used by the applicant to verify that the work qualifies for an exemption:
>
> a. Work will be limited to one or more of the maintenance activities listed above . . . .
>
> b. Other evidence as to the original specifications of the ditch system, such as: historical and current photographs and aerial photographs; contracts, bid documents, etc.; specifications for typical ditch sections; individuals attesting to the original ditch dimensions (such as contractors, former or current government employees); information on the soils and vegetation in the ditch. . . .

Memorandum at unnumbered pages 1-3.

284. The Memorandum is published evidence of the agency statement. However, the statement expressed in the Memorandum exists and is applied by the District independently of the Memorandum.

285. The District expresses and applies the statement each time the District enforces agency action based on the statement and not just when the agency publishes a particular document that captures the statement in writing. The existence, terms, and scope of the statement are measured on a de facto basis by the effect of the statement. That effect emerges from all of the evidence of record including, but not limited to, the publication of the statement in various documents such as the Memorandum.

286. The District illustrates in its PRO and PFO how easily an agency statement can elude the four corners of a particular document on which it is written and emerge from the evidence as an unwritten statement with broader applicability than that stated in a particular document. In relevant part, the District states:

> 9. The 1989 memorandum was not written to explain the maintenance exemption for . . . drainage ditches in 40C-4.051(11)(c) . . . because this rule did not exist when the memorandum was written. It was written to explain the grandfathering exemption at 40C-4.051(2)(a) . . . which exempts the "maintenance" of "systems" in existence prior to December 7, 1983 from the permitting requirements of Chapter 40C-4. . . . (emphasis supplied)
>
> * * *
>
> 55. Modern claims that the ditch excavation is exempt under the ditch maintenance exemption in 40C-4.051(11)(c). . . . (emphasis supplied)

> 56. Not all ditch excavation is exempt under this exemption, just routine custodial maintenance . . . having a minor environmental impact. . . . "Routine" indicates something that is done on a regular basis. (emphasis supplied)
>
> 57. The maintenance exemption for ditches in paragraph 40C-4.051(11)(c) . . . is based on the exemption in paragraph 403.813(2)(g) . . . .
>
> 13. . . . the ditches that are subject to the grandfathering exemptions under 40C-4.051(2) . . . are the same ditches that may also be exempt under the statute. . . .

PFO at 7; PRO at 28.

287. Although the Memorandum purports to limit the statement to the "grandfathering exemption" in Rule 4.051(2)(a), District practice relies on the statement to apply the exemptions in Section 403.813(2)(g) and Rule 40C-4.051(11)(c). The District has applied the statement consistently since at least 1984.

11.1(b) General Applicability

288. The statement expressed in the Memorandum is a statement of general applicability within the meaning of Section 120.52(15). In effect, the statement creates rights, requires compliance, or otherwise has the direct and consistent effect of law.

289. The District submitted evidence intended to refute the general applicability of the agency statement by showing that the District does not rely on the Memorandum. The District contends

that it has never relied on the Memorandum separate and apart from the statutes and rules interpreted by the Memorandum; that it has never initiated an enforcement action that relies on the Memorandum; that the Director forgot about the Memorandum after signing it; and that District staff do not utilize the Memorandum on a regular basis.

290. The District misses the point. The general applicability of a statement is not determined by the applicability of a particular document in which the statement is expressed. The general applicability of a statement is determined by the effect of the statement evidenced by all of its applications irrespective of the label assigned by the agency to each application.

291. The Director may have forgotten that he signed the Memorandum, but the record shows that neither he nor his staff forgot about the statement expressed in the Memorandum that maintenance exemptions apply only to "routine custodial maintenance." The record is replete with examples of how the District applies the statement with general applicability whenever the District construes the term "maintenance" in Section 403.813(2)(f) and (g); in Rule 40C-4.051(2)(a) 2 and 3; and in Rule 40C-4.051(11)(b) and (c).

292. The District illustrates in its PRO how the statement is applied with the direct and consistent effect of law. In relevant part, the District states:

> Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that dredging must be . . . part of routine custodial maintenance. . . . (emphasis supplied)

District PRO at 83.

293. The statement expressed in the Memorandum is generally applicable within the meaning of Section 120.52(15). The statement defines the scope of the permit requirement in Section 373.416 and the scope of the exemption in Section 403.813(2)(g). The District consistently applies the statement to create rights, to require compliance, or to otherwise have the direct and consistent effect of law.

11.1(c) Law and Policy

294. Although the statement implements, interprets, or prescribes law or policy, it does not do so by defining routine custodial maintenance as work which restores a ditch to its original design specifications. The requirement that maintenance must be no more than is necessary to restore a ditch to its original design specifications is present in each of the "maintenance" exemptions authorized in Section 403.813(2)(f) and

(g) and in Rules 40C-4.051(2), 40C-4.051(11)(b), and 40C-4.051(11)(c).

295. The statement implements, interprets, or prescribes law or policy by applying maintenance exemptions only to routine custodial maintenance. The restricted application of maintenance exemptions effectively amends the definitions of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20).

296. The statement expressed in the Memorandum first refers to the exemptions in Section 403.813(2)(f) and (g). The statement then declares that "these exemptions . . . only apply to what is defined as 'routine custodial maintenance.'"

297. Unlike the agency statement, Section 373.403(8) and Rule 40C-4.021(20) define "maintenance" to exclude "routine custodial maintenance." Because routine custodial maintenance is "not maintenance," routine custodial maintenance is neither subject to the maintenance permitting requirements in Section 373.416 nor required to satisfy the maintenance exemption requirements in Section 403.813(2)(f) and (g).

298. Maintenance has only one definition. That single definition defines "maintenance" to exclude routine custodial maintenance from maintenance that is subject to the exemption requirements in Section 403.813(2)(f) and (g). There is not another definition that includes routine custodial maintenance in maintenance that must satisfy maintenance exemption requirements.

299. Routine custodial maintenance is the definitional complement to maintenance. Remedial work that is routine custodial maintenance is "not maintenance." Remedial work that is not routine custodial maintenance is maintenance that must either obtain a maintenance permit or satisfy applicable "maintenance" exemption requirements.

300. The terms "exclude" and "exempt" are not synonymous. Routine custodial maintenance that is excluded from the definition of maintenance is "not maintenance" and need not qualify as exempt maintenance.

301. Maintenance that is not routine custodial maintenance is not excluded from the definition of maintenance. Included maintenance is subject to the maintenance permitting provisions but may qualify for a maintenance exemption if the maintenance satisfies the requirements prescribed for maintenance exemptions.

11.1(d) Practice and Procedure

302. Even if the District statement did not amend existing statutes and rules, the statement describes the practice requirements for the District. It prescribes the criteria to be used in applying the ". . . working definition of 'Routine Custodial Maintenance.'" The statement prescribes information that normally should be included in original design specifications. It prescribes mandatory practice requirements

including prohibitions against: any alteration of hydraulic capacity or hydrologic function beyond original design; and maintenance at less than regular intervals.

303. The statement describes eligibility requirements used by the District. The statement provides that a permit is required, "If the work is not routine custodial maintenance . . . ." The statement describes information that must be provided in any request for verification that work is exempt. Such information must include ". . . evidence of original design specifications. . . ." Finally, the statement describes the type of evidence that will be considered by the District when original design specifications are not available.

11.1(e) Internal Management Memorandum

304. The Memorandum is not an internal management memorandum that is excluded from the definition of a rule pursuant to Section 120.52(15)(a). The Memorandum has application outside of the agency. It affects the private interests of Respondents. It also affects a plan or procedure important to the public. Even if the Memorandum were an internal management memorandum, the agency statement exists and is applied by the agency independently of the Memorandum.

11.2 Prove-up Requirements: Section 120.57(1)(e)

305. The statement evidenced in the Memorandum and elsewhere in the record is an unadopted rule within the meaning of Section 120.57(1)(e). The statement is defined as a rule in Section 120.52(15) but is not adopted as a rule in accordance with the rulemaking procedures prescribed in Section 120.54.

306. The District relied on the unadopted rule to determine the substantial interests of Respondents. The District must show that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

307. The unadopted rule satisfies the requirements of Section 120.57(1)(e)2a, part of c, and d. However, the rule does not meet the requirements of Section 120.57(1)(e)2b, the remainder of c, e, f, and g.

11.2(a) Powers, Functions, and Duties

308. The unadopted rule is within the range of powers, functions, and duties delegated by the legislature within the meaning of Section 120.57(1)(e)2a. Section 373.416, in relevant part, delegates authority to the District to require permits and too impose conditions that are reasonably necessary to assure that the "maintenance" of any stormwater system, or works, complies with the provisions of Chapter 373, Part IV, and applicable rules promulgated pursuant to Chapter 373.

Interpretation and application of the maintenance exemption authorized in Section 403.813(2)(g) and Rule 40C-4.051(11)(c) are within the range of powers delegated in Section 373.416.

11.2(b) Bridled Discretion

309. The unadopted rule does not vest unbridled discretion in the District within the meaning of Section 120.57(1)(e)2c. The definition of routine custodial maintenance is bounded by numerous examples that do and do not qualify as routine custodial maintenance. The definition identifies the technical criteria to be used in the working definition of routine custodial maintenance. The definition prescribes reasonable procedures for conducting maintenance under an exemption, and formulates objective requirements for determining the sufficiency of original design specifications.

11.2(c) Arbitrary or Capricious

310. The unadopted rule is not arbitrary or capricious within the meaning of Section 120.57(1)(e)2d. The rule has a rational basis and a legitimate purpose. It is based on fact and logic and seeks to prevent harm to the water resources of the District by requiring permits to review non-exempt maintenance activities which may have the potential for adverse environmental impacts.

311. The definition of routine custodial maintenance is based on a fundamental engineering reality. If a ditch is not maintained, it will, as a general rule, fill-in and diminish in function and capacity.

312. Ditches fill-in at different rates, depending on site-specific conditions, the level of service provided by the ditch, and the level of work performed during each maintenance interval. Ditches with high water-velocity may not require maintenance as frequently in order for the maintenance to satisfy the requirement that it be performed regularly.

313. NS1 and EW1 must be maintained relatively frequently in order for maintenance to qualify as routine maintenance. The water velocity in these ditches is low because the surrounding area is flat and because water velocity is controlled by culverts and water levels south of SR 50. The low water velocities contribute to the filling of NS1 and EW1 with sediment. The high sediment content in the surrounding native lands also contributes to the filling of NS1 and EW1.

314. The Crane Creek ditch in Brevard County illustrates the relativity of the frequency standard. In that case, the District determined that maintenance of the Crane Creek ditch qualified for a maintenance exemption approximately 20 years before when the ditch had last been maintained. There was considerable slope in the ditch. High water velocities in the

ditch kept the ditch well scoured. In addition, the surrounding area was highly developed and covered with either pavement or lawns which provided little sediment material.

315. It is theoretically possible for maintenance to be routine even though the interval of maintenance is 50 years. As a practical matter, however, a maintenance interval of 20 years represents the upper limit for maintenance in the general region of NS1 and EW1.

316. Time is not the only factor in determining whether maintenance is routine. The frequency with which work must be performed to be routine depends on site-specific conditions as well as the level of service provided both by the particular ditch and by the particular work performed at each maintenance interval.

317. The bottom line in determining if maintenance is routine custodial maintenance is whether the maintenance is regular enough to maintain continuity of function. Continuity of function is important to persons upstream and downstream of a ditch. Once a ditch has become nonfunctional, other property uses may occur upstream or downstream of the ditch in reliance upon the fact that the ditch is no longer functional.

11.2(d) Modifies or Contravenes

318. The unadopted rule modifies or contravenes the specific law implemented in violation of Section 120.57(1)(e)2b. For reasons stated in earlier findings and incorporated here by this reference, the unadopted rule modifies and contravenes Sections 373.403(8), 373.416, and 403.813(2)(g). The unadopted rule also modifies and contravenes Rules 40C-4.021(20), 40C-4.051(2)(a) 2 and 3, and 40C-4.051(11)(c).

319. The term "maintenance" is defined in Section 373.403(8) to exclude routine custodial maintenance. By limiting maintenance exemptions to routine custodial maintenance, the unadopted rule transforms the statutory exclusion of routine custodial maintenance into a statutory inclusion.

320. The unadopted rule modifies and contravenes the specific law implemented in another way. The unadopted rule exempts only the maintenance of "systems." In the statement of criteria, the Memorandum states that work must be done to restore the "ditch system."

321. However, statutory maintenance exemptions are not limited to systems. They apply to individual canals, channels, and drainage ditches. Similarly, Sections 373.413 and 373.416 require permits for works such as individual ditches as well as systems. By limiting the maintenance exemptions to systems, the

unadopted rule modifies and contravenes the specific law implemented.

11.2(e) Vague and Inadequate Standards

322. The limits on discretion in the unadopted rule do not grant unbridled discretion to the District. However, some of the standards imposed in the rule are vague and inadequate in violation of Section 120.57(1)(e) 2c.

323. The unadopted rule states two sets of criteria for a working definition of routine custodial maintenance. The first set of criteria address the purpose of the work performed. The second set of criteria address the interval or regularity of the work performed.

324. The unadopted rule states that the purpose of routine custodial maintenance must be to restore the ditch to its "original design specifications." During testimony at the hearing, however, the District explained that the purpose of routine custodial maintenance could be to restore the ditch to its "existing function." A discussion in the proposed findings of the District's PRO illustrates the ambiguity:

> 64. If a ditch has filled in over a number of years so that it no longer retains its original function but does convey some water during high rain events, the ditch could not be cleaned out to its original design under the maintenance exemption. . . . To the extent that it still had some function that was usable for the surrounding area, it could

> be maintained to maintain that existing level of function. . . . (emphasis supplied)

District PRO at 31.

325. The interval at which work must be performed to satisfy the definition of routine custodial maintenance is vague and inadequate in the unadopted rule. In the Memorandum, the unadopted rule states that most ditch systems in Florida require maintenance once every 10 to 15 years. At the hearing, however, District witnesses who were asked to explain the District policy stated that ditches in Florida typically lose their function if not maintained every five to ten years. A range of 5 to 15 years is too vague to provide an adequate standard by which regulated parties are able to ascertain whether they are in compliance with the rule.

326. The definition of routine custodial maintenance will necessarily vary with site-specific conditions of the ditch. However, it is clear from the evidence that the unadopted rule defines the purpose and interval of routine custodial maintenance by vague standards that can vary substantially with the person who is interpreting the unadopted rule.

327. Standards prescribed in the unadopted rule are vague and inadequate in another aspect. Time is not the only factor considered in the unadopted rule to determine whether work is

routine and custodial. Maintenance must be frequent enough to maintain a continuity of function for a particular ditch.

328. Continuity of function suggests that function may be measured over a continuum of time. However, the unadopted rule does not quantify the continuum and does not identify the site-specific conditions that will be considered in assessing continuity of function during any particular continuum. The unadopted rule does not state whether the site-specific conditions will be assessed during low-flow conditions in dry years, normal years, or wet years; or whether alternating dry and wet conditions within each type of year also factor into the formula for continuity of function. The unadopted rule does not identify the relative weight, if any, assigned by the agency to these and other site specific-conditions used in the formula for determining continuity of function.

11.2(f) Due Notice

329. The unadopted rule is being applied to Respondents without due notice in violation of Section 120.57(1)(e)2e. An agency cannot provide adequate notice of vague and inadequate standards contained in the unadopted rule; notice of vague and inadequate standards is inherently vague and inadequate. Such notice does not provide regulated parties with due notice of the standards by which they can judge their compliance with the rule.

