STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE SIERRA CLUB,

Petitioner,
and

BOBBY C. BILLIE and SHANNON LARSEN

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

Intervenors,

vs.

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

Respondents.
_____/

BOBBY C. BILLIE and SHANNON LARSEN,

Petitioners,

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

vs.

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

Respondents.
_____/

THE SIERRA CLUB,

Petitioner,

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

vs.

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

Respondents.
_____/

FINAL ORDER AND ORDER OF REMAND

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". Petitioners, The Sierra Club, Bobby C. Billie and Shannon Larsen ("Petitioners"), timely filed joint exceptions to the Recommended Order and Respondents, St. Johns River Water Management District ("District") and Hines Interests Limited Partnership ("Hines"), each timely filed exceptions to the Recommended Order. All parties timely filed responses to exceptions. This matter then came before the Governing Board on February 8, 2000 for final agency action.

B. STATEMENT OF THE ISSUES

This case involves two issues. The first issue in this case is whether Hines Interests Limited Partnership's application for an individual environmental resource permit ("ERP") for a surface water management system should be approved pursuant to Chapter 373, Florida Statutes, and Chapters 40C-4 and 40C-42, Florida Administrative Code. The second issue is 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.

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, SL Pra. "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 Rergulation, 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. 15t 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 is 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. Dent. Human Res. Servs, 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 33 exceptions to the ALJ's findings of fact and conclusions of law. Hines and the District each filed seven exceptions to the ALJ's findings of fact and conclusions of law. The parties' exceptions to the Recommended Order have been reviewed and are addressed below. Exceptions to the portions of the Recommended Order related to the ERP application and the CUP application will be addressed in separate sections.

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 Administrative LAW Judge 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 Recommended Order will be designated by "R.O." followed by the page number (e.g. R.O.: 28).

THE ENVIRONMENTAL RESOURCE PERMIT APPLICATION RULINGS ON PETITIONERS' EXCEPTIONS Petitioners' Exception 1

Petitioners take exception to recommended finding of fact number 25, in which the ALJ found that modifications to impacts on wetland F-69 are not considered practicable because environmental benefits to be achieved would be small in comparison to the cost of modifying the project and because the modification of F-69 would result in significant changes to the type or function of the proposed Project. Petitioners contend that the ultimate conclusion that modifications to the proposed project regarding wetlands F-69 are not practicable is a conclusion of law and not a finding of fact. Petitioners also contend that there is no competent substantial evidence supporting the ALJ's recommended finding that the environmental benefits to be achieved by reducing impacts to wetland F-69 would be small in comparison to the cost of the modification. Petitioners go on in this exception to cite to a number of portions of the record, which Petitioners believe support a finding that slight modifications in the design of the pond at its existing location could result in the reduction and elimination of impacts to wetland F-69 and that such design changes would not result in significant changes to the type or function of the proposed project.

As to Petitioners' contention that this finding is a conclusion of law, we note that whether a particular design modification is practicable is a mixed question of fact and law, which ultimately must be decided by the agency on a case-by-case basis. VQH Dev., Inc. v. Dep't of Envtl. Regulation, 15 F.A.L.R. 3426 (Dept. of Envtl. Regulation, 1993), aff'd 642 So. 2d 755 (Fla. 2d DCA 1994). The determination of whether a design modification is practicable is infused with policy considerations.

As to Petitioners' contention that there is no competent substantial evidence to support the ALJ's finding that the environmental benefits to be achieved by reducing impacts to wetland F-69 would be small compared to the cost of the modification, this exception is rejected. As explained above, an

agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). Hines provided competent substantial evidence to support the factual underpinnings for the ALJ's conclusion that there were no practicable design alternatives to eliminate or reduce impact area F-69. (Hines Ex. 22: 5; Elledge Vol. VII: 68-70; District Ex.1: 5). We find that the ALJ's application of the law to the facts was reasonable and proper and comports with this Board's policy view on reduction and elimination of wetland impacts. District Rule 12.2.1.1, MSSW-A.H., provides that if a proposed system will result in adverse impacts to wetland functions and other surface water functions, then the District in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts. "Modification" does not include the alternative of not implementing the system in some form or of requiring a project that is significantly different in type or function. Section 12.2.1.1, MSSW-A.H. Moreover, a proposed modification which is not technically capable of being done, is not economically viable, or which affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." In determining whether a proposed modification is practicable, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves. Thus, the ultimate decision of whether a proposed modification is practicable may involve a cost/benefit balancing. In this case, there was competent substantial evidence that the location of the stormwater system was dictated by the drainage area and irrigation requirements of the golf course and that redesigning the stormwater pond system so as to reduce the impacts associated with that system could affect the type or function of the project. (O'Shea Vol. II: 15; Elledge Vol. VII: 69). This evidence provides a sufficient basis to support the ALJ's finding and for him to determine that design modifications to the stormwater system which would result in impact area F-69 were not practicable.

In addition, the record contains competent substantial evidence that redesign of the stormwater pond system to reduce or eliminate impact area F-69 was not practicable from a technical standpoint pursuant to section 12.2.1.1, MSSW-A.H., and therefore not practicable. The ALJ found that a number of wetland impacts, including F-69, "are associated with the construction of a group of core facilities close to each other including the village center, lake system, golf clubhouse, driving range and starting and finishing holes on the golf course" and that these facilities

needed to be located close to one another. (R.O.: 15-16). Further, as noted above, the ALJ found that "the location of the stormwater system was dictated by the drainage area and irrigation requirements of the golf course." These findings are supported by the record. The interconnected stormwater ponds, including pond Y-2, are designed to provide stormwater treatment for runoff from the entry road and golf course and from future phases of development, including the Village Center, as well as serve as a source of irrigation water. (Elledge Vol. VII: 68; Hines Ex. 22). Therefore, they must be located in proximity to the development they are designed to serve. (Elledge Vol. VII: 69). Hines located stormwater ponds, including pond Y-2, in the largest area of uplands on the site where they could minimize wetland impacts, especially to contiguous wetlands. (Elledge Vol. VII: 69-70). Since the stormwater pond system is a network, the parts of the system must "fit" together. (Elledge Vol. VIII: 29). Relocating a stormwater pond such as pond Y-2 away from the area it is designed to serve affects the engineering design of the conveyance system for runoff from the golf course to the ponds and from future residential development to the ponds. (Elledge Vol. VIII: 29). Thus, alternative locations for the stormwater ponds, including pond Y-2, were not practicable from a technical standpoint. (Elledge Vol. VII: 69).

As to Petitioners' citations to portions of the record which the Petitioners believe support their argument that slight modifications in the design of the pond at its existing location could result in the reduction and elimination of impacts to wetland F-69 and that such design changes would not result in significant changes to the type or function of the proposed project, this exception is rejected. In making these arguments, Petitioners are, in essence, attempting to relitigate the factual underpinnings of the ALJ's determination. Petitioners presented this argument at the hearing (T. Vol. VIII: 26-30) and the ALJ squarely rejected this position when he found that "the modification of F-69 would result in significant changes to the type or function of the proposed Project." (R.O.: 16). The record contains competent substantial evidence from which the ALJ could reasonably draw this inference. (Elledge Vol. VII: 26-30). DCA 1990)(the Administrative LAW Judge may reasonably infer from Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th the evidence a factual finding).

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. Fla. Dept. of Corrections v. Bradley, 510 So.2d at 1122 (Fla. 1st DCA 1987); West Coast Regional Water Supply Auth. v. Harris, 604 So.2d 892, cause dismissed, 613 So.2d 4 (Fla. 1992). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, section 120.57(1(1), Fla. Stat. (1999); Berry, supra; Fla. Chapter of Sierra Club, supra. Thus, for all of the reasons discussed above, Petitioners' Exception 1 is rejected.

Petitioners' Exception 2

Petitioners take exception to recommended finding of fact number 14, to the extent that it finds that impacts to wetlands arising from the entry road are acceptable without further alteration, that the damage done to the wetlands is offset by the mitigation plan and to the relevancy of the fact that Hines may have considered the location of a school in the design of the road. Petitioners contend that the school and park, which are not part of the current permit application, should not be considered in determining whether there are practicable design modifications to reduce or to eliminate wetland impacts and that even if relevant, such a consideration has little bearing on the reduction and elimination analysis. Additionally, Petitioners assert that there is no competent substantial evidence that Hines and the school board have completed negotiations over the location of a school site nor that the school board has otherwise acquired a site. Finally, Petitioners contend that a finding that the mitigation offsets the wetland impacts is a conclusion of law and not a finding of fact.

As to Petitioners' arguments regarding the finding that the impacts to wetlands arising from the entry road are acceptable without further alteration and the relevancy of the consideration of the location of the future school and park, Petitioners' exception essentially express a disagreement with the ALJ's determination that further design modifications to the entry road to reduce or eliminate its wetland impacts are not practicable. As stated above, the issue of whether a particular design modification is practicable is a mixed question of fact and law, which ultimately must be decided by the agency on a case-by-case basis. VQH Dev., Inc., supra. Under the District's rules, a proposed modification which affects public safety through the endangerment of lives or property is not considered "practicable." Competent substantial evidence exists in the record that the road was designed to allow safe travel and to avoid impacting to the extent practicable the wetlands in this area of the property. (Fullerton Vol. I: 36-40; Elledge Vol. VII: 73-75; Hines Ex. 22). The record also contains competent

substantial evidence that a certain design modification to avoid wetland impact F-20 would adversely affect public safety by creating traffic conflicts and causing the physical separation of a ten-acre athletic park and a twelve-acre elementary school which must be located adjacent to one another. (Fullerton Vol. I: 72, 74; O'Shea Vol. II: 8-9; Elledge Vol. VII: 74). Competent substantial evidence also exists in the record that the location of the school and park was fixed. (Elledge Vol. VII: 74; Fullerton Vol. I: 40; O'Shea Vol. II: 8). The ALJ accepted this evidence as demonstrated by the language of the finding to which Petitioners now object. (R.O.: 11). Thus, because competent substantial evidence exists in the record, we may not modify or reject this finding.

The consideration of the location of the future school and athletic park in the reduction and elimination analysis for the entry road is appropriate. Competent substantial evidence exists in the record that Hines completed a master planning process which will minimize impacts to the highest quality wetlands on the project site both in present and future phases. (Elledge Vol. VII: 63; Hines Ex. 22).

The remaining part of Petitioners' exception relates to the ALJ's determination that the entry road's adverse impacts to wetlands are offset by Hines' mitigation plan. The determination of whether mitigation for a proposed project is sufficient is an ultimate conclusion of law and rests with the agency. Fla. Power Corp. v. State Dept. of Environmental Regulation, 638 So.2d 545, 561 (Fla. 1st DCA 1994); Vanwaqoner v. Dept. of Transp. 18 F.A.L.R. 2277 (DEP 1996) [1996 WL 405159,16] approved 700 So.d 113 (Fla. 2d DCA 1997); 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So.2d 946, 955 (Fla. 1st DCA 1989). Thus, we agree with Petitioners' statement that a finding regarding the adequacy of mitigation is a conclusion of law (Petitioners' Exceptions at 6), but we uphold the ALJ's conclusion that the proposed mitigation will compensate for the project's adverse impacts, including those associated with the entry road.

Competent substantial evidence exists in the record to support the factual underpinnings for the ALJ's findings regarding mitigation and to support his conclusion that the mitigation will offset the project's adverse impacts to the functions of wetlands and surface waters. See, section 12.3, MSSW-A.H. All of the adverse impacts of the Marshall Creek golf course and entry road project can be offset by mitigation. (Esser Vol. V: 110). Under its mitigation plan, Hines will create 11.34 acres of wetlands; preserve 102.73 acres of the on-site wetlands and 38.06 acres of uplands, including buffers around preserved wetlands; restore 0.16 acres of on-site wetlands; and enhance

3.11 acres of on-site wetlands. (District Ex. 1: 7-9; R.O.: 26). All of the created and preserved wetlands and upland areas will be placed under a conservation easement. (Hines Ex. 2: 11; R.O.: 25). The adequacy of the mitigation plan is determined by comparing the current functions to fish and wildlife provided by the wetlands that will be impacted, with the functions to fish and wildlife that the mitigation plan will carry out. (Esser Vol. V: 1 10). The functions of a particular wetland depend on the actual vegetation in the bottom of the wetland and the wetland's hydroperiod rather than its designation as "forested" or "herbaceous." (Esser Vol. VI: 37-38). The mitigation plan is an overall plan and the sum of its parts is greater than the individual parts because of the individual parts' locality, their habitat and their proximity to each other. (Esser Vol. VI: 74). If one took the plan's individual pieces and separated them out and placed those acreages in different locations, they would not provide the same value as the proposed mitigation plan. (Esser Vol. V: 115-116; Vol. VI: 73-74; R.O.: 27).

The project will impact approximately 12 acres of wetlands. (District Ex. 1). Of these impacts, approximately 9.5 acres requires mitigation. (District Ex.1).

The impacts to isolated wetland systems are largely to ephemeral systems and their functions will be replaced primarily through the creation of ten acres of isolated wetlands and the preservation of isolated wetlands and upland buffers associated with those preserved isolated systems. (Esser Vol. V: 111; District Ex. 1).

The impacts to contiguous wetlands will be mitigated primarily through the preservation and creation of contiguous wetlands and the preservation of upland buffers around these wetlands. (Esser Vol. V: 113-114). The project site has been under active silviculture for an extensive period of time. (Esser Vol. V: 113). Preservation of large contiguous systems on the site will prevent these areas from being continuously impacted by silvicultural activities which include roadways, ditches and crossings. (Esser Vol. V: 113). The upland buffers will provide additional value to wildlife that would use the adjacent uplands. (Esser Vol. V: 114).

