

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES H. GRIFFIN,)
)
 Petitioner,)
)
 vs.) Case No. 98-0818
)
 ST. JOHNS RIVER WATER MANAGEMENT)
 DISTRICT,)
)
 Respondent,)
)
 and)
)
 LIVE OAK PLANTATION NO. 1, LTD.,)
)
 Intervenor.)
)
 _____)
 MICHAEL D. RICH, a citizen of the)
 state of Florida, and COALITION)
 FOR RESPONSIBLE ECONLOCKHATCHEE)
 DEVELOPMENT, INC., a not-for-)
 profit corporation of the state)
 of Florida,)
)
 Petitioners,)
)
 vs.) Case No. 98-0819
)
 ST. JOHNS RIVER WATER MANAGEMENT)
 DISTRICT,)
)
 Respondent,)
)
 and)
)
 LIVE OAK PLANTATION NO. 1, LTD.,)
)
 Intervenor.)
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 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings,
by its duly designated Administrative Law Judge, Mary Clark,

held a formal hearing in the above-styled consolidated cases on July 14-17, 1998, in Orlando, Florida.

APPEARANCES

For Petitioners: Scott M. Price, Esquire
Rich and C-RED J.A. Jurgens, P.A.
505 Wekiva Springs Road
Longwood, Florida 32779

For Petitioner: Charles H. Griffin, pro se
Griffin 250 West 7th Street
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For Respondent: Michael L. Gore, Esquire
Live Oak Meredith A. Harper, Esquire
Ken W. Wright, Esquire
Shutts and Bowen, LLP
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Orlando, Florida 32801

For Respondent: Anthony J. Cotter, Esquire
District St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

STATEMENT OF THE ISSUES

Live Oak Plantation No. 1, Ltd. (Live Oak) through Stanford Development Group filed application number 4-117-0464AC-ERP with the St. Johns River Water Management District (SJRWMD) in April 1997, seeking a conceptual approval environmental resource permit. After SJRWMD issued its notice of intent to grant the permit, the Petitioners filed their petitions challenging the intended agency action.

The central issue in this proceeding is whether the permit should be issued pursuant to Chapter 373, Florida Statutes, and

Chapters 40C-4, 40C-41 and 40C-42, Florida Administrative Code, including specific provisions of the Applicant's Handbook adopted by rule and identified in the parties' prehearing stipulation filed July 8, 1998.

PRELIMINARY STATEMENT

After the SJRWMD forwarded the petitions to the Division of Administrative Hearings (DOAH), they were consolidated and Live Oak was granted leave to intervene.

At the commencement of the hearing, upon the motion by SJRWMD, official recognition was given to the SJRWMD Applicant's Handbook, as well as certain provisions of the Florida Statutes and Florida Administrative Code.

Live Oak presented the testimony of three witnesses, all of whom were qualified as expert witnesses. John Florio, a Florida registered professional engineer employed by Donald W. McIntosh and Associates, Inc., the applicant's consulting engineer, was accepted as an expert in the areas of engineering and design, permitting and construction of water and wastewater systems, including retention/detention basins, control structures, pipe networks and its grading. James Nugent, a project engineer employed by Universal Engineering Sciences, Inc., was accepted as an expert in the analysis of soil and groundwater conditions. James Modica, a biologist and the owner of Modica and Associates, Inc., was accepted as an expert in the area of analysis of wildlife, including threatened and endangered species surveys,

evaluation and relocation of species, analysis of wetland communities, including mitigation design and ratios and environmentally sensitive lands.

SJRWMD presented the testimony of four witnesses, three of whom were qualified as expert witnesses. David Eunice, an environmental specialist employed by the SJRWMD, was accepted as an expert in the field of ecology, wetland and wildlife ecology, mitigation planning and environmental resource permitting. Glen Lowe, a division director of the Division of Environmental Resource Management, was accepted as an expert in the field of wetland ecology, wildlife biology, mitigation planning, and environmental resource permitting. Carla Palmer, the chief engineer for the SJRWMD's Department of Resource Management, was accepted as an expert in the field of storm water and surface water system engineering and design, and environmental resource permitting. Patrick Frost, the assistant director of the Department of Resource Management, appeared as a fact witness.

Petitioners Coalition for Responsible Econlockhatchee Development, Inc. (CRED) and Michael Rich offered one fact witness, Petitioner Michael Rich, and three expert witnesses. Vickie Larson was accepted, over objection, as an expert in the wildlife survey methodologies, wildlife biology and ecology, and wetlands mitigation. Steven Rich was accepted as an expert in land management, water quality, wildlife with regard to

threatened and endangered species, mitigation, wetlands, uplands, proscribed environmental burning, enforcement and compliance with environmental permits, and turbidity and erosion control. Charles Drake was accepted as an expert in hydrogeology and groundwater flow modeling.

Petitioner Charles Griffin testified on his own behalf.

Live Oak offered 13 Exhibits which were admitted into evidence as Live Oak Exhibit numbers 1 through 13. SJRWMD identified 10 Exhibits during the course of the hearing. The district's Exhibit numbers 1 and 3 through 10 were admitted into evidence. C-RED identified 15 Exhibits during the course of the hearing. C-RED Exhibits 1,3,4,5,7,8,9,10,13,14, and 15 were admitted into evidence. Mr. Griffin did not offer any exhibits into evidence.

The transcript of the proceedings was filed on August 17, 1998 and the parties, with the exception of Mr. Griffin, submitted their Proposed Recommended Orders on September 11 and September 14, 1998. The proposals of the SJRWMD are substantially adopted here.

