STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SIERRA CLUB,

Petitioner,

and

BOBBY C. BILLIE and SHANNON LARSEN,

Intervenors,

vs. DOAH No. 99-1905
SJRWMD No. 99-1907

HINES INTERESTS LIMITED PARTNERSHIP and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Respondents.
_____/

BOBBY C. BILLIE and SHANNON LARSEN,

Petitioners,

vs. DOAH No. 99-3933
SJRWMD No. 99-1949

HINES INTERESTS LIMITED PARTNERSHIP and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondents.
_____/

THE SIERRA CLUB,

Petitioner.

vs. DOAH No. 99-3934
SJRWMD No. 99-1951

HINES INTERESTS LIMITED PARTNERSHIP and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

Respondents.
_____/

FINAL ORDER ON CONSUMPTIVE USE PERMIT APPLICATION

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable Stephen F. Dean, held a formal administrative hearing in the above-styled cases on October 18-22, 1999, in St. Augustine, Florida.

A. APPEARANCES

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On December 30,1999, the Honorable Stephen F. Dean ("Administrative Law Judge" or "ALJ") submitted to the St. Johns River Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A". This matter then came before the Governing Board on February, 2000 for final agency action. At that time, the Governing Board issued a Final Order and Order of

Remand, which approved the applicant's ERP application and remanded the CUP application back to the ALJ to provide conclusions of law relating to the issue of whether the CUP application should be granted. Such conclusions of law were not included in the December 30,1999 Recommended Order. On April 26, 2000, the ALJ submitted to the St. Johns River Water Management District and all other parties to this proceeding an Order on Remand: Additional Conclusions of Law, a copy of which is attached as Exhibit "B". Thereafter, Hines waived the Chapter 120, Fla. Stat., timeframes for final agency action on the CUP permit application through June 15, 2000. Petitioners, The Sierra Club, Bobby C. Billie and Shannon Larsen ("Petitioners"), timely filed joint exceptions to the ALJ's Order on Remand and St. Johns River Water Management District ("District") timely filed exceptions to the ALJ's Order on Remand. Hines did not file exceptions. The District and Hines timely filed responses to exceptions. This matter then came before the Governing Board on June 13, 2000 for final agency action.

B. STATEMENT OF THE ISSUES

This Final Order on Remand involves one issue: whether Hines' application for an individual consumptive use permit ("CUP") should be approved pursuant to Chapter 373, Florida Statutes, and Chapter 40C-2, Florida Administrative Code. All issues related to the ERP application were addressed in our February 10, 2000, Final Order.

C. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a Recommended Order are well established. The Governing Board is prescribed by section 120.57(1)(1), Fla. Stat. (1999), in acting upon a Recommended Order. The Administrative Law Judge ("ALJ"), not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifitz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the findings of fact are not based upon competent substantial evidence or that the proceedings on which the findings or fact were based did not comply with essential requirements of law. Section 120.57(1)(1), Fla. Stat.; Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16,1999).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

The Governing Board in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification are stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. Section 120.57(1)(1), Fla. Stat. (1999). Furthermore, the Governing Board's authority to modify a Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Serve, 419 So.2d 705 (Fla. 1st DCA 1982). In interpreting the "substantive jurisdiction" amendment as it first appeared in the 1996 changes to the Administrative Procedures Act, courts have continued to interpret the standard of review as requiring deference to an agency in interpreting its own statutes and rules. See, e.g., State Contracting and Engineering Corporation v. Department of Transportation, 709 So.2d 607, 608 (Fla. 1st DCA 1998).

D. RULINGS ON EXCEPTIONS

Petitioners jointly filed 12 exceptions to the ALJ's Order on Remand. The District filed three exceptions to the ALJ's Order on Remand. Hines did not file any exceptions to the ALJ's Order on Remand. The parties' exceptions to the Recommended Order have been reviewed and are addressed below.

Hereinafter, references to testimony will be made by identifying the witness by surname followed by transcript page number (e.g. O'Shea Vol. II: 6). References to exhibits received by the ALJ will be designated "Petitioners" for Petitioners, The Sierra Club, Bobby C. Billie and Shannon Larsen; "District" for Respondent, St. Johns River Water Management District; and "Hines" for Respondent, Hines Interests Limited Partnership, followed by the exhibit number, then page number, if appropriate (e.g. Hines 2: 32). Other references to the transcript will be indicated with a "T" followed by the page number (e.g. T. Vol. II: 60). References to the December 30,1999 Recommended Order will be designated by "R.O." followed by the page number (e.g. R.O.: 28). References to the ALJ's April 26, 2000 Order on Remand will be designated as "Remand" followed by the page number (e.g. Remand: 5). Unless otherwise noted, all references to conclusions of law are to those in the April 26, 2000 Order on Remand.

RULINGS ON DISTRICT'S EXCEPTIONS

District's Exception No. 1

District staff take exception to an apparent typographical error in Conclusion of Law No. 2. It appears that the ALJ transposed the numbers of a section in the District's rules. In this conclusion of law, the ALJ states that 40C-2.031, F.A.C., sets out the conditions for issuance of a CUP. It is obvious that this is a typographical error. The reference to "Section 40C-2.031, Florida Administrative Code," should read "Section 40C-2.301, Florida Administrative Code." Section 40C-2.031, Florida Administrative Code (F.A.C.), deals with the implementation dates of individual consumptive use permitting programs within the District, whereas section 40C-2.301, F.A.C., entitled Conditions for Issuance of Permits, sets forth the conditions for issuance of a CUP. Therefore, District staff's exception number 1 is granted and the reference to "Section 40C-2.031, Florida Administrative Code," in Conclusion of Law No. 2 is hereby corrected to read "Section 40C-2.301, Florida Administrative Code."