11.2(g) Evidence of Support

330. The unadopted rule is not supported by competent and substantial evidence within the meaning of Section 120.57(1)(f). Although the technical standards used to define routine custodial maintenance in the unadopted rule are supported by competent and substantial evidence, the basis for the application of that definition is unsupported.

331. The technical standards used to define routine custodial maintenance in the unadopted rule are matters infused with agency expertise and should not be overturned unless clearly erroneous. The technical standards are not clearly erroneous and are supported by competent and substantial evidence.

332. The standards used by the District to apply the definition of routine custodial maintenance are not infused with agency expertise. They are infused with the District's legal interpretation of relevant case law and, in particular, one circuit court case in 1984. Evidence submitted by the District does not support the standards used by the District to apply the unadopted rule.

333. The District contends that the limitation of maintenance exemptions to routine custodial maintenance in the unadopted rule implements and reiterates principles developed in St. Johns River Water Management District v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints,

7 Fla.Supp. 2d 61 (9th Judicial Circuit of Florida, October 29, 1984), affirmed, Corporation of President of Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District, 489 So. 2d 59 (Fla. 5th DCA 1986), rev. denied, 496 So. 2d 142 (Fla. 1986). As the trial court did, the parties in this proceeding refer to the decision in Latter-Day Saints as the "Deseret" case ("Deseret").

334. The District asserts that the unadopted rule is intended to ". . . reiterate the Deseret holding regarding 'routine custodial maintenance' . . .". The District also claims that it:

> . . . relied on the lower court Deseret decision, as well as the common meaning of the terms and the common things that you look for in what is an original design specification. The District's policy [is] to require compliance with the Deseret holding.

District PFO at paragraph 13, page 9.

335. A determination of whether the unadopted rule is supported by competent and substantial evidence of the principles and holdings in Deseret requires a two-step factual examination. Factual findings must first identify the principles developed in Deseret and then elucidate whether the unadopted rule actually implements or reiterates those principles and holdings.

336. In October 1982, the landowner in Deseret increased, by one foot, the height of a perimeter dike system originally

constructed between 32 and 42 years earlier to prevent water from either getting into or out of the area protected by the dike. No work had been performed on the dike for approximately 25 years, and portions of the dike had failed or declined in the interim. The landowner claimed the work was exempt pursuant to the maintenance exemption authorized in Section 403.813(2)(g).

337. The trial court entered three holdings in Deseret which are relevant to the authority relied on by the District for its unadopted rule. In relevant part, the trial court held in paragraphs 10 and 12 of its Conclusions of Law:

> 10. . . . The legislature excluded only routine custodial maintenance from the permitting requirements of Chapter 373. (emphasis supplied)
>
> 10. . . . the exemption applies only to routine custodial maintenance having a minimal adverse environmental effect. (emphasis supplied)
>
> 12. . . . Deseret has failed to meet the burden of proving entitlement to the maintenance exemption under Section 403.813(2)(g). . . .

Deseret, 7 Fla.Supp. 2d at 66-67.

338. The district court did not expressly rule on the trial court's holding that the maintenance "exemption" applies only to routine custodial maintenance. The district court expressly approved only the trial court holding that the legislature "excluded" routine custodial maintenance and the trial court

holding that the evidence failed to show entitlement to the maintenance exemption. In relevant part, the district court said:

> We agree with the trial court's conclusion that the legislature intended to exclude only routine custodial maintenance . . . from permit requirements.
>
> We also agree that the Church was not entitled to a maintenance exemption because it failed to meet its burden of proving the original design specifications for the dike system. (emphasis supplied)

Deseret, 489 So. 2d at 60-61.

339. The unadopted rule imposes requirements supported by the only ruling in the circuit court decision that was not expressly approved by the district court in Deseret. The unadopted rule reiterates and implements a holding that appears only in the trial court decision.

340. Any reasonable doubt as to the basis for the holding in Deseret was removed in 1993 by the First District Court of Appeal in SAVE the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193 (Fla. 1st DCA 1993). In SAVE, the Sportsmen Against Violating the Environment contended, as the District does in this proceeding, that the maintenance exemption applies only to routine custodial maintenance. In rejecting that contention, the court explained the basis for the earlier decision in Deseret. The court stated:

> . . . the [Deseret] court held that the applicant seeking to rebuild dikes on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two reasons: (1) the church had failed to carry its burden of proving the original specifications . . . , and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during that period.

SAVE, 623 So. 2d at 1203.

341. In SAVE, the court explicitly rejected the contention that the maintenance exemption applied only to routine custodial maintenance. The court entered the following ruling:

> This brings us to SAVE's third contention, that Smith wholly failed to qualify for an exemption under subsection 403.813(2)(g). This is a multifaceted argument that we reject in all respects. SAVE cites no . . . authority to support its contention that the exemption under this subsection is limited to "routine" or "custodial" maintenance that conceptually excludes refilling the breaks from the scope of the exemption. Subsection 403.813(2)(g) requires only that the dike be restored to "its original design specifications." (emphasis supplied)

SAVE, 623 So. 2d at 1202.

342. The District argues that the court in SAVE did not reject the contention that the exemption applies only to routine custodial maintenance but merely held that there was nothing in routine custodial maintenance that conceptually excludes the refilling of the breaks. The court goes beyond the "conceptual"

realm in the next sentence when the court expressly states that Section 403.813(2)(g) requires "only" that works be restored to their original design specifications.

343. The District cannot read the decision in SAVE in isolation from the plain language of Section 373.403(8). Section 373.403(8) provides more than a "conceptual" reason why the exemption in Section 403.813(2)(g) does not apply to routine custodial maintenance. Section 373.403(8) expressly states that maintenance "excludes routine custodial maintenance." The exemption authorized in Section 403.813(2)(g) applies only to maintenance defined in Section 373.403(8) to exclude routine custodial maintenance. Only maintenance that is not routine custodial maintenance must satisfy the requirements in Section 403.813(2)(g) for an exemption. Routine custodial maintenance is "not maintenance" and is not required to either obtain a maintenance permit or qualify for a maintenance exemption.

11.2(h) Regulatory Costs

344. The District failed to show that the unadopted rule does not impose excessive regulatory costs on Respondents within the meaning of Section 120.57(1)(e)2g. It is true, as far as it goes, that regulatory costs incurred by a proposed activity are not excessive once a determination is made that the activity either is or is not routine custodial maintenance. As this

proceeding illustrates, however, the regulatory expense that must be incurred to show that excavation is routine custodial maintenance can be substantial. Any such expense is excessive when it is incurred to satisfy a requirement that is not found in applicable statutes or rules.

12. Effect of Unadopted Rule

345. The District may not rely on the unadopted rule to affect the substantial interests of Respondents. The District failed to "prove-up" the requirements of Sections 120.57(1)(e)2b, c, e, f, and g.

346. The proposed agency action is supported by the evidence-of-record in this proceeding without relying on the unadopted rule. For reasons stated in earlier findings and incorporated here by this reference, the District action taken in the Emergency Order and the action proposed in the Administrative Complaint are supported by the weight of the evidence after the unadopted rule is excluded from consideration.

347. The excavation of NS1 and EW1 in January 1997 was not "routine custodial maintenance" based on the common and ordinary meaning of the term, rather than the unadopted rule. Part of the excavation of NS1, EW1, and the larger system was "maintenance," which must satisfy the requirements of any claimed exemptions in order to avoid applicable permitting requirements.

348. That part of the excavation which was maintenance did not satisfy essential requirements for any of the "maintenance" exemptions in Section 403.813(2)(f) and (g) and Rules 40C-4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c). The weight of the evidence did not show that:

(a) the "maintenance" consisted of only that "remedial work" which was necessary to return NS1 and EW1 to their original design specifications within the meaning of Section 403.813(2)(f) and (g) and Rule 40C-4.051(11)(b) and (c) 3;

(b) spoil material was deposited on an upland soil site that prevented the escape of spoil material or return water, or both, into wetlands, other surface waters, or waters of the state within the meaning of Section 403.813(2)(f) and (g); and Rule 40C-4.051(11)(b) and (c) 1;

(c) the excavation was performed in such a way that prevented deleterious dredged material or other deleterious substances from discharging into adjacent waters during maintenance within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b);

(d) the excavation resulted in no significant impacts to previously undisturbed natural areas within the meaning of Section 403.813(2)(f);

(e) no natural barrier was removed which separated NS1 and EW1 from adjacent waters, adjacent wetlands, or other surface waters within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b); and

(f) the excavation performed maintenance dredging on canals or channels within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b).

349. That part of the excavation defined as an alteration of NS1, EW1, and the larger system is not entitled to the "maintenance" exemptions claimed by Respondents. Similarly, that part of the excavation defined as an operation of the ditches is not entitled to the "maintenance" exemptions claimed by Respondents.

350. Pursuant to Sections 373.413 and 373.416, Modern was required to obtain a permit for the excavation of NS1, EW1, and the larger system in January 1997. Modern neither applied for nor obtained a permit for the excavation.

351. Modern violated the permitting requirements authorized in Sections 373.413 and 373.416. Modern is subject to the proposed agency action in the Administrative Complaint.

CONCLUSIONS OF LAW

352. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1). The parties were duly noticed for the hearing.

353. Ruling on the District's motion in limine was reserved for disposition in this Recommended Order. The motion is denied. The District's objection to the relevancy of evidence adopted from the proceeding conducted pursuant to Section 120.57(1) for use in the proceeding conducted pursuant to Section 120.56 is overruled.

13. Burden of Proof

354. The burden of proof is on the party seeking to prove the affirmative of an issue unless the burden is otherwise established by statute. Florida Department of Transportation vs. J.W.C. Company, Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); Balino vs. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350-351 (Fla. 1st DCA 1977). Although Section 120.57(1)(h) prescribes the standard of proof in administrative proceedings, the statute does not prescribe the burden of proof.

13.1 Permitting Requirements

355. The District has the burden of proving the factual and legal allegations in the Emergency Order and those in the Administrative Complaint and the reasonableness of any proposed agency action. The District must ultimately prove that: an emergency existed; the emergency action was reasonable; Modern excavated NS1, EW1, and the larger system; a permit was required for the excavation; and Modern failed to obtain the required permit.

13.2 Exemptions

356. Respondents have the burden of proving that the excavation of NS1, EW1, and the larger system is entitled to the exemptions claimed by Respondents. Robinson v. Fix, 113 Fla.

151, 151 So. 512, 512 (1933); Deseret, 489 So. 2d at 61. Any ambiguity in the statutes and rules authorizing the claimed exemptions must be construed strictly against Modern. Samara Development Corp. v. Marlow, 556 So. 2d 1097, 1100-1101 (Fla. 1990); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997), reh'g denied; Florida Department of Revenue v. James B. Pirtle Construction Company, Inc., 690 So. 2d 709, 711 (Fla. 4th DCA 1997); State, Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. WJA Realty Limited Partnership, 679 So. 2d 302, 304 (Fla. 3d DCA 1996); Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232, 233 (Fla. 4th DCA 1980) reh'g denied; Coe v. Broward County, 327 So. 2d 69, 71 (Fla. 4th DCA 1976), reh'g denied, aff'd 341 So. 2d 762 (Fla. 1976).

13.3 Unadopted Rule

357. When a person challenges an agency statement as an unadopted rule pursuant to Section 120.56(4), the ultimate burden of proof is on the person challenging the agency statement. St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA July 29, 1998), reh'g denied., rev. denied, 727 So. 2d 904 (Fla. Feb. 5, 1999). When a person challenges an agency statement as an unadopted rule

pursuant to Section 120.57(1)(e), however, the burden of proof is not controlled by Section 120.56(4).

358. Section 120.57(e)(1)1 prescribes the burden of proof for challenges to agency statements in terms that are substantially similar to those prescribed in Section 120.56(2) for challenges to proposed rules. Neither a proposed rule nor agency action based on an unadopted rule is "presumed valid or invalid" in Sections 120.57(1)(e)2 and 120.56(2)(c). Section 120.56(2)(a) requires the agency to prove that a proposed rule is not an invalid exercise of delegated legislative authority defined in Section 120.52(8). Section 120.57(1)(e)2 requires that the "agency must demonstrate" that the unadopted rule satisfies the requirements in Section 120.57(1)(e)2a-g. The grounds prescribed in Section 120.52(8)(b)-(g) for the invalidity of a proposed rule are substantially similar to the grounds prescribed in Section 120.57(1)(e)2a-g for the invalidity of an unadopted rule.

359. There is no discernible reason why similar statutory terms should be construed to create distinctly different burdens of proof. A determination of the applicable burden of proof in a particular administrative proceeding must be made in a manner that is consistent with the underlying statutory framework. J.W.C. Company, 396 So. 2d at 787.

360. The statutory terms that prescribe the burden of proof for proposed rules have been judicially construed to impose on the agency the ultimate burden of establishing that a proposed rule is valid. Consolidated-Tomoka, 717 So. 2d at 76. Although the agency has the ultimate burden of persuasion, the challenger must first establish a preliminary factual basis to support any objections to the proposed rule. Id.

361. A similar analysis is applicable to similar terms in Section 120.57(1)(e). Respondents have the burden of proving that the agency statement is an unadopted rule. In addition, Respondents must submit sufficient evidence to provide a preliminary factual basis for their objections. Although Section 120.57(1)(e) does not require a substantially affected party to file a separate petition challenging an agency statement as an unadopted rule, the statute also does not require an agency to disprove an objection to an unadopted rule before the challenger establishes a preliminary factual basis for the objections in the record of the proceeding conducted pursuant to Section 120.57(1)(e).

14. Standard of Proof

362. Each party must satisfy its respective burden of proof in this proceeding by a preponderance of the evidence. Authority cited by each party to require the other to satisfy its burden of

proof by clear and convincing evidence is inapposite to this proceeding.

14.1 Administrative Complaint and Emergency Order

363. The burden of proof borne by the District must be satisfied by a preponderance of the evidence unless the action proposed by the District is punitive in nature. Section 120.57(1)(h) and (j). Cf., Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987)(the standard of proof is "clear and convincing" in administrative proceedings that are punitive in nature). The agency action proposed in the Administrative Complaint is not punitive in nature.

364. The District does not seek to impose a fine, restrict a professional or occupational license, or otherwise impair the substantial interests of a person. Cf., Osborne Stern, 670 So. 2d at 935 (administrative fines are punitive and subject to "clear and convincing" standard of proof); Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997), reh'g denied (ethical sanctions implicate a loss of livelihood and more and are subject to "clear and convincing" standard of proof). In order for the District to seek civil penalties from Modern,

pursuant to Section 373.129(5), the introductory paragraph in Section 373.129 expressly requires the District to:

> . . . commence and maintain proper and necessary actions and proceedings in any court of competent jurisdiction. . . .

365. Only circuit courts have jurisdiction to impose "civil" penalties. An administrative law judge may impose only "administrative" fines specifically authorized by statute or rule. Neither Section 373.129, 373.430, nor 373.430(2) authorizes an administrative fine in this proceeding. The District has not proposed a fine.

366. The agency action authorized in the Emergency Order is not punitive. The Emergency Order, in relevant part, authorizes the Wildlife Service to construct two weirs in the Refuge.

14.2 Exemptions

367. The District contends that Respondents must prove the entitlement to exemptions by clear and convincing evidence. In Deseret, 7 Fla.Supp. 2d at 64, the trial court required the landowner to prove entitlement to an exemption by clear and convincing evidence. The circuit court relied on a 1933 decision in Fix, 151 So. at 512.

368. Section 120.57(1)(h) did not exist in 1933 when the Florida Supreme Court entered its decision in Fix. Furthermore,

Section 120.57(1)(h) is limited to administrative proceedings and does not apply to a circuit court proceeding.