FINDINGS OF FACT

A. The Parties

1. Michael D. Rich is a former resident of Seminole County who lived on the property contiguous to the Live Oak site. He is the legal representative of his mother who still resides on the property and he is president of C-RED.

2. C-RED is a Florida non-for-profit corporation with members from the City of Oviedo and unincorporated areas of Seminole County who are interested in assuring that development is done without improper impact on the taxpayers and the rural character of the area.

3. Mr. Griffin is a resident of Seminole County living on Horseshoe Lake, which adjoins the Live Oak site.

4. Live Oak is a Florida Limited Partnership which intends to develop the project that is the subject of this proceeding.

5. SJRWMD is a special taxing district created by Chapter 373, Florida Statutes, and charged with responsibility for various permitting programs, including the one at issue here.

B. The Project

6. Live Oak proposes to develop a large multi-phased single family project with two small commercial sites. The project, to be known as "Live Oak Reserve," will be on approximately 1,041 acres on the south side of county road 419 in southeastern Seminole County in the City of Oviedo.

7. The project site is located near the confluence of the Econlockhatchee River (Econ River) and Little Econlockhatchee River. The Live Oak Reserve property includes approximately half of Horseshoe Lake, as well as a small creek, Brister Creek, which flows from Horseshoe Lake across the property to the Econ River. The Econ River, a class III water and designated an Outstanding Florida Water (OFW), crosses the southwestern corner of the Live

Oak Reserve property. The Econ River is the receiving water body of Live Oak Reserve.

8. The Live Oak Reserve property is located within the Econlockhatchee River Hydrologic Basin. A portion of the Live Oak Reserve property lies within the Econlockhatchee River Riparian Habitat Protection Zone (RHPZ). The Live Oak property lies within a 1,500 acre drainage basin; approximately 450 acres off-site drain through Live Oak Reserve. Horseshoe Lake has approximately 500 acres that drain through it, then through the wetlands and into the Econ River.

9. Historically, the Live Oak Reserve property has been used for agricultural practices, including silviculture and cattle production. Some areas of the property have been logged and some areas have been converted to pasture. Cattle have grazed in wetlands, thereby decreasing the amount and diversity of groundcover vegetation on portions of the property. Additionally, on-site drainage ditches have had a major impact on the hydrological characteristics of the wetlands on the property, including the reduction of surface water elevations. The Live Oak Reserve property is currently vacant and undeveloped.

C. The Application Process

10. In April 1997, Live Oak submitted to the SJRWMD an Environmental Resource Permit Application, N4-117-0464AC-ERP, for conceptual approval of a master stormwater and floodplain management system for the development of Live Oak Reserve.

11. A conceptual permit is utilized in complex multi-phased projects which are expected to have a longer build-out period than a single phase project. A conceptual permit does not allow any construction activity, but provides the outline for final engineering calculations and construction drawings. Further permits are required before any sitework or construction is undertaken.

12. In conjunction with its permit application Live Oak submitted detailed technical information, including but not limited to charts, maps, calculations, studies, analyses and reports necessary to show that the conceptual development plan was consistent with the permitting criteria of the SJRWMD found in Chapter 40C-4, Florida Administrative Code, and the Applicant's Handbook.

13. The master plan for the Live Oak project was designed by Donald W. McIntosh Associates, Inc.(McIntosh) using input from: (a) land planners who were required to consider issues related to the comprehensive plans, open space requirements and related issues; (b) landscape architects who were responsible for the proposed park systems and landscape treatments throughout the project; (c) geotechnical engineers responsible for evaluating the soil and groundwater conditions; and (d) environmental consultants, Modica and Associates, who were responsible for wetland delineation and flagging and wildlife surveys.

14. The first version of the Live Oak Reserve site plan prepared for the project by McIntosh included development of all upland areas and filling several portions of the mixed forested wetlands to maximize lot yield. This included development of the upland adjacent to the Econ River and development of an upland parcel on the west side of the river. After much consideration and revision by the developer and its consultants, a site plan was developed which minimizes impacts to wetlands and other surface water functions, particularly as it relates to the Econ river, and maximizes the benefits to wildlife by establishing a series of wildfire corridors across the site.

15. The final plan submitted to the SJRWMD at the time of the application includes the preservation of the entire Econ River floodplain and two adjacent developable upland areas, a large mixed hardwood forested wetland which traverses the site from the northeast to the southwest, and upland and wetland areas in the southern portion of the site that provide a corridor between a large undeveloped parcel to the east and the Econ River to the west.

16. After submission of its application, Live Oak participated in a review process with SJRWMD staff to further eliminate and reduce wetland impacts. Specifically, SJRWMD requested changes to the site plan which included reductions in impacts to various wetlands and additional buffers to other wetlands. Several changes to the site plan were made to

accommodate the SJRWMD's concerns relating to reducing impacts to wildlife, particularly the Florida sandhill crane.

17. The reductions in wetland impacts and other design changes resulted in a revised site plan which the SJRWMD staff recommended to the district's governing board for approval. The staff recommendation of approval, with associated conditions, is set forth in Technical Staff Report dated February 10, 1998. On July 14 and 16, 1998, the SJRWMD revised the technical staff report to reflect changes to the project design and mitigation plan, as well as to add conditions inadvertently omitted from the earlier technical staff report. Condition no. 8 was mistakenly added to the July 16 technical staff report and by stipulation of all the parties, this condition was removed from the technical staff report. (See transcript, page 521)

D. Stormwater Analysis

18. McIntosh utilized information from different sources in preparing the stormwater calculations submitted to the SJRWMD. The developer provided information regarding proposed lot sizes and types so as to determine the impervious surface area for developable lots. The geotechnical consultants, Universal Engineering Sciences, (Universal) provided McIntosh with preliminary, interim, and final geotechnical reports, soil boring logs, and groundwater table estimates.