District Exception No. 2

District staff take exception to Conclusions of Law Nos. 14, 15, 16, and 17 on the basis that the ALJ incorrectly concludes that subsection 40C-2.301 (2), F.A.C., does not apply to the subject CUP application.

Subsection 40C-2.301 (2), F.A.C., states:

> To obtain a consumptive use permit for a use which will commence after the effective date of implementation, the applicant must establish that the proposed use of water:
>
> (a) is a reasonable beneficial use;
>
> (b) and will not interfere with any presently existing legal use of water; and
>
> (c) is consistent with the public interest.

Paragraph 40C-2.301 (5)(a), F.A.C., states:

> A proposed consumptive use does not meet the criteria for the issuance of a permit set forth in subsection 40C-2.301 (2), F.A.C., if such proposed water use will:
>
> [List of six numbered reasons for denial.]

We agree with staff's analysis. The three-prong test in subsection 40C-2.301 (23, F.A.C., is the umbrella provision of the conditions for issuance of a consumptive use permit. This provision applies to all CUP applications. Subparagraphs 40C-2.301 (5)(a)1 through 6 are individual grounds for denial of a CUP application. If one of the six circumstances is present, the three-prong test in subsection 40C-2.301 (2), F.A.C., is not met, but the test nonetheless applies to the application. Subsection 40C-2.301 (2) requires the applicant to establish that its proposed use meets the three-prong test, and therefore, even if the grounds for denial in subparagraphs 40C-2.301 (5)(a)1 through 6 are not applicable to an application, the requirement that the applicant's proposed use of water meets the criteria in subsection 40C-2.301 (2) is not negated. In fact, paragraph 40C-2.301 (5)(b) states: "Compliance with the criteria set forth in subsection (5)(a) above [the six reasons for denial] does not preclude a finding by the Board that a proposed use fails to comply with the criteria set forth in Section 40C-2.301 (2) above [the three-prong test]." In Conclusions of Law Nos. 14,15,16, and 17, the ALJ mistakenly concludes that the three-prong test in subsection 40C-2.301 (2), F.A.C., does not apply if the grounds for denial do not also apply. The Governing Board has substantive jurisdiction and the primary responsibility to interpret its own rules which it is required to enforce. As explained above, the ALJ erroneously interpreted section 40C-2.301 (2) and we find that our interpretation is as reasonable, or more reasonable, than the conclusion of the ALJ. Therefore, District staff's exception number 2 is granted and the references

to subsection 40C-2.301 (2) as not applying to the subject CUP application are hereby stricken from Conclusions of Law Nos. 14, 15, 16, and 17.

District Exception No. 3

In their exceptions to the ALJ's December 30,1999 Recommended Order, District staff took exception to Finding of Fact No. 82 in the December 30,1999 Recommended Order, relating to the CUP application. In our February 10,2000 Final Order, we reserved ruling on this exception. Thus, in their exception number 3 to the Order on Remand, District staff is now reasserting exception to Finding of Fact No. 82, in which, the ALJ finds "[a]s an adjunct to the chemical plan, the water in these shallow wells should be periodically tested to ensure no chemicals leech [sic] into the surficial water table." To implement this finding, paragraph 40C-2.301 (5)(b) states: "Compliance with the criteria set forth in subsection (5)(a) above [the six reasons for denial] does not preclude a finding by the Board that a proposed use fails to comply with the criteria set forth in Section 40C-2.301 (2) above [the three-prong test]." In Conclusions of Law Nos. 14,15,16, and 17, the ALJ mistakenly concludes that the three-prong test in subsection 40C-2.301 (2), F.A.C., does not apply if the grounds for denial do not also apply. The Governing Board has substantive jurisdiction and the primary responsibility to interpret its own rules which it is required to enforce. As explained above, the ALJ erroneously interpreted section 40C0-2.301 (2) and we find that our interpretation is as reasonable, or more reasonable, than the conclusion of the ALJ. Therefore, District staff's exception number 2 is granted and the references to subsection 40C-2.301 (2) as not applying to the subject CUP application are hereby stricken from Conclusions of Law Nos. 14, 15, 16, and 17.

District Exception No. 3

In their exceptions to the ALJ's December 30,1999 Recommended Order, District staff took exception to Finding of Fact No. 82 in the December 30,1999 Recommended Order, relating to the CUP application. In our February 10,2000 Final Order, we reserved ruling on this exception. Thus, in their exception number 3 to the Order on Remand, District staff is now reasserting exception to Finding of Fact No. 82, in which, the ALJ finds "[a]s an adjunct to the chemical plan, the water in these shallow wells should be periodically tested to ensure no chemicals leech [sic] into the surficial water table." To implement this finding, District staff recommend the following language be added as a condition of the CUP permit:

> The Permittee must submit a proposal to periodically monitor the water quality of the proposed surficial wells for indications that the chemicals being applied on the golf course are leaching into the surficial aquifer. At a minimum, this plan must include monitoring frequency, parameters, and duration, well locations and method of reporting data. The draft plan must be submitted to the District in conjunction with the Integrated Pest Management Plan required to be submitted under ERP no. 4-109-0216. After receiving written approval from the District staff of a surficial water quality monitoring plan, the permittee must implement the approved plan.