369. When the appellate court did not overturn the clear and convincing standard applied by the circuit court in Deseret, the decision did not obviate the application of Section 120.57(1)(h) to administrative proceedings. The standard of proof must be determined by reference to the underlying statutory framework. J.W.C. Company, 396 So. 2d at 787. Thus, findings of fact relevant to the exemptions claimed by Modern are statutorily required to be based on a preponderance of the evidence.

14.3 Unadopted Rules

370. As previously discussed, many similarities exist in statutory terms that prescribe the burden of proof in challenges to proposed rules, pursuant to Section 120.56(2), and in challenges to agency statements pursuant to Section 120.57(1)(e). However, the standard of proof in challenges to proposed rules is uncertain.

371. Some courts have held that the preponderance of evidence standard does not apply to challenges to proposed rules. Agency for Health Care Administration, Board of Clinical Laboratory Personnel v. Florida Coalition of Professional Laboratory Organizations, Inc., 718 So. 2d 869, 871 (Fla. 1st DCA Sept. 4, 1998), reh'g. denied; Board of Clinical Laboratory

Personnel v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA Aug. 3, 1998), reh'g. denied. Compare, General Telephone Co. of Florida v. Florida Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984) (quantitative standard such as competent and substantial evidence is inapplicable to challenge to proposed rules; and "reasonably related test" is the appropriate standard for review), with Consolidated-Tomoka, 717 So. 2d at 78-79 and Department of Business and Professional Regulation v. Calder Race Course, 724 So. 2d 100, 101 (Fla. 1st DCA July 29, 1998), reh'g denied (both holding that Section 120.52(8) has overruled the "reasonably related" test). Until there is a specific judicial determination to the contrary, Section 120.57(1)(h) requires that an agency must prove by a preponderance of the evidence that an unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

15. Fifth Amendment

372. The District argues that an adverse inference should be drawn from the invocation by Mr. Charles Moehle and Mr. Michael Moehle of their Fifth Amendment protection against self-incrimination. An adverse inference may be drawn from the invocation of a party's Fifth Amendment protection against self-incrimination. Atlas v. Atlas, 708 So. 2d 296, 299 (Fla. 4th DCA 1998); 8 J. Wigmore, Evidence Section 439 (McNaughton rev. 1961).

373. The inference is discretionary and not mandatory. No inference is drawn from the invocation of the Fifth Amendment in this proceeding. No such inference is required to make relevant findings of fact and conclusions of law in this case. The testimony of Mr. Daniel McConnell and Mr. Randy McConnell was credible and persuasive and supported by other competent and substantial evidence.

16. Emergency Order and Administrative Complaint

374. The District satisfied the burden of proof required to support the Emergency Order. A preponderance of the evidence supports the factual and legal allegations in the Emergency Order and the agency action authorized in the Emergency Order.

375. Section 373.119(2) authorizes the procedure followed and action taken in the Emergency Order. The emergency action was reasonably necessary to avoid the threat to environmental concerns and the harm to such concerns that could have resulted from a delay in taking timely action. The Emergency Order did not violate applicable due process requirements. West Coast Regional Water Supply Authority v. Southwest Florida Water Management District, 646 So. 2d 765, 766 (Fla. 5th DCA 1994), reh'g denied. The record supports the Emergency Order and does not provide a sufficient basis for quashing the order at the conclusion of the hearing. Id.

376. The Emergency Order states with particularity the facts supporting the finding of an emergency. Compare, Denney v. Conner, 462 So. 2d 534, 536-537 (Fla. 1st DCA 1985)(emergency order issued pursuant to Section 120.59(3) was factually sufficient even though the order did not allege that destroyed trees were healthy or infected with citrus canker). For reasons stated in earlier findings and incorporated here by this reference, the evidence supports the facts alleged in the Emergency Order as well as the agency action taken pursuant to the Emergency Order.

377. The District satisfied the burden of proof required to support the Administrative Complaint. A preponderance of the evidence supports the factual and legal allegations in the Administrative Complaint and the agency action proposed therein.

17. Permitting Requirements

378. In relevant part, Section 373.413(1) provides:

> Except for the exemptions set forth herein, the . . . department may require such permits and impose such reasonable conditions as are necessary to assure that the . . . alteration of any stormwater management system . . . or works will comply with the provisions of this part and applicable rules . . . and will not be harmful to the water resources of the district.

379. In relevant part, Section 373.416(1) provides:

> Except for the exemptions set forth in this part, the . . . department may require such permits and impose such reasonable conditions

> as are necessary to assure that the operation or maintenance of any stormwater management system . . . or works will comply with the provisions of this part and applicable rules . . . will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

380. Pursuant to the permissive authority in Sections 373.413(1) and 373.416(1), the District requires a permit for the alteration, operation, and maintenance of a stormwater management system or works. NS1, EW1, and the larger system each are a stormwater management system or works within the meaning of Section 373.403(5) and (10) and Rule 40C-4.021(25) and (31).

17.1 Maintenance

381. The District does not expressly charge Modern with the maintenance of NS1 and EW1 without a permit. In relevant part, the Administrative Complaint alleges:

> 32. Respondent's [Modern] alteration and operation of the two preexisting ditches without being authorized by a permit issued by the District constitute a violation of Sections 373.413 and 373.416, and Sections 40C-4.041(1), 40C-4.041(2)(b)2., and 40C-4.041(2)(b)8. . . .

Administrative Complaint at 10.

382. The District charges Modern with the maintenance of NS1 and EW1 without a permit by necessary implication. In relevant part, the Administrative Complaint alleges:

> 30. Pursuant to Rule 40C-4.041 . . . permits are required for the construction,

> alteration, maintenance, or operation of surface water management systems.
>
> 31. Because the ditches . . . have not been maintained for over 30 years and because dredge material was placed in wetlands, the maintenance exemption in 403.813(2)(g) . . . does not apply to the ditch alteration work done in the instant case.

Administrative Complaint at 9-10.

383. The allegation that the excavation does not qualify for maintenance exemptions is unnecessary without an implied allegation that the excavation constitutes maintenance. Maintenance exemptions, by necessary implication, apply only to work that is maintenance.

384. The burden of proof is on the District to show that the excavation of NS1, EW1, and the larger system satisfied the definition of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20). The term "maintenance" is defined, in relevant part, to mean:

> . . . remedial work as may affect the safety of any . . . works, but excludes routine custodial maintenance.

Section 373.403(8).

385. Among other things, the District must prove that the excavation of NS1 and EW1 was not "routine custodial maintenance" that is excluded from the statutory definition of "maintenance." As previously discussed in the Findings of Fact and incorporated here by this reference, an exclusion is not an exemption. The

exclusion of routine custodial maintenance is one of the elements of the statutory definition of maintenance. The District has the burden of proving that the excavation in 1997 satisfied the statutory requirements within the definition of maintenance, including proof that the excavation was not an excluded activity.

386. The District satisfied its burden of proof. No part of the excavation of NS1, EW1, and the larger system in 1997 was routine or custodial. The extent of the excavation exceeded the scope of routine custodial maintenance. Deseret, 489 So. 2d at 61. Cf. SAVE, 623 So. 2d at 1203 (distinguishing the holding in Deseret, in relevant part, based on differences in the extent of work performed).

17.2 Alteration

387. The term "alteration" is defined, in relevant part, in Section 373.403(7) and Rule 40C-4.021(2)as meaning:

> . . . to extend . . . works beyond maintenance in its original condition, including changes which may increase . . . the flow . . . of surface water which may affect the safety of such . . . works.

Section 373.403(7).

388. Part of the excavation in January 1997 was defined as an alteration of NS1, EW1, and the larger system within the meaning of Section 373.403(7) and Rule 40C-4.021(2). That part of the excavation extended NS1 and EW1 beyond maintenance in

their original condition before the excavation. It included changes that increased the flow of surface water.

17.3 Safety

389. Even though the excavation in 1997 did not affect the safety of NS1 and EW1, both the maintenance and the alteration of NS1 and EW1 satisfied their respective definitions in Section 373.403(7) and (8) and Rule 40C-4.021(2) and (20). When the legislature uses the term "may" in Section 373.403(7) and (8), the term must be defined by its common and ordinary meaning unless such a meaning would frustrate legislative intent for the statute. Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404, 410 (Fla. 1st DCA 1997); Eager v. Florida Keys Aqueduct Authority, 580 So. 2d 771, 772 (Fla. 3d DCA 1991), review denied, 591 So. 2d 181; Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986), reh'g denied; Gar-Con Development, Inc. v. Department of Environmental Regulation, 468 So. 2d 413, 415 (Fla. 1st DCA 1985), rev. denied, 479 So. 2d 117; Department of Health and Rehabilitative Services v. McTigue, 387 So. 2d 454, 456 (Fla. 1st DCA 1980). The term "may" is not defined in the enabling legislation, is not a scientific term, and is not a word of art. The term should be given its plain and ordinary meaning. State,

Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Salvation Limited, Inc., 452 So. 2d 65, 67 (Fla. 1st DCA 1984).

390. If the term "may" were construed to mean "shall," the result would exclude from the permitting requirements any alteration that only affected the function and capacity of a covered system or works and did not affect its safety. Such a construction would constrict the scope of public interest protected by Chapter 373 and frustrate the legislative intent stated in Sections 373.413(1) and (6), 373.016, and 403.021. Statutes intended to protect the public should be liberally construed in favor of the public. Samara Development, 556 So. 2d at 1100. The legislature is presumed to enact effective laws and does not intend any act to be a nullity. See, e.g., North Miami General Hospital v. Central National Life Insurance Company, 419 So. 2d 800, 802 (Fla. 3d DCA 1982) and City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422, 423 (Fla. 4th DCA 1972)(courts should avoid interpretation that renders legislatively created provision ineffective or purposeless), reh'g denied. Compare, Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1102 (Fla. 1989) and Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986)(holding that literal context must yield to legislative intent).

17.4 Operation

391. Part of the excavation in 1997 is defined as an operation of NS1 and EW1 for which a permit is required in Section 373.416. The term "operation" is not defined by statute and must be defined by its plain and ordinary meaning. Cole Vision, 688 So. 2d at 410.

392. The excavation involved a series of acts performed to effect a certain purpose or result. The American Heritage Dictionary 871 (second college ed. 1982) ("Dictionary"). It also created a new process or new way of operating over time. Id.

17.5 Integrated Transaction

393. In this proceeding, the facts show that the excavation of NS1 and EW1 consisted of three separate steps performed in a single integrated transaction. Each step in the transaction satisfied the respective definitions of maintenance, alteration, and operation for which Sections 373.413 and 373.416 impose separate permitting requirements.

394. The first step in the transaction satisfied the statutory definition of "maintenance." That step involved only remedial work other than routine custodial maintenance. The second step progressed in scope to an alteration. It extended the ditches beyond maintenance in their original condition and included changes that increased the flow of surface water. The

third step involved the operation of NW1 and EW1 in a new way and at an increased level of operation that did not exist before the excavation.

395. If the excavation had been halted after the first step in the transaction, the completed step would have required a permit as maintenance unless it qualified for a maintenance exemption. Each step in the transaction resulted in separate impacts on the overall objectives of the District and created separate and different risks of harm to the water resources of the District.

396. One of the purposes of the permitting requirements in Sections 373.413 and 373.416 is to prevent the maintenance, alteration, and operation of drainage ditches, such as NS1 and EW1, in a way that is inconsistent with the legislative goals stated in Sections 373.413(1), 373.416(1), 373.016, and 403.021. The legislative goals for Chapter 373 and Chapter 403 are intended to protect natural resources vital to the public. Statutes intended to protect the public should be liberally construed in favor of the public. See, e.g, Samara Development, 556 So. 2d at 1100-1101 (the Interstate Land Sales Full Disclosure Act was intended to protect the public and should be liberally construed); Town of Indialantic v. McNulty, 400 So. 2d 1227, 1233 (Fla. 5th DCA 1981) (coastal construction line permitting requirements are intended to protect valuable natural

resources in the public interest from imprudent construction and should be balanced against the threat of harm from proposed construction). Chapter 373 and Chapter 403 are best served by evaluating the impacts of each step in a single integrated transaction as well as the cumulative impacts of the transaction as a whole.

397. If separate steps in a single transaction were viewed as mutually exclusive, the recognition of one step, such as maintenance, would require the impacts of the other steps to be excluded from consideration. Similarly, the exemption of one step, such as maintenance, arguably would require the exemption of other steps that were excluded from consideration. The result of either alternative could greatly expand the scope of the maintenance exemptions and significantly constrict the salutary purposes of Chapter 373 and Chapter 403.

398. The legislature does not intend any enactment to be a nullity. Sharer v. Hotel Corporation of America, 144 So. 2d 813, 817 (Fla. 1962). Significance and effect must be accorded each section in Chapter 373 and Chapter 403 in a manner that gives effect to each chapter as a whole. Villery v. Florida Parole and Probation Commission, 396 So. 2d 1107, 1111 (Fla. 1980), corrected on reh'g denied; State v. Gale Distributors, Inc., 349 So. 2d 150, 153 (Fla. 1977), reh'g denied; Ozark Corporation v.

Pattishall, 185 So 333, 337 (Fla. 1938); Topeka Inn Management v. Pate, 414 So. 2d 1184, 1186 (Fla. 1st DCA 1982).

17.6 Estoppel

399. Respondents allege numerous acts which allegedly provide a basis for estopping the District from enforcing the permitting requirements in Sections 373.413 and 373.416. An agency is estopped from enforcing authorized action only where the agency misrepresents a material fact. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215-216 (Fla. 1st DCA 1986). Estoppel does not operate upon a mistake of law. Id.

400. Respondents must prove three elements to estop the District from its proposed action in this proceeding. Respondents must show:

> (1) a representation by an agent of the state as to a material fact that is contrary to a later asserted position;
>
> (2) reasonable reliance on the representation;
>
> (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

Harris v. State, Department of Administration, Division of State Employees' Insurance, 577 So. 2d 1363, 1366 (Fla. 1st DCA 1991).

401. A determination of whether estoppel applies in a particular case requires a factual examination of the evidence of

record. Department of Labor and Employment Security v. Little, 588 So. 2d 281, 282 (Fla. 1st DCA 1991)(findings of fact do not support estoppel); Harris, 577 So. 2d at 1367 (the impediment relates to the lack of sufficient record pertaining to reasonable reliance and detrimental change in Respondents' position). The evidence presented by Respondents is not sufficient to satisfy the three essential requirements for estoppel.

402. Respondents failed to show that the District misrepresented a material fact that would estop the District from enforcing statutory permitting requirements. Respondents failed to show that they relied to their detriment on any misrepresentation of a material fact. Compare Harris, 577 So. 2d at 1367 (the lack of sufficient evidence), Nelson Richard Advertising v. Department of Transportation, 513 So. 2d 181, 183 (Fla. 1st DCA 1987)(implicit acceptance by agency representatives of factual understanding by applicant does not satisfy requirements of estoppel), and State of Florida Department of Environmental Protection v. C.P. Developers, Inc., 512 So. 2d 258, 263 (Fla. 1st DCA 1987)(doctrine of equitable estoppel inapplicable when record shows dispute of fact between the parties); with Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994)(misunderstanding of the law does not transform factual representations into legal representations) and Warren v. Department of Administration, 554

So. 2d 568, 570 (Fla. 5th DCA 1989)(record supported finding of estoppel). See also Title Plus v. Albanese, 546 So. 2d 93, 94 (Fla. 1st DCA 1989) and Jones v. Citrus Central, Inc., 537 So. 2d 1123, 1127 (Fla. 1st DCA 1989)(for cases discussing an inference adverse to a party).