The proposed project's adverse impacts including adverse secondary impacts will be offset by the creation, preservation, enhancement and restoration of wetlands. (Hines Ex. 2; Esser Vol. V: 115, 116). Mitigation for adverse secondary impacts includes the enhancement of wetlands associated with a portion of the existing Shannon Road and designated as mitigation area M5. (Esser Vol. V: 116; Hines Ex. 10, Sheet 25; Hines Ex. 2: 4). By removing the road which currently has no culvert underneath it,

the hydrology of the wetland will be restored and enhance the wetland's value. (Esser Vol. V: 116; Hines Ex. 2: 4-5). The provision of culverts at crossing area F-33 will also mitigate some secondary impacts associated with use of the road. (Esser Vol. V: 116-1 17). Further, the grouping of wetland creation areas (M-23, M-24, M-25 and M-26) within Wetland LL together with upland areas (U-1 and U-10) will offset adverse secondary impacts. (Esser Vol. V: 117-118; Hines Ex. 2: 7-8; Hines Ex. 10, Sheet 26). In Mitigation Area A in the northwestern portion of the property, Hines will maintain a 25 foot connection to an isolated wetland system within Wetland A and an upland connection to Wetland C which is a portion of the Marshall Creek tributary. (Esser Vol. V: 118; Hines Ex. 10, Sheet 25; Hines Ex. 2: 1). This configuration will also compensate for some adverse secondary impacts. (Esser Vol. V: 118).

The proposed permit includes conditions requiring monitoring of the wetland creation areas for a period of five years and meeting success criteria for these areas. (Esser Vol. V: 110; District Ex. 1: 7; District Ex. 12, Special MSSW Condition 17; R.O.: 26). A permit modification will be required if the mitigation success criteria are not met. (Esser Vol. V: 1 10; District Ex. 1: 7; District Ex. 12, Special MSSW Condition 18).

Thus, we find that there is competent substantial evidence in the record to support the ALJ's conclusions regarding the sufficiency of the mitigation. We also conclude that the ALJ's interpretation of the District's mitigation rules was proper and comports with this Board's view of those rules. Although Petitioners are correct that a determination regarding the sufficiency of mitigation is a conclusion of law, Petitioners' Exception 2 is rejected for the foregoing reasons.

Petitioners' Exception 3

Petitioners take exception to recommended finding of fact number 7, in which the ALJ found that certain runoff will have a negligible effect on Stokes Creek wetlands because the water redirected by a ditch to Stokes Creek will not be contaminated. Petitioners argue that the record does not reflect that this ditch and the water flowing through it will be subject to any water quality treatment, and that therefore, this finding is not supported by competent substantial evidence. We agree with Petitioners that there is no competent substantial evidence in the record to support this portion of recommended finding of fact number 7. The water in question is being redirected from a portion of the property that is outside the project area (Johnson Vol. II: 72). Therefore, water quality treatment is not required under the District's rules. See, section 2.0(pp), MSSW-A.H. The

remaining portion of this finding is supported by competent substantial evidence and should not be disturbed. (Johnson Vol. II: 120-122). Therefore, this exception is granted and the third sentence in recommended finding of fact no. 7, is modified to read:

> This redirected runoff will have a negligible effect on the wetlands in the upstream area of Stokes Creek because the water will not be contaminated; it will be reintroduced into Stokes Creek, and the wetlands where it would have gone are primarily hydrated through rainfall and ground w ater saturation.

Petitioners' Exception 4

Petitioner takes exception to recommended finding of fact number 9 wherein the ALJ's states that the wetland areas identified as F-8A, F-33, F-35, F36 and F-112 are isolated wetlands. (R.O.: 10). The Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). For wetland area F-8A, no competent substantial evidence exists in the record to characterize the wetland as isolated. Rather, the evidence shows that this is a contiguous wetland. (Hines Ex. 13, Pruitt Vol. IV: 104, 106; O'Shea Vol. II: 6). With regard to wetland F-36, although the District agrees that this wetland is a contiguous wetland, not an isolated wetland, one witness testified at the final hearing that U[t]his centrally located wetland, of which in fact area F36 is a part, is also isolated." (Pruitt Vol. IV: 107). Therefore, there is evidence in the record from which the ALJ could reasonably infer that wetland area F-36 is an isolated wetland, and the finding as to F-36 cannot be disturbed. Berry v. Dept of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). Based on the foregoing, Petitioners' exception is granted in part and rejected in part. Please refer to the Governing Board's Ruling on District's Exception No. 1 for a discussion of the wetland areas identified as F-33, F-35 and F-112 and for the modified finding. We further note that Petitioner does not request that any conclusion of law be changed as a result of this modification.

Petitioners' Exception 5

Petitioners take exception to recommended finding of fact number 10, in which Petitioners maintain that the ALJ found that the DRI mandates the proposed location of the entry road. In fact, the ALJ found that the DRI mandates that the proposed entry

road enter the Marshall Creek site opposite the present intersection of U.S. Highway 1 and International Golf Parkway. The ALJ did not find that the DRI mandates the specific location of the entry road. In any event, we presume that Petitioners are asserting that this finding is not supported by competent substantial evidence. We find that competent substantial evidence exists in the record to support this finding. This evidence showed that one of several conditions placed upon the project by the DRI was that the project's entry road be aligned with International Golf Parkway since that is the only location that a full intersection will be allowed by the Florida Department of Transportation. (O'Shea Vol. I: 103; Elledge Vol. VII: 73). Moreover, the DRI development order states that "[a] full median opening shall be only allowed at the main entrance at the U.S. 1/ international Golf Parkway intersection." (Hines Ex. 4: 35).

As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). Because the ALJ's findings are supported by competent substantial evidence, Petitioners' Exception 5 regarding finding of fact number 10 is rejected.

Petitioners' Exception 6

Petitioners take exception to recommended finding of fact number 41, to the extent that "it does not list all wetlands that do not have adequate buffers." Petitioners contend that golf holes 7 and 16 do not have minimum 25-foot upland buffers. Petitioners request clarification that buffers be provided to golf holes 7 and 16, or in the alternative, remand of this issue back to the ALJ for specific findings regarding golf holes 7 and 16.

As to the first part of Petitioners' exception, a review of the record indicates that competent substantial evidence exists to support the portion of the finding to which Petitioners have taken exception and, therefore, this finding may not be rejected or modified. (Esser Vol. V: 87-93; Hines Ex. 10, sheet 25).

After taking exception to this finding of fact, Petitioners then assert that findings of fact nos. 39 and 83 require minimum 25 foot buffers along golf holes 7 and 16. We disagree that these findings impose such a requirement. Finding of fact number 39 relates exclusively to golf hole 6 and imposes a requirement that a minimum 25 foot buffer be maintained landward from the edge of the wetlands adjacent to golf hole 6.[1] Depending upon which of the two alternative locations approved by the ALJ the applicant selects for golf hole 6 (see our ruling on District

Exception 7b, below), the relevant wetlands adjacent to the golf hole may be Marshall Creek or the Tolomato River. Recognizing this, the ALJ made reference to both the Tolomato River and Marshall Creek.

Finding of fact number 83 states that:

> Regarding the concerns expressed by the Petitioners over spraying chemicals in close proximity to the marshes and creeks, the requirement of maintaining a minimum 25-foot buffer zone will assist in preventing chemicals used on the golf course from migrating into the marsh or creeks. (R.O.: 34-35) (Emphasis added).

This finding does not in itself impose a buffer requirement separate from, or in addition to, the buffer requirement in finding of fact no. 39. Rather, it refers to the buffer requirement that has already been established in finding of fact no. 39 which relates only to golf hole No. 6. 2/ Accordingly, this exception is rejected and Petitioners' request for clarification, or in the alternative, a remand, is denied.

Petitioners' Exception 7

Petitioners take exception to recommended finding of fact number 46, in which the ALJ found that there is nothing unique about the Project site for Florida Black Bear use. Petitioners assert that there is no competent substantial evidence in the record to support this finding. As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). A review of the record indicates that testimony was offered that "there's not something unique about the Marshall Creek site that says, you know, here's a big neon sign, 'I'm black bear habitat."' (Dennis Vol. IV: 175). Since there is competent substantial evidence in the record to support this finding, it cannot be disturbed. Berry, supra.

Although the record does reflect conflicting opinions regarding the value of the Project site to the Florida black bear, the decision to believe one expert over another is left to the Administrative Law Judge as the fact finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383 (Fla. 58, DCA 1983). These are evidentiary matters within the province of the Administrative LAW Judge. Bradley, supra. The

Governing Board is not free to reweigh the evidence, but rather we are limited to determining whether some competent substantial evidence was presented to support the Administrative LAW Judge's findings. South Florida Water Management District v. Caluwe, 459 So.2d 390 (Fla. 4th DCA 1989). Since there is competent substantial evidence supporting this portion of finding of fact number 46, we must reject Petitioners' Exception 7.

Petitioners' Exception 8

Petitioners take exception to recommended finding of fact number 54, in which the ALJ found that the plan to use upland buffers in future phases for treatment of rear lot runoff will not significantly alter the habitat or buffering functions of those wetland areas to the adjacent wetlands. Petitioners contend that the record does not contain competent substantial evidence to support his finding. A review of the record reflects, however, that there is competent substantial evidence to support this finding (District Ex. 1 at paragraph III.E.1), and therefore, the finding cannot be disturbed. Berry, supra.

Petitioners also argue that consideration of future plans for stormwater treatment for the residential sections of the development was not before the ALJ. However, the future use of the upland buffers as stormwater treatment was properly before the ALJ under the District's secondary impact analysis. See, section 12.2.7, MSSW-A.H.

Since there is competent substantial evidence to support finding of fact number 54, Petitioners' Exception 8 is rejected.

Petitioners' Exception 9

Petitioners take exception to recommended finding of fact number 59, concerning mitigation, except for the first sentence of the finding. Petitioners contend that the finding that mitigation success will be achieved in that the impacts are to lower quality wetlands on site and the mitigation incorporates all elements of the mitigation in appropriate places is not supported by the record. Petitioners also contend that the finding that the mitigation incorporates all elements of the mitigation in appropriate places is vague, confusing and ambiguous and fails to provide a logical basis for a finding of fact or conclusion of law. Additionally, Petitioners assert that the portion of this finding that provides there are no impacts to wetland functions which are not likely to be successfully recreated is not supported by the record. Finally, Petitioners argue that the finding that the mitigation plan will be successful is a conclusion of law rather than a finding of fact.

As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). As more fully discussed in our ruling on Petitioners' Exception number 2, a review of the record indicates that the ALJ's findings of fact that support his conclusions with regard to the sufficiency of the mitigation are supported by competent substantial evidence. (Dennis Vol. IV: 18788, 190; Esser Vol. V: 110-115). Thus, Petitioners' Exception 9 regarding recommended finding of fact number 59 is rejected. However, as explained in our ruling on Petitioners Exception number 2, we agree that a finding as to the sufficiency of mitigation is a conclusion of law.

Petitioners' Exception 10

Petitioners take exception to recommended finding of fact number 63, in which the ALJ found that there will be no net loss of surface water to Stokes or Marshall Creek. Petitioner bases this exception on its allegation that the Applicant failed to conduct a water quantity analysis to establish the effect of diverting surface water runoff to the golf course irrigation ponds and from the effect of converting groundwater recharge into surface water runoff going to the irrigation ponds that will occur as a result of the build out of the Marshall Creek DRI. Consequently, Petitioners conclude that there is no basis in the record to conclude that there will be no net loss of surface water to Stokes or Marshall Creek. As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). A review of the record indicates that there is competent substantial evidence in the record to support this portion of recommended finding of fact number 63. Specifically, the record contains evidence 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. (Miracle Vol. VI: 145-155).

We disagree with Petitioners' assertion that Hines was required to conduct any specific type of water quantity analysis. As a permit applicant, Hines is charged with providing reasonable assurances, not absolute guarantees. Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (Dept. Envtl. Regulation, Dec. 6, 1990). The level of evidence the applicant must provide to demonstrate reasonable assurance is case specific depending upon the nature of the issues involved. Dent. of Transp. v. J.W.C.. Co., Inc., 396 So.2d 778, 789 (Fla. 1st DCA 1981). There is no requirement in the District rules that an applicant conduct any

specific type of water budget analysis. It is up to the ALJ, as the trier of fact, to decide whether sufficient facts have been presented to support a particular finding. For edification purposes, we note that even if Petitioners were correct that there was no competent substantial evidence to support this finding, rejection of this portion of finding of fact no. 63 would not affect our conclusion that Hines is entitled to the issuance of an ERP because the District's ERP rules do not require that there be no net loss of surface water runoff to the creeks in order to obtain a permit. See, sections 40C-4.301 and 40C-4.302, Fla. Admin. Code.

Petitioners also take exception to the portion of recommended finding of fact number 63 that reads: "Groundwater flow patterns will be maintained." There is competent substantial evidence in the record to support this finding. (Johnson Vol. II: 87). Therefore, Petitioners' Exception 10 to recommended finding of fact number 63 is rejected.

Petitioners' Exception 11

Petitioners take exception to recommended finding of fact number 67, in which the ALJ found that there will be a net improvement to the total and fecal coliform levels. Petitioners assert that there is no evidence in the record that indicates that the source of the violations is from the Project site.

As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). A review of the record indicates that there is competent substantial evidence in the record to support this finding.(Miracle Vol. VI: 160-161) ("My opinion is that . . . there will be a net improvement in the receiving water body, in the total [and] [sic] fecal coliform, once this proposed system is put in place.") Petitioners also claim that this finding by the ALJ is "misleading to the extent that it suggests that a measurable net improvement will occur to Marshall Creek." (Emphasis added). However, we find that this suggestion, to the extent it is suggested by the ALJ's finding, is also supported by competent substantial evidence in the record. (Miracle Vol. VII: 2526). Since there is competent substantial evidence to support finding of fact number 67, Petitioners' Exception 11 is rejected.