19. The input from Universal primarily involved the establishment of seasonal high and seasonal low groundwater elevations for the pre-development and post-development conditions on the site. The estimated seasonal high and seasonal low groundwater levels refer to the range of levels the groundwater is expected to attain on the site during the wetter (high) and dryer (low) periods of a normal year. These elevations were then utilized in the stormwater calculations prepared by McIntosh.

20. Topography on Live Oak Reserve consists of elevations ranging from 48 feet to 25 feet NGVD. In its pre-development condition, Live Oak Reserve has 6 distinct drainage patterns. Off-site drainage basins also contribute runoff to the property. The conceptual post-development design will modify the project's on-site drainage patterns into 28 drainage basins.

21. At the request of the SJRWMD, Live Oak prepared seasonal high and seasonal low groundwater elevation contour maps. Live Oak performed approximately 200 borings on the Live Oak Reserve property. From the borings, Live Oak determined the soil types present and the existing groundwater elevations. Live Oak also used the borings to assist in establishing the estimated seasonal groundwater elevations. With the exception of several shallow borings in wetland areas, all borings were taken by split spoon sampling. Seventy-nine piezometers were installed next to bore holes to measure groundwater levels.

22. In establishing the seasonal high groundwater levels, Live Oak evaluated the groundwater level at the time of boring; the time of year the groundwater level was measured; the time span of the investigation and its relationship to normal rainfall patterns; soil indicators such as coloration, mottling, and particle size; site specific topography; USGS quadrangle maps depicting site topography; Soil Conservation Service (NSCS) estimates of the expected seasonal high groundwater levels; and vegetative indicators.

23. It is not essential to evaluate rainfall data when determining the seasonal water levels because the historical seasonal water levels are recorded in the soils. The estimated seasonal high groundwater level can be determined during the dry season. The range of the estimated seasonal high groundwater

level on the Live Oak Reserve property is from standing water on the ground to five feet below the existing grade.

24. In evaluating Live Oaks estimated seasonal groundwater levels, the District reviewed Live Oak's submittals, and also reviewed the NSCS soil survey to confirm that the estimated seasonal groundwater levels were reasonable.

25. Wetland seasonal surface water levels were estimated using biological indicators such as lichen lines, buttressing, water lines, and sand lines. Lichen lines were apparent on the Live Oak Reserve property and reflective of normal rainfall conditions. Seasonal high water levels are expected at the end of September. Seasonal low water levels are expected in May.

26. The wetland surface water levels encountered in January 1997, when the seasonal levels were estimated, were neither exceptionally low nor exceptionally high. The water levels were representative of a period of normal rainfall.

27. Water quantity attenuation and stormwater treatment will be accomplished through wet detention ponds and vegetative natural buffers.

28. Due to the location of Live Oak Reserve in the Econlockhatchee River Hydrologic Basin, special basin criteria apply to this project. The special basin criteria, also known as the "Econ Rule," is more stringent than the stormwater management criteria set forth in Applicant's Handbook sections 9 and 10.

The special basin criteria, as it relates to the surface water management systems, requires Live Oak to control its discharge from two design storms: the mean-annual design storm, and the 25-year, 24-hour design storm. A design storm is a hypothetical storm with a predetermined rainfall amount, a predetermined intensity and 24 hour-duration.

29. Designing the system to control the peak discharge during the mean-annual storm will prevent erosive velocities that would be harmful to Brister Creek and the Econ River. The conceptually proposed system is designed to limit peak rates of discharge to those of pre-development for the mean-annual and the 25-year, 24-hour design storm events. The system, as conceptually proposed, will limit post-development discharge rates to the same as or lower than the pre-development discharge rates.

30. Each stormwater management area will pre-treat its respective post-development basin's pollution volume prior to discharge downstream. Live Oak proposes to use vegetative natural buffers for a portion of the rear lots within the post-development condition to fulfill treatment requirements.

31. Live Oak Reserve is designed for the retention of the first inch of runoff from the total area of the post-development basins or the total runoff from 2.5 inches times the post-development basin's impervious area, whichever is greater.

Furthermore, because Live Oak Reserve conceptually discharges to the Econ River, an OFW, the system is designed to provide an additional 50 percent of treatment. For discharges to an OFW the system must treat to a 95 percent removal standard.

32. The outfall structures within each wet detention system are designed to draw down one-half the required treatment volume between 60 to 72 hours following storm event, but no more than one-half of this volume will be discharged within the first 60 hours. Each wet detention pond is designed with a permanent pool with a 31.5-day residence time during the wet season. Residence time is the time that the water within a pond will stay in the pond prior to discharge. The residence time includes the 14-day residence time required of all wet detention systems, an additional 50 percent residence time (7 days) for discharging into an OFW, for a total of 21 days. In addition, each system has been designed to provide an additional 50 percent residence time (10.5 days) because Live Oak has elected not to plant littoral shelves within each pond.

33. As conceptually designed, Live Oak reserve's post-development drainage pattern will have no effect on the drainage patterns of Lake Eva or Horseshoe Lake. As conceptually designed, Live Oak Reserve's post-development drainage pattern will reduce the rate of flow during the storm events, which is a positive effect on the drainage pattern of Brister Creek. The reduction in flow velocity reduces the erosiveness of the storm.