We agree with District staff that the proposed permit condition is necessary to implement the ALJ's finding. Moreover, in its Response to Exceptions, Hines has indicated that it agrees with this proposed permit condition. Thus, District exception number 3 is granted.

RULINGS ON PETITIONERS' EXCEPTIONS

Petitioners' Exception No. 1

Petitioners take exception to the ALJ's alleged failure to make findings of fact necessary to determine whether the public interest test is met. Petitioners appear to be arguing that the Governing Board's Final Order and Order of Remand required the ALJ to make additional findings of fact regarding the public interest test in the Order on Remand. As support, Petitioners quote from our Final Order and Order of Remand, in which we stated that "on remand for inclusion of the conclusions of law, the Administrative Law Judge may find it necessary for additional findings from the evidence to properly apply the findings to the requisite law." Petitioners' argument is without merit. In our previous order, we simply stated that the ALJ may make additional findings of fact if necessary. Nowhere in that order did we indicate that the ALJ was required to make additional findings of fact or that such additional findings were necessary.

Petitioners also cite to section 120.569(2)(m), Fla. Stat., which provides that "[f]indings of fact, if set forth in a manner which is no more than mere tracking of statutory language, must be accompanied by a concise explicit statement of the underlying facts of record which support the findings" and section 1 20.57(1)(j) that provides that findings of fact shall be based upon a preponderance of the evidence. Petitioners contend that

the ALJ failed to adhere to these statutory requirements regarding findings of fact related to the public interest test and other requirements of the rules. Petitioners do not identify any specific findings of fact regarding the public interest test or any other rule requirements that are lacking. Nevertheless, a review of the ALJ's December 30, 1999 Recommended Order reveals that the ALJ has made sufficient findings of fact to support a conclusion of law that the public interest test has been met.

"Public interest" is defined by the District as "those rights and claims on behalf of people in general." Rule 9.3, CUP Applicants Handbook. This rule further states that "[I]n determining the public interest * * *, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or of the water resources in the area, the District and the State." This definition has two components which require a determination as to whether the use is "detrimental" or "beneficial": 1) the overall collective well being of the people; and 2) the water resource in the area, the District and the state. William Nassau v. Vernon & Irene Beckman, et al., DOAH Case No. 92-0246 (St. Johns River Water Management District, June 10, 1992). It is within our purview to make a determination of whether the public interest test has been met, based on the findings of fact determined by the ALJ. The ALJ's findings of fact indicate that the proposed water use will not be detrimental to the water resources of the area, the District or the State and will not be detrimental to the overall collective well being of the people. Moreover, the ALJ's findings indicate that the proposed use will provide some benefit to the overall collective well-being of the people. The ALJ's findings of fact that support our conclusion that the public interest test has been met include the following: (1) the proposed water use is to serve the needs of people who use a recreational facility, a sales office and a construction trailer (R.O.: 7-8; Findings of Fact 4); (ii) irrigation water for the golf course will primarily be drawn from the storm water management system, with the Floridan aquifer serving as a secondary source (R.O.: 13-14, 33; Findings of Fact 18,19 and 75); (iii) the surface water source is designed so as to minimize impacts to wetlands (R.O.: 13; Findings of Fact 18); (iv) the water source for golf course way stations, the sales center, the temporary clubhouse, and a construction trailer is surficial aquifer wells with an anticipated drawdown of only 0.01 feet (R.O.: 7,14; Findings of Fact 4 and 20); (v) the primary source of irrigation water, the surface water management system, will not adversely affect surface waters (R.O.: 29; Findings of Fact 63); (vi) the surface water management system will comply with water quality standards (R.O.: 30-31; Findings of Fact 66-69); (vii) the allocated quantity of water is consistent with District Standards and with the allocations for other golf courses in the

area (R.O.: 32; Findings of Fact 74); (viii) water used for irrigation is from the lower quality sources (the storm water pond and the deeper aquifer), saving the more desirable shallow aquifer for drinking and household uses (R.O.: 33; Findings of Fact 75); (ix) extensive water conservation measures have been implemented (R.O.: 32; Findings of Fact 76); (x) reclaimed water will be used for irrigation when it becomes available to the site (R.O.: 34; Findings of Fact 77); (xi) the water use is not expected to cause saline water intrusion (R.O.: 34-35; Findings of Fact 78, 80); (xii) the water use will not adversely affect existing legal uses of water (R.O.: 34; Findings of Fact 79); (xiii) the water use will not lower water levels so as to adversely affect off-site vegetation (R.O.: 35; Findings of Fact 81); and (ivx) additional testing will be undertaken to ensure that groundwater quality is not adversely affected (R.O.: 34-35; Findings of Fact 78 and 82).

Consequently, the ALJ has entered substantial findings to support a determination under Rule 9.3, A.H. CUP, that the proposed water use is consistent with the public interest. Moreover, we note that contrary to the Petitioners' contentions, the ALJ's findings of fact are not a "mere tracking of the statutory language", but instead are facts specific to this case that the ALJ gleaned from the voluminous record in this case. Thus, this exception is rejected.