Petitioners' Exception 12

Petitioners take exception to recommended finding of fact number 68, in which the ALJ found that there will be a net improvement to dissolved oxygen levels in the receiving waters. Petitioners assert that there is no evidence in the record that

indicates that the source of the violation is from the Project site. As explained above, an agency may not reject or modify an administrative law judge's finding of fact that is supported by competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). A review of the record indicates that there is competent substantial evidence in the record to support this finding. (Miracle Vol. VI: 161-165; Vol. VII: 25-26). Since there is competent substantial evidence to support finding of fact number 68, Petitioners' Exception 12 is rejected.

Petitioners' Exception 13

Petitioners take exception to recommended finding of fact number 69, in which the ALJ found that construction and operation of the System will not have a negative effect on Class II receiving waters. Petitioners contend that this is a conclusion of law rather than a finding of fact. Furthermore, Petitioners assert that there will be adverse water quantity impacts to the receiving waters. Additionally, Petitioners take exception to recommended finding number 69 to the extent that there are no upland buffers around the Marshall Creek wetlands adjacent to golf holes 7 and 16, as Petitioners allege is required by recommended finding numbers 39 and 83.

Although couched as an exception that recommended finding of fact number 69 is a conclusion of law, in essence, this exception is challenging the factual basis for the ALJ's ultimate finding. The issue of an adverse impact to water quality is a factual issue susceptible to ordinary methods of proof. Berry v. Department of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). There is competent substantial evidence in the record to support this finding/conclusion. Testimony was presented that the Project will not have a negative effect on Class II receiving waters. (Harper Vol. III: 71-72; Miracle Vol. VI: 174).

Petitioners contend that "there are no upland buffers around the Marshall Creek wetlands adjacent to golf holes 7 and 16. . .", we have previously addressed the issue of whether recommended findings of fact numbers 39 and 83 require buffers at golf holes 7 and 16 in our ruling on Petitioners' Exception number 6.

As to Petitioners' contention that "there will be adverse water quantity impacts to the receiving waters." (Emphasis added). Whether there will be adverse water quantity impacts is irrelevant to this finding because the ALJ's recommended finding of fact number 69 specifically addresses water quality, not water quantity. This finding is contained in a section entitled "Water Quality" and uses language from Rule 12.2.5, MSSW-A.H. This rule is a water quality criterion. This is obvious from the title of

the section: "Class II Waters; Waters approved for shellfish harvesting," as well from a reading of the text which refers to "Class 11 waters" and "standards" throughout this section of the Applicant's Handbook. These references are to the Florida Department of Environmental Protection's surface waters classification system and surface water quality standards established by rule in chapter 62-302, Fla. Admin. Code.

For all of the above-stated reasons, Petitioners' Exception 13 to recommended finding of fact no. 69 is rejected.

Petitioners' Exception 14

Petitioners take exception to recommended finding of fact number 70, in which the ALJ found that construction and operation of the System will not have an adverse impact on the water quality of the immediate Project area or adjacent areas. Petitioners contend that this is a conclusion of law and not a finding of fact. Additionally, Petitioners take exception to recommended finding of fact number 70 to the extent that there are no upland buffers around Marshall Creek wetlands adjacent to golf holes 7 and 16, as required by recommended finding numbers 39 and 83.

Although couched as an exception that finding of fact number 70 is a conclusion of law, in essence, this exception is challenging the factual basis for the ALJ's ultimate finding. The issue of an adverse impact to water quality is a factual issue susceptible to ordinary methods of proof. Berrv, supra. A review of the record indicates that there is competent substantial evidence to support this finding. (Harper Vol. III: 72-73; Miracle Vol. VI: 173-174). Consequently, for this reason and for the reasons set forth above in our ruling on Petitioners' Exception number 13, this exception is rejected. Petitioners' Exception 15 Petitioners take exception to recommended finding of fact number 86, in which the ALJ found that over 1,000 test holes were dug on the property. Petitioners apparently object to the finding based upon purported contradictions between testimony evidence and documentary evidence. The fact that the record may contain evidence contrary to the ALJ's finding is not sufficient basis to overturn a finding of fact that is otherwise supported by a competent substantial evidence. Florida Sugar Cane League, 580 So.2d at 851. Recommended finding of fact number 86 is supported by the testimony of Hines' expert archeologist Stokes who testified:

> "We dug over 1,000 holes on this property and we had probably 100 or 120 that had artifacts in them."

(Stokes Vol. IV: 70). Therefore, the finding is support by competent substantial record evidence.

Second, Petitioners have mischaracterized the finding in their exception. They state "while the applicant's archaeologist misleadingly stated at hearing that about 100-120 artifacts were found, her report lists 382 artifacts." In fact, Dr. Stokes testified that out of 1,000 test holes, artifacts were found in 100 or 120 of the test holes. (Stokes Vol. IV: 70). Dr. Stokes did not testify to, nor did the ALJ find, that only 100 to 120 artifacts were found.

Since there is competent substantial evidence to support finding of fact number 86, Petitioners' Exception 15 is rejected.

Petitioners' Exception 16

Petitioners take exception to recommended finding of fact number 102, in which the ALJ found that the surface water management system will retain the pollutants generated on site. Petitioners cite to portions of the record that they assert contradict this finding. Specifically, Petitioners cite to the testimony of an expert witness which provided that pollutant removal will not be 100%, (Harper Vol. III: 68). 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). The record contains competent substantial evidence that the stormwater management system is an excellent oversized system that "retains virtually all of the pollutants generated on site." (Harper Vol. III: 74). Therefore, we must reject Petitioner's Exception 16.

Petitioners' Exception 17

Petitioners take exception to recommended conclusion of law number 113, in which the ALJ concludes that with the modifications recommended by the ALJ, the applicant has provided reasonable assurance of having implemented all practicable design modifications to reduce or eliminate adverse impacts to wetland functions and other surface water functions. Petitioners note that the burden is upon Hines to show that a modification is not

practicable. Additionally, Petitioners assert that this recommended conclusion is not supported by recommended findings as it relates to impacts associated with the entry road. Specifically, Petitioners contend that the ALJ has not recommended finding that undertaking modifications in the proposed design of the entry road would adversely affect public safety, not be technically capable of being undertaken nor be economically viable. Thus, Petitioners seek a remand for further findings on this matter.

Petitioners are correct regarding Hines' burden. However, the ALJ concluded that Hines carried its burden and recommended additional conditions to assure compliance. An ALJ's authority to propose such conditions is well recognized. See, Hopwood v. Department of Environmental Regulation, 402 So.2d 1296 (Fla. 2d DCA 1981); also, Manatee County v. Department of Environmental Regulation, 429 So.2d 360 (Fla. 1st DCA 1981). Finally, Petitioners' attempt to relitigate this issue by referring to those sections of their Proposed Recommended Order which argue that wetland impacts associated with golf hole No. 4, Pond Y-2, and the entry road have not been sufficiently reduced or eliminated is rejected.

As previously discussed in our rulings on Petitioners' Exceptions 1 and 2, the ALJ's conclusion of law, including as it relates to the entry road, is supported in its entirety by findings of fact that are based on competent substantial evidence. The ALJ's findings in findings of fact nos. 10, 11, and 14 state the requirements and considerations necessary to construct a safe road. (R.O.: 10-11). These requirements and considerations include the radius of the roadway curves, roadway design speed, sight distance along the road, and adequate traffic stacking. After having considered all the evidence, including the road modifications suggested by Petitioners, the ALJ specifically found the proposed road design to be a compromise between the necessity to design the road for safe travel and to avoid the wetlands. (R.O.: 11). Consequently, it is clear that the ALJ rejected those modifications as not practicable because they were incompatible with the necessity for the road to be designed with these safety requirements and considerations. The ALJ's findings provide a sound basis for the ALJ to conclude that Hines provided reasonable assurance that it had implemented all practicable design modifications to reduce or eliminate adverse impacts to wetland functions. Accordingly, Petitioners' Exception 17 is rejected.

Petitioners' Exception 18

Petitioners take exception to recommended conclusion of law number 108, in which the ALJ concludes that there will be no

adverse water quantity impacts to the extent that this recommended conclusion includes consideration of section 12.2.4, MSSW-A.H. Petitioners argue that this rule specifically requires the Applicant to "perform an analysis of the drawdown in water levels or diversion of water flows resulting from such activities." Petitioners posit that because there was no competent substantial evidence that an analysis of diversion of water flows or drawdown in water levels was conducted, the requirements of section 12.2.4, MSSW-A.H., have not been met. Petitioners go on to assert that the record establishes that there will be a diversion in water flows with an unknown effect on wetlands and, therefore, there is no factual basis to conclude that there will be no adverse water quantity impacts.

Petitioners expressly limit this exception to consideration of the requirements of section 12.2[.2].4[sic], A.H. It first should be noted that section 12.2.2.4, by its terms, is considered by the District in relation to Rule 40C4.301(1)(d),-Fla. Admin. Code, and 12.1.1(a), MSSW-A.H, as opposed to 40C-4.301(1)(a) and section 10.2.1, MSSW-A.H., which is the subject of conclusion of law number 108. However, conclusion of law no. 108 expressly addresses Rule 40C-4.301(1)(a), Fla. Admin. Code, and section 10.2.1, MSSW-A.H. The subject of these two related rule provisions is flooding, not the converse, which is the subject of section 12.2.2.4, MSSW-A.H. Consequently, recommended conclusion no. 108 does not include consideration of section 12.2.2.4, MSSW-A.H., and therefore, this exception is rejected.

In any event, although Petitioners essentially complain about the caliber of the analysis which was performed to meet 12.2.2.4, MSSW-A.H., the reasonable assurance standard does not require the Applicant to perform every known test concerning an issue in order to establish entitlement to a permit. Booker Creek Preservation. Inc. v. Mobil Chemical Co., 481 So.2d 10,13 (Fla. 1st DCA 1986). Rather, reasonable assurance means a "substantial likelihood" that the project will be successfully implemented. Metropolitan Dade Co. v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3rd DCA 1992). As the Applicant in this proceeding, Hines has the ultimate burden of persuasion. Florida Dep't of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 787-790 (Fla. 1st DCA 1981). Hines also had the initial burden of presenting prima facie evidence demonstrating that it has complied with all applicable District standards. Petitioners then must present "contrary evidence of equivalent quality" proving the truth of allegations in their petitions. In this case, as explained in the ruling on Petitioners' exception number 19 below, competent substantial evidence to demonstrate compliance with 12.2.2.4, MSSW-A.H. was presented via expert witnesses who explained their analyses. Petitioners speculate about the potential problems and question why an analysis of the

type they would be happy with was not performed, but presented insufficient evidence at hearing to prove their speculation.

Petitioners' Exception 19

Petitioners take exception to recommended conclusion of law number 114, in which the ALJ concludes that there will be no adverse water quantity impacts to wetlands. The basis for this exception is Petitioners' allegation the Applicant failed to conduct a water quantity analysis to establish the effect of diverting surface water runoff to the golf course irrigation ponds and from the effect of converting groundwater recharge into surface water runoff going to the irrigation ponds that will occur as a result of the build out of the Marshall Creek DRI.

> Section 12.2.2.4, MSSW-A.H., provides, in pertinent part:
>
> Pursuant to paragraph 12.1 .1 (a), an applicant must provide reasonable assurance that the regulated activity will not change the hydroperiod of a wetland or other surface water, so as to adversely affect wetland functions or other surface water functions as follows:
>
> (a) Whenever portions of a system, such as constructed basins, stormwater ponds, canals, and ditches, could have the effect of reducing the depth, duration or frequency of inundation or saturation in a wetland or other surface water, the applicant must perform an analysis of the drawdown in water levels or the diversion of water flows resulting from such activities and provide reasonable assurance that these drawdowns or diversions will not adversely impact the functions that wetlands and other surface waters provide to fish and wildlife listed species. (Emphasis added).

The Petitioners assert that the "analysis" required by paragraph 1 2.2.2.4(a) was not performed. Petitioners assume that the required analysis must be a quantitative analysis. Petitioners argue that, based on the record, since a number was not calculated for every component of the Applicant's and the District's analysis of drawdown and diversion effects, e.g., evapotranspiration, the required analysis was not performed; hence they allege there is no competent substantial evidence in the record to support this recommended conclusion by the ALJ.

Section 12.2.2.4(a), MSSW-A H., does not require a quantitative versus a qualitative type of analysis to be performed. Either type of analysis or a combination type of analysis may be sufficient to meet the rule depending on the results of this analysis in a particular case. In this case, the record is replete with competent substantial evidence that the required analysis was performed. (Frye Vol. V: 22-29; Miracle Vol. VI: 142-158). In fact, both a qualitative (Frye Vol. V: 22-29) and a quantitative (Miracle Vol. V: 142-158) analysis was performed. Based on these analyses, the District's Chief Engineer determined that reasonable assurance had been provided that the projected drawdowns and diversions in water levels and flows would not result in adverse impacts under the rule. (Miracle Vol. VII: 31-32, 39-43, 46-47). In order to provide additional assurance regarding the wetland adjacent to pond L, a monitoring condition was recommended pursuant to paragraph 12.2.2.4(c), MSSW-A.H. (Frye Vol. V: 25-26; District Ex. 1).