34. Live Oak has demonstrated that the 25-year and 100-year, 24-hour storm events' post-development peak stages for Lake Eva and Horseshoe Lake are not changed as a result of this conceptual project. Based upon Live Oak's calculations, the Live Oak Reserve project will not cause any restriction to the flow of water as it outfalls from Horseshoe Lake to Brister Creek.

35. The conceptual wet detention systems within Live Oak Reserve are proposed to have a maximum depth of 12 feet. However, Live Oak requested consideration at the time of final engineering for each phase of development to maximize selected stormwater management areas for maximum depths of up to 25 feet. That consideration will be made in subsequent application review and is also subject to the City of Oviedo's approval.

36. The conceptual wet detention ponds are designed with an average length to width ratio of two to one, and are configured to minimize the occurrence of short circuiting. As such, they will meet the criteria of the applicable rules.

37. Tailwater conditions for the project were based on published flood elevations. Live Oak analyzed the tailwater condition for the mean-annual, 25-year 24-hour, and the 100-year 24-hour design storms.

38. Live Oak completed a 100-year flow analysis for Live Oak reserve. Pre-development floodplain elevations for Lake Eva, Horseshoe Lake, and the Econ River were referenced from previous studies (Seminole County) and the Federal Emergency Management

Agency. Live Oak determined that the 100-year floodplain elevations effecting Live Oak Reserve to be 40.2 feet NGVD from Horseshoe Lake, 45.0 feet NGVD for Lake Eva, and 32.5 feet NGVD for the Econlockhatchee.

39. The U.S. Geological Survey (USGS) has produced a map of flood prone areas which indicates that the elevation delineating the flood prone area for Horseshoe Lake is 40.14, not 40.2, and for Lake Eva is 43.38, not 45.0. Therefore, the area indicated by USGS as the flood prone area is included in the 100-year floodplain analysis of Live Oak. Live Oak, in its conceptual design, has demonstrated that it will provide compensating storage for any encroachments into the 100-year floodplain. Live Oak has conceptually proposed to fill approximately 18.69 acre-feet within the 100-year floodplain.

Live Oak will compensate the filling of the floodplain by providing a cut with the 100-year floodplain of approximately 27.09 acre-feet.

40. By meeting the criteria in the "Econ Rule" the project conceptually meets all other relevant standards for stormwater management as the basin rule is more stringent. Live Oak has provided reasonable assurance that the development will not affect surrounding property or raise stagewater elevations of any surrounding property; the development will not displace the 100-year flood plain area; and the development will not restrict or impede the natural flow from Horseshoe Lake.

E. Wetland and Wildlife Impacts

41. Approximately 430 acres of wetlands cover the project site. Two general types of wetlands are found on the Live Oak reserve property: herbaceous wetlands and forested wetlands. Twenty-three herbaceous wetlands are classified as freshwater marshes. These wetlands range in size from 0.2 acre to over 8 acres. Wetlands 10 and 16, the largest on the property, are mixed hardwood forested wetlands.

42. Approximately 525 acres of the Live Oak Reserve property are located within the RHPZ. Of this area, approximately 410.5 acres are wetlands, and the remainder are uplands that are predominantly pine flatwoods and xeric scrub. A few of the wetlands on site are considered RHPZ wetlands, not "isolated," solely because they are connected to floodplain wetlands by ditches. These wetlands and 50 feet of the uplands surrounding them are considered part of the RHPZ.

43. The wetlands within the RHPZ are intact with little disturbance, especially in the Econ River corridor that is a part of wetland 16. Wetland 10 has been logged and the species composition in that wetland has changed. Wetlands 12 and 14 have ditch connections to the Econ River, but these ditch connections do not appear to have adversely impacted the wetlands hydrologically. Wetlands 2,3, and 8 have ditch connections to the Econ River. These wetlands have been adversely affected (drained) by the ditching.

44. The RHPZ uplands are in good condition and provide very valuable habitat, except for 12 acres that are adjacent to upland cut drainage ditches. These 12 acres have no habitat value. The portion of the Live Oak Reserve property within the RHPZ provides good habitat important to fish and wildlife, and is part of the Econ River floodplain.

45. The upland areas outside the RHPZ on the Live Oak Reserve property primarily consist of pine flatwoods and pasture. The pine flatwoods have been logged and are overgrown. The pasture appears to have been cleared many years ago and planted with bahia grass.

46. Twenty-two isolated wetlands, which total approximately 17.9 acres, are located on the Live Oak reserve property. The isolated wetlands are intact and in good condition, except for temporary impacts due to cattle grazing and logging. The isolated wetlands provide habitat for wading birds, frogs, toads, and other wildlife.

47. Ephemeral wetlands are wetlands that are seasonally inundated, but not necessarily inundated every year. Ephemeral wetlands provide important functions to wildlife, including gopher frogs and other amphibians for breeding, wading birds and sandhill cranes for foraging, and invertebrates.

48. Ephemeral wetlands or "seasonal" wetlands occur on the Live Oak Reserve property. Although Live Oak did not separately address any of the wetlands as ephemeral, the value and functions

of ephemeral wetlands were assessed by SJRWMD staff-person, David Eunice. While several small ephemeral wetlands are being impacted by the proposed development, several others are being preserved.

49. Live Oak conducted wildlife surveys of the Live Oak Reserve property in accordance with the Florida Game and Fresh Water Fish Commission's approved Wildlife Methodology Guidelines.

50. Based on the surveys, Live Oak determined that three listed species occurred on-site: the Florida sandhill crane, the gopher tortoise, and the Sherman's fox squirrel. The Florida sandhill crane is a threatened species. Live Oak found no evidence that the property hosts Florida panthers.