Petitioners' Exception No. 2

Petitioners take exception to recommended conclusion of law number 4, in which the ALJ concludes that the proposed use is for a purpose that is reasonable and in the public interest. Specifically, Petitioners contend that the ALJ sets forth no facts or reasoning for drawing this conclusion, but merely tracks the statutory language. Petitioners maintain that such a bare statement the rule is met does not comply with section 120.569(2)(m), Fla. Stat. First, as was correctly pointed out by District staff, Petitioners have misstated the ALJ's conclusion of law and the pertinent rule provision. The ALJ's conclusion of law number 4 and the District's rule 40C-2.301 (4)(b), F.A.C., both state that "[t]he use must be for a purpose that is both reasonable and consistent with the public interest." (emphasis provided). Further, it should be noted that section 120.569(2)(m), Fla. Stat., applies to "findings of fact." Petitioners exception number 2 is directed at a "conclusion of law." Thus, the cited statutory provision is not applicable. Nevertheless, as described in detail in our holding on Petitioners exception number 1, the ALJ made numerous factual findings in the December 30, 1999 Recommended Order from which he could reasonably conclude that the proposed use is for a purpose that is both reasonable and in the public interest. Moreover,

contrary to Petitioners' assertions, in conclusion of law number 4, the ALJ expressly stated that the use of stormwater and groundwater for the purpose of irrigating a golf course and the use of groundwater for the purpose of temporary household-type uses, (i.e., drinking water uses at comfort stations, construction and sales facilities) were reasonable purposes consistent with the public interest. Thus, Petitioners' exception number 2 is rejected.

Petitioners' Exception No. 3

Petitioners take exception to recommended conclusion of law number 19, in which the ALJ concludes, among other things, that the proposed use is consistent with the public interest. Again, Petitioners maintain that the ALJ sets forth no facts or reasoning for drawing this conclusion and that such a bare statement the rule is met does not comply with section 120.569(2)(m), Fla. Stat. First, it should be noted that the ALJ's conclusion of law number 19 is merely a summary of all of his previous conclusions of law in numbers 1 through 18. It does not contain any new conclusions not previously drawn by the ALJ in the Order on Remand. For the reasons stated more fully in our holdings on Petitioners' exceptions numbers 1 and 2, we find that the ALJ made sufficient factual findings to reasonably conclude that the propose use meets the public interest test. Thus, Petitioners' exception number 3 is rejected.

Petitioners' Exception No. 4

Petitioners take exception to recommended conclusion of law number 6, in which the ALJ concludes that there is no environmental or economic harm caused by the consumptive use. Petitioners argue that Hines failed to conduct an analysis of surface or groundwater flow, and therefore there is insufficient basis for the broad conclusion that there will be no environmental harm caused by the consumptive use. Again, Petitioners contend that the ALJ sets forth no facts or reasoning for drawing this conclusion, but merely tracks the statutory language and that such a bare statement the rule is met does not comply with section 1 20.569(2)(m), Fla. Stat. Petitioners cite to portions of the record that they believe support their position that there is not sufficient data to support the ALJ's conclusion. Petitioners also contend that the ALJ improperly referred to a lack of saltwater intrusion and existing legal users as reasons that this test is met. Petitioners maintain that the requirements of 40C-2.301 (4)(d) regarding adverse environmental and economic harm cannot be met by meeting the saltwater intrusion and existing legal users criteria that are addressed in other permitting criteria.

Once again, we start by pointing out that section 120.569(2)(m), Fla. Stat., applies to factual findings, not to conclusions of law, such as the one being objected to here. Next, it appears that in this exception, Petitioners' are attempting to have us reweigh the evidence and reject the ALJ's earlier findings of fact in the December 30,1999 Recommended Order that support this conclusion. We are not at liberty to do so. In the December 30,1999 Recommended Order, the ALJ made findings of fact related to the issue of whether the proposed use would result in environmental or economic harm in findings of fact numbers 78, 79, 80, 81 and 82. It is not within our purview to determine whether the record contains evidence contrary to the Administrative Law Judge's finding of fact, but whether the finding of fact is supported by competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991); Heifetz v. Dept of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). Notwithstanding that the record may contain evidence contrary to the Administrative Law Judge's finding, we are bound by these findings if the record discloses any competent substantial evidence in support. Bradley, 510 So.2d 1122; West Coast Regional Water Supply Auth. v. Harris, 604 So.2d 892, cause dismissed, 613 So.2d 4 (Fla. 1992). It should be noted that Petitioners failed to file any exceptions to the ALJ's findings of fact supporting this conclusion in their exceptions to the ALJ's December 30, 1999 Recommended Order. Nor are Petitioners now arguing that the ALJ's findings are not supported by competent substantial evidence. Instead, Petitioners appear to be arguing that there are certain specific tests that Hines should have conducted to support its application. The District rules do not require any specific test be conducted to meet the criterion in section 40C-2.301 (4)(d), F.A.C. The record contains analyses that Hines conducted regarding surface and groundwater flow. (Hines Exhibits 6, 7 and 25). As evidenced by his findings of fact, the ALJ apparently determined that the specific types of studies that Petitioners argue in favor of are not required for him to reach his findings. We are not free to second guess the ALJ in these factual determinations. In any event, the record does contain competent substantial evidence to support the ALJ's factual findings and conclusion of law. Specifically, the record contains evidence that, based on Hines' analysis of the potential for saltwater intrusion in the Floridan aquifer, the potential for water level drawdowns in the surficial aquifer and/or in adjacent wetlands and the potential for impacts to ground and surface water quality, the environmental harm caused by the consumptive use will be reduced to an acceptable amount. (Silvers Vol. VI: 105). Hines performed geophysical logging and a step-drawdown test on a Floridan aquifer well, TW-1, which previously existed on the site. This test included water quality sampling. (Davidson Vol. III: 15-16; Hines Ex. 25). The information obtained from the