17.7 Impairment of Property Rights

403. As a threshold matter, the undersigned has no jurisdiction to determine the existence, nature, and extent of the property rights of Respondents whether an alleged property right is a fee estate or an easement such as a drainage easement. Buckley v. Department of Health and Rehabilitative Services, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987), reh'g denied. Jurisdiction over such matters lies in the circuit court. State ex rel Department of General Services v. Willis, 344 So. 2d 580, 588 (Fla. 1st DCA 1977). When issues before an administrative agency are intertwined with issues that can only be decided by a circuit court, the circuit court must decide the issues over which it alone has jurisdiction. See, e.g., Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Ruff, 592 So. 2d 668, 668 (Fla. 1991) (emergency rules were intertwined with constitutional issues), reh'g denied.

404. Assuming arguendo that Respondents possess the easements they contend are being impaired, the regulatory

framework of permits and exemptions authorized in Chapter 373 and Chapter 403 does not impair the right of Respondents to use their easements to capture, discharge, and use water for purposes permitted by law, within the meaning of Section 373.406(1). The regulatory framework imposed on Respondents by applicable statutes and rules is no more severe or strict than is reasonably necessary to achieve the purposes of a valid state police power. McNulty, 400 So. 2d at 1232.

405. There is no question that the police power of the state can be used to protect and preserve the environment. McNulty, 400 So. 2d at 1231; City of Miami Beach v. First Trust Co., 45 So. 2d 681, 684 (Fla. 1949), reh'g denied. A prohibited limitation on the use of private property rights must be more than a limitation on "the highest and best" use of the property. McNulty, 400 So. 2d at 1232.

406. The burden of proving the effect of a regulatory statute or rule is on Respondents. Id. The harm intended to be prevented for the public good must be weighed against the owners' rights in the private property at issue. Id.

407. Respondents failed to satisfy their burden of proof. Respondents retain whatever rights they enjoy in the drainage ditches and are not prevented from enjoying those rights in a manner compatible with applicable permitting and exemption statutes and rules. See Florio v. City of Miami Beach, 425 So.

2d 1161, 1162 (Fla. 3d DCA 1983)(inclusion in redevelopment area did not preclude ownership rights and renovation), reh'g denied.

18. Maintenance Exemption

408. The question of whether the excavation of NS1 and EW1 qualifies for a maintenance exemption must be answered in two parts. The threshold issue is whether, as the District contends, the claimed maintenance exemptions apply only to routine custodial maintenance. If the scope of the exemption is not limited to routine custodial maintenance, it is necessary to determine whether the excavation of NS1 and EW1 qualifies for any of the exemptions claimed by Respondents.

18.1 Routine Custodial Maintenance

409. The District contends that maintenance exemptions apply only to routine custodial maintenance. For reasons previously stated and incorporated here by this reference, the District is incorrect. Maintenance exemptions apply to maintenance. Maintenance excludes routine custodial maintenance. See Sections 373.403(8) and 403.813(2)(g) and Rules 40C-4.021(20) and 40C-4.051(11)(c).

410. The District cites several cases in support of its contention and argues that both the District and the ALJ are bound to follow these cases. In relevant part, the District states:

37. Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that the dredging must be conducted as part of routine custodial maintenance to maintain an existing, functional system to its original design specifications so that it remains usable for its intended purpose. (emphasis supplied) St. Johns River Water Management District v. Corporation of the President of the Church of Latter-Day Saints, 7 Fla.Supp. 61,66 (Fla. 9th Cir. Ct. 1984), aff'd 489 So. 2d 59 (Fla. 5th DCA 1985), rev. denied 496 So. 2d 142 (Fla. 1986); Save the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193 (Fla. 1st DCA 1993); Department of Environmental Regulation v. C.G. Investment of Polk County, Inc., Case No. GC-G086-781 (Fla. 10th Cir. Ct. 1990); St. Johns River Water Management District v. Henson, 36 Fla. Supp. 2d 132 (Fla. 4th Cir.Ct. 1989); James Bunch and Santa Rosa County Board of County Commission v. Department of Environmental Protection, 19 F.A.L.R. (Fla. Dept. Env. Prot. 1997); In Re Petition for Declaratory Statement by James D. Bunch, 18 F.A.L.R. 4031, 4035-36 (Fla. Dept. Env. Prot. 1996); Manasota-88 v. Hunt Building Corp., 13 F.A.L.R. 927 (Fla. Dept. Env. Reg. 1991); Ericson Marine v. Department of Environmental Regulation, 8 F.A.L.R. 5092 (Fla. Dept. Env. Reg. 1986); Island Developers Ltd. v. Department of Environmental Regulation, 6 F.A.L.R. 5042 (Fla. Dept. Reg. 1983).

38. Neither the District nor an ALJ is free to reinterpret the maintenance exemption. The District must "follow the interpretations of statutes as interpreted by the courts of this state, if there is a controlling interpretation by a district court of appeal in this state, the [agency] must follow it . . . [and] must adhere to the interpretation given by those courts. Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be

> tolerated." Mikolsky v. Unemployment Appeals Com'n, 721 So. 2d 738 (Fla. 5th DCA 1998).

District PRO at 83-84.

411. The District is correct. The District and the ALJ must follow the decisions of the district courts of appeal in this state. Mikolsky v. Unemployment Appeals Commission, 721 So. 2d 738, 740 (Fla. 5th DCA Sept. 11, 1998), motion for certification denied (Nov. 6, 1998). In SAVE, the First District Court of Appeal expressly rejected the contention that the maintenance exemption in Section 403.813(2)(g) is limited to "routine custodial maintenance." In relevant part, the court held:

> This brings us to SAVE's third contention, that Smith wholly failed to qualify for an exemption under subsection 403.813(2)(g). This is a multifaceted argument that we reject in all respects. SAVE cites no statute, rule, or other authority to support its contention that . . . the exemption under this subsection is limited to "routine" or "custodial" maintenance. . . . Subsection 403.813(2)(g) requires only that the dike be restored to "its original design specifications." . . .

SAVE, 623 So. 2d at 1202.

412. In SAVE, the court explained the basis for the appellate court's decision in Deseret. In relevant part, the court in SAVE said:

> . . . the [Deseret] court held that the applicant seeking to rebuild dikes on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two

> reasons: (1) the church had failed to carry its burden of proving the original design specifications . . ., and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during that period.

SAVE, 623 So. 2d at 1203.

413. Neither of the district courts in SAVE and Deseret recognized, as a basis for their respective holdings, the ruling by the trial court in Deseret that maintenance exemptions apply only to routine custodial maintenance. The District and the ALJ are bound by the district court decisions in SAVE and Deseret.

414. The circuit court decision in Deseret and the other two circuit court decisions cited by the District are not controlling in this proceeding. First, they are not district court decisions. Second, they are not binding to the extent they are in conflict with the district court decisions in SAVE and Deseret.

415. The five decisions of administrative agencies cited by the District are neither district court cases nor circuit court cases. The requirement that great weight must be given to an administrative construction of a statute by the agency responsible for its administration is limited to matters infused with agency expertise. Zopf v. Singletary, 686 So. 2d 680 (Fla. 1st DCA 1997), reh'g denied; SAVE, 623 So. 2d at 1202.

416. Application of the District statement is not infused with agency expertise. It requires no technical expertise in engineering, hydrology, excavation, wetlands management, or the placement and construction of weirs. However, the statement does require the ability to read SAVE and Deseret in concert with the plain language of Section 373.403(8) and Rule 40C-4.021(20).

417. Even if the District's contention were infused with agency expertise, the contention is clearly erroneous. SAVE, 623 So. 2d at 1202. The District's statutory construction "includes" routine custodial maintenance in "maintenance" that must qualify for an exemption or obtain a permit. The statute "excludes" routine custodial maintenance from "maintenance" that must either qualify for an exemption or obtain a permit. The District's statutory construction conflicts with the clear terms of the statute. The statute controls any conflict or ambiguity between the terms of the statute and the unadopted rule. See Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. State, Department of Highway Safety & Motor Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998)(statute prevails over adopted rule that conflicts with statute); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997)(statute controls any conflict between statute and rule), reh'g denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881,884 (Fla. 5th DCA

1992)(conflict between a subsequent statute and preexisting rule does not give rise to ambiguity in the subsequent statute), reh'g denied; Roberts v. Department of Professional Regulation, Construction Industry Licensing Board, 509 So. 2d 1227, 1227 (Fla. 1st DCA 1987)(agency interpretation that statute requires four years' experience as "certified contractor," rather than "building contractor," imposes a requirement not found in the statute); Board of Optometry, Department of Professional Regulation v. Florida Medical Association, Inc., 463 So. 2d 1213, 1215 (Fla. 1st DCA 1985)(proposed rule in conflict with statute is invalid), reh'g denied.

418. Like Section 373.403(8), Rule 40C-4.021(20) defines maintenance to exclude routine custodial maintenance from maintenance that must either obtain a permit or qualify for an exemption. The unadopted rule includes routine custodial maintenance in maintenance that must either obtain a permit or qualify for an exemption. The unadopted rule conflicts with the unambiguous language of the rule. An agency's construction that conflicts with the unambiguous language of the rule is clearly erroneous. Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 34, 36 (Fla. 1994); Arbor Health Care Company v. State, Agency for Health Care Administration, 654 So. 2d 1020, 1021 (Fla. 1st DCA

1995); Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991), reh'g denied.

18.2 Exemption Requirements

419. Respondents claim entitlement to the maintenance exemptions authorized in Section 403.813(2)(f) and (g); and Rules 40C-4.051(2)(a)1 and 3, 40C-4.051(11)(b), and 40C-4.051(11)(c). Respondents have the burden of proving by a preponderance of the evidence that the excavation of NS1 and EW1 satisfies the requirements for each exemption. SAVE, 623 So. 2d at 1203; Desert, 489 So. 2d at 61.

420. Respondents failed to show they are entitled to any of the claimed exemptions. Respondents failed to show that they satisfied essential requirements in Section 403.813(2)(f) and (g) and in Rules 40C-4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c).

18.3 Drainage Easements

421. The legislature amended Section 403.813(2)(f) to add an exemption for maintenance dredging of certain drainage easements. The amendments became effective on October 1, 1997. 1997 Laws of Florida, Chapter 97-22, Section 4, page 152.

422. In relevant part, the 1997 amendments exempt:

> . . . previously dredged portions of natural water bodies within . . . drainage easements which have been recorded in the public records of the county. . . . provided that no

> significant impacts occur to previously undisturbed natural areas . . . and best management practices for erosion sediment control are utilized to prevent bank erosion and scouring and to prevent . . . dredged material [and] deleterious substances from discharging into adjacent waters during maintenance dredging. Further . . . an entity that seeks an exemption must notify the . . . water management district . . . at least 30 days prior to dredging and provide documentation of original design specifications or configurations where such exist. . . .

1997 Laws of Florida, Chapter 97-22, Section 3, pages 150-151.

423. As a threshold matter, the undersigned lacks jurisdiction to determine the property rights of Respondents, including recorded drainage easements. Cf. Ruff, 592 So. 2d at 668 (where other rights are intertwined with administrative issues, all issues should be resolved in circuit court); Buckley, 516 So. 2d at 1009 (an administrative hearing is not the appropriate forum to determine interests in property). Any reasonable doubt as to jurisdiction should be resolved in favor of arresting the further exercise of that power. Edgerton v. International Company, 89 So. 2d 488, 490 (Fla. 1956); State v. Atlantic Coast Line R. Co., 56 Fla. 617, 637, 47 So 969, 976 (Fla. 1908); Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 492 So. 2d 1122, 1124 (Fla. 3d DCA 1986), reh'g denied, rev'd, City of Miami v. Fraternal Order of Police, Miami Lodge

20, 511 So. 2d 549, 551 (Fla. 1987)(upholding agency deferral to arbitrator to interpret contract).

424. Even if Respondents possess recorded drainage easements, the relevant amendments to Section 403.813(2)(f) do not apply to this proceeding. The amendments became effective on October 1, 1997, and the excavation at issue was completed in January 1997.

425. Even if the drainage easements described in the statute were applied to the drainage easements claimed by Respondents, it is not determinative of whether Respondents satisfied other requirements for the exemption. If Respondents are entitled in Section 403.813(2)(f) to the benefits that travel with the new provisions pertaining to drainage easements, Respondents also incur the burdens associated with the new provisions. For example, Respondents must satisfy the new requirements for 30-day notice, no significant impacts to previously undisturbed natural areas, and best management practices. Respondents failed to satisfy the foregoing requirements in Section 403.813(2)(f).

19. Unadopted Rule

426. Respondents challenge as an unadopted rule the District's working definition of routine custodial maintenance. Respondents allege that the "working" part of the definition

limits maintenance exemptions to routine custodial maintenance; and to functioning ditches.

427. As previously discussed, the requirement for routine custodial maintenance is intended to preserve the continuity of function for a drainage ditch. Therefore, the requirement for routine custodial maintenance the requirement that a ditch must be functioning. The limitation of maintenance exemptions to functioning ditches is addressed hereinafter only in the context of the requirement for routine custodial maintenance.

19.1 Procedural Issues

428. The District argues that Respondents have not raised a challenge to the unadopted rule in their petitions in the proceeding conducted pursuant to Section 120.57(1). "Nor could they," the District asserts, because the pleadings from the rule challenge cases filed pursuant to Section 120.56(4) do not carry over to this proceeding.

429. The District's argument is correct as far as it goes. The pleadings from the rule challenge cases under Section 120.56(4) do not carry over to this proceeding. However, the pleadings do not need to carry over for Section 120.57(1)(e) to apply in this proceeding. Section 120.57(1)(e) authorizes a de novo review of an unadopted rule independently of Section 120.56(4).

430. Nothing in Section 120.56(4) precludes Respondents from challenging an unadopted rule in a ". . . proceeding conducted pursuant to Section 120.57(1)(e). . . ." Section 120.56(4)(f). Nothing in Section 120.57(1)(e) requires Respondents to file a separate petition in a proceeding conducted pursuant to Section 120.57(1)(e) or to amend the original petition in the Section 120.57(1) proceeding after discovering an unadopted rule.

431. The absence of a statutory requirement for a separate petition in Section 120.57(1)(e) acknowledges the practical reality that an unadopted rule often remains invisible until the blue spark in time when it emerges from evidence adduced during the hearing. Section 120.57(1)(e) authorizes a substantially affected party to challenge such a rule without first filing a separate petition in the same action in which the party previously filed the original petition. Respondents filed their petitions in this proceeding several months before they filed any rule challenges pursuant to Section 120.56(4) and are not required by Section 120.57(1)(e) to amend the original petitions filed pursuant to Section 120.57(1).

19.2 Statutory Interplay

432. The District argues that judicial interpretations of former Section 120.535, Florida Statutes (1995), apply to this

proceeding. The District argues that those decisions state that the exclusive method to challenge an agency's failure to adopt agency statements of general applicability as rules is found in Section 120.56(4). Cf. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 590 n.1 (Fla. 1st DCA 1996) and Christo v. Florida Department of Banking and Finance, 649 So. 2d 318, 321 (Fla. 1st DCA 1995), rev. dismissed mem., 660 So. 2d 712 (Fla. 1995)(in which the court considered statutory requirements for "expeditious" and "good faith rulemaking" now found in Section 120.56(4)).

433. The authority in Section 120.56(4) to challenge an unadopted rule does not nullify any portion of Section 120.57(1)(e). The legislature does not intend any enactment to be a nullity. Sharer, 144 So. 2d at 817. Significance and effect must be accorded each section in Chapter 120 in a manner that gives effect to Chapter 120 as a whole. Villery, 396 So. 2d at 1111; Gale Distributors, 349 So. 2d at 153; Ozark Corporation, 185 So at 337; Topeka Inn, 414 So. 2d at 1186.