51. Although the wildlife surveys did not identify gopher frogs, a species of special concern, the SJRWMD recognized the potential for the gopher frog to use the wetlands, including the ephemeral or seasonal wetlands, on the Live Oak Reserve property.

52. Florida sandhill cranes have been observed foraging in a few areas on the Live Oak reserve property. In the spring of 1997, Live Oak identified two active nests in freshwater marshes (wetlands 21 and 29). There is no evidence that the sandhill cranes are currently nesting in wetland 29; however, Florida sandhill crane nests have been located in wetlands 14 and 21 this year.

53. The typical critical nesting habitat for Florida sandhill cranes is a large, isolated marsh, generally either

dominated by maidencane or pickerel weed. The marsh must maintain a surface water level between 12 and 24 inches so that the birds can construct a suitable nesting platform in the marsh. Nesting success, in part, depends upon wetland type used and water depths.

54. The Florida sandhill crane also requires a certain amount of pasture-like upland habitat in which to forage. However, the crane forages in both uplands and wetland. Upland pasture is the sandhill crane's preferred foraging habitat. The sandhill crane's second most preferred foraging habitat is freshwater marsh.

55. When the sandhill cranes have chicks and fledglings, the birds forage in the wetlands. After a period of three to four months, the juvenile and adult sandhill cranes will move to open pasture to forage.

56. The Econ River floodplain wetlands and their associated upland habitats on the Live Oak reserve property are regionally ecologically significant. Overall, the Live Oak Reserve property provides good ecological value. It is part of the river corridor, has a tributary that runs through it and has uplands that have had little disturbance.

57. Live Oak has eliminated certain wetland impacts and reduced others during the design of the Live Oak Reserve project. Live Oak eliminated some road crossings, and redesigned the pond configuration to eliminate or reduce encroachments into wetlands.

Live Oak's site plan that was submitted as part of the initial April 14, 1997, application reflects Live Oak's initial attempts to eliminate or reduce impacts. Live Oak, in its application, proposed a project design with 46 acres of wetland impacts. The site plan has changed since Live Oak made the initial application to the SJRWMD.

58. The initial project design called for the removal of the southern one-half of wetland 29 for the construction of a stormwater pond. Live Oak redesigned the project to preserve wetland 29 with a 50-foot upland buffer around it to eliminate direct impacts to the sandhill cranes nesting there.

59. Live Oak further reduced impacts by preserving wetlands 14 and 15, and by placing upland buffers around them to protect sandhill crane habitat. The revised design of the surface water management system reduced wetland impacts by approximately 7 acres. The SJRWMD February 10, 1998, technical staff report includes the design plans reducing impacts by 7 acres.

60. After the SJRWMD issued its February 10, 1998, technical staff report, Live Oak once again redesigned the project to preserve wetland 12. This redesign reduced wetland impacts by an additional 3 acres.

61. In this case, SJRWMD staff worked with Live Oak to reduce or eliminate its impacts. Nonetheless, staff believed Live Oak's proposed mitigation qualified for the exception under Section 12.2.1.2b, that is, the on-site preservation of the Econ

River floodplain and associated uplands, in concert with Live Oak's contribution to acquiring a conservation easement over the Yarborough parcel, discussed below, provides regional ecological value and provides greater long term ecological value than the areas impacted. Live Oak proposes practicable design alternatives, but it is not required to reduce or eliminate all impacts. Some design alternatives, such as whether to use a bridge or culverts for the Brister Creek crossing, must be addressed and considered at a later permit application stage and not at this conceptual permit stage.

62. The proposed design includes dredging or filling of approximately 35.9 acres of wetlands and construction in approximately 38 acres of RHPZ uplands. Of these 35 wetlands on the Live Oak Reserve property, Live Oak will completely impact 23 of the wetlands (17.64 acres of wetland impact); partially impact 5 wetlands (18.28 acres of wetland impacts out of 370.15 acres of wetlands); and will avoid impacts to 7 wetlands (40.63 acres).

63. The impacts are mostly limited to the small isolated wetlands, the upland/wetland transitional edges of the floodplain wetlands, and portions of RHPZ already degraded by a ranch roadway and ditch placement. Live Oak focused its impacts on areas, including wetlands, that were historically disturbed.

64. SJRWMD staff considered that the isolated wetlands less than 0.5 acre were used by sandhill cranes and other threatened

or endangered species. Therefore, staff required Live Oak to offset impacts to the small isolated wetlands.

65. In addition to physical impacts to wetlands and RHPZ, the habitation of the proposed subdivision, which will result in noise and intrusion into wildlife habitat by humans and their pets, will cause secondary impacts. Those secondary impacts are offset in part by the upland buffers proposed by the applicant (a total of 10 acres of 25 foot buffers and 47.86 acres of 50-foot buffers.)

66. After considering the type of impact proposed; past, present and future activities that may occur in the Econ River Hydrologic Basin; and that Live Oak off-site mitigation of adverse impacts is located within the same hydrologic basin; SJRWMD staff appropriately determined that Live Oak Reserve would not have an adverse cumulative impact.

E. Mitigation

67. Live Oak's mitigation plan consists of both on-site and off-site preservation.

68. The proposed on-site component of the mitigation plan entails the preservation of 19.3 acres of herbaceous marsh, 373.2 acres of forested wetlands, and 124.9 acres of uplands. The mitigation plan preserves approximately 5.65 acres of isolated wetlands on-site, and approximately 386.86 acres of RHPZ wetlands on-site.