The Petitioners incorporate pages 55-58 of their Proposed Recommended Order as further support of this exception. In these pages, Petitioners discuss two opinions from the district courts of appeal and a final order of the District, all of which support the proposition that it is the permit applicant's burden to provide the requisite reasonable assurances before the permit is granted. Booker Creek Preservation, Inc v. Mobil Chemical Co.. 481 So.2d 10, 13-14 (Fla. 1st DCA 1985); Metropolitan Dade County. Coscan Florida, Inc., 609 So.2d 644, 648649 (Fla. 3rd DCA 1992); Osceola County v. St. Johns River Water Mgmt. Dist., ER FALR '92: 109. We do not disagree with this proposition, and we find that in this case, prior to the permit being issued through this Final Order, Hines has provided reasonable assurance at hearing that the requirements of section 12.2.2.4, MSSW-A.H., are met. The reasonable assurance standard does not require the Applicant to perform every known test concerning an issue in order to establish entitlement to a permit. Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So.2d 10,13 (Fla. 1st DCA 1986). Rather, reasonable assurance means a "substantial likelihood" that the project will be successfully implemented. Metropolitan Dade Co. v. Coscan Florida, Inc., 609 So.2d 644, 648 (Fla. 3rd DCA 1992). Petitioners additionally argue on page 58 of their PRO that since a water level monitoring program for wetlands on the project site (excepting the pond L wetland) is not being required, the provisions of paragraph 12.2.2.4(c), MSSW-A.H., have not been met. Paragraph 12.2.2.4(c) provides:

> Whenever portions of a system could have the effect of altering water levels in wetlands or other surface waters, applicants shall be required to monitor the wetland or other surface waters to demonstrate that such

> alteration has not resulted in adverse impacts; or calibrate the system to prevent adverse impacts. Monitoring parameters, methods, schedules, and reporting requirements shall be specified in permit conditions.

We find that based upon the reasonable assurance provided under paragraph 12.2.2.4(a), as discussed herein, there are no other portions of the system that could alter water levels, and consequently, no additional monitoring is required under paragraph 12.2.2.4(c), MSSW-A.H., in this instance. This conclusion is supported by competent substantial evidence. (Frye Vol. V: 25-26; District Ex. 1). Therefore, this is not a basis for modifying or rejecting recommended conclusion of law number 114.

For the reasons set forth above, Petitioners' Exception 19 to the ALJ's recommended conclusion of law number 114 is rejected.

Petitioners' Exception 20

Petitioners take exception to recommended conclusion of law number 118, in which the ALJ concludes that the proposed mitigation will offset the impacts to the values and functions served by the wetlands which will be impacted. Specifically, Petitioners contend that section 12.3.1.1, MSSW-A.H., has not been met since the mitigation does not create wetlands "similar to those being impacted." Additionally, Petitioners contend that there will be a net loss in wetland or other surface water functions, which is prohibited by Rule 12.1, MSSW-A.H.

Petitioners' exception objects only to the ALJ's determination that the mitigation is sufficient and therefore, they contend the permit should be denied. As set forth in detail in our ruling on Petitioners' exception no. 2, competent substantial evidence exists in the record to support the ALJ's findings of fact regarding the sufficiency of the mitigation. Based on his factual findings, the ALJ reasonably concluded that the mitigation will offset the project's adverse impacts to the functions of wetlands and surface waters. We find that the ALJ properly applied the District's mitigation rule requirements and properly concluded that the proposed mitigation is sufficient. Further, for edification, we note that section 12.3.1.1, MSSW-A.H., does not create an absolute requirement as Petitioners appear to contend, for the creation of wetlands "similar to those being impacted." Rather, it provides guidance about how mitigation "in general" is "best accomplished;" the ultimate requirement regarding mitigation is "only to off-set the adverse

impacts to the functions identified in sections 12.2-12.2.8 caused by regulated activities." Section 12.3, MSSW-A.H. This determination is made on a case-by-case basis. In this case, we concur with the ALJ that the mitigation plan off-sets the project's adverse impacts.

Petitioners' argument regarding cumulative impacts is addressed in our ruling on Petitioners' exception no. 28, below.

Petitioners' Exception 21

Petitioners take exception to recommended conclusion of law number 119, in which the ALJ concludes that there will be no significant impact to surface or groundwater flow. The Petitioners base this exception on their allegation that the Applicant failed to conduct an analysis of surface or groundwater flow.

As explained previously, the reasonable assurance standard does not require the Applicant to perform every known test concerning an issue in order to establish entitlement to a permit. Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So.2d 10,13 (Fla. 15t DCA 1986). Rather, reasonable assurance means a "substantial likelihood" that the project will be successfully implemented. Metropolitan Dade Co. v. Coscan Florida. Inc., 609 So.2d 644, 648 (Fla. 3rd DCA 1992).

We find that there is competent substantial evidence in the record to support the ALJ's conclusion that there will be no significant impact to surface or groundwater flow and we concur in the ALJ's conclusion. The ALJ made extensive findings that wetland values and functions will not be adversely impacted by water quantity impacts. The ALJ found: (1) there will be no net loss of surface water to Stokes Creek or Marshall Creek; (2) adverse groundwater drawdown has been prevented through a system of cut-off walls; (3) groundwater flow patterns will be maintained; (4) impacts to groundwater recharge will be insignificant; and (5) monitoring of hydrology in some wetlands is required (R.O.: 28). These findings are supported by competent substantial evidence in the record. (Johnson Vol. II: 86-87; Frye Vol. V: 22-27, 41-42: Miracle Vol. VI: 142-154; District Ex. 1: 2-3; Hines Ex. 10: sheets 23-26; Hines Ex. 9: sheets 3-11). Further, evidence exists that further modeling of impacts to water quantity was not necessary. (Miracle Vol. VII: 31-32). Thus, Petitioners' Exception number 21 is rejected.

Petitioners' Exception 22

Petitioners take exception to recommended conclusion of law number 120, in which the ALJ concludes that the wetlands will

continue to function as under pre-development conditions. The basis for this exception apparently is that Petitioners believe that the mitigation plan will not offset wetland impacts and that wetlands, both individually and cumulatively, will not continue to function as under pre-development conditions. The Recommended Order cites to section 12.2.3.4, MSSW-A.H., which describes how this public interest factor is to be reviewed. This section requires consideration of the "adverse effects or improvements to existing recreational uses of a wetland or other surface water" from the parts of the project located in, on, or over wetlands. Competent substantial evidence exists in the record that to the extent that any recreational values exist on-site, they will be maintained. (Esser Vol. V: 121-122). Thus, we agree with the ALJ's conclusion that the functions the wetlands provide for recreational uses under pre-development conditions will be maintained after the project is completed. Additionally, Petitioners' contention that the record does not support the ALJ's conclusions regarding the sufficiency of the mitigation plan to offset impacts is dealt with in the ruling on Petitioners' Exception number 2. Accordingly, Petitioners' Exception 22 is rejected.

Petitioners' Exception 23

Petitioners take exception to conclusion of law number 122 wherein the ALJ concludes that the historical and archaeological resources factor of the public interest test is generally neutral. (R.O.: 49). Petitioners contend that no basis exists to support this conclusion because Hines did not survey for such resources within wetlands.

Section 12.2.3.6, MSSW-A.H., provides that "the District will evaluate whether the regulated activity in, on, or over wetlands will impact significant historical or archeological resources" and requires an applicant to "map the location and characterize the significance of any known historical or archeological resources that may be affected by the regulated activity located in, on or over wetlands or other surface waters." In addition, the District is to provide copies of permit applications to the Division of Historical Resources of the Department of State to "solicit their comments regarding whether the regulated activity may adversely affect significant historical and archeological resources." If such resources are reasonably expected to be impacted by the regulated activity, a permit applicant must perform "an archeological survey" and implement a plan to protect any significant historical or archeological resources.

The source of Petitioners' contention is the fact that Hines' expert did not conduct shovel tests within wetlands. The

unrebutted testimony of Hines' expert was that conducting shovel tests in wetlands was not physically possible because of the inability to put the wetland material through the surveying screen. (Stokes Vol. IV: 67). Contrary to Petitioners' assertion, Dr. Stokes testified that the area "adjacent to wetlands" was a high probability area for archeological sites and that extensive shovel tests were conducted all around the wetlands. (Stokes Vol. IV: 67). Section 12.2.3.6 does not specifically require wetland shovel tests. Competent substantial evidence was presented that Hines performed an extensive archeological survey consistent with the State's Division of Historic Resources guidelines (Stokes Vol. IV: 13-29 and Hines Ex. 5), and the ALJ made extensive findings about the survey's results. (R.O.: 35-38). The level of evidence an applicant must provide is one of reasonable assurances, not absolute guarantees. Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972, 4987 (Dept. of Envtl. Regulation, December 6,1990). Accordingly, Petitioners' Exception 23 is rejected.

Petitioners' Exception No. 24

Petitioner takes exception to conclusion of law number 124 wherein the ALJ finds that "[n]o significant or [sic] historic or archeological resources were found in, on, or over wetlands or surface waters within the Project area." (R.O.: 50) (Emphasis added). The ALJ further found that "[o]ne significant site (Old Kings Road) was found in an upland area of the Project." (R.O.: 50) (Emphasis added). Contrary to Petitioners' assertions, these statements are not inconsistent. Competent substantial evidence was presented that the Old Kings Road site as well as other identified sites are located in uplands. (Hines Ex. 41). The ALJ's finding only referenced wetlands. Accordingly, Petitioners' exception is rejected.

Petitioners' Exception 25

Petitioners take exception to recommended conclusion of law number 126, in which the ALJ concludes that all factors in the public interest test are neutral. Petitioners do not provide any specific support for this assertion. Petitioners merely state "[f]or the reasons more specifically described herein * * *." Without a more specific explanation of the basis of this very broad exception, it is difficult to provide a detailed ruling. Nevertheless, based on our review of the entire record and based on our consideration of all of Petitioners' exceptions, along with the bases provided in support thereof, we find that the ALJ properly applied the public interest test and properly concluded that all components of the public interest test are neutral. This issue is more fully discussed in our ruling on Petitioners'

Exception 32, below. Accordingly, Petitioners' Exception 25 is rejected.

Petitioners' Exception 26

Petitioners take exception to the first sentence of recommended conclusion of law number 139, wherein the ALJ concludes that "[t]he Division of Historical Resources has determined that the upland and wetland portion of the project will not adversely affect historic or archaeological resources." Petitioners contend that this statement is actually a finding of fact, not a conclusion of law, and that said finding of fact is not supported by competent substantial evidence. In addition, Petitioners argue that (1) "there is no evidence to support the conclusion that the Division of Historic Resources was interpreting the term 'adversely impact' in the same fashion as the District interprets the term 'adversely affect' in section 373.414(1)(a) 6, Fla. Stat.;" (2) this statement does not support a finding of fact; and (3) this statement "is not relevant and does not provide a basis for a conclusion of law."

The first sentence of conclusion of law number 139 is a finding of fact in that it reiterates the ALJ's finding of fact in paragraph 94. Petitioners took no exception to the finding in paragraph number 94. The Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). This finding is supported by competent substantial evidence in the form of testimony by an expert archaeologist, as well as District staff, and a letter from the Division of Historical Resources, and thus, cannot be disturbed. (Stokes Vol. IV: 34-35; Esser Vol. V: 101-103; District Ex. 11). We concur with the ALJ's interpretation of this criteria.

There was testimony at the final hearing that District staff forwarded for review a copy of the notice of Hines' application to and requested comments from the Department of State, Division of Historical Resources. (Esser Vol. V: 101-103). The response letter (District Ex. 11) was the basis for District staff's opinion that the project would not impact significant historical or archeological resources under the secondary impact analysis. (Esser Vol. V: 101-103; District Ex. 11). Additionally, Hines' expert provided competent substantial evidence to support archaeological findings and this conclusion. (Stokes Vol. IV: 34-35, 4143). Petitioners further argue that this finding is not relevant. This finding is relevant under the secondary impact analysis found in paragraph 1 2.2.7(c), MSSW-A.H., which is part of the public interest balancing test.

Section 12.2.3.6 specifically states that the District will solicit the view of the Division of Historical Resources in assessing the criterion regarding historical and archaeological resources. The finding that "[t]he Division of Historical Resources has determined that the upland and wetland portion of the project will not adversely affect historic or archaeological resources" supports the ALJ's conclusion of law that reasonable assurances have been provided to meet this criterion, however, as explained above, it is not the only finding which supports the conclusion that significant historical and archaeological resources will not be adversely affected. Accordingly, Petitioners' Exception 26 is rejected.

Petitioners' Exception 27

Petitioners take exception to recommended conclusion of law number 140, in which the ALJ concludes that future impacts have been evaluated. Petitioners contend that this is a finding of fact rather than a conclusion of law. Petitioners further maintain that as a finding of fact it is meaningless unless more information is provided regarding what future impacts have been evaluated. Despite Petitioners' characterization of the ALJ's finding, a review of the ALJ's finding reveals that the ALJ found that "reasonably expected future phases and related activities have been described and evaluated."