434. Sections 120.56(4) and 120.57(1)(e) were enacted in the same act and relate to the same subject matter. 1996 Laws of Florida, Chapter 96-159, Sections 16 and 19, pages 180-188. Such statutes must be considered in pari materia in a manner that harmonizes them and gives effect to legislative intent for the

entire act. Major v. State, 180 So. 2d 335, 337 (Fla. 1965); Abood v. City of Jacksonville, 80 So. 2d 443, 444-445 (Fla. 1955); Tyson v. Stoutamire, 140 So 454, 456 (Fla. 1932); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997); Armas v. Ross, 680 So. 2d 1130, 1130 (Fla. 3d DCA 1996); State Farm Mutual Automobile Insurance Company v. Hassen, 650 So. 2d 128, 133 n. 5 (Fla. 2d DCA 1995); Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989); Escambia County Council on Aging v. Goldsmith, 465 So. 2d 655, 656 (Fla. 1st DCA 1985); Jackson v. State, 463 So. 2d 373, 373 (Fla. 5th DCA 1985), reh'g denied. Such statutes are imbued with the same spirit and actuated by the same policy.

435. Sections 120.56(4) and 120.57(1)(e) are successors to former Sections 120.535 and 120.57(1)(b)15, Florida Statutes (1995). Like their predecessors, Sections 120.56(4) and 120.57(1)(e) are intended to maximize the scope of statutory rulemaking requirements. House of Representatives Committee on Governmental Operations Final Bill Analysis & Economic Impact Statement (HB 1879, 1991) at 3-4, Florida State Archives, Series 19, Box 2182 ("HB 1879"). Sections 120.56(4) and 120.57(1)(e), whenever possible, should be construed as having a cumulative and harmonious effect, rather than a mutually exclusive effect, so as to maximize the scope of statutory rulemaking requirements.

436. Sections 120.56(4) and 120.57(1)(e) are not redundant statutes. Sections 120.56(4) and 120.57(1)(e) contain different provisions that create different incentives for rulemaking and also provide different disincentives for failing to do so.

437. Section 120.56(4)(e), in relevant part, encourages rulemaking by permitting an agency to rely on an unadopted rule if the agency satisfies two conjunctive requirements. The agency must proceed expeditiously and in good faith to rulemaking before the entry of a final order; and the unadopted rule must satisfy the requirements of Section 120.57(1)(e).

438. Section 120.57(1)(e) does not require expeditious and good faith rulemaking as a condition of enforcing an unadopted rule. If a party wishes to require an agency to proceed to rulemaking, the party must file a petition pursuant to Section 120.56(4). Section 120.57(1)(e) does not authorize a challenge to a rule on the ground that the rule is an invalid exercise of delegated legislative authority defined in Section 120.52(8)(a).

19.3 Rule Defined

439. Section 120.57(1)(e) requires Respondents to prove that the limitation of maintenance exemptions to routine custodial maintenance is a rule. Section 120.52(15), in relevant part, defines a rule to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the

> procedure or practice requirements of an agency and . . . includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency. . . .

Section 120.52(15).

19.3(a) Conjunctive Requirements

440. The statutory definition of a rule creates a threshold test that includes two conjunctive requirements. There must be a statement; and the statement must be one of general applicability.

19.3(a)(1) Statement

441. The limitation of maintenance exemptions to routine custodial maintenance is a statement within the meaning of Section 120.52(15). Although the statement is expressed in the Memorandum, the Memorandum is only published evidence of the statement. The statement exists and is applied independently of the Memorandum.

442. The District expresses and applies the statement each time the District takes agency action based on the statement and not just when the agency publishes a particular document that captures the statement in writing. The existence, terms, and scope of the statement are measured on a de facto basis by the

effect of the statement. The effect of the statement emerges from all of the evidence of record including, but not limited to, the publication of the statement in various documents and the consistent enforcement of agency action based on the statement. In other words, the statement is defined not only by the talk the agency talks, but also by the walk the agency walks. See North Broward Hospital District v. Eldred, 466 So. 2d 1210, 1210 (Fla. 4th DCA 1985)(finding that a hospital is an agency on the grounds that "if it looks, walks, quacks and swims like a duck, that is what it is"), approved as modified, Eldred v. North Broward Hospital District, 498 So. 2d 911 (Fla. 1986). For other cases analyzing legal issues based on the way facts "walk and talk," see State v. O'Brien, 633 So. 2d 96, 99 n.5 (Fla. 5th DCA 1994)(if it "quacks like a duck and waddles like a duck" but lacks "webbed feet," it is not certain whether testimony is Williams rule evidence), rev. denied, 639 So. 2d 981 (1994); Rubenstein v. Sarasota County Public Hospital Board, 498 So. 2d 1013, 1014 (Fla. 2d DCA 1986)(rejecting appellant argument that if county organization "looks like a duck and quacks like a duck, then it must be a duck"); DeToro v. Dervan Investments Limited Corp., 483 So. 2d 717, 722 (Fla. 4th DCA 1986)(the old saying that "if it looks like a duck and walks like a duck . . . doesn't necessarily apply" to determine existence of partnership), amended on reh. denied; Booker Creek Preservation, Inc. v.

Pinellas Planning Council, 433 So. 2d 1306, 1308 (Fla. 2d DCA 1983)(rejecting argument by appellant that county organization is an agency on the ground that if it "looks like a duck and quacks like a duck, then it must be a duck").

19.3(a)(1)[a] Law

443. The principle of law that Section 120.52(15) includes unwritten statements has existed for more than 23 years. In 1976, the Florida Supreme Court held that unwritten standards imposed by the Department of Revenue in connection with certain bond requirements were rules and were unenforceable because they had not been promulgated pursuant to Section 120.54. Straughn v. O'Riordan, 338 So. 2d 832, 834 n. 3 (Fla. 1976).

444. The unwritten agency statements at issue in Straughn were requirements: which the chief of the sales tax bureau "considers"; for which the area supervisor "plays it by ear"; and for which the Department itself had developed a "rule of thumb." Straughn, 338 So. 2d at 833 and n. 2. In rejecting unwritten standards as invalid rules, the court observed that Chapter 120 has as one of its principal goals:

> . . . the abolition of "unwritten rules" by which agency employees can act with unrestrained discretion to adopt, change and enforce governmental policy. . . .

Straughn, 338 So. 2d at 834 n. 3.

445. The requirement to invalidate an unadopted rule is intended to:

> . . . close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know.

McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977).

446. In 1997, the First District Court of Appeal followed the 1976 holding in Straughn. The court held that unwritten agency procedures are statements of general applicability and are invalid rules. Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997), reh'g denied. The dissent, in relevant part, argued that there was no statement because the agency procedures had not been reduced to writing. In rejecting the requirement that a statement be reduced to writing, the majority stated:

> The dissent's primary focus, as to the last three of the disputed procedures, appears to be that because none of the statements had been reduced to writing . . . they could not be considered to comply with section 120.52(15)'s definition of a rule. In espousing this position, [the dissent] has failed to cite any authoritative legislative or judicial source for [its] novel contention. Indeed, [its] reference to Straughn v. O'Riordan . . . supports an opposite conclusion. Nothing in Straughn reveals that the court's decision was influenced by the existence of written standards. In fact, the quotes from Straughn regarding "unwritten rules" and "invisible policy-making" strongly suggest the contrary.

> Even if it were possible to interpret Straughn as implying that the standards there attacked had been reduced to writing, any decision which requires a writing as a necessary ingredient of an unpublished rule is, in our judgment, clearly at variance with the legislative purpose behind the adoption of the 1974 Administrative Procedure Act. (citations omitted)

Schluter, 705 So. 2d at 84.

447. The legal principle that unwritten agency statements fall within the ambit of Section 120.52(15) has been approved by the legislature pursuant to the doctrine of long-standing legislative reenactment. Subsequent reenactment of a statutory provision that has received a definite judicial construction is presumed to constitute legislative approval of the judicial construction. State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973), reh'g denied; Walsingham v. State, 250 So. 2d 857, 859 (Fla. 1971); Collins Investment Company v. Metropolitan Dade County, 164 So. 2d 806, 809 (Fla. 1964), reh'g denied; Advisory Opinion to Governor, 96 So. 2d 541, 546 (Fla. 1957) (en banc); Depfer v. Walker, 125 Fla. 189, 169 So 660, 664 (Fla. 1935), on reh'g, further reh'g denied; Cole Vision, 688 So. 2d at 408; Davies v. Bossert, 449 So. 2d 418, 420-421 (Fla. 3d DCA 1984); Aronson v. Congregation Temple De Hirsch of Seattle, Washington, 138 So. 2d 69, 73 (Fla. 3d DCA 1962), reh'g denied.

19.3(a)(1)[b] Evidence

448. Although an unwritten agency statement clearly falls within the ambit of Section 120.52(15), the specific terms of a particular statement must be established in the record. Unwritten agency statements must be sufficiently described by the party challenging the statement as a rule. Aloha Utilities, Inc., v. Public Service Commission, 723 So. 2d 919, 921 (Fla. 1st DCA January 31, 1999). See also Wigenstein v. School Board of Leon County, 347 So. 2d 1069, 1072 (Fla. 1st DCA 1977)(school board required to adopt superintendent's policy as a rule once the board is aware of the policy); Krestview Nursing Home v. Department of Health and Rehabilitative Services, 381 So. 2d 240, 241 (Fla. 1st DCA 1979)(final agency action can occur in form of summary letters, telephone calls, and other conventional communications of government).

449. In this proceeding, Respondents adequately and precisely describe the statement of the District. The Memorandum expressly applies maintenance exemptions only to routine custodial maintenance. The terms of the statement emerge from consistent applications of the statement evidenced in the record.

450. The District expresses the terms of the statement each time the agency enforces action based on the statement. Agency statements are expressed through agency action to enforce the statement. Cf. Reiff v. Northeast Florida State Hospital, 710

So. 2d 1030, 1032 (Fla. 1st DCA May 27, 1998)(enforcement of clinical privileges in hospital by-laws is an invalid rule); Federation of Mobile Home Owners, 683 So. 2d at 591-592 (unpromulgated policy of general applicability that repeals an existing promulgated rule is itself a rule under former Section 120.535 even when agency denies existence of the unpromulgated policy); Department of Revenue of State of Florida v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (enforcement of tax assessment procedure in training manual is an invalid rule); Christo, 649 So. 2d at 319 (enforcement of "CAMEL" ratings as a means to recover costs of examination and supervision of an institution is an invalid rule under former Section 120.535); Florida Public Service Commission v. Central Corporation, 551 So. 2d 568, 570 (Fla. 1st DCA 1989) (administrative order is invalid rule); McCarthy v. Department of Insurance and Treasurer, 479 So. 2d 135, 136 (Fla. 2d DCA 1985) (letter establishing qualifications for eligibility and revoking certification is invalid rule), reh'g denied; Department of Administration, Division of Personnel v. Harvey, 356 So. 2d 323, 324 (Fla. 1st DCA 1977)(statement denying application is an invalid rule), reh'g denied; Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 887 (Fla. 1st DCA 1977) (orders may not be employed to prescribe substantive standards), cert. denied, 359 So. 2d 1210 (Fla. 1978).

451. The statement of the District is expressed through directives issued by the Director and other District staff. An agency statement may be evidenced in its directives to agency staff. Department of Revenue v. U.S. Sugar Corporation, 388 So. 2d 596, 597 (Fla. 1st DCA 1980)(denial of request for tax refund is an invalid rule when based on administrative determination that delivery to contract carrier, rather than to common carrier, is a sale inside the state); Harris v. Florida Real Estate Commission, 358 So. 2d 1123, 1126 (Fla. 1st DCA 1978)(directive approved at meeting of Commission which limited use of name of franchisor unless it was preceded by individual broker name was a statement and an invalid rule), reh'g denied, cert. denied, 365 So. 2d 711; State, Department of Administration v. Stevens, 344 So. 2d 290, 296 (Fla. 1st DCA 1977)(directive and guidelines expressed in employee "bumping" and "retention" procedures and guidelines are statements and an invalid rule). See also Florida Department of Offender Rehabilitation v. Walsh, 352 So. 2d 575, 575 (Fla. 1st DCA 1977)(administrative directive is a statement and an invalid rule).

452. The District statement is expressed in the Memorandum. Agency memoranda provide sufficient evidence of an agency statement defined as a rule. Department of Corrections v. Sumner, 447 So. 2d 1388, 1390 (Fla. 1st DCA 1984)(statement expressed in interoffice memorandum concerning prisoner

visitation is an invalid rule); Amos v. Department of Health and Rehabilitative Services, District IV, 444 So. 2d 43, 45 (Fla. 1st DCA 1983)(statement expressed in document entitled "CSE Policy Clearance 79-6" is an invalid rule), reh'g denied; Florida State University v. Dann, 400 So. 2d 1304, 1305 (Fla. 1st DCA 1981) (statement in faculty memorandum setting out procedures for awarding merit salaries and pay increases is an invalid rule).

453. The District does not ascribe the label "moratorium" to its refusal to grant a maintenance exemption for maintenance that is not routine custodial maintenance. However, the effect of the refusal is the same as the effect of a "moratorium" of indefinite duration.

454. The District statement is expressed in the District's self-imposed "moratorium" on exemptions for any work that does not qualify as routine custodial maintenance. An agency's self-imposed moratorium limiting applications for permits has been held to be a statement. Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977 (Fla. 1st DCA 1984) (holding that self-imposed moratorium on applications for certificates of need is an invalid rule).

455. Rule 40C-4.021(20) defines maintenance as remedial work that is not routine custodial maintenance. The District statement defines "maintenance" entitled to the maintenance exemption as only routine custodial maintenance. An agency

statement is a rule if it adopts an interpretation of a rule that is clearly contrary to the unambiguous language of the rule. Kearse v. Department of Health and Rehabilitative Services, 474 So. 2d 819, 820 (Fla. 1st DCA 1985)(agency must comply with its own rules), reh'g denied.

456. A statement is expressed in the District's deviation from its own rule. An agency is not free to deviate from a valid existing rule. Section 120.68(7)(e)2. An agency must follow its own rules. See, e.g., Vantage Healthcare Corporation, 687 So. 2d at 307(agency statement that does not follow its own rules is an invalid rule); Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1241 (Fla. 1st DCA 1996)(change in procedure expressed in adopted rule must be undertaken by rulemaking), reh'g denied; Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994)(agency cannot use declaratory statement to alter exemption authorized in rule); Florida H-Lift v. Department of Revenue, 571 So. 2d 1364, 1366-1367 (Fla. 1st DCA 1991)(agency statement imposing requirements not in agency rule simply to enhance state revenue is an invalid rule), reh'g denied; Decarion v. Martinez, 537 So. 2d 1083, 1087 (Fla. 1st DCA 1989)(agency interpretation of its own rule to impose different requirements is a statement and an invalid rule); Williams v. Department of Transportation,

531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency deviation from personnel procedures in rule is a statement and an invalid rule).

457. The District statement is expressed in letters and other written communications of the District. An agency statement can be expressed in agency memoranda, letters, and forms. See, e.g., Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 196-197 (Fla. 1st DCA 1991)(letter to developer limiting exemption from coastal construction control line permit is a statement that is an invalid rule), reh'g denied; Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Martin County Liquors, Inc., 574 So. 2d 170, 173 (Fla. 1st DCA 1991)(form required by agency but not filed with Secretary of State and agency policy requirements for completing the forms are statements and an invalid rule), reh'g denied; State, Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 887-888 (Fla. 1st DCA 1988)(form which provides the substantive standard for review in all instances is a statement and an invalid rule), reh'g granted, clarified; McCarthy, 479 So. 2d at 137 (letter setting out requirements and prerequisites for certification as a fire marshal is a statement and an invalid rule).