69. The cornerstone of Live Oak's on-site mitigation is the preservation of the Econ River forested floodplain swamp, as well as two upland areas, in the southwestern corner of the property. One of the upland areas is a 15-acre upland scrub island on the east side of the river that is surrounded by forested wetlands. The other upland area is 24 acres of uplands located near the Econ River on its west side. Portions of both uplands are within the RHPZ.

70. Both the forested floodplain and the associated upland areas provide habitat of regional ecological significance. The forested floodplain wetlands and the uplands that are part of the RHPZ are protected to a large degree by SJRWMD regulations. These regionally significant wildlife communities, however, can be temporarily, but chronically, impacted, if not permanently degraded, by timbering and other activities that are relatively unregulated. Live Oak proposes to protect and preserve these areas by placing them in a conservation easement.

71. Placing Econ River forested floodplain wetlands and the upland RHPZ areas in a conservation easement will provide a greater level of protection and assurance that they will mature to an "old growth" condition, which will benefit many wildlife species. The Econ River floodplain wetlands, the upland scrub island and the small isolated wetland in the scrub island will accommodate the smaller wildlife species that currently use the Live Oak Reserve property.

72. Live Oak has preserved most of the larger isolated wetlands with high ecological value. The large isolated wetlands preserved on-site will continue to maintain a high level of ecological function even with the surrounding development. Wildlife, such as frogs, toads, snakes, and wading birds will continue to use those wetlands.

73. The on-site portion of the mitigation plan preserves approximately 71.87 acres of upland buffers, of which 2.04 acres are located in 25-foot buffers and 69.83 acres are located in 50-foot RHPZ buffers. The buffer areas will be placed in a conservation easement.

74. The wildlife values of the uplands on this property that are not within the RHPZ are protected to some degree by local government regulations; they are, however, largely unprotected by the existing regulations of SJRWMD. Without the proposed conservation easements, this habitat may be developed or significantly degraded by other activities.

75. As a component of its on-site sandhill crane nesting site management plan, Live Oak preserves a 6.83-acre upland buffer next to wetland 21, which hosts a sandhill crane nest. Additionally, Live Oak provides enhancement of 3.88 acres on the southside of wetland 21 within the 6.83-acre buffer area by converting this area to improved pasture for sandhill crane foraging habitat.

76. The mitigation plan sufficiently offsets the impacts to the smaller isolated wetlands, even if these wetlands have more than a typical resource value.

77. When evaluating impacts and mitigation, Applicant's Handbook Section 12.2.3.7 requires the SJRWMD to evaluate the predicted ability of the wetland or other surface water to maintain their current functions as part of the proposed system once the project is developed. Many of the smaller isolated wetlands, when located in a natural setting such as a pine flatwood, are very critical and provide very high ecological value. However, once a project is developed and the small isolated wetland is surrounded by homes, the resource value of the small isolated wetland is diminished. Many of the smaller wildlife species, such as frogs and snakes, will be extirpated from the developed area of property, whether or not the smaller isolated wetlands remain. SJRWMD considered the value of the off-site mitigation to offset the adverse impacts to the smaller isolated wetlands.

78. In determining the adequacy of the preservation component of the mitigation plan, SJRWMD staff did not rely upon any specific rule, regulation, or comprehensive plan of the City of Oviedo. However, the staff did consider the overall protections afforded by the regulatory and comprehensive plan requirements of the city and determined that preservation of the mitigation areas by conservation easement provided greater

assurance that these areas will be protected than the local government rules, regulations, and comprehensive plan.

79. The off-site component of the mitigation plan is the contribution of \$160,525 towards participation in the SJRWMD acquisition of a conservation easement over the 3,456 acre Yarborough parcel. The Yarborough parcel is located in the northeastern corner of the Econ River Hydrologic Basin. The Yarborough parcel encompasses property north and south of the Econ River. A portion, mostly sovereign lands, lies within the Puzzle Lake/Upper St. Johns River Hydrologic Basin. The Yarborough parcel is part of a large working ranch. The parcel contains improved and unimproved pasture, significant cabbage palm hammocks, pine flatwood communities, and freshwater marsh.

80. Live Oak's participation equates to the acquisition of a conservation easement over 200 acres of the Yarborough parcel. However, Live Oak is not purchasing any particular 200 acres with the Yarborough parcel. Live Oak's contribution is applied to 200 acres of the Yarborough parcel within the Econ River Hydrologic Basin.

81. SJRWMD estimates that of the 200 acres, 165 acres are wetlands and 35 acres are uplands. This assessment is based on the composition of wetlands and uplands on the Yarborough property within the Econlockhatchee River Hydrologic Basin.

82. SJRWMD has purchased development rights over the Yarborough parcel. Yarborough is authorized to continue its

cattle operation on the Yarborough parcel for 20 years in accordance with the conditions of the conservation easement. However, Yarborough is not permitted to increase the amount of improved pasture or further develop the parcel. On the contrary, the conservation easement requires Yarborough to decrease the number of cattle on the parcel over the next 20 years.

83. Purchase of the conservation easement over the working ranch has positive environmental benefits. The conservation easement will protect the wildlife species that use the ranch. This environmental benefit can be used to offset adverse impacts on the Live Oak Reserve property.

84. To participate in this type of mitigation, the acquisition must be imminent so that the SJRWMD is reasonably assured that the purchase will go forward. Participation is precluded for a parcel after its acquisition is concluded.