test was representative of data that exists from other Floridan aquifer wells in the region, such as the City of St. Augustine's wellfield, three miles from the project site, and the Dee Dot Ranch wells. (Davidson Vol. III: 26; Silvers Vol. VI: 108-109). This information was relied upon by the District's expert to conclude that the proposed consumptive use will not cause significant saline water intrusion (to such an extent as to be inconsistent with the public interest), further aggravate currently existing saline water intrusion problems, or seriously harm the water quality of this source of water. (Silvers Vol. VI: 108-109). As added assurance, District staff recommended a permit condition that would require Hines to monitor the water quality in the proposed Floridan aquifer well for indicators that saltwater intrusion is occurring and to curtail or abate the saltwater intrusion if it does occur. (Silvers Vol. VI: 109; District Ex. 4). Moreover, the proposed surficial aquifer wells will be approximately 70 feet deep. (Silvers Vol. VI: 110). There are no known sources of saltwater close enough to the proposed locations of these wells to present a concern regarding a potential for saltwater intrusion. (Silvers Vol. VI: 110). Further, the proposed pumping rates are too low to induce saltwater intrusion. (Silvers Vol. VI: 110). Therefore, the water quality of this source will not be seriously harmed by the consumptive use. (Silvers Vol. VI: 110).

Hines performed geologic borings to determine the characteristics of the surficial aquifer on the project site property. (Davidson Vol. III: 15). Using the information obtained from these borings and assuming a pumping rate of approximately 400 gallons per day from each of the five proposed surficial aquifer wells, District staff modeled the drawdowns in the surficial aquifer. (Silvers Vol. VI: 112-113). Even at the wellhead, the projected drawdown was only approximately one-hundredth of a foot; this amount of drawdown is too small to be shown on a map. (Silvers Vol. VI: 112-113). Hines and the District also evaluated whether the use of surface water to irrigate the golf course would adversely affect water levels in Marshall Creek and associated wetlands by reducing the amount of stormwater runoff going to these areas. (Frye Vol. V: 25-27; Miracle Vol.s VI: 142-158, and VII: 38-47). The Marshall Creek site is Fla. and has sandy soils; these two characteristics operate to minimize stormwater runoff volumes, and hence surface flows contribute the smallest component of water to the wetlands on this site. (Frye Vol. V: 25, 27, 53-54). As a cautionary measure, District staff recommended that a condition be placed on the environmental resource permit for the golf course requiring Hines to monitor the wetland located adjacent to Pond L (the Florida-shaped pond) for changes resulting from dehydration, and to mitigate for such changes if they do occur. (Frye Vol. V: 25, 27). Consequently, the proposed use will not cause the water

table or surface water level to be lowered so that interference will be caused to existing legal users, nor will stages or vegetation be adversely and significantly affected on lands other than those owned, leased, or otherwise controlled by the applicant. (Silvers Vol. VI: 112-113).

Using the Floridan aquifer characteristics derived from the geophysical logs and the step-drawdown test, Hines modeled the drawdowns in the Floridan aquifer based on different pumping scenarios. (Davidson Vol. III: 16; Hines Ex. 25). The District's expert reviewed this work and concluded that the anticipated decline in the potentiometric surface will not interfere with existing legal users. (Silvers Vol. VI: 114). Therefore, the proposed use will not cause aquifer potentiometric surface levels to be lowered so that interference will be caused to existing legal users. (Silvers Vol. VI: 113).

As to Petitioners' argument that saltwater intrusion should not be considered in determining whether a proposed use will result in environmental or economic harm, we disagree. First, nothing in chapter 373, Fla. Stat., or the District's rules prohibits such a consideration. Moreover, we believe the ALJ reasonably interpreted the criteria in 40C-2.301 (4)(d), F.A.C., as including a consideration of saltwater intrusion. While clearly there are other possible environmental and economic harms, saltwater intrusion is certainly one possible harm that should be considered in this analysis. The mere fact that other parts of the District's rules specifically address saltwater intrusion, does not mean that an ALJ or this Board is prohibited from considering saltwater intrusion in making its determination under rule 40C-2.301 (4)(d), F.A.C. Thus, for all of the reasons described above, Petitioners' exception number 4 is rejected.

Petitioners' Exception No. 5

Petitioners take exception to recommended conclusion of law number 10, in which the AM concludes that the proposed consumptive use will not cause or contribute to flood damage. Petitioners assert that the ALJ's finding of fact no. 62 which addresses flood prevention does not refer to the consumptive use and that it only refers to off-site flooding. Moreover, Petitioners conclude that there are insufficient findings of fact to support the conclusion of law in accordance with section 120.569(2)(m), Fla. Stat. Although the ALJ does not reference any specific findings of fact in conclusion of law no. 10, we find that there are sufficient findings in the Recommended Order that support the ALJ's conclusion. Specifically, in finding of fact number 62 the ALJ found that by not increasing the discharge rate off-site, the system will not result in off-site flooding and that to prevent on-site flooding, Hines developed the project

to be flood-free as required by St. Johns County ordinance. (R.O.: 29) In this finding, the ALJ expressly found that the construction and operation of the system will not result in on-site or off-site flooding. Further, finding of fact number 62 expressly found that there would be no on-site flooding. Moreover, finding of fact number 62 relates to the CUP application in the sense that it relates to the stormwater management system, which is the primary source of water for golf course irrigation and is contained within a section of the Recommended Order entitled "Water Quantity Considerations," which is not limited to ERP issues.