19.3(a)(2) General Applicability

458. The requirement of general applicability in the statutory definition of a rule is a threshold distinction between a statement that is a rule and a non-rule statement. A non-rule statement is the definitional complement to a statement defined as a rule in Section 120.52(15). A non-rule statement is one that is, inter alia, not generally applicable. A statement that is not generally applicable cannot be defined as a rule.

459. Agency statements satisfy the test of general applicability if they:

> . . . are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.

McDonald, 346 So. 2d at 581.

460. Whether a statement is an incipient non-rule statement or has emerged into a rule is determined by the effect of the statement rather than the label ascribed to it by the agency. Vanjaria Enterprises, 675 So. 2d at 255; Balsam, 452 So. 2d at 978; Amos, 444 So. 2d at 46-47; Harvey, 356 So. 2d at 325. Compare Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 714 So. 2d 589, 591 (Fla. 3d DCA July 8, 1998)(declaratory statement is a rule because it is generally applicable) with Environmental Trust v. State, Department of Environmental Protection, 714 So.

2d 493, 498 (Fla. 1st DCA June 3, 1998)(rejecting the notion that an agency must adopt a rule for each "particular set of facts") and Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998)(a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person). The District's limitation of maintenance exemptions to routine custodial maintenance satisfies the test of general applicability.

461. The application of maintenance exemptions only to routine custodial maintenance is not, as the District argues, a single isolated occurrence in the Memorandum which was allegedly buried and forgotten by District staff. The Memorandum is merely published evidenced of the statement.

462. The record is replete with other evidence of how the District applies the limitation of exemptions to create rights, require compliance, or otherwise have the direct and consistent effect of law as if the limitation were actually included in the maintenance exemptions enacted by the legislature. As the District explains in its PRO:

> Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that the dredging must be conducted as part of routine custodial maintenance to maintain an existing, functional system to its original design specifications so that it remains usable for its intended purpose. (emphasis supplied) (citations omitted)

District PRO at 83.

463. The record shows that the District limited maintenance exemptions to routine custodial maintenance in 1984 in Deseret. On November 20, 1989, the District published its statement in the Memorandum. In 1993, the First District Court of Appeal rejected the statement that maintenance exemptions are limited to routine custodial maintenance. SAVE, 623 So. 2d at 1202. In 1999, the District continues to consistently apply the rejected statement.

464. For more than 15 years, the District has consistently limited maintenance exemptions to routine custodial maintenance to create rights, require compliance, or otherwise have the direct and consistent effect of law. The statement that a maintenance exemption applies only to routine custodial maintenance satisfies the test of general applicability. Central Corporation, 551 So. 2d at 570; Balsam, 452 So. 2d at 978; Stevens, 344 So. 2d at 296.

19.3(b) Disjunctive Requirements

465. The statutory definition of a rule requires that a statement of general applicability must also satisfy one of several disjunctive requirements in the Section 120.52(15). The statement of general applicability, in relevant part, must either:

> (a) implement, interpret, or prescribe law or policy;

(b) describe the procedure or practice requirements of an agency; or

(c) amend or repeal a rule.

466. The District's limitation of exemptions to routine custodial maintenance implements, interprets, and prescribes the policy of the District as well as the law in Section 403.813(2)(f) and (g); and Rules 40C-4.051(2)(a) 1 and 3, 40C-4.051(11)(b), and 40C-4.051(11)(c). The statement that maintenance exemptions apply only to routine custodial maintenance amends and repeals the express language of relevant statutes. It imposes an interpretation on Section 403.813(2)(g) that is not readily apparent from the statute. Ocala Breeder Sales Company, Inc. v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 464 So. 2d 1272, 1274 (Fla. 1st DCA 1985); Amos, 444 So. 2d at 47; Gulfstream Park Racing Association, Inc. v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 407 So. 2d 263, 265 U.S. Sugar, 388 So. 2d at 598; Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977). See also Allied Marine Group v. Department of Revenue 701 So. 2d 630, 631 (Fla. 4th DCA 1997)(statute imposing tax on use cannot be applied to tax sales).

467. The limitation of maintenance exemptions to routine custodial maintenance is unduly restrictive. Administratively imposed limits on statutory exemptions are unduly restrictive.

See Campus Communications, Inc. v. Department of Revenue, State of Florida, 473 So. 2d 1290, 1295 (Fla. 1985)(the term "newspaper" cannot be interpreted narrowly to deny a statutory exemption); Pederson v. Green, 105 So. 2d 1, 4 (Fla. 1958)(rule restricting statutory exemption for feed to particular types of feed is unduly restrictive of the feeds legislatively exempted); McTigue, 387 So. 2d at 456 (rule construing statutory exemption for physician statement to mean statement from a Florida physician is unduly restrictive); Salvation Limited, 452 So. 2d at 66-67 (rule interpreting statutory terms "restaurant" and "serve" to require food to be cooked on premises is unnecessarily restrictive).

468. The District statement is not an internal management memorandum. The statement prescribes specific procedures and practice requirements of the agency and affects the private interests of Respondents. Cf. Alexander v. Singletary, 626 So. 2d 333, 335 (Fla. 1st DCA 1993)(operating procedure that prohibits inmates from earning more than $100 a month is invalid rule); Martin City Liquors, 574 So. 2d at 174 (policies and procedures held to be invalid rules); Department of Transportation v. Blackhawk Quarry Company of Florida, Inc., 528 So. 2d 447, 450 (Fla. 5th DCA 1988)(standard operating procedures established agency policy for accepting materials produced for agency) rev. denied 536 So. 2d 243; Department of Corrections v.

Holland, 469 So. 2d 166, 167 (Fla. 1st DCA 1985)(inmate clothing and linen policy is invalid rule); Sumner, 447 So. 2d at 1390 (interoffice memorandum concerning prisoner visitation is an invalid rule); and Amos 444 So. 2d at 45 (document entitled "CSE Policy Clearance 79-6" is a statement), reh'g denied; Dann, 400 So. 2d at 1305 (faculty memorandum setting out procedures for awarding merit salaries and pay increases is an invalid rule). But see State ex rel. Bruce v. Kiesling; Florida Public Service Commission Nominating Council v. Kiesling, 632 So. 2d 601, 604 (Fla. 1994)(statements of procedure requiring appointment of commissioners from three nominees are not rules).

469. The limitation satisfies the statutory definition of a rule and has not been adopted and promulgated in accordance with the statutory rulemaking procedures prescribed in Section 120.54. The District may not rely on the unadopted rule unless it demonstrates that the rule satisfies the requirements of Section 120.57(1)(e)2a-g. Section 120.57(1)(e)2.

19.4 Prove-up Requirements

470. Section 120.57(1)(e), in relevant part, provides:

> . . . Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge . . . .

In the de novo review, the "agency must demonstrate" that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

471. The District demonstrated by a preponderance of the evidence that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a and d. However, the District failed to demonstrate that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2b, c, e, f, and g.

19.4(a) Section 120.57(1)(e)2a and d

472. The unadopted rule meets the requirements of Section 120.57(1)(e)2a and d. The rule is within the powers, functions, and duties delegated by the legislature in accordance with Section 120.57(1)(e)2a. The rule is not arbitrary or capricious within the meaning of Section 120.57(1)(e)2d.

19.4(a)(1) Range of Powers Test

473. Section 120.57(1)(e)2a requires, inter alia, that the unadopted rule must fall ". . . within the powers, functions, and duties delegated by the legislature." The terms of the requirement in Section 120.57(1)(e)2a are substantially similar to those prescribed in the introductory paragraph in Section 120.52(8). In relevant part, Section 120.52(8) defines an invalid exercise of delegated legislative authority to include:

> . . . action which goes beyond the powers, functions, and duties delegated by the Legislature.

474. Section 120.52(8) has been judicially construed to require a proposed rule to fall within the:

> . . . range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented. . . .

Consolidated-Tomoka, 717 So. 2d at 80.

475. There is no discernible reason why terms as similar to those in Sections 120.52(8) and 120.57(1)(e)2a should be construed differently. Both statutes address the subject of an agency seeking to enforce a statement which has not yet been adopted but which is proposed for enforcement. Statutes addressing the same subject matter should be construed in pari materia. See Consolidated-Tomoka, 717 So. 2d at 80 (construing Sections 120.52(8) and 120.54(1) together).

476. The District's limitation of exemptions to routine custodial maintenance is within the "range of powers," functions, and duties delegated by the legislature to the District for the purpose of enforcing and implementing Section 373.416. See Consolidated-Tomoka, 717 So. 2d at 80. The unadopted rule regulates a matter directly within the class of powers and duties

identified in the statute implemented. Standards for permitting and exemptions fall within the class of powers and duties identified in Sections 373.413 and 373.416.

477. The requirement in Section 120.57(1)(e)2a which is subject to the "range of powers" test is separate and distinct from the requirement in 120.57(1)(e)2b. The distinction is best illustrated by an analysis of Sections 120.52(8)(b) and 120.52(8)(c) in Consolidated-Tomoka. In relevant part, the court stated:

> . . . section 120.52(8)(b) provides that a rule is invalid if "[t]he agency has exceeded its grant of rulemaking authority" Additionally, section 120.52(8)(c) provides that a rule is invalid if it "enlarges, modifies, or contravenes the specific provisions of law implemented." These subsections address two different problems: the former pertains to the adequacy of the grant of rulemaking authority and the latter relates to limitations imposed by the grant of rulemaking authority. . . .

Consolidated-Tomoka, 717 So. 2d at 81.

478. A rule that satisfies the "range of powers" test applicable to Sections 120.57(1)(e)2a and 120.52(8) must independently satisfy the requirements of Sections 120.57(1)(e)2b and 120.52(8)(c). In other words, an agency may take action that is within its "range of powers" but do so in an invalid manner. Cf. Koontz v. St. Johns River Water Management District, 720 So. 2d 560, 561-562 (Fla. 5th DCA 1998)(District had power to create

river basin even though the power was executed without adequate basis in the record), reh'g denied; Witmer v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 662 So. 2d 1299, (Fla. 4th DCA 1995), reh'g denied (agency had authority to promulgate rule regarding issuance of license but no authority to include vague or inadequate standards); But See Department of Business and Professional Regulation v. Calder Race Course, Inc., 724 So. 2d 100, 102-103 (Fla. 1st DCA 1998)(a proposed rule that authorized agency to conduct warrantless searches of wagering facilities is not within the range of powers).

479. The requirements in Section 120.57(1)(e)2a-g are substantially similar to those in Section 120.52(8)(b)-(g). Section 120.52(8)(b)-(g) was enacted, in relevant part, to overrule judicial use of the so-called "reasonably related" test to determine the validity of a rule. Section 120.52(8), flush paragraph; Consolidated-Tomoka, 717 So. 2d at 78; Calder Race Course, 724 So. 2d at 101. There is no discernible reason why similar statutory terms in Section 120.57(1)(e)2a-g should be construed differently from those in Section 120.52(8)(b)-(g). The "reasonably related" test should not be used to determine the validity of an unadopted rule pursuant to Section 120.57(1)(e)2a-g. Consolidated-Tomoka, 717 So. 2d at 78; Calder Race Course, 724 So. 2d at 101.

480. Under the "reasonably related" test used prior to 1996, rules were deemed valid if they were "reasonably related" to the purposes of the enabling legislation and were not "arbitrary or capricious." Marine Industries Association of South Florida, Inc. v. Florida Department of Environmental Protection, 672 So. 2d 878, 882 (Fla. 4th DCA 1996); Cortes v. State, Board of Regents, 655 So. 2d 132, 135 (Fla. 1st DCA 1995), reh'g denied; State, Department of Environmental Regulation v. SCM Glidco Organics Corporation, 606 So. 2d 722, 728 (Fla. 1st DCA 1992), reh'g denied; Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So. 2d 1363, 1367 (Fla. 1st DCA 1992); Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991). The "reasonably related" and "arbitrary or capricious" standards evolved over the course of 20 years as a judicially created two-prong test for determining the validity of a rule. Motel 6, Operating L.P. v. Department of Business Regulation, Division of Hotels & Restaurants, 560 So. 2d 1322, 1323 (Fla. 1st DCA 1990), reh'g denied; Adam Smith Enterprises, Inc. v. State, Department of Environmental Regulation, 553 So. 2d 1260, 1274 (Fla. 1st DCA 1989), reh'g denied; Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So. 2d 209, 215 (Fla. 1st DCA 1986); Austin v. Department of Health and Rehabilitative Services, 495 So. 2d 777, 779 (Fla. 1st DCA 1986), reh'g denied.

481. Some decisions applied one or the other prong of the "reasonably related" test in determining the validity of a rule. See, e.g., Cataract Surgery Center v. Health Care Cost Containment Board, 581 So. 2d 1359, 1360-1361 (Fla. 1st DCA 1991)(agency interpretation of a statute must be shown to be arbitrary and capricious), reh'g denied; Department of Corrections v. Hargrove, 615 So. 2d 199, 201 (Fla. 1st DCA 1993)(rule must be shown to be arbitrary and capricious), reh'g. denied. Other decisions applied a variation of the reasonably related and arbitrary or capricious test. PPI, Inc. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 698 So. 2d 306, 309 (Fla. 3d DCA 1997)(where agency is granted rulemaking authority, it is given "wide discretion" in exercising that authority), reh'g denied; Hobe Associates, Ltd. v. State, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, 504 So. 2d 1301, 1306 (Fla. 1st DCA 1987)(rule need only be within "general statutory duties"), reh'g denied.

482. In 1996, the legislature enacted new legislation intended to overrule earlier case law to the extent the decisions in those cases applied the "reasonably related" test for determining the validity of a rule. Consolidated-Tomoka, 717 So. 2d at 78-79. The "arbitrary and capricious" standard survived in

Sections 120.52(8)(e) and 120.57(1)(e)2d. However, the "reasonably related" standard is no longer applicable in determining the validity of a rule. Calder Race Course, 724 So. 2d at 101.

483. In Consolidated-Tomoka, the court cited specific cases which the legislature intended to overrule to the extent the cases had applied the "reasonably related" test to determine the validity of a rule. The cited cases are: General Telephone Company of Florida v. Florida Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984); Department of Labor and Employment Securities, Division of Workers' Compensation v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994); Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984), reh'g denied; Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237 (Fla. 1st DCA 1985); Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So. 2d 759, 762 (Fla. 1st DCA 1978), reh'g. denied (dissent), cert. denied, sub nom., 376 So. 2d 74; Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975).

484. Prior to 1996, many cases had determined the validity of agency action based on a test of whether the agency's action was within the "range of permissible interpretations" of the delegated statutory authority. When the court adopted the new

"range of powers" test in Consolidated-Tomoka, the court did not distinguish the "range of powers" test from the "range of permissible interpretations" test. See, e.g., Suddath Van Lines, Inc. v. State, Department of Environmental Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996), reh'g denied; Golfcrest Nursing Home v. State, Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995); Koger v. Department of Professional Regulation, Board of Clinical Social Work, Marriage Family Therapy and Mental Health Counseling, 647 So. 2d 312, 312 (Fla. 5th DCA 1994); B.K. v. Department of Health and Rehabilitative Services, District 7, Orange County, 537 So. 2d 633, 635 (Fla. 1st DCA 1989), reh'g denied; Department of Health and Rehabilitative Services v. Framat Realty, Inv., 407 So. 2d 238, 242 (Fla. 1st DCA 1981); Moorehead v. Department of Professional Regulation, Board of Psychological Examiners, 503 So. 2d 1318, 1320 (Fla. 1st DCA 1987).