85. Live Oak's mitigation plan, with its on-site and off-site components, offsets Live Oak Reserves adverse impacts.

86. SJRWMD calculates the mitigation ratio and compares it to the guidelines in the Applicant's Handbook to determine if mitigation is adequate. SJRWMD however, is not required to adhere to any set ratio. The upland preservation ratio (area preserved to area impacted), excluding the 12 acres of uplands along the upland cut ditches and the Yarborough parcel uplands, is 6 to one. The rule guidelines for upland preservation is from 3 to one to 20 to one. The wetland preservation ratio is 15.5 to

one. The rule guidelines for wetland preservation is from 10 to one to 60 to one.

F. Public Interest Criteria

87. Live Oak Reserve will not have any effect on the public health, safety or welfare or property of others.

88. Because the mitigation plan adequately offsets all adverse impacts, Live Oak reserve will not adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats.

89. Because of the benefits of lowering the discharge rates in the post-development condition and reducing the velocity of stormwater in Brister Creek, Live Oak Reserve will reduce the potential for erosion.

90. Live Oak Reserve will not have any affect on the fishing or recreational values or marine productivity in the vicinity of the site.

91. Live Oak Reserve will be of permanent nature. However, its adverse impacts have been offset by mitigation. The permanence of the project is beneficial in that it provides treatment of untreated off-site runoff from county road 419 by the Live Oak surface water management system and it reduces the discharge rate of stormwater down Brister Creek. Therefore, the permanence of the project is not contrary to the public interest.

92. In accordance with Section 373.414, Florida Statutes, the Florida Department of State Division of Historical Resources

determined that the Live Oak Reserve project will have no possible impact to historic properties listed, or eligible for listing, in the National Register of Historical Places, or otherwise of historical or architectural value. Furthermore, the Division of Historical Resources determined that the project is consistent with Florida's Coastal Management Program and its historic preservation laws and concerns.

93. The current condition and relative value of functions being performed by the various vegetative communities on the Live Oak Reserve property is good. However, there is no guarantee that the value and functions would remain good if the property is not managed for species like the sandhill crane or if agricultural and silvicultural practices continue to occur on the property. The mitigation plan, preserving regionally ecologically significant wetland and upland communities on both the Live Oak Reserve and Yarborough parcel by conservation easement, should provide a greater protection of those communities than what currently exists.

CONCLUSIONS OF LAW

Regulatory Jurisdiction and Rules

94. The Division of Administrative Hearings has jurisdiction of the parties and subject matter in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

95. Live Oak's application for a conceptual approval environmental resource permit is governed by Florida

Administrative Code Chapter 40C-4, Regulation of Surface Water Management Systems. Chapter 40C-4 implements, in part, Part IV of Chapter 373, Florida Statutes. Pursuant to these laws and regulations, SJRWMD has regulatory jurisdiction over the permit applicant in this case. Rule 40C-4.041(2)(a), Florida Administrative Code.

96. Live Oak has the burden of proving by a preponderance of the evidence that it is entitled to the requested permit. Rule 40C-1.545, Florida Administrative Code; Department of Transportation v. JWC Co., 396 So 2d. 778, 788 (Fla 1st DCA 1981).

97. SJRWMD requirements applicable to Live Oak's application are found in Rule 40C-4.301, Florida Administrative Code, with the exception of 40C-4.301(1)(g),(h) and (i), Florida Administrative Code; Rules 40C-4.302(1)(a) and (b), Florida Administrative Code; Rule 40C-4.381, Florida Administrative Code; and Rule 40C-41.063(5), Florida Administrative Code.

Econlockhatchee River Special Basin Criteria

98. Brister Creek (wetland 16) is not a named tributary for the purposes of the Econlockhatchee River Hydrologic Basin standards and design criteria set forth in Applicant's Handbook Section 11.4. Pursuant to Applicant's Handbook Section 11.4.4, only Brister Creek and uplands which are within 50 feet landward of the landward extent of the wetlands are within the RHPZ.

99. To satisfy the Riparian Habitat Protection Standard (Applicant's Handbook Section 11.4.4), Live Oak must provide reasonable assurance that the surface water management system within the RHPZ, as conceptually designed, will not adversely affect the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species. Applicant's Handbook Section 11.4.4(a).

100. The evidence presented at the hearing demonstrated that the overall merits of the proposed plan of development, including the preservation of the regionally ecologically significant Econ River forested floodplain and the associated uplands, as well as the preservation of the Yarborough parcel, provide a degree of resource protection to fish and wildlife which offsets adverse effects that the system may have on the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species provided by the RHPZ. Therefore, Live Oak has provided reasonable assurance that the surface water management system within the RHPZ, as conceptually designed, will not adversely affect the abundance, diversity, food sources, or habitat of aquatic or wetland dependent species. Applicant's Handbook Sections 11.4.4(a) and (e).

101. Live Oak has provided reasonable assurance that its conceptual surface water management system complies with the design storm criteria set forth in Applicant's Handbook Section 11.4.1.

102. Live Oak has provided reasonable assurance that its conceptual surface water management system complies with the floodplain storage criteria set forth in Applicant's Handbook Section 11.4.2.

103. Live Oak has provided reasonable assurance that its conceptual surface water management system complies with all the applicable stormwater management standard criteria in Applicant's Handbook Section 11.4.3. The criteria set forth in Applicant's Handbook Section 11.4.3(b)(4) do not apply because Live Oak elected to provide at least 50 percent additional permanent pool volume pursuant to Rule 40C-42.026(4)(d)2.a, Florida Administrative Code. The criteria in applicant's Handbook Section 11.4.3(b)(8) and (9) are not applicable in the instant case because these criteria are addressed during the permitting of the construction phases of the project.