This exception essentially challenges the evidentiary support for the ALJ's findings in paragraphs 100-102. We find that these findings are supported by competent substantial evidence in the record. (Elledge Vol. VII: 83-87; Dennis Vol. IV: 204-205; Hines Ex.'s 14,16). We find no merit in Petitioners' assertion that this finding is meaningless. This finding is important under the secondary impact analysis conducted pursuant to section 12.2.7, MSSW-A.H. Section 12.2.7 requires:

* * *

> (d) An applicant shall provide reasonable assurance that the following future activities:
>
> 1. additional phases or expansion of the proposed system for which plans have been submitted to the District or other governmental agencies; and
>
> 2. on-site and off-site activities regulated under part IV, chapter 373, Fla. Stat., or activities described in section 403.813(2), Fla. Stat., that are very closely linked and

> causally related to the proposed system, will not result in water quality violations or adverse impacts to the functions of wetlands and other surface waters as described in subsection 12.2.2. As part of this review, the District will also consider the impacts of the intended or reasonably expected uses of the future activities on water quality and wetland and other surface water functions. (Emphasis added).
>
> * * *

The statement that "[r]easonably expected future phases and related activities have been described and evaluated" is supported by findings of fact 100-102 and thus Hines has satisfied the criterion of having to provide reasonable assurances that future activities will not result in water quality violations or adverse impacts to the functions of wetlands or other surface waters. Consequently, since the findings are supported by competent substantial evidence and are relevant to the proceeding, it cannot be disturbed. Berry, supra. Accordingly, Petitioners' exception number 27 is rejected.

Petitioners' Exception 28

Petitioners take exception to recommended conclusion of law number 141, in which the ALJ concludes that the wetland mitigation plan offered for the Project ensures that there will be no unacceptable cumulative impacts because: (1) the mitigation offsets the adverse impacts of the Project; (2) the mitigation is to be undertaken on the Project site; and (3) the mitigation is to be undertaken in the same drainage basin. Petitioners assert that the Applicant failed to present sufficient evidence of past, present and future regulated activities in the same drainage basin, and that therefore, there is no factual basis to conclude that there will be no unacceptable cumulative impacts.

To the extent Petitioners are arguing that the Administrative Law Judge improperly interpreted the District's cumulative impacts rule, Petitioners are incorrect. The ALJ's conclusion reflects this Governing Board's interpretation of its cumulative impacts rule and is consistent with the manner in which we routinely apply this rule. See, Sarah H. Lee v. St. Johns River Water Management District and Walden Chase Developers, Ltd., DOAH Case No. 99-2215 (rendered September 27, 1999) at 47 ("The mitigation proposed by Walden Chase will be on-site and thus within the same drainage basin as the Walden Chase Development. District staff determined that the mitigation will

off-set the project's adverse impacts. Therefore, pursuant to section 40C-4.302(1)(b), the cumulative impacts criterion is met"). Accordingly, Petitioners' Exception number 28 is rejected.

Petitioners' Exception 29

Petitioners take exception to recommended conclusion of law 142, in which the ALJ concludes that project's mitigation ratios are greater than those set forth in the handbook. Petitioners contend that the ALJ did not make any findings as to what the applicable ratios are and therefore there is no basis to conclude these unknown ratios exceed the ratio guidelines in the rules. Additionally, Petitioners take exception to the conclusion that the mitigation offsets the direct and secondary impacts associated with the Project. Petitioners argue that the Applicant has failed to provide competent substantial evidence of reasonable assurance of compliance with the mitigation requirements set forth in Rules 12.3.3.2(b), (c), (9), (i), (k), (n), (o); 12.3.3.1(b); 12.3.5; 1 2.3.7.7(a); 12.3.1.1, MSSW-A.H.

With regard to the ALJ's conclusion regarding the sufficiency of mitigation, we have previously addressed this issue in our ruling on Petitioners' Exception number 2 and have found that there is competent substantial evidence for the ALJ to conclude that the mitigation will offset the project's direct and secondary impacts. The mitigation ratios contained in the District's rules are guidelines only and the actual ratios needed to offset adverse impacts may be higher or lower based on a consideration of factors listed in sections 12.3.2.1 and 12.3.3.2, MSSW-A.H. See, section 12.3.2., MSSW-A.H. Moreover, the District is authorized to consider innovative mitigation proposals which deviate from the standard mitigation practices and to evaluate them on a case by case basis. See, section 12.3.1.8., MSSW-A.H. Therefore, a determination regarding mitigation ratios is not necessary to determine the sufficiency of mitigation. In any event, although the ALJ may not have explained in detail how he reached this conclusion, the Administrative LAW Judge may reasonably infer from the evidence a factual finding. Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990). With regard to Petitioners' contention that Hines has not provided reasonable assurance of compliance with sections 12.3.3.2(b), (c), (g), (I), (k), (n) and (o); 12.3.3.1(b); 12.3.5, 12.3.7.7(a) and 12.3.1.1., MSSW-A.H., this contention is without merit. Section 12.3.3.2 provides in pertinent part that an applicant's submittal of a mitigation plan "shall include the following information, as appropriate for the type of mitigation proposed: . . ." (Emphasis added). There is no absolute requirement that an applicant submit all of the items contained in section 12.3.3.2. These items are designed to

assist staff in making a determination that the mitigation plan complies with the District's rules. In this case, as demonstrated by the testimony of the District's expert witness Walter Esser, staff was able to make this determination based on the information submitted by Hines. (Esser Vol. V: 1 15). Section 12.3.3.1 (b) provides that an applicant "shall provide reasonable assurance that the proposed mitigation will:

> (b) achieve mitigation success by providing viable and sustainable ecological and hydrological functions.

The ALJ found that the mitigation will indeed achieve success by providing such functions (R.O.: 27) and this conclusion is supported by competent substantial evidence. (Esser Vol. V: 115).

Section 12.3.5 has been met in that Hines presented competent substantial evidence that all of the created and preserved wetlands and upland areas will be placed under a conservation easement. (Hines Ex. 2: 11).

Section 1 2.3.7.7(a) has been met because there was unrebutted competent substantial evidence that Hines provided the District with an estimate of the proposed mitigation costs and that the estimate was reasonable. (Esser Vol. V: 114; Hines Ex. 46).

Section 12.3.1.1. provides guidance as to how mitigation is best accomplished. Since Petitioners have not elaborated on what part of this section Hines allegedly has not complied with, we assume that the basis for Petitioners' exception is that they believe the mitigation is insufficient. Our reasons for concluding that the mitigation is sufficient are fully set forth in our ruling on Petitioners' Exception 2.

Accordingly, Petitioners' Exception 29 is rejected.

Petitioners' Exceptions 30 and 31

Petitioners take exception to recommended conclusions of law numbers 144 and 151, in which the ALJ concludes that the criteria set forth in section 10.2.2, MSSW-A.H., have been met. Petitioners' basis for this exception is that the ALJ provided no analysis or reasoning upon which he bases this broad conclusion. Petitioners contend that all components of section 1 0.2.2(c), MSSWA.H., regarding the District's environmental criteria have not been met. In each of these exceptions, Petitioners rely on the arguments they have made in all of their previous exceptions. Section 10.2.2, MSSW-A.H., states the sections of the Applicant's Handbook with which an applicant must comply in order to

demonstrate reasonable assurance that a project meets the requirements of 40C-4.301 (1)(d), (e), (f), (j), (k) and 40C-4.302(1)(a), (b), (c), and (d). 3/ Without a more specific statement for the basis of these two exceptions, it is difficult to address these exceptions in detail. Nevertheless, based upon a review of the entire record and based upon a consideration of all of Petitioners' exceptions, we find that the ALJ properly concluded that the criteria set forth in section 10.2.2, MSSW-A.H., have been met. For further discussion, see our ruling on Petitioners' Exception 32, below. Thus, Petitioners' Exceptions 30 and 31 are rejected.

Petitioners' Exception 32

Petitioners take exception to recommended conclusion of law number 156, in which the ALJ concludes that the conditions contained in Rules 40C-4.301 and 40C-4.302 have been met. Petitioners contend that all components of Rules 40C-4.301 and 40C-4.302 have not been met. Petitioners do not state the basis for this exception. Again, Petitioners merely refer to their previous exceptions to argue that these conditions have not been met. Without a more specific statement for the basis of these two exceptions, it is difficult to address these exceptions in detail. The exception merely reiterates, without specificity, positions rejected by the Recommended Order. See, Britt v. Dept. of Professional Regulation, 492 So.2d 697 (Fla. 15t DCA 1986), disapproved on other grounds, Dept. of Professional Regulation v. Bernal, 531 So.2d 967 (Fla. 1988) (agency need not explicitly rule on exceptions which merely reiterates positions previously asserted and addressed in the Recommended Order). Nevertheless, based upon a review of the entire record and based upon a consideration of all of Petitioners exceptions, we find that the ALJ properly concluded that the criteria set forth in 40C-4.301 and 40C-4.302, Fla. Admin. Code, have been met.

The District's requirements applicable to Hines' ERP application are found in section 40C-4.301, Fla. Admin. Code, and paragraphs 40C-302(1)(a) and (b), Fla. Admin. Code. These rules provide in relevant part as follows:

> 40C-4.301: Conditions for Issuance of Permits
>
> (1) In order to obtain a standard general, individual, or conceptual approval permit under this chapter . . . an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system: (a) Will

not cause adverse quantity impacts to receiving waters and adjacent lands;

(b) Will not cause adverse flooding to on-site or off-site property;

(c) Will not cause adverse impacts to existing surface water storage and conveyance capabilities;

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;

(e) Will not adversely affect the quality of receiving waters such that the water quality standards set forth in chapters 62-3, 62-4, 62-302, 62-520, 62-522 and 62-550, Fla. Admin. Code, including any antidegradation provisions of sections 624.242.(1)(a) and (b), 62424(2) and (3), and 62.300, Fla. Admin. Code, and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in 62-4.24(2) and (3), Fla. Admin. Code, will be violated;

(f) Will not cause secondary impacts to water resources;

(9) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established in 40C-8, Fla Admin. Code:

(h) Will not cause adverse impacts to a work of the District established pursuant to section 373.086, Fla. Stat.;

(i) Will be capable, based on generally accepted engineering and scientific principles of being performed and of functioning as proposed;

(j) Will be conducted by an entity with the financial, legal and administrative capability of ensuring that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued;

(k) Will comply with any applicable special basin or geographic area criteria established in chapter 40C-41, Fla. Admin. Code.

(2) If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the applicant must comply with the requirements set forth in sub-section 12.2.4.5 of the Applicant's Handbook: Management and Storage of Surface Waters.

(3) The standards and criteria, including the mitigation provisions and the provisions for elimination or reduction of impacts, contained in the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in section 40C-4.091, Fla. Admin. Code, shall determine whether the reasonable assurances required by subsections 40C-4.301 (1) and 40C-4.302, Fla. Admin. Code, have been provided.

40C-4.302: Additional Conditions for the Issuance of Permits

(1) In addition to the conditions set forth in section 40C-4.301, Fla. Admin. Code, in order to obtain a standard general, individual, or conceptual approval permit under this chapter . . ., an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, ... of a system:

(a) located in, on, or over wetlands or other surface waters will not be contrary to the public interest . . . as determined by balancing the following criteria as set forth in sub-sections 12.2.3 through 12.2.3.7 of the Applicant's Handbook: Management and Storage of Surface Waters:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

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

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

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

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

6. Whether the activity will adversely affect or will enhance significant historical and archeological resources under the provisions of section 267.061, Fla. Stat.; and

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

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in subsections 12.2.8 through 12.2.8.2 of the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in section 40C-4.091, Fla. Admin. Code.

(c) Located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class 111 waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting as set forth or incorporated by reference in chapter 62R-7, Fla. Admin. Code, will comply with the additional criteria in sub-section 12.2.5 of the Applicant's Handbook: Management and Storage of Surface Waters adopted by reference in section 40C-4.091, Fla. Admin. Code.

The evidence produced at hearing and contained in the Recommended Order demonstrates that, with the modifications recommended by the ALJ and required as permit conditions by this Final Order, Hines has met the conditions set forth above for issuance of an individual environmental resource permit. Pursuant to section 10.2.1 (a), MSSW-A H., Hines' surface water management system is presumed to have complied with paragraphs 40C-4.301(1)(a), (b) and (c) since the record shows that the post-development peak rate of discharge would be lower than the pre-development peak rate of discharge for a 24-hour, 25-year storm event (R.O.: 27-28), and sections 10.2.1 (b) through (d), MSSWA.H., are not applicable to Hines since its system will not be discharging to a landlocked lake; is not located downstream on a point or watercourse where the drainage area is five square miles; and does not impound a stream or other water course.

The record shows that the Marshall Creek golf course and entry road project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters as required by paragraph 40C-4.301(1)(d), Fla. Admin. Code. (R.O.: 28). To determine whether this paragraph has been met, Hines was required to demonstrate compliance with sections 12.2.2 and 12.2.2.4 of the MSSW Applicant's Handbook. Section 12.2.2, MSSW-A.H., requires consideration of whether Hines will impact the values of wetlands and surface waters on the site so as to cause adverse impacts to the abundance, diversity, and habitat of fish, wildlife and listed species. Compliance with sections 12.2.2 and 12.2.2.4, MSSW-A.H., however, is not required for those parts of the Marshall Creek entry road and golf course project which will be located in isolated wetlands less than one-half acre in size 4/ since none of the exceptions in sections 1 2.2.2.2(a) through (d), MSSW-A.H., were demonstrated to apply in this case. 5/

First, the evidence failed to show that any threatened or endangered species actually utilize, on more than an incidental basis, any of the isolated wetlands less than 0.5 acres in size located on the project site. (R.O. 14-15). The record shows only that certain species could or may potentially use some of these wetlands on an incidental basis and these observations are insufficient to rise to the level of "use" contemplated by section 12.2.2.1(a), MSSW-A.H. 6/ (R.O. 14-15).

Second, none of the isolated wetlands less than 0.5 acres in size are located in an area of state concern or are connected by standing or flowing surface water at seasonal high water level to one or more wetlands. (R.O.: 14-15). Finally, the District did not establish that any of the isolated wetlands less than 0.5 acres in size proposed to be impacted singly or cumulatively are of more than minimal value to fish and wildlife. (R.O.: 14-15).