19.4(a)(2) Arbitrary or Capricious

485. A determination of whether a rule is arbitrary or capricious is a separate inquiry from that required to determine whether a rule falls within the range of powers delegated to the agency. State, Department of Insurance v. Insurance Services Office, 434 So. 2d 908, 913 (Fla. 1st DCA 1983). The latter inquiry looks to whether the rule regulates something within its

"range of powers" while the former inquiry looks to the wisdom of the rule. Id.

486. A rule is arbitrary if it is not supported by facts or logic or is despotic. Agrico, 365 So. 2d at 763. A rule is capricious if is not supported by thought or reason, or it is irrational. Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995).

487. A determination of whether the unadopted rule of the District is arbitrary or capricious must be supported by the evidence of record. Florida Marine Fisheries Commission v. Organized Fishermen of Florida, 610 So. 2d 92, 92 (Fla. 1st DCA 1992). The inquiry is usually a "fact-intensive" one. Dravo Basic Materials Company, Inc. v. State, Department of Transportation, 602 So. 2d 632, 634 (Fla. 2d DCA 1992), reh'g denied. See also General Telephone, 446 So. 2d at 1067 (upholding a rule based, in part, on testimonial evidence of record); State, Department of Health and Rehabilitative Services v. Health Care and Retirement Corporation of America, 593 So. 2d 539, 541 (Fla. 1st DCA 1992)(a rule that is lacking in factual support is arbitrary and capricious).

488. The unadopted rule of the District is neither arbitrary nor capricious. For reasons stated in the Findings of Fact and incorporated here by this reference, the rule is not without thought or reason. Dravo, 602 So. 2d at 634. Rather,

the rule is supported by logic, thought, and reason. It is grounded in the engineering reality that a drainage ditch that is not maintained routinely will eventually degrade and cease to function. There is a rational relationship between fundamental engineering principles and the requirement for routine custodial maintenance. See Department of Natural Resources v. Sailfish Club of Florida, Inc., 473 So. 2d 261, 263 (Fla. 1st DCA 1985) (rule is not arbitrary and capricious if it bears a rational relationship with a legitimate purpose). A rule based upon appropriate study and the recommendations of technical staff is not arbitrary or capricious. Florida Agricultural Research Institute v. Florida Department of Agriculture and Consumer Services, 416 So. 2d 1153, 1156 (Fla. 2d DCA 1982), as amended on denial of reh'g.

489. The unadopted rule does not defy a deliberative reading. It is not thick with terms more uncertain by passive grammatical construction than the statutory language it purports to define. The rule does not serve more to obfuscate the statutory language than to elaborate statutory criteria or standards. It does not prescribe standards to guide discretion that depend totally on the judgment of agency staff for determination. Cf. Merrit v. Department of Business and Professional Regulation, Board of Chiropractic, 654 So. 2d 1051, 1054 (Fla. 1st DCA 1995)(a rule is arbitrary and capricious if it

violates the foregoing requirements). The rule is not irrational or without basis in fact or logic. Humana, Inc. v. Department of Health and Rehabilitative Services, 469 So. 2d 889, 890 (Fla. 1st DCA 1985). But see Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 362 (Fla. 1st DCA 1984)(a rule that allows an agency to ignore some statutory criteria and to emphasize others is arbitrary and capricious).

19.4(b) Section 120.57(1)(e)2b, c, e, f, and g.

490. The evidentiary deficiencies underlying the District's failure to satisfy its burden of proof for Section 120.57(1)(e)2b, c, e, f, and g are stated in the Findings of Fact and incorporated here by this reference. Some of the issues relevant to the requirement for support in Section 120.57(1)(e)2f are discussed in the Findings of Fact and incorporated here by this reference.

19.4(b)(1) Modifies or Contravenes

491. The District's limitation of the maintenance exemption to routine custodial maintenance enlarges, modifies, or contravenes the specific law implemented in violation of Section 120.57(1)(e)2b. The unadopted rule limits exempt maintenance to routine custodial maintenance. Section 373.403(8) excludes

routine custodial maintenance from exempt maintenance in Section 403.813(2)(g).

492. The unadopted rule imposes a requirement not found in Sections 373.403(8) and 403.813(2)(g). A rule cannot impose a requirement not found in the statute implemented. See DeMario v. Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla. 4th DCA 1994)(agency lacked authority to impose, by rule, time requirement not found in statute) reh'g and reh'g en banc denied, rev. denied, 659 So. 2d 1086; Cataract Surgery, 581 So. 2d at 1361 (agency lacked authority to require 45 data items from patients of free-standing ambulatory surgical centers); Wingfield Development Company, 581 So. 2d at 196 (additional limitations that affect exemption from permit imposes requirements not specifically authorized by statute); Board of Trustees of the Internal Improvement Fund of the State of Florida v. Board of Professional Land Surveyors, 566 So. 2d 1358, 1360-1361 (Fla. 1st DCA 1990)(agency cannot impose technical standards not authorized by statute); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988)(agency cannot vary impact of statute by creating waivers or exemptions); Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117; Salvation, Limited, Inc., 452 So. 2d at 66-67 (agency cannot add

requirement for exemption not authorized in statute); Department of Health and Rehabilitative Services v. Petty-Eiffert, 443 So. 2d 266, 267 (Fla. 1st DCA 1983)(existing rule that imposes requirement not found in statute is invalid); Gulfstream Park, 407 So. 2d at 265 (agency cannot deny permit based on statutory interpretation that is not readily apparent from the terms of the statute).

493. The District cannot interpret its rule to define exempt "maintenance" as only routine custodial maintenance. Administrative convenience or expediency cannot dictate the terms of a valid existing rule. Cleveland Clinic, 679 So. 2d at 1241-1242; South Broward Hospital District v. Clinic Florida Hospital, 695 So. 2d 701 (1997); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)(agency must follow its own rule); Flamingo Lake RV Resort, Inc. v. Department of Transportation, 599 So. 2d 732, 732 (Fla. 1st DCA 1992); Boca Raton Artificial Kidney Center, 493 So. 2d at 1057.

494. An agency's deviation from a valid existing rule is itself a rule that is invalid and unenforceable. Federation of Mobile Home Owners, 683 So. 2d at 592 (repeal of rule implements "non-rule policy" that is a statement of "general applicability"); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977)(order denying hearing in derogation of existing rule is an invalid rule); Price Wise, 343 So. 2d at

116 (declaratory statement that repeals prior interpretation of a rule is itself an invalid rule). But see Florida Department of Environmental Protection v. Environmental Corporation of America, Inc., 720 So. 2d 273, 274 (Fla. 2d DCA Oct. 16, 1998)(agency can revise existing rule without complying with rulemaking procedures); Florida Coalition of Professional Laboratory Organizations, 718 So. 2d at 871 (existing rule can be abolished under Section 120.52(8)); Environmental Trust, 714 So. 2d at 498 (agency can revise and clarify existing rule without adopting revision as a rule).

9.4(b)(2) Vague and Inadequate Standards

495. The unadopted rule is vague and fails to provide adequate standards for the purpose and the interval required to satisfy the definition of routine custodial maintenance. Cf. Witmer, 662 So. 2d at 1302 (rule punishing "corrupt" and "fraudulent" practices without defining terms must refer to adequate standards by which practice may be judged), reh'g denied; State v. Reisner, 584 So. 2d 141, 144 (Fla. 5th DCA 1991) (HRS rule requiring annual checks of intoxilyzer for "accuracy" and "reproducibility" are vague and ambiguous). Criteria provided in the unadopted rule are inadequate to enable a regulated party to know whether a particular activity satisfies the requirements for exemption. Grove Isle, Ltd. v. State,

Department of Environmental Regulation, 454 So. 2d 571, 573-574 (Fla. 1st DCA 1984), reh'g denied.

19.4(b)(3) Due Notice and Unadopted Rules

496. Adequate notice of agency action is a fundamental due process requirement that is central to the fairness of administrative hearings. Amos, 444 So. 2d at 47; Willis, 344 So. 2d at 590. The adequacy of notice of an agency statement is tested by separate standards depending on whether the statement satisfies the statutory definition of a rule.

497. Adequate notice of an agency statement that does not satisfy the statutory definition of a rule is provided through adjudication of individual cases. McDonald, 346 So. 2d at 582. Non-rule statements in agency orders must also comply with the indexing requirements prescribed in Section 120.53. Plante, V.M.D. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 716 So. 2d 790, 791-792 (Fla. 4th DCA 1998), clarified (Aug. 12, 1998); Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996); Gessler, M.D. v. Department of Business and Professional Regulation, 627 So. 2d 501, 503 (Fla. 4th DCA 1993), reh'g denied, dismissed, 634 So. 2d 624 (Fla. 1994).

498. Adequate notice of an agency statement that satisfies the statutory definition of a rule requires the statement to be

adopted and promulgated in accordance with the rulemaking procedures prescribed in Section 120.54. McDonald, 346 So. 2d at 581. Rulemaking is not a matter of agency discretion.

> Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable. (emphasis supplied)

Section 120.54(1)(a).

499. Rulemaking by agencies is a quasi-legislative function. Booker Creek Preservation, 534 So. 2d at 422; Properly adopted and promulgated rules have the force and effect of law. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985), reh'g denied; Florida Livestock Board v. Gladden, 76 So. 2d 291, 293 (Fla. 1954); Canal Insurance Company v. Continental Casualty Company, 489 So. 2d 136, 137 (Fla. 2d DCA 1986).

500. A statement which effectuates agency policy and also satisfies the definition of a rule must be invalidated if it has not been legitimated by the rulemaking process prescribed in Section 120.54. McDonald, 346 So. 2d at 580. Invalidation of unadopted rules is the necessary effect if rulemaking procedures prescribed in Chapter 120 are not to be atrophied by non-use. Id.

501. Over the course of approximately 20 years, a judicially created "prove-up" exception evolved which allowed agencies to "prove-up" statements defined as a rule but not promulgated pursuant to Section 120.54. The result caused the

rulemaking procedures prescribed in Section 120.54 to fall into relative non-use.

502. Several factors contributed to the non-use of rulemaking requirements. Some courts construed the definition of a rule narrowly. See, e.g., Department of Highway Safety and Motor Vehicles v. Florida Police Benevolent Association, 400 So. 2d 1302, 1303-1304 (Fla. 1st DCA 1981)(characterizing a proceeding as a "marginal" rule challenge). Other courts did not construe the "other incentives" doctrine enunciated in McDonald in a manner that limited agencies to "proving-up" incipient non-rule statements.

503. Some courts allowed agencies to "prove-up" statements defined as a rule but not adopted as a rule. Police Benevolent Association, 400 So. 2d at 1304; McDonald, 346 So. 2d at 583. Cf. Amos, 444 So. 2d at 47 (invalidating an unadopted rule, in relevant part, because the agency had not shown the reasonableness and factual accuracy of the policy). By 1983, several decisions held that attempts to label agency action as either a rule or non-rule policy had been largely discarded. Department of Revenue v. American Telephone and Telegraph Company, 431 So. 2d 1025, 1027 (Fla. 1st DCA 1983); Barker v. Board of Medical Examiners, Department of Professional Regulation, 428 So. 2d 720, 722 (Fla. 1st DCA 1983). See Patricia A. Dore, Florida Limits Policy Development Through

Administrative Adjudication and Requires Indexing and Availability of Agency Orders, 19 FLA. ST. U. L. REV. 437 (1991)("[b]efore long . . . the limited McDonald exception swallowed the rule"). See also Rini v. State, Department of Health & Rehabilitation, 496 So. 2d 178, 180 (Fla. 1st DCA 1986) (creation of classes for providing routine dental treatment is "non-rule policy" that is an "agency statement of general applicability" and agency assumes the burden of "articulating the rule").

504. The judicial "prove-up" exception to rulemaking was not the only cause for the non-use of statutory rulemaking requirements. Prior to 1984, former Section 120.68(12), Florida Statutes (1983), authorized an agency to deviate from an adopted rule if the agency explicated the basis for the deviation. In 1984, the legislature eliminated the statutory authority for an agency to deviate from an adopted rule. Since then, cases have generally invalidated agency action to enforce unadopted rules. Investment Corp. of Palm Beach, 714 So. 2d at 591; Vanjaria, 675 So. 2d at 255-256; Central Corporation, 551 So. 2d at 570; Department of Corrections v. Piccirillo, 474 So. 2d 1199, 1202 (Fla. 1st DCA 1985), reh'g granted, in part; Gar-Con Development, 468 So. 2d at 415; Department of Corrections v. Adams, 458 So. 2d 355, 356-357 (Fla. 1st DCA 1984).

505. Despite the legislature's attempt to prohibit the non-use of statutory rulemaking requirements, courts continued to apply the "prove-up" exception to allow agency reliance on unadopted rules. The legislature explicitly intended former Sections 120.535 and 120.57(1)(b)15, Florida Statutes (1995), to reverse the judicially created "prove-up" exception to rulemaking requirements in several cases. The cases expressly rejected in HB 1879, supra, are: Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So. 2d 92, 96-97 (Fla. 1983); Florida Cities Water Company v. Florida Public Service Commission, 384 So. 2d 1280, 1282 (Fla. 1980); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 406 (Fla. 1st DCA 1991); Florida Power Corporation v. State of Florida, Siting Board, 513 So. 2d 1341, 1343 (Fla. 1st DCA 1987), reh'g denied; Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981); Hill v. School Board of Leon County, 351 So. 2d 732, 733 (Fla. 1st DCA 1977), as corrected on denial of reh'g. HB at 3-4.

506. In 1996, the legislature retreated from its historical insistence on compliance with statutory rulemaking requirements by enacting the "due notice" standard in Section 120.57(1)(e)2e. The "due notice" standard does not require an agency statement defined as a rule to provide notice through the rulemaking procedures prescribed in Section 120.54(1)(a). If the

requirement for "due notice" were construed to mean rulemaking, such a construction would invalidate any unadopted rule for violating Section 120.57(1)(e)2e and reduce the remaining grounds in Section 120.57(1)2 to a nullity.

507. The relaxed notice standard in Section 120.57(1)(e)2e represents a retreat from the historical legislative mandate to invalidate unadopted rules. The retreat seeks to balance the desire to preserve wise agency policy with the due process requirement for adequate notice in Section 120.54(a)(1).

508. The plain and ordinary meaning of "due notice" should be construed in accordance with the specific purpose for which the "due notice" requirement is intended. Section 120.57(1)(e)2e is intended to require both timely and sufficient notice of the existence and terms of an unadopted rule.

509. The District provided Respondents with timely notice of the existence of the unadopted rule and its terms. The notice provided a reasonable period in which Respondents could prepare the evidence required to make the required preliminary showing.

510. The District failed to provide Respondents with sufficient notice of the unadopted rule. The standards in the unadopted rule are vague and inadequate. Any notice of such standards is itself necessarily vague and inadequate.

19.4(b)(4) Support

511. The District cites the decision in the 1984 Deseret case, the circuit court opinion in Deseret, and numerous administrative orders in support of the unadopted rule. The specific citations are set forth in the Findings of Fact and incorporated here by this reference. Any support the District gleaned from these collective authorities was specifically rejected by the First District Court of Appeal in 1993. SAVE, 623 So. 2d at 1202-1203.

512. The District argues that the ALJ must follow the decision in Deseret. In support of its argument, the District cites Mikolsky, 721 So. 2d at 738.

513. In Mikolsky, former Section 443.101(1)(a) disqualified an individual from unemployment benefits for the week in which the individual voluntarily left work without good cause. The statute was amended in 1994 to define work to include full-time or part-time work. The Unemployment Appeals Commission (the "agency") interpreted the amendment to mean that quitting either part-time or full-time employment without good cause results in the termination of all benefits.