Environmental Criteria

104. Live Oak provided reasonable assurance that the Live Oak reserve project complies with the applicable environmental conditions for issuance in Applicant's Handbook Section 12.1.1, including Sections 12.1.1(a), 12.1.1(b), 12.1.1(c), 12.1.1(f), and 12.1.1(g). Sections 12.1.1(d) and (e), are not applicable to this application.

105. Compliance with Applicant's Handbook Section 12.1.1 is determined through compliance with the criteria explicated in Applicant's Handbook Sections 12.2 through 12.3.8.

106. Generally, the applicant must explore design modifications to reduce or eliminate adverse impacts. Adverse impacts remaining after the applicant makes practicable design modification may be offset by mitigation. A proposed modification that is not technically capable of being done, is not economically viable, or which adversely affects public safety through the endangerment of lives or property is not considered practicable. Applicant's Handbook Section 12.2.1.

107. Applicant's Handbook Section 12.2.1.2 provides in part:

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

* * *

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

108. The findings of fact in this case demonstrate that Live Oak proposes mitigation that implements all or part of a plan that provides regional ecological value and provides greater long term value than the area of wetland or other surface water to be adversely affected. Consequently, Live Oak was not required to implement practicable design modifications to reduce or eliminate impacts in accordance with Applicant's Handbook Section 12.2.1. However, Live Oak has reduced its impacts where

practicable and therefore has complied with elimination or reduction of impacts criteria in Applicant's Handbook Section 123.2.1.

109. Live Oak has provided reasonable assurance that the Live Oak Reserve project will not adversely affect the value of wetlands, including isolated wetlands less than one-half acre, and other surface water functions to fish, wildlife, listed species and their habitats. Applicant's Handbook Section 12.2.2.

110. Petitioners presented no competent evidence that the Live Oak Reserve project would significantly degrade or is within the Econ River. To the contrary, the evidence indicated that the project will benefit the Econ River by reducing stormwater velocities during the mean-annual and 25-year, 24-hour design storm events.

111. Since the project is located adjacent to, but not within the Econ River, an OFW, Live Oak must provide reasonable assurance that the surface water management system, as conceptually designed, is not contrary to the public interest. Applicant's Handbook Section 12.2.3. Based on the present design which provides water quality benefits and a mitigation plan that offsets the project's adverse impacts, on balance, Live Oak has provided reasonable assurance that the Live Oak Reserve project is not contrary to the public interest. Applicant's Handbook Section 12.2.3.

112. Secondary impacts to the habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if buffers with a minimum width of 15 feet and an average width of 25 feet are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat. Applicant's Handbook Sections 12.2.7(a)). The project meets this criteria and Live Oak has provided reasonable assurance that the Live Oak reserve project will not cause adverse secondary impacts to the water resources. Applicant's Handbook Section 12.2.7.

113. Live Oak has provided reasonable assurance that the Live Oak Reserve project will not cause adverse cumulative impacts. Applicant's Handbook Section 12.2.8.

114. Live Oak has complied with the applicable criteria under Applicant's Handbook Section 12.3.2, namely, Applicant's Handbook Section 12.3.2.2. The mitigation ratios provided in Section 12.3.2 are guidelines for preliminary planning purposes only. The actual ratio needed to offset adverse impacts may be higher or lower based on the consideration of factors listed in subsections 12.3.2.1 and 12.3.2.2. Based on the regional ecological significance and long-term viability of much of the mitigation proposed, the SJRWMD properly assessed and implemented appropriate mitigation and preservation ratios. Applicant's Handbook Section 12.3.2.

115. Applicant's Handbook Section 12.3.1.8 provides in pertinent part:

Innovative mitigation proposals which deviate from the standard practices described in Sections 12.3-12.3.6 shall be considered on a case-by-case basis. The donation of money is not considered to be an acceptable method of mitigation, unless cash payments are specified for use in a District or Department of Environmental Protection endorsed environmental preservation, enhancement or restoration project and the payments initiate a project or supplement an ongoing project. The project or portion of the project funded by the donation of money must offset the impacts of the proposed system.

116. Live Oak's contribution of money towards the purchase of a conservation easement is an innovative mitigation proposal subject to Applicant's Handbook Section 12.3.1.8. Further, the uncontroverted evidence demonstrated that the donation was specified for use in a district-endorsed environmental preservation project. Accordingly, said donation is acceptable under Applicant's Handbook 12.3 if the portion of the project funded by Live Oak offsets the impacts of the proposed system.

117. Based on the testimony and evidence presented Live Oak provided reasonable assurance that the payment of money toward the acquisition of a conservation easement over the Yarborough parcel, in concert with the on-site mitigation, offset the adverse impacts, including secondary impacts to the Florida sandhill crane.

Surface Water Management System Engineering Criteria

118. Live Oak has provided reasonable assurance that it complied with the applicable surface water management criteria set forth in Applicant's Handbook Sections 8, 9, and 10.

119. In summary, the evidence presented at the final hearing demonstrated that Live Oak has provided reasonable assurance that the requirements of SJRWMD rules have been met and the permit should be granted.

RECOMMENDATION

Based on the forgoing, it is

RECOMMENDED

That a final order be entered granting Live Oak's application for a conceptual approval environmental resource permit with the conditions set forth in the SJRWMD technical staff report dated July 16, 1998, with the exception of condition 8, deleted by stipulation.

DONE AND ENTERED this 2nd day of November, 1998, in Tallahassee, Leon County, Florida.

MARY CLARK
Administrative Law Judge
Division of Administrative Hearings
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this 2nd day of November, 1998

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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