Hines proposes to fill or clear 11.57 acres of wetlands that represent impacts to isolated wetlands greater than 0.5 acres in size or are contiguous wetlands. Since these impacts will eliminate these wetland areas' ability to provide functions to fish and wildlife, they are initially considered adverse. Section 12.2.1.1, MSSW-A.H., provides that in this instance Hines must implement practicable design modifications to reduce or eliminate these adverse impacts. 7/ Pursuant to section 12.2.1.1, MSSW-A.H., the term "modification" excludes alternatives that would require a project that is significantly different in type or function or that would consist of not implementing the proposed system in some form. A modification is not considered "practicable" if (1) the proposed modification is not technically capable of being done; (2) is not economically viable; (3) would adversely affect public safety through the endangerment of lives or property; or (4) the cost of the modification outweighs the environmental benefit it would achieve. See, section 12.2.1.1, MSSW-A.H.

With the modifications recommended by the ALJ and required as permit conditions by this Final Order, Hines has implemented all practicable design modifications. Consideration in this analysis of both present and future phases for which plans have been submitted to, and approved by, local government agencies was appropriate since failure to consider future phases could lead to a waste of economic resources and the applicant's loss of potential economic use of the property. Initially, Hines has completed a master planning process that resulted in a development scheme which will minimize impacts to the highest quality wetlands on the project site both in present and future phases.

After performing a master planning process, Hines conducted a reduction and elimination analysis for adverse wetland impacts associated with the entry road, golf hole 4, and the development block including golf holes 1, 9, 10, 18, the driving range, Village Center (including the future club house), and stormwater ponds Y-1, Y-2, and L. Hines evaluated alternative locations for golf hole 4. The record shows that Hines minimized the impacts associated with the entry road by designing a road alignment that incorporated an existing wetland road crossing and by relocating the entry road's stormwater runoff ditch immediately adjacent to the road. Further design modifications were not practicable because they would adversely affect public safety. (R.O.: 10-11). Hines minimized the impacts associated with golf hole 4 by designing the golf hole fairway 50 feet narrower than optimal. The record shows that relocation of golf hole 4 was not practicable because the cost of the relocation more than

outweighed the environmental benefit of avoiding impact area F-82. (R.O.: 17).

Impacts from the large development block associated with the starting and finishing holes on the front and back nine, the driving range, and the future Village Center, including a future clubhouse, have been minimized by locating them in an area of uplands where wetland impacts will be minimal. (R.O.: 15-16). Many of the wetlands in this area are isolated wetlands less than one-half acre in size for which a reduction and elimination analysis is not required. See, footnote 5 above. The remaining wetland impacts could not be further reduced or eliminated since design modifications would result in adverse impacts to public safety, not be technically or economically feasible, or result in a significantly different project in terms of type or function. (R.O.: 14-17).

Pursuant to section 12.2.1 .2(a), MSSW-A.H., design modifications to reduce or eliminate proposed impact area F-41 are not considered practicable because the ecological functions of this area are low and the proposed mitigation will provide greater long term viability. (R.O.: 16-17).

The record shows that the Marshall Creek entry road and golf course project wil! not change the hydroperiod of wetlands or surface waters so as to adversely affect wetland functions or surface water functions, and that the project, therefore, complies with section 12.2.2.4, MSSW-A.H., the other prong of the test to determine whether paragraph 40C-4.301(1)(d) has been met. (R.O.: 27-28). Since the groundwater contribution and, less importantly, the surface water contribution to wetlands will not be significantly different after the project is completed, the project is not reasonably expected to alter the water levels in wetlands remaining on the site after the project has been built. (R.O.: 28). As a precaution, the special vegetative monitoring condition proposed by the District shall be a condition of the permit.

Since Hines has implemented all practicable design alternatives to eliminate and reduce those adverse wetland impacts for which a reduction and elimination analysis was required, the District, pursuant to section 12.3, MSSW-A.H., was able to consider mitigation proposed for the Marshall Creek entry road and golf course project. The record shows that existing large contiguous wetland systems will be preserved and protected with upland buffers and together with the proposed wetland creation, enhancement and restoration areas will replace the types of functions that the impacted areas provide to fish and wildlife. (R.O.: 23-27). Hines' mitigation plan will offset the adverse impacts the project will have on the value of functions

provided to fish and wildlife by contiguous and isolated wetlands and paragraph 40C-4.301(1)(d) is, therefore, met.

Since the mitigation proposed by Hines will be on-site and thus within the same drainage basin as the Marshall Creek entry road and golf course project and will offset the projects adverse impacts, paragraph 40C-4.302(1)(b), the cumulative impacts criterion, is met. (R.O.: 57).

With the modifications recommended by the ALJ and required as permit conditions by this Final Order, the Marshall Creek entry road and golf course project will not cause adverse secondary impacts to the water resources pursuant to paragraph 40C-4.301(1)(f). Compliance with this paragraph is determined by a number of tests in section 12.2.7, MSSW-A.H. The record shows that under the first test [section 1 2.2.7(a)], the following potential impacts were evaluated: (i) the effect of the use of the entry road and golf cart crossings on wildlife where the road or crossings are located in, over or adjacent to wetlands; (ii) the effect of human use of the golf course where such use would occur adjacent to wetlands; and (iii) the effect of surface water runoff from the golf course on the water quality in adjacent wetlands. Pursuant to section 1 2.2.7(a) and with the exception of areas adjacent to golf hole 4, impact areas F-20, F-112, F-8 A, F-111 and F-33, and clearing areas C-2 and C-5, the secondary impacts of human activity adjacent to the wetlands are not considered adverse since the evidence showed that Hines has proposed buffers with a minimum width of 25 feet around these wetlands. (R.O.: 21). Secondary impacts from the golf cart crossings were also not considered adverse since the evidence showed that wetland functions to fish and wildlife will be maintained despise the crossings. (R.O.: 21).

No secondary impacts will occur under the second test [section 12.2.7(b)] since there was no evidence that any aquatic or wetland dependent listed animal species use uplands for existing nesting or denning adjacent to the Marshall Creek entry road and golf course project. (R.O.: 21-22). See, Ruling on District Exception Number 5. Abandoned alligator's nests were discovered on the edge of the salt marsh in the southeastern portion of the site, but no part of the entry road or golf course will be located in this area. (R.O.: 21-22). (A list of such species is provided in Table 12.2.7-1, MSSW-A.H.). Under section 12.2.7(d), the evidence was uncontroverted that additional development phases of the Marshall Creek entry road and golf course project can be constructed in a way that is permittable under the District's rules and will not result in water quality violations or adverse impacts to the functions of wetlands or surface waters. (R.O.: 39-40). The secondary impacts test in section 1 2.2.7(c) is considered as part of the public interest

balancing test in Rule 40C-4.302(1)(a), Fla. Admin. Code. The evidence showed that the proposed project will not cause impacts to significant historical or archaeological resources. (R.O.: 35-37).

Pursuant to section 12.2.7, MSSW-A.H., a permit applicant has the option of proposing measures to prevent adverse secondary impacts or proposing mitigation measures to offset such impacts. See also, section 12.3, MSSW-A.H ("Mitigation . . . is required only to offset the adverse impacts to the functions identified in 12.2-12.2.8.2 [which includes 12.2.7, MSSW-A.H.] caused by regulated activities.") In the instant case, the record shows that the mitigation proposed by Hines - wetland creation, enhancement, restoration, and upland and wetland preservation - will offset all of the project's adverse impacts to wetlands, including its limited adverse secondary impacts, and therefore paragraph 40C-4.301(1)(f) is met. (R.O.: 23-27).

Pursuant to paragraph 40C-4.302(1)(a), Hines must provide reasonable assurance that the parts of its surface water management system located in, on, or over wetlands are not contrary to the public interest. See also, section 12.2.3, MSSW-A.H. It was not required to provide reasonable assurance that these parts of the project are clearly in the public interest since no part of the system will significantly degrade or be located within an Outstanding Florida Water. See, paragraph 40C-4.302(1)(a), Fla. Admin. Code. (R.O.: 51).

Hines has provided reasonable assurance that, with the modifications recommended by the ALJ and required as permit conditions by this Final Order, the Marshall Creek entry road and golf course project is not contrary to the public interest since the evidence established that all of the public interest factors to be balanced were determined to be neutral. (R.O.: 51). Because the mitigation proposed for the Marshall Creek entry road and golf course project will offset the project's adverse impacts to wetlands, no adverse effects to the conservation of fish and wildlife or due to the project's permanent nature will occur. (R.O.: 58). The record shows that best management practices and erosion control measures will ensure that the project will not result in harmful erosion or shoaling. (R.O.: 30). Further, it was demonstrated that the proposed project will not adversely affect the flow of water, navigation, significant historical or archaeological resources 8/ recreational or fishing values, marine productivity, or the public health, safety, or welfare or property of others. (R.O.: 48-51). The project's design, including mitigation, was found to be such that the current condition and relative value of functions performed by wetlands will be maintained. (R.O.: 50-51).

Paragraph 40C-4.301 (1)(e), Fla. Admin. Code, requires the applicant to provide reasonable assurance that the proposed project will not adversely affect the quality of receiving waters such that the water quality standards as set forth in chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, Fla. Admin. Code, including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b) and sections 62-4.242(2) and (3), and section 62-302.300, Fla. Admin. Code, and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in sub-sections 62-4.242(2) and (3), Fla. Admin. Code, will be violated. Chapter 62-3, Fla. Admin. Code, was repealed on December 9, 1996, and therefore is no longer applicable to any permit applications. The only applicable provision of chapter 62-4, Fla. Admin. Code, is sub-section 62-4.242(2), which contains standards applying to Outstanding Florida Waters. Subsection 62-4.242(1), Fla. Admin. Code, only applies where a proposed discharge is expected to result in water quality degradation, and hence is not applicable to the proposed project. Subsection 62-4.242(3), Fla. Admin. Code, contains standards applying to Outstanding National Resource Waters, and therefore, too, is not applicable. Chapter 62-302, Fla. Admin. Code, contains the state's surface water classifications, special designations, and water quality standards. Chapters 62-520 and 62-550, Fla. Admin. Code, contain the state's groundwater classifications and water quality standards. Chapter 62-522, Fla. Admin. Code, only applies to cases where a zone of groundwater discharge is needed and associated monitoring required, and therefore does not apply to the proposed project.

Hines has provided reasonable assurance that the construction and operation of the golf course and entry road project will not adversely affect the quality of receiving waters such that the state water quality standards will be violated. The record shows that Hines has designed the stormwater management system in accordance with the applicable wet detention and stormwater reuse criteria in sections 8.0, 9.0, 14.0, and 20.0, Stormwater Applicant's Handbook. (R.O.: 29). Under the District's rules this creates a presumption that state water quality standards, including those for Outstanding Florida Waters, will be met. See, paragraph 40C-42.023(2)(a), Fla. Admin. Code. This presumption has not been rebutted and, therefore, the requirements of paragraph 40C-4.301 (1)(e), Fla. Admin. Code, have been met. In addition, Hines' and the District's analyses of the treatment efficiency of the stormwater management system and the potential for groundwater impacts demonstrate that state water quality standards will not be violated as a result of discharges from the proposed project. (R.O.: 29-30).

In addition, section 12.2.4 of the ERP Applicant's Handbook states, in part, that reasonable assurances regarding water quality must be provided both for the short term and the long term, addressing the proposed construction, alteration, operation, maintenance, removal and abandonment of the system. Hines has provided reasonable assurance that this requirement is met through the design of its stormwater management system, its long-term maintenance plan for the system, and the long and short-term erosion and turbidity control measures it proposes. (R.O.: 29-30). The ERP will require that the stormwater management system be constructed and operated in accordance with the plans approved by the District. The ERP will also require that the proposed erosion and turbidity control measures be implemented.

Paragraph 62-4.242(2)(a) provides, in pertinent part, that "[n]o Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or [sic] which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters." The record shows that Hines has met this criterion by a showing that the discharges from the proposed project will not violate any of the applicable state water quality standards, and in fact will be of better quality than the existing pre-development discharges from the project site. (R.O.: 29-30). Consequently the proposed project will not significantly degrade any Outstanding Florida Waters.

Paragraph 40C-4.302(1)(c), Fla. Admin. Code, requires the applicant to provide reasonable assurance that any portion of the surface water management system located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class 111 waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting as set forth or incorporated by reference in chapter 62F 7, Fla. Admin. Code, will comply with the additional criteria in section 12.2.5, MSSW-A.H. On June 23, 1999, chapter 62R-7, Fla. Admin. Code, was transferred to chapter 5L-1, Fla. Admin. Code. This chapter establishes a classification system for shellfish harvesting areas and incorporates by reference shellfish harvesting area descriptions and maps. See, section 5L-1.003, Fla. Admin. Code. The record shows that no part of the Marshall Creek entry road and golf course project is located in shellfish waters. (R.O.: 38). Additionally, the record shows shellfish would not occur in areas impacted by the project based on the habitat needs of shellfish, and one of Petitioners' witnesses confirmed that shellfish do not occur as far up into Marshall Creek as the existing road crossing at Shannon Road. (R.O.: 38).

Therefore, Hines was required to comply with sections 12.2.5 (a) and (b), MSSW-A.H., which provide as follows:

> In accordance with paragraph 12.1.1 (d) [§40C-4.302(1)(c), Fla. Admin. Code], the District shall:
>
> (a) deny a permit for a regulated activity in Class II waters which are not approved for shellfish harvesting unless the applicant submits a plan or proposes a procedure to protect those waters and waters in the vicinity. The plan or procedure shall detail the measures to be taken to prevent significant damage to the immediate project area and the adjacent area and shall provide reasonable assurance that the standards for Class II waters will not be violated;
>
> (b) deny a permit for a regulated activity in any class of waters where the location of the system is adjacent or in close proximity to Class 11 waters, unless the applicant submits a plan or proposes a procedure which demonstrates that the regulated activity will not have a negative effect on the Class 11 waters and will not result in violations of water quality standards in Class 11 waters.