514. Cases decided before the statutory amendment in 1994 held that leaving a part-time position did not affect an individual's right to compensation for losing another full-time

position. The agency reasoned that the 1994 amendment was intended to change that result.

515. In 1995, the Fifth District Court of Appeal rejected the agency's interpretation of the 1994 amendment. The decision was followed in subsequent cases in other districts. However, the agency continued to apply its statutory interpretation to individual cases. In reversing the agency's order disqualifying Ms. Mikolsky from receiving unemployment compensation benefits, the court stated:

> . . . we have difficulty understanding why the [agency] continues to adhere to its rejected interpretation of the statute. The result is delay and expense for . . . people who can little afford either and who may ultimately lose because they lack sufficient knowledge and ability to successfully pursue an appeal. . . . (citation omitted)

Mikolsky, 721 So. 2d 739.

516. The agency moved the appellate court to certify the question as one of great public importance. In denying the motion, the court stated:

> . . . the [agency] admits that it has continued to apply the penalty prescribed by the statute, pursuant to its rejected interpretation, and has not followed the interpretation of the district courts of appeal. By way of explanation, the [agency] asserts it cannot circumvent an unambiguous statutory provision (its own interpretation of the statute), and implies it cannot and will not follow the interpretations of the district courts of appeal. (emphasis not supplied)

> An agency of this state . . . must follow the interpretations of statutes as interpreted by the courts of this state. . . . The bottom line here is that the [agency] is not free to continue following its interpretation of the statute. The district courts of appeal have spoken on this issue, and the [agency] must adhere to the interpretation given by those courts. Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated.

Mikolsky, 721 So. 2d at 740.

517. Like the rejected agency interpretation in Mikolsky, the District's statement that the maintenance exemption in Section 403.813(2)(g) applies only to routine custodial maintenance has been rejected in all respects by the First District Court of Appeal. SAVE, 623 So. 2d at 1202. The court ruled that such a contention lacks any authority.

518. Six years later, the District continues to apply its rejected interpretation of Section 403.813(2)(g). Like the court in Mikolsky, it is difficult to understand why the District continues to adhere to its rejected interpretation of the statute. The District's continued application of its rejected interpretation results in delays and regulatory costs for those who can little afford either and who may ultimately lose because they lack the knowledge and ability to pursue their remedies.

519. The statement of the District in this proceeding has even less raison d'être than did the statement of the agency in Mikolsky. There is no statutory amendment after 1993 upon which

the District can base its statement in this proceeding. Rather, the District inexplicably clings to one ruling by a circuit court 15 years ago which was not expressly approved by the reviewing district court and which was expressly rejected six years ago in SAVE. Not only does the District have constructive knowledge of the decision in SAVE, the District was a party in SAVE and has actual, first-hand knowledge. Moreover, a key witness who explicated the basis of the unadopted rule in this proceeding was a key witness in SAVE.

520. If the District has always construed Section 403.813(2)(g) according to its rejected interpretation, that is not precedent for continuing to do so. The length of time during which an agency has done something wrong does not make correct the continued commission of the wrong.

521. The District cannot amend or deviate from the definition of "maintenance" in its own rule. An agency must follow its own rule. If the rule proves to be impracticable or otherwise ineffective, the District must seek changes through the rulemaking procedures prescribed in Section 120.54.

522. The District cannot adopt a statutory interpretation that conflicts with the statute. If the District does not agree with the statute, the appropriate remedy is a legislative one.

523. Until the District obtains a legislative solution, the District is not free to follow its own interpretation of Section

403.813(2)(g). The First District Court of Appeal has spoken on this issue. The District must adhere to that interpretation.

> Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated.

Mikolsky, 721 So. 2d at 740.

19.4(b)(5) Regulatory Costs

524. The District failed to show that the limitation of maintenance exemptions to routine custodial maintenance does not impose excessive regulatory costs on Respondents. The District did not show that it had adequately considered the economic burden of its unadopted rule on those subject to its effect. See Humana, 469 So. 2d at 890 (upholding an economic impact statement that was not a model of financial forecasting but did consider the economic effects of the rule upon existing and potential providers). Any costs incurred to prove compliance with an exemption requirement not authorized in Sections 373.03(8) and 403.813(2)(g) are excessive. Framat Realty, Inc., 407 So. 2d at 242. See also Department of Health and Rehabilitative Services v. Mitchell, 439 So. 2d 937, 941 (Fla. 1st DCA 1083)(absence of economic impact statement renders rule invalid).

20. Effect of Unadopted Rule

525. The inability of the District to rely on its unadopted rule does not alter the outcome of this proceeding. The proposed

agency action in the Administrative Complaint and the action taken in the Emergency Order is supported by the weight of evidence without relying on the unadopted rule. Respondents failed to show by a preponderance of the evidence that Modern is entitled to any of the claimed exemptions. See City of Palm Bay v. State, Department of Transportation, 588 So. 2d 624, 628 (Fla. 1st DCA 1991)(invalidity of rule had no effect on law applied), reh'g denied.

21. Attorney's Fees and Costs

526. Section 120.595(1) authorizes an award of reasonable attorney's fees and costs to a prevailing party. Although the parties agreed to a separate hearing to determine entitlement of attorney fees and costs and the amount, if any, to be awarded, certain determinations are made based on the record thus far in an effort to narrow the scope of the evidentiary hearing on fees and costs. As a threshold matter, it should be noted that neither the District nor the Department is a "party" within the meaning of Section 120.52(12).

527. Respondents filed a motion for attorney's fees on October 28, 1998. Respondents are entitled to an award only if Respondents are a prevailing party and the District is a nonprevailing party.

21.1 Section 120.57(1) Proceeding

528. The term "prevailing party" is not defined by applicable statutes or rules. However, Section 120.595(1)(e), in relevant part, defines a "nonprevailing adverse party" to mean:

> 3. . . . a party that has failed to have substantially changed the outcome of the . . . agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended or shall state whether the change is substantial for purposes of this subsection . . . . (emphasis supplied)

Section 120.595(1)(b).

529. Except for Respondents' challenge to the District's unadopted rule, Respondents are not the prevailing party in the proceeding conducted pursuant to Section 120.57(1). Respondents are the nonprevailing adverse party and are not entitled to attorney's fees and costs for that portion of the proceeding conducted pursuant to Section 120.57(1).

21.2 Section 120.57(1)(e) Proceeding

530. Respondents' challenge to the District's unadopted rule is described by the legislature in Section 120.56(4)(f) as a proceeding. In relevant part, Section 120.56(4)(f) states:

> . . . Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by

> an agency action from bringing a proceeding pursuant to s. 120.57(1)(e). (emphasis supplied)

21.2(a) Proceeding

531. A challenge to an unadopted rule under Section 120.57(1)(e) is a separate proceeding conducted pursuant to Section 120.57(1) for purposes of Section 120.595(1)(b). Section 120.57(1)(e) authorizes a unique remedy not otherwise available in Section 120.57(1). The scope of review and applicable standards are distinctly different from those authorized in Section 120.57(1) generally.

532. A party who challenges an unadopted rule in a proceeding brought pursuant to Section 120.57(1)(e) incurs additional litigation expenses to "prove-down" separate requirements in Section 120.57(1)(e). Section 120.595(4) authorizes attorney's fees and costs only for challenges to agency statements based on violations of Section 120.54(1)(a) and not for violations of Section 120.52(8)(b)-(g). Without a separate award for fees and costs in a Section 120.57(1)(e) proceeding, an agency can, with impunity, require substantially affected parties to incur the litigation costs of repeatedly "proving-down" agency statements for violations of Section 120.57(1)(e)2a-g. Compare, Section 120.52(b)-(g).

533. A separate award of attorney's fees for a proceeding brought pursuant to Section 120.57(1)(e) serves the legislative goals of abolishing unpromulgated rules and maximizing the scope of statutory rulemaking requirements. One of the principal purposes of Chapter 120 is the abolition of unpromulgated rules. Straughn, 338 So. 2d at 834 n. 3.

534. Unlike Section 120.56(3), Section 120.56(4) contains neither a limit on the amount of fees that can be awarded nor an exemption if the failure to promulgate a rule is "substantially justified." Moreover, the fact that Section 120.56(4) limits attorney's fees to violations of Section 120.52(8)(a) underscores the legislative intent to use attorney fees and costs to encourage rulemaking. Sections 120.56(4) and 120.57(1)(e) should be read in pari materia. Section 120.56(4)(e). See also Consolidated-Tomoka, 717 So. 2d at 76 (sections 120.54 and 120.56 should be read in pari-materia).

21.2(b) Prevailing Party

535. By any plain and ordinary meaning of the term, the District is not the "prevailing party" in the Section 120.57(1)(e) proceeding. It does not necessarily follow, however, that Respondents are the "prevailing party" in the Section 120.57(1)(e) proceeding.

536. It is clear that Respondents are not the "nonprevailing adverse party" defined in Section 120.595(1)(e)3. Respondents raised this issue in the petitions filed pursuant to Section 120.56(4) in this consolidated proceeding. The consolidated proceeding resulted in a substantial modification that both sides intended, adamantly believed, and vehemently argued would resolve the matters raised in Respondents' petition filed pursuant to Section 120.57(1).

537. If Respondents are not a "nonprevailing adverse party," are they a "prevailing party" in the Section 120.57(1)(e) proceeding? The answer to this question requires a determination of whether the undefined term, a "prevailing party," is intended to be the definitional complement of the defined term, a "nonprevailing adverse party."

538. The plain and ordinary meaning of the double negative, "not a nonprevailing adverse party," if the meaning of a double negative is ever plain and ordinary, means that a party who is "not a nonprevailing party" is a "prevailing party." The only express exception to this construction is the exception in Section 120.595(1)(e)3 for a party who is an intervenor. Respondents are not intervenors in this proceeding.

21.2(c) Nonprevailing Adverse Party

539. The District is the "nonprevailing adverse party" in the Section 120.57(1)(e) proceeding. The District failed to change the outcome of the rule challenge in the Section 120.57(1)(e) proceeding.

21.2(d) Improper Purpose

540. The next issue is whether the District participated in the Section 120.57(1)(e) proceeding for an improper purpose. The "improper purpose" issue is an issue of fact. State v. Hart, 677 So. 2d 385, 386 (Fla. 4th DCA 1996). Intent and motivation must be determined based on the evidence. Hart, 677 So. 2d at 386; Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324, 325 (Fla. 3d DCA 1992); Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991).

541. The evidence in this proceeding does not support the rebuttable presumption authorized in Section 120.595(1)(c). The District did not participate in two or more other such proceedings involving the same Respondents.

542. Although the District has not participated in two or more other proceedings against Respondents, the District has participated in two other proceedings in Deseret and SAVE which involved the same matter at issue in this proceeding. In both district court cases, the District was a full-party participant.

The individual responsible for explicating the unadopted rule in this case was a witness in SAVE. The First District Court of Appeal told the parties and the witnesses:

> This is an argument that we reject in all respects. SAVE cites no statute, rule, or other authority to support its contention . . . . (emphasis supplied)

SAVE, 623 So. 2d at 1202.

543. When the District participated in the Section 120.57(1)(e) proceeding in this case, the District had actual knowledge that the underlying statement had been rejected in all respects by the district court as lacking any authority. The evidence suggests that the District participated in the Section 120.57(1)(e) proceeding primarily for a frivolous purpose or to needlessly increase the cost of permitting or securing an exemption within the meaning of Section 120.595(1)(e)1. Dolphins Plus, 598 So. 2d at 325; Harbor Estates Associates, 591 So. 2d at 1037. However, the District will have an opportunity to present evidence at the evidentiary hearing which will explain why the District did not participate in the Section 120.57(1)(e) proceeding for an improper purpose.

21.2(e) Reasonable Amount

544. Pursuant to the agreement of the parties, no evidence was submitted during the hearing in this consolidated proceeding concerning the amount of attorney's fees and costs that is

attributable to the Section 120.57(1)(e) proceeding. A determination of that amount must be deferred until the parties have an opportunity to show whether fees and costs should be awarded and, if so, to sort through the record and quantify the amount of fees and expenses that should be awarded for the Section 120.57(1)(e) proceeding; unless the parties reach a mutually satisfactory agreement before the hearing.

545. In the interim, determinations based on the record to date may assist the parties in preparing for the evidentiary hearing on attorney's fees and costs. The "record" in this proceeding is defined in Section 120.57(1)(f). The record includes 209 exhibits; many duplicate enlargements for the exhibits; the testimony of 16 witnesses contained in a 15-volume Transcript; matters officially recognized; and motions, orders, objections, and rulings.

546. An additional 163 items were filed in the record during the 544 calendar days between September 17, 1997, when the first five cases were referred to DOAH, and March 15, 1999. The items identified on the DOAH docket sheet include notices for depositions, requests for subpoenas, subpoenas for depositions, various types of other discovery requests, objections to depositions and discovery requests, responses to discovery requests, petitions, motions, responses to petitions and motions,

responses to the responses, orders, prehearing stipulations, hearings, and proposed orders.

547. In the 115 business days between December 22, 1997, and June 1, 1998, the parties filed 31 motions, or an average of one motion every 3.71 business days. The parties filed 44 "other documents" including responses to the motions, requests for discovery, objections to discovery requests, and responses to discovery. The parties filed an average of a motion or other document every 1.53 business days prior to the hearing.

548. In 28 business days between February 2 and March 10, 1998, the parties filed 16 motions and 29 other documents. The parties filed an average of one motion every 1.75 days and 1.61 motions and other documents every business day.

549. During the hearing, the parties filed additional motions and made ore tenus motions which the undersigned disposed of in orders entered on the record during the final hearing. The hearing required two and a half weeks to complete.

550. Several factors have contributed to the voluminous record in this proceeding. They include the number of parties and matters at issue, the technical complexity of the issues, and the reluctance of the undersigned to preclude as irrelevant evidence concerning the Hacienda Road project without first hearing the evidence concerning the project.

551. A significant portion of this consolidated proceeding has involved discovery, evidence, and legal argument concerning routine custodial maintenance. Some of that time and expense was reasonably necessary for the District to show that the excavation was not excluded from the definition of maintenance in Section 373.403(8) and Rule 40C-4.021(20).

552. However, a substantial part of the time and expense related to routine custodial maintenance was attributable to the District's attempt to limit maintenance exemptions to routine custodial maintenance. The effort to limit exemptions to routine custodial maintenance needlessly extended an already long and arduous proceeding, wasted administrative resources of the state, and imposed undue expense and financial burdens on Respondents.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order upholding the Emergency Order and directing Modern to undertake and complete, in a reasonable time and manner, the corrective actions described in the Administrative Complaint.

DONE AND ENTERED this 15th day of June, 1999, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of June, 1999.

COPIES FURNISHED:

Carroll Webb, Executive Director
Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Chief
Bureau of Administrative Code
The Elliott Building
Tallahassee, Florida 32399-0250

Henry Dean, Executive Director
St. Johns River Water
Management District
Highway 100, west
Post Office Box 1429
Palatka, Florida 32178-1429

Marianne Trussell, Esquire
Murray M. Wadsworth, Jr., Esquire
Department of Transportation
605 Suwannee Street
Mail Station 58
Tallahassee, Florida 32399-0458

William H. Congdon, Esquire
Mary Jane Angelo, Esquire
Stanley J. Niego, Esquire
St. Johns River Water
  Management District
Post Office Box 1429
Palatka, Florida 32178-1429

Allan P. Whitehead, Esquire
Moseley, Wallis and Whitehead, P.A.
1221 East New Haven Avenue
Post Office Box 1210
Melbourne, Florida 32902-1210

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.