In addition, Petitioners contend that the Recommended Order's Finding of fact number 62 and a statement in our Final Order and Order of Remand contradict each other. Petitioners are mistaken. In finding of fact number 62, the ALJ found that by not increasing the discharge rate off-site, the system does not cause or contribute to off-site flooding. Our Final Order and Order of Remand stated that "the post development runoff will exceed the pre-development runoff and that the increased volumes of runoff resulting from the placement of impervious surface more than compensates for the amount used for reuse water to irrigate the golf course." (F.O.: 25) These statements are not contradictory. The ALJ's finding of fact number 62 addresses the rate of discharge, whereas our finding addresses the volume of discharge. The rate of discharge and the volume of discharge are not coterminous. A post-development increase in stormwater runoff does not necessarily mean that there will be flooding. In fact, the ALJ made specific findings of fact that addresses how the increased runoff would be handled (R.O.: 7-8) and ultimately found that the system would not result in flooding (R.O.: 28).

For all of the reasons stated above, Petitioners' exception number 5 is rejected.

Petitioners Exception No. 6

Petitioners take exception to recommended conclusion of law number 9, in which the ALJ concludes that, with regard to section 40C-2.301 (4)(j), Fla. Stat., "the groundwater sources of water will not seriously be harmed if the conditions recommended are met." Petitioners argue that only two water quality samples were taken from the test well and that these samples showed that the total dissolved solids parameter is in excess of the 500 mg/l drinking water standard in section 62-550.320(1), F.A.C. Petitioners argue that the permit requirement that Hines conduct tests after the fact does not alleviate Hines' responsibility to prove that the requirements are met in advance of approval of a permit. Thus, Petitioners assert that Hines has failed to meet its burden of proof that the water quality of the source of the

water shall not be seriously harmed by the consumptive use under section 40C-2.301 (4)a)., F.A.C.

It appears that, by taking exception to conclusion of law number 9, Petitioners are actually taking exception to the ALJ's factual findings that support this conclusion. Once again, Petitioners appear to be arguing that District rules require certain specified tests to be conducted or a certain specified number of samples to be taken. Petitioners are mistaken. District rules do not contain any such requirements. Once again, Petitioners are attempting to have the Governing Board reweigh the evidence regarding what types of tests or what numbers of samples are sufficient. Such a weighing of the evidence is the job of the ALJ and is beyond our authority. In the December 30, 1999 Recommended Order, the ALJ made numerous findings of fact which support his conclusion that the "groundwater sources of water will not be seriously harmed if the conditions are met."

In the Recommended Order, the ALJ made the following relevant findings: (i) other similar wells in the area have pumped for years without inducing saltwater intrusion (R.O.: 34; Finding of Fact 78): (ii) tests of an existing on-site well showed no changes in water quality (R.O.: 34; Finding of Fact 78); (iii) an additional pump test will be required to demonstrate that no saltwater intrusion is occurring (R.O.: 34; Finding of Fact 78); (iv) water quality data indicate that the surficial aquifer in the area meets secondary drinking water standards (R.O.: 35; Finding of Fact 80); (v) there is no underlying saline water in the surficial aquifer (R.O.: 35; Finding of Fact 80); (vi) the wells are not located near a source of lateral saline water intrusion (R.O. 35; Finding of Fact 80); (vii) the proposed pumping rates are so low, they will not cause hydraulic pressure changes which would induce saltwater intrusion (R.O.: 35; Finding of Fact 80); (viii) the low rate of pumping from the surficial aquifer wells means that off-site vegetation will not be adversely affected through lowered water levels or stages (R.O.: 35; Finding of Fact 81); and (ix) water in the surficial aquifer will be periodically tested to ensure no chemicals leak into the surficial aquifer (R.O.: 35; Finding of Fact 82). Thus, there is ample competent substantial evidence to support the ALJ's determination that the groundwater sources of water will not be seriously hammed Petitioners' reliance on Metropolitan Dade County v. Coscan Florida, Inc. 609 So.2d 644 (Fla. 3d DCA 1992), is misplaced. In Coscan, the permit applicant and the agency had conducted no analysis as to whether the project at issue would meet water quality standards. Id. At 648. The District Court concluded that the agency must make "an effort to project at [the application] stage what the effects of the proposed project will be." Id. In the instant case the ALJ relied upon the District staff's analysis of the proposed effects

to groundwater. In addition to the application materials and hydrogeological reports of on-site testing (Hines Exhibits 6, 7, 25, 26, 27 and 28), District expert Silvers conducted her own independent analyses of the effects of the consumptive use. Silvers testified that further testing was not necessary to provide reasonable assurances because (i) the applicant adequately demonstrated the aquifer characteristics; (ii) the applicant adequately conducted the analytical modeling; (iii) Silvers is aware of the saltwater interface based on past investigations in the area; (iv) there was no potential for "up-coming" of saltwater due to the shallowness of the wells and the proposed withdrawal rates; (v) the applicant conducted draw-down tests on the site; and (vi) the water quality from the tests are consistent with regional data. (Transcript Volume VI, pages 108-09, 127 and 132-34). Thus, there is ample evidence at hearing to support a conclusion that analyses were conducted and reasonable assurances have been provided

For all of the reasons set forth above, Petitioners' exception number 6 is rejected.

Petitioners Exception No. 7

Petitioners take exception to recommended conclusion of law number 13, in which the ALJ concludes that the public interest test contained in paragraph 40C-2.301 (2)(c), F.A.C., is met because Hines is proposing to use the lowest quality sources of water available while avoiding adverse impacts to existing legal users and the water resources. Again, Petitioners argue that the requirements that the consumptive use utilize the lowest quality water source and not interfere with existing legal users are separate tests, which presumably Petitioners believe cannot be considered in making a public interest determination. Further, Petitioners contend that the conclusion that the public interest test is met does not have the supporting corresponding factual specificity required by section 120.569(2)(m), Fla. Stat.