Hines has satisfied these requirements by submitting plans and detailed measures which include reusing treated stormwater to irrigate the golf course, managing the application of pesticides and fertilizers on the golf course, implementing erosion and turbidity control measures, and designing the stormwater management system to provide a higher level of treatment than the required minimum level of treatment. The measures detailed to be taken by Hines, in conjunction with the permit conditions required by this Final Order, will prevent significant damage to the immediate project area and adjacent area, and the plans submitted by Hines demonstrate that the proposed project will not have a negative effect on Class 11 waters.

The record showed that Hines has designed the stormwater management system in accordance with the applicable wet detention and stormwater reuse criteria in sections 8.0, 9.0, 14.0 and 20.0, Stormwater Applicant's Handbook. (R.O.: 29). Under the District's rules, this creates a presumption that state water quality standards will be met. Paragraph 40C-42.023(2)(a), Fla. Admin. Code. In addition, Hines' and the District's analyses of the treatment efficiency of the stormwater management system and

the potential for groundwater impacts demonstrate that state water quality standards will not be violated as a result of discharges from the proposed project. (R.O.: 29-30). Therefore, Hines has provided reasonable assurance that any portion of the surface water management system located in, adjacent to or in close proximity to Class II waters or located in Class II waters or Class 111 waters classified by the Department as approved, restricted or conditionally restricted for shellfish harvesting will comply with the additional criteria in section 12.2.5, MSSW-A.H.

Subparagraph 373.414(1)(b)3, Fla. Stat., provides:

> If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

Section 12.3.1.4, MSSW-A.H., which implements this statutory provision, states:

> In instances where an applicant is unable to meet water quality standards because existing ambient water quality does not meet standards and the system will contribute to this existing condition, mitigation for water quality impacts can consist of water quality enhancement. In these cases, the applicant must implement mitigation measures that will cause a net improvement of the water quality in the receiving waters for those parameters which do not meet standards.

The record shows that the proposed stormwater management system will not contribute to the existing ambient water quality in terms of its DO and total and fecal coliform levels. (R.O.: 29-30). The treatment and aeration that will be provided to the stormwater runoff in the wet detention system will result in mass loadings/discharges that are lower in BOD and total and fecal coliform levels and higher in DO levels. (R.O.: 29-30). This will in turn result in a net improvement in the existing ambient water quality levels for DO and total and fecal coliforms. (R.O.: 29-30).

Thus, for all of the reasons set forth above, we find that there is competent substantial evidence to support a conclusion that, with the modifications recommended by the ALJ and required as permit conditions by this Final Order, Hines has met the conditions for issuance of an individual environmental resource permit. Moreover, the Administrative Law Judge's conclusions of law are correct. Thus, Petitioners' Exception 32 is rejected.

Petitioners' Exception 33

This exception is addressed in the section of this Final Order regarding the consumptive use permit application.

RULINGS ON DISTRICT'S EXCEPTIONS

District's Exception No. 1

> In finding of fact number 9, the ALJ finds that:
>
> F-4 is an isolated wetland less than 0.5 acres in size. F-111 is an isolated forested wetland of 0.09 acre. F-112 is an isolated wetland of 0.12 acre. F-8A is an isolated wetland 0.23 acre. F-20 is an isolated wetland of 0.27 acre. F-33 is an isolated wetland of 0.22 acre. F-35 is an isolated wetland of 0.17 acre. F-36 is an isolated wetland of 0.43 acre.

District takes exception to this finding of fact to the extent that the ALJ describes wetlands F-111, F-112, F-20, F-33, F-35, and F-36 as being 0.09 acre, 0.12 acre, 0.23 acre, 0.27 acre, 0.22 acre, 0.17 acre, and 0.43 acre in size, respectively. It appears that the wetland sizes described in Finding of Fact 9 were a result of an apparent misreading of Hines Ex. 13. Hines Ex. 13 contains a table that describes the wetland impacts proposed in the ERP application; however, the "Acres" identified in Hines Ex. 13 describes the proposed fill impacts to each wetland, not the size of the impacted wetland. The Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). There being no competent substantial evidence to support that portion of finding of fact number 9 pertaining to the size of the impacted wetlands, District's exception to that part of finding of fact number 9 is accepted. Furthermore, no competent substantial evidence exists in the record to characterize the wetlands associated with

impacts F-112, F-20, F-33 and F-35 as isolated. All of these impacts are to contiguous wetlands (Hines Ex. 13, Pruitt Vol. IV: 104, 106; O'Shea Vol. II: 6). Therefore, the Governing Board substitutes the following finding for finding of fact number 9:

> F-4 is an isolated wetland less than 0.5 acres in size. F-111 is an isolated forested wetland. F 112, F-8A, F-20, F-33 and F-35 are contiguous wetlands. F-36 is an isolated wetland.

We further note that District does not request that any conclusion of law be changed as a result of this modification.

District's Exception No. 2:

In Finding of Fact 16, the ALJ finds that "where the entry road crosses Marshall Creek where Shannon Road is currently located . . . a culvert of sufficient size to accommodate the passage of deer and bear needs to be installed . . ." (R.O.: 12). District staff takes exception to the portion of this finding that states "the entry road crosses Marshall Creek where Shannon Road is currently located . . ." The evidence indicates that the entry road ceases after crossing Stokes Creek, which is approximately one mile west of Marshall Creek. (Hines Ex. 10, Sheet 25). The evidence only showed that a future loop road, not the entry road, may cross Marshall Creek at this location. (Hines Ex. 10, Sheet 25). The Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). There being no competent substantial evidence to support the finding that the entry road crosses Marshall Creek, District's exception to that portion of finding of fact number 16 is accepted. Accordingly, finding of fact number 16 is modified to substitute the words "entry road" with the words "future loop road."

District staff also takes exception to the finding that states a culvert of sufficient size to accommodate the passage of deer and bear needs to be installed at the aforementioned location. District staff assert that this finding is actually a conclusion of law and further suggest a permit condition to address the ALJ" conclusion. We agree with District staff and add the following permit condition:

> As part of any future permit application for the construction of a loop road that includes a crossing over Marshall Creek, the permittee

shall design the crossing to allow the passage of deer and bear.

District's Exception No. 3

In finding of fact number 40, the ALJ concludes that the 25-foot buffer required for golf hole 6 "would be consistent with [the] District's rules and the other conditions of the DRI." (R.O.: 20). District staff takes exception to this finding on the basis that it is a conclusion of law and that a determination whether a project is consistent with a development order's conditions is irrelevant and not required under the District's regulations. The determination of whether the 25-foot buffer is consistent with District rules is a matter of discretionary policy and is thus a conclusion of law. 1800 Atlantic Developers v. Dept. of Envtl. Regulation, 552 So.2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So.2d 345 (Fla. 1990); Florida Power Corp. v. Dept. of Envtl. Regulation, 638 So.2d 545 (Fla. 1st DCA), rev. denied, 650 So.2d 989 (Fla. 1994); Save Anna Maria Inc. v. Dept. of Transportation, 700 So.2d 113 (Fla. 199); Collier County v. State, Dept. of Envtl. Regulation, 592 So.2d 1107 (Fla. 2d DCA 1991); Florida Sugar Cane League v. State, 580 So.2d 846 (Fla. 1st DCA 1991). The determination of whether the 25-foot buffer is consistent with a local government development order is also a conclusion of law. However, the District's rules do not require a determination that a buffer is consistent with a local government's development order. See Fla. Admin. Code 40C-4.301 and 40C-4.302; Save the St. Johns River v. SJRWMD, 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993)(proceeding is only to determine if the application meets District rules). The agency in its final order may reject or modify conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Section 120.57(1)(1), Fla. Stat. (1999). Accordingly, the Governing Board accepts District Staff's Exception 3 and modifies recommended finding of fact number 40 by striking "and the other conditions of the DRI."

District's Exception No. 4

District staff takes exception to apparent typographical errors in findings of fact numbers 51, 58, and 74 on the basis that there is no competent substantial evidence in the record to support them. Additionally, District staff takes exception to an apparent typographical error in conclusion of law number 142. Typographical errors are addressed in a separate section entitled "Typographical Corrections."

District's Exception No. 5

District staff takes exceptions to portions of the ALJ's conclusion of law number 138. In this conclusion of law, the ALJ states that the second part of the secondary impact test contained in section 12.2.7 of the ERP Applicant's Handbook is "applicable in part" and that the maintenance of "natural corridors will enhance Hines' mitigation of these and other impacts." (R.O.: 55). District staff takes exception to the ALJ's conclusion that the test is "applicable in part." District staff suggests that this part of the test is applicable in its entirety to this project. However, based on the ALJ's findings of fact, the only conclusion of law that can be drawn is that no adverse secondary impacts will occur under this part of the test. In support of its argument, District staff cites finding of fact number 45 wherein the ALJ finds that there is "no evidence" that any "listed aquatic and wetland dependent species * * * use the uplands for nesting or denning." (R.O.: 21-22) (Emphasis added).

The Governing Board accepts the District's exception. First, the second part of the secondary impact test is applicable in its entirety to this project. This part of the test requires a permit applicant to provide reasonable assurance that

> the construction, alteration, and intended or reasonable expected uses of a proposed system will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including:
>
> 1. Areas needed for foraging; or
>
> 2. Wildlife corridors, except for those limited areas of uplands necessary for ingress and egress to the nest or den site from the wetland or other surface water. (Emphasis added).

See, Section 12.2.7(b), MSSW-A.H. (Table 12.2.7.-1 of the ERP Applicant's Handbook identifies those aquatic or wetland dependent listed species that use upland habitats for nesting and denning).

Second, the only conclusion of law that can be drawn is that no adverse secondary impacts will occur under this part of the test. Finding of fact number 45 and conclusion of law number 138 contain what appear to be contradictory findings regarding the use of uplands for nesting or denning by aquatic or wetland

dependent listed animal species. Finding of fact number 45 states that there is "no evidence" that any "listed aquatic and wetland dependent species * * * use the uplands for nesting or denning." (R.O.: 21-22). In contrast, conclusion of law number 138 states that h[a]quatic or wetland dependent species have used and currently use the Project site and adjacent marshlands for nesting and feeding." (R.O.: 55). While this finding does not specifically reference aquatic or wetland dependent listed animal species, it appears from the context of the finding that the ALJ meant such species. As this portion of conclusion of law number 138 is a finding of fact, the Governing Board may not reject or modify it unless the agency first determines from a review of the entire record, and states with particularity in the order, that the finding of fact was not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). A review of the entire record indicates that no competent substantial evidence exists to support this finding. There being no competent substantial evidence to support the finding that aquatic or wetland dependent listed animal species currently utilize the uplands for nesting or denning, this finding is stricken from conclusion of law number 138. Based on this finding, the Governing Board further concludes that no secondary impacts will occur under section 12.2.7(b), MSSW-A.H.

Accordingly, the Governing Board strikes the following from conclusion of law 138:

> Aquatic or wetland dependent species have used and currently use the Project site and adjacent marshlands for nesting and feeding. This criterion is applicable in part, and maintaining these natural corridors will enhance Hines' mitigation of these and other impacts.

In addition, conclusion of law number 138 is further modified by adding "Although Section 12.2.7(b), MSSW-A.H. is applicable to this project, no secondary impacts will occur under this provision of the District's rules."

District's Exception No. 6

District staff takes exception to the omission of conclusions of regarding the consumptive use permit application. This exception is discussed in a later section entitled "Consumptive Use Permit."

District's Exception No. 7

In the Recommended Order, the ALJ proposes various modifications to the project that are necessary for his recommendation of approval. The ALJ's authority to recommend such modifications is well recognized. See, Hopwood, supra. However, the ALJ did not include language in the form of permit conditions that would implement these modifications. To that end, District staff has proposed a number of permit conditions. Each of these is discussed below.

a. In finding of fact number 16, the ALJ finds that culverts are necessary under wetland impact areas F -35 and F-36 (R.O.: 11). These impact areas are proposed as part of the construction of a temporary road that will provide access from U.S. Route 1 to the outparcels on the site. (Elledge Vol. VII: 64). The ALJ finds that the culvert at F-35 "need not consider animal transit," but provides no further guidance on the size of the culverts at this location. District staff recommends that the ERP contain a condition that "[t]he permittee shall install two thirty-inch culverts under the road crossing designated in the permitted plans as impact F-35." This recommendation is supported by the record. (Elledge Vol. VII: 65). Accordingly, the Governing Board accepts this recommendation.

By contrast, the ALJ found that "construction of the box culvert at F-36 "must make provision for deer-sized animals to transit the creek bed" and that "adding only six inches in height" to the two and one-half feet tall box culvert proposed at this location " would be sufficient to permit transit of deer-sized animals." (R.O.: 12, 26). District staff recommends that the ERP contain a condition that "[t]he permittee shall install three box culverts under the road crossing designated in the permitted plans as impact F-36. Each culvert shall have a width of twelve feet and a height of at least three feet." Competent substantial evidence supports the ALJ's finding that the culvert at F-36 should make provision for the transit of deer-sized animals. (MacDonald Vol. IX: 86-87). However, a review of the entire record indicates that finding of fact number 55 wherein the ALJ finds that "[a]dding only six inches in height would be sufficient to permit transit of deer-sized animals" is not supported by competent substantial evidence. (R.O.: 26). The Governing Board may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(1), Fla. Stat. (1999). There being no competent substantial evidence to support this finding, the Governing Boards strikes the above-quoted portion of finding of fact number 55.