Nothing in chapter 373, Fla. Stat., or the District's rules prohibits a consideration of the lowest quality source of water or potential effects on existing legal users as part of the public interest analysis. Petitioners appear to be arguing that the ALJ cannot rely on the same finding of fact to support more than one conclusion of law. We disagree. We believe the ALJ reasonably interpreted the criteria in 40C-2.301 (2)(c), F.A.C., as including a consideration of the quality of the source of water used and potential impacts to existing legal users. While clearly there are other possible considerations that could factor into a public interest determination, the quality of the water source and the impact on existing legal users certainly are factors that should be considered in this analysis. The mere

fact that other parts of the District's rules also address these matters does not mean that an ALJ or this Board is prohibited from considering these matters in making its public interest determination under rule 40C-2.301 (2)(c), F.A.C.

As to Petitioners' argument regarding the factual support for the ALJ's conclusions of law that the public interest test is met, we have addressed that issue in our rulings on Petitioners' exceptions 1 and 2, above. Thus, for all of the reasons described above, Petitioners' exception number 7 is rejected.

Petitioners Exception No. 8

Petitioners take exception to recommended conclusion of law number 14, in which the ALJ concludes that "In addition, none of the six specific reasons for denial listed in Subsection 40C-2.301 (5), [F.A.C.], must be applicable to the applicant." Apparently Petitioners read this sentence as meaning that the ALJ "exempted" Hines from this section of the rule. We believe that Petitioners have misinterpreted the ALJ's statement. A careful reading of the ALJ's Order on Remand indicates that this sentence merely introduces his treatment of rule 40C-2.301(5), F.A.C., in the balance of conclusion of law number 14 and conclusions of law numbers 15 through 18. In each of these conclusions, the ALJ explains how the facts of this case do not invoke the reasons for denial in this rule. In other words, contrary to the Petitioners' assertion, the ALJ is not "exempting" Hines from the reasons for denial in the rule. Instead, the ALJ is saying that for the permit to be issued, none of these six reasons for denial must be invoked. The ALJ then explains why they are not invoked under the facts of this case. Thus, this portion of Petitioners' exception number 8 is rejected.

Further in this exception, Petitioners also express concern with the ALJ's statement that subparagraphs 40C-2.301 (5)(a)1 and 40C-2.301 (2), F.A.C., do not apply. We agree with Petitioners with regard to 40C-2.301 (2), F.A.C.. We have already addressed this issue in our ruling granting the District's exception number 2. As to 40C-2.301 (5)(a)1, however, Petitioners are mistaken. In his conclusion of law number 14, the ALJ analyzed rule 40C-2.301 (5)(a)1, F.A.C. and found that based on the specific facts of this case, it does not apply -- i.e., the proposed use of water will not significantly induce saline water encroachment in this case. Thus, Petitioners' exception 8 is accepted in part and rejected in part.

Petitioners Exception No. 9

Petitioners take exception to recommended conclusion of law number 15, in which the ALJ concludes that subparagraph 40C-2.301

(5)(a)2 and subsection 40C-2.301 (2), F.A.C., do not apply. Petitioners contend that these sections do apply and that because Hines failed to conduct an analysis of surface or groundwater flow, there was no factual basis for any conclusion that surface water levels will not be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased or otherwise controlled by the applicant. Petitioners make factual arguments, citing to various expert witness testimony from the transcript, that they believe are contrary to the ALJ's conclusion.

First, we agree with Petitioners that rule 40C-2.301 (2), F.A.C., does apply in this case. We addressed this issue in our ruling on the District's exception number 2 above. As to the applicability of rule 40C-2.301 (5)(a)2, F.A.C., the ALJ did not exempt Hines from this rule. The ALJ analyzed rule 40C-2.301 (5)(a)2, F.A.C., and determined that based on the specific facts of this case, that rule Does not apply" -- i.e., the proposed use will not cause the water table or surface water level to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased or otherwise controlled by the applicant.

As to Petitioners' arguments regarding the factual underpinnings for these conclusions, we find that the ALJ did provide sufficient findings of facts to reach the conclusion that rule 40C-2.301 (5)(a)2, F.A.C., is not invoked in this case. Specifically, the ALJ's findings of fact number 81 (R.O.: 35) in the December 30, 1999 Recommended Order states that maximum drawdown from the surficial aquifer withdrawals will be approximately 0.01 feet.

The remainder of Petitioners' exception number 9 is nothing more than a rearguing of the evidence. As described more fully above in our ruling on Petitioners exception 4, we are not free to reweigh the evidence. Thus, Petitioners' exception number 9 is accepted in part and rejected in part.

Petitioners Exception No. 10

Petitioners take exception to recommended conclusion of law number 16, in which the ALJ concludes that subparagraph 40C-2.301 (5)(a)3 and subsection 40C-2.301 (2), F.A.C., do not apply. Again, we agree with Petitioners that 40C-2.301 (2), F.A.C., is applicable. We addressed this issue in our ruling on District exception number 2. As to the applicability of rule 40C-2.301 (5)(a)3, F.A.C., the ALJ did not exempt Hines from this rule. The ALJ analyzed rule 40C-2.301 (5)(a)3, F.A.C., and determined that based on the specific facts of this case, that rule does not apply -- i.e., the proposed use will not cause the water table or

aquifer potentiometric surface level to be lowered so that significant and adverse impacts will affect existing legal users.

In the remainder of this exception, Petitioners once again reargue the weight of the evidence. We are not free to reweigh the evidence in this Final Order. In addition, Petitioners assert that the applicant has not provided reasonable assurance that the proposed consumptive use will not interfere with existing legal uses because a "full-blown pump test" will not be performed until after the permit is issued and the proposed well is constructed. The applicant must provide "reasonable assurance" that the applicable requirements of sections 40C-2.301, Fla. Admin. Code, have been met. This standard has been deemed not to require an absolute guarantee that a violation of a rule is a scientific impossibility, only that its non-occurrence is reasonably assured by accounting for foreseeable contingencies. Manasota 88 v. Agrico, 12 FALR 1319, 1325 (DER 1990) aff'd 576 So.2d 781 (Fla. 2d DCA 1991). See also, Adams v. Resort Village Utility, 18 FALR 1682, 1701 (DEP 1996). (applicant required to show a substantial likelihood that the project will be successfully implemented in accordance with the rules, but not to provide an absolute guarantee that the project will comply with all the rules). The ALJ determined that the groundwater modeling provided sufficient reasonable assurances. See R.O.: 33, Finding of Fact 79 and Order on Remand: 6, Conclusion of Law 16. For these reasons, Petitioners' exception no. 10 is accepted in part and rejected in part.

Petitioners Exception No. 11

Petitioners take exception to recommended conclusion of law number 17, in which the ALJ concludes that subsection 40C-2.301 (2), F.A.C., does not apply. We agree with Petitioners. We have already addressed this issue in our ruling on the District's exception 2. Thus, Petitioners' exception 11 is accepted.

Petitioners Exception No. 12

Petitioners take exception to the ALJ's recommended conclusion of law number 19. Conclusion of law number 19 contains the ALJ's ultimate conclusion that the proposed water use complies with the District's criteria for permit issuance. Petitioners do not provide any specific reasons for this exception. Petitioners merely state that the exception is "as addressed more specifically above." Without a more specific statement for the basis of these two exceptions, it is difficult to address these exceptions in detail. We find that the ALJ made sufficient findings of fact and conclusions of law to support this ultimate conclusion. Petitioners' arguments "addressed more specifically above" exception number 12 have been addressed above

in this Final Order. Thus, Petitioners' exception number 12 is rejected.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

The portions of the Recommended Order dated December 30, 1999, attached hereto, relating to the CUP application as well as the Order on Remand dated April 26, 2000 are adopted in their entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the rulings on Petitioners' Exceptions 8, 9, 10 and 11 and District's Exceptions 1, 2, and 3. Hines' application number 50827 for an individual consumptive use permit is hereby granted under the terms and conditions contained in the District's proposed agency action as set forth in the Technical Staff Report dated October 19, 1999, attached hereto, with the addition of the following condition:

> 1) The Permittee must submit a proposal to periodically monitor the water quality of the proposed surficial wells for indications that the chemicals being applied on the golf course are leaching into the surficial aquifer. At a minimum, this plan must include monitoring frequency, parameters, and duration, well locations and method of reporting data. The draft plan must be submitted to the District in conjunction with the Integrated Pest Management Plan required to be submitted under ERP no. 4-109-0216. After receiving written approval from the District staff of a surficial water quality monitoring plan, the permittee must implement the approved plan.

DONE AND ORDERED this 14th day of June, 2000, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY:_____
WILLIAM W. KERR CHAIRMAN

RENDERED this 15th day of June, 2000.

BY:_____
SANDRA BERTRAM
DISTRICT CLERK

Copies to:

Deborah J. Andrews, Esquire
11 N. Roscoe Blvd.
Ponte Vedra Beach, FL 32082

Peter Belmont, Esquire
102 Fareham Place, North
St. Petersburg, Florida 33701

Marsha P. Tjoflat, Esquire
Lynne Matson, Esquire
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1301 Riverplace Blvd.
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Tom Jenks, Esquire
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& Reisch
200 W. Forsyth Street
Suite 1400
Jacksonville, FL 32202

Veronika Thiebach, Esquire
Jennifer Springfield, Esquire
St. Johns River Water Management
District
P. O. Box 1429
Palatka, FL 32178-1429

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Protection and any person named in the order within 20 days of adoption of a rule or the rendering of the District order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

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

Deborah J. Andrews, Esquire
11 North Roscoe Blvd
Ponte Vedra Beach, FL 32082

At 4:00 P.M. this 15th day of June, 2000.

CERTIFIED MAIL # Z 229 564 559

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of rendering of the final District action.

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CERTIFICATE OF SERVICE

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

Peter Belmont, Esquire
102 Fareham Place North
St Petersburg, FL 33701

At 4:00 P.M. this 15th day of June, 2000.

CERTIFIED MAIL # Z 229 564 562

SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

NOTICE OF RIGHTS

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5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

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

Marsha P. Tjoflat, Esquire
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207

At 4:00 P.M. this 15th day of June, 2000.

CERTIFIED MAIL # Z 229 564 560

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429

NOTICE OF RIGHTS

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2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App. 9.110 within 30 days of the rendering of the final District action.

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5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 or #2

or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

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

John G. Metcalf, Esquire
Pappas, Metcalf, Jenks, Miller & Reisch
200 W. Forsyth Street
Suite 1400
Jacksonville, FL 32202

At 4:00 P.M. this 15th day of June, 2000.

CERTIFIED MAIL # Z 229 564 561

_____
SANDRA L. BERTRAM
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178-1429