Accordingly, the Governing Board adds the following permit condition:

> The permittee shall install three box culverts under the road crossing designated in the permitted plans as impact F-36. Each culvert shall be designed to accommodate the passage of deer-sized animals along the creek bed. These plans must be reviewed and approved by the District staff prior to construction.

b. In findings of fact numbers 33 though 38, the ALJ finds that alternative locations for golf hole 6 evaluated by Hines and proposed by Petitioners are "viable economical alternatives" that would "retain the advantages of a signature hole while preserving the wetlands." (R.O.: 20). In conclusion of law number 113, the ALJ finds that the "additional modifications" proposed for the location of golf hole 6 would be "minimal and practicable." (R.O.: 46). To implement a modification of the design of golf hole 6 that is consistent with the Recommended Order, the Governing Board adds the following permit condition:

> Prior to commencement of construction of any portion of golf hole 6, the permittee shall submit revised plans for the design of golf hole 6 to District staff for review and written approval. The revised plans must demonstrate that all surface water runoff will be directed to the storm water management system. This golf hole shall be designed in a fashion that avoids impacts to wetlands and may not be larger than proposed in the plan presented at the administrative hearing. The design shall be consistent with one of the two alternatives presented at the administrative hearing on the permit application.

Allowing post-hearing design submittals is well recognized. Kralik v. Ponce Marina, Inc. and Dept. of Envtl. Regulation, 11 F.A.L.R. 669, 672 (Dept. of Envtl. Regulation, January 11,1989), affirmed, 545 So.2d 882 (Fla. 5th DCA 1989) (Agency concluded that reasonable assurance was given provided that the applicant submitted design and operation specification prior to construction with notice of submittal to petitioners); Manasota 88. Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319 (Dept. of Envtl. Regulation, January 2, 1990), affirmed, 576 So.2d 781 (Fla. 2d DCA 1991). Furthermore, the relocation of the golf hole

was suggested by Petitioners, indicating that Petitioners have been afforded sufficient due process notice as to the modification. See, Hopwood, supra.

c. In finding of fact number 39, the ALJ finds that:

> To permit the vistas which a "signature" hole requires, Hines should be permitted to reduce the existing vegetation along the marsh in the vicinity of the green of golf hole No. 6. However, in order to address the secondary impacts on the movement of animals along the shore, a 25-foot buffer should be maintained from the edge of the marsh shoreward along the shoreline. Hines should be permitted to trim or replace the scrubs [sic] to maintain a height of no less than 3 feet and to thin the trees to create and maintain a view of the marsh. This 25 foot minimum buffer should be maintained all along the Tolomato River and Marshall Creek. (R.O.: 20).

In finding of fact number 53, the ALJ further states that the restoration and enhancement of areas M-15 and M-16 which are located adjacent to the originally proposed impact area for golf hole 6 "could be part of [the] creation of the buffer in this area." (R.O.: 24). While the ALJ's modification may not have fallen within what has come to be known as the "safe harbor" buffer provision of 1 2.2.7(a), 9/ the ALJ concluded that the modification provided adequate mitigation for any adverse secondary impacts to water resources. (R.O.: 20, 55).

Accordingly, the Governing Board adds the following permit condition:

> To prevent secondary impacts from the use of golf hole 6, the permittee shall maintain a natural buffer that extends 25 feet landward from the edge of the wetlands adjacent to golf hole 6. The buffer shall consist of uplands except that the permi tee may elect to include the areas designated M-15 and M-16 on the permitted plans as part of the buffer. In order to create and maintain a view of the marsh from the green at golf hole 6, the permittee is authorized to thin trees, including those located in the wetland or buffer, and to trim or replace shrubs, including those located in the wetland or

> buffer, so that the shrubs have a minimum height of at least three feet. The permittee shall depict the natural buffer on the design plans submitted to the District for golf hole 6. If the permittee decides to remove vegetation or trees as authorized by this condition, the permittee shall also submit a trimming and vegetation removal plan to the District for written approval by District staff prior to such removal. The plan shall depict the area around the green in which the permittee proposes to remove vegetation and describe the removal method and the amount and type of vegetation to be removed.

d. In finding of fact number 57, the ALJ finds that "[b]ecause the proposed fill associated with golf hole No. 6 is not found to be consistent with the rules and not approved, Hines should be permitted to adjust the extent of its mitigation plan accordingly." (R.O.: 26). The wetland fill impacts for the project are reduced by 2.08 acres as a result of moving golf hole No. 6. (Hines Ex. 13, Table A). The mitigation plan for the project did not separate out specific mitigation for that 2.08 acres, but rather offered mitigation for the entire project. (Hines Ex. 2 and 13). Moreover, additional mitigation will be needed for up to 17.81 acres of wetland impacts in future phases of the Marshall Creek DRI. (R.O.: 25-26). Thus, the most effective method for adjusting the mitigation plan is to credit the mitigation made for this impact against mitigation required for future impacts on the same property. Accordingly, the Governing Board adds the following permit condition:

> The permittee shall implement the mitigation plan presented at the administrative hearing. However, the approved mitigation plan included mitigation for a 2.08 acre impact designated as F-105 that is not authorized by this permit. The permittee may utilize the mitigation that was provided for this unauthorized impact to offset future impacts on the same property in accordance with Section 12.3 of the ERP Applicant's Handbook.

e. In findings of fact numbers 88, 89, and 90, the ALJ describes archeological sites 8SJ3472, 8SJ3474 and 8SJ3473 respectively and finds that "[i]t was determined that these three sites did not warrant Phase II examination." (R.O.: 36). However, in finding of fact number 91, the ALJ finds that "[g]iven the nature of the heavy construction necessary to build the road or the green for the golf holes and the resultant

irreparable damage to an archeological site, archeological staff should be present when excavating these areas to halt construction if the excavation reveals that the sites are more significant than initially determined." Consistent with finding of fact number 91, the ALJ recommends in conclusion of law number 124 that "Hines be required to have trained archeologists on-site when excavation is begun at each of these sites to halt work if they determine the character of the site warrants reporting and preservation." (R.O.: 50). In order to implement this recommendation, the Governing Board adds the following permit condition:

> At ieast one qualified archeologist shall be present on the project site during the excavation of archeological sites 8SJ3474, 8SJ3473 and 8SJ3472. If the archeologist finds that the character of any of these sites warrants reporting and preservation or that the site is more significant than initially determined, excavation of the site shall be halted, the Permittee shall notify the District of such findings, and the Permittee shall consult with the Division of Historic Resources to develop and implement an appropriate plan for the site.

f. In finding of fact number 82, 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." In order to implement this finding, District staff recommended that language be added as a condition of the CUP permit. Because this proceeding is being remanded for additional findings of fact and conclusions of law on the consumptive use permit application, the Governing Board will reserve ruling on this recommendation. Please refer to the section entitled "Consumptive Use Permit" for a discussion of the Governing Board's decision to remand the consumptive use permit application.

RULINGS ON HINES' EXCEPTIONS

Hines' Exception No. 1

Hines takes exception to finding of fact number 16 wherein the ALJ finds that the entry road crosses Marshall Creek and requires the installation of a culvert for the passage of deer and bear. Hines' exception to this finding is accepted. In response, the Governing Board relies on its Ruling to District Exception No. 2. Hines also recommends modifying the conclusion of law to include the following condition:

> If, during future phases of construction, the existing Shannon Road crossing at Marshall Creek is modified, then the crossing must be designed so as to provide for a minimum three-foot clearance to allow for passage of animals.

As discussed in our ruling on District Exception Number 2, we are adding a condition based on the ALJ's recommendation. We find no competent substantial evidence in the record to support Hines' proposed condition, and thus, this portion of Hines' Exception Number 1 is rejected.

Hines' Exception No. 2

In the Recommended Order, the ALJ proposes various modifications to the project that are necessary for his recommendation of approval. However, the ALJ did not include language for permit conditions that would implement these modifications. To that end, Hines has proposed permit conditions in its exceptions numbered 2, 3, 4, 6 and 7.

In Exception No. 2, Hines proposes a permit condition to address the ALJ's modifications to the project found in findings of fact numbers 35 and 39. The modifications are to the location of golf hole No. 6 and to certain buffer requirements. In response, the Governing Board relies on its Ruling to District Exception No. 7(b) and (c).

Hines' Exception No. 3

In response to the ALJ's finding of fact number 55, Hines proposes a permit condition to address the ALJ's recommended modification of the project to require that the temporary road crossing at F-35 and F-36 be designed to include certain culverts. (R.O.: 25-26). The Governing Board relies on its Ruling to District Exception No. 7(a).

Hines' Exception No. 4

In response to the ALJ's finding of fact number 56 and conclusion of law number 142, Hines proposes a permit condition to address the ALJ's recommendation that the amount of mitigation needed to off-set the wetland impacts can be reduced as a result of the elimination of wetland impact F-105. (R.O.: 25-26, 57-58) The Governing Board relies on its Ruling to District Exception No. 7(d).

Hines' Exception No. 5

Hines takes exception to an apparent typographical error in finding of fact number 74 on the basis that there is no competent substantial evidence in the record to support it. Typographical errors are addressed in a separate section entitled "Typographical Corrections."

Hines' Exception No. 6

In finding of fact number 82, 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." In order to implement this finding, Hines recommended that language be added as a condition of the CUP permit. Because this proceeding is being remanded for additional findings of fact and conclusions of law on the consumptive use permit application, the Governing Board will reserve ruling on this recommendation. Please refer to the section entitled "Consumptive Use Permit" for a discussion of the Governing Board's decision to remand the consumptive use permit application.

Hines' Exception No. 7

In response to the ALJ's finding of fact number 91 and conclusions of law numbers 124 and 139, Hines proposes a permit condition to address the ALJ's recommendation that archeological staff be present when excavating Sites 8SJ3472, 8SJ3473 and 8SJ 3474 and that construction be halted if, during the excavation, the archeologist determines that the sites are more significant than initially determined. (R.O.: 36, 50, 56). The Governing Board relies on its Ruling to District Exception No. 7(e).

THE CONSUMPTIVE USE PERMIT APPLICATION

The Recommended Order contains no conclusions of law regarding the consumptive use permit application at issue in this proceeding. Petitioners' Exception No. 33 notes this deficiency and asserts the permit should either be denied or remanded to the Administrative LAW Judge. The District's Exception No. 6 suggests the Governing Board cure the defect by inserting legal conclusions as proposed in the District exception which are referenced to the ALJ's findings of fact. The Governing Board rejects District Exception No. 6 and accepts Petitioners' Exception No. 33 requesting a remand.

In a section 120.57, Fla. Stat., proceeding the Administrative Law Judge finds the facts and applies the law to the facts, as would a court, and additionally serves the public

interest role of exposing, informing, and challenging agency policy and discretion. State ex ref. Dep't of Gen. Serv. v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977); McDonald v. Dep't of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977). This role is served in section 120.57(1)(k), Fla. Stat. (1999), which mandates, in pertinent part, "[t]he presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in a final order" (emphasis added). Further, section 120.57(1)(b), Fla. Stat. (1999), provides, in pertinent part, "[a]ll parties shall have the opportunity...to submit exceptions to the presiding officer's recommended order. . ." (emphasis added). See, Rule 28-106.217, Fla. Admin. Code. The opportunity of parties to submit exceptions is not only statutorily required, but is essential for a party to preserve matters for appellate review. Couch v. Comm'n on Ethics, 617 So.2d 1119 (Fla. 5th DCA 1993) (matters not properly excepted to or challenged before the agency head are not preserved for appeal); also, Envtl. Coalition of Florida v. Broward County, 586 So.2d 1212 (Fla. 15t DCA 1991); Kantor v. Sch. Bd. of Monroe County, 648 So.2d 1266 (Fla. 3d DCA 1995). Consequently, the essential requirements of the law direct the Administrative LAW Judge to submit conclusions of law in the Recommended Order and that the parties be provided the opportunity to submit exceptions to those recommended conclusions before final action in this proceeding. See, Cohn v. Dep't of Professional Regulation, 477 So. 2d 1039 (Fla. 3rd DCA 1985); Beaumont v. Orlando Regional Healthcare System, Inc., 19 F.A.L.R. 1116 (November 30,1995).

While the Recommended Order does contain factual findings related to the consumptive use permit, 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. Thus, the Governing Board is statutorily obligated to remand this proceeding to the Administrative LAW Judge to make those factual findings on the evidence presented at hearing regarding the consumptive use permit application and to provide appropriate conclusions of law on those findings.

TYPOGRAPHICAL CORRECTIONS

In addition to its rulings on exceptions, the Governing Board makes the following rule clarifications and corrections to typographical errors:

1. In finding of fact number 51 of the Recommended Order, third sentence, the following correction should be made: "[a]ll

wetland impacts and all wetland mitigation occur in the Tolomato River drainage basin and on the project site ~~side~~."

2. In finding of fact number 58 of the Recommended Order, first sentence, the following correction should be made: "[o]f the 309.99 acres of wetlands on the Project site, 102.73 will be preserved, 14.16 will be lost, and 1.75 will be disturbed ~~distributed~~."

3. In finding of fact number 74 of the Recommended Order, first sentence, the following correction should be made: "[t]he quantity ~~quality~~ of water proposed for golf course irrigation is consistent with the results from an irrigation demand model prepared by the University of Florida Supplemental Irrigation Requirement model." (See, Vol. VI: 103-104; Hines PRO, FOF 50).

4. In conclusion of law number 142 of the Recommended Order, first sentence, the following correction should be made: "[i]n order to off-set adverse impacts ~~functions~~ to wetland functions and values, mitigation may be required." (See, Section 12.3 MSSW-A.H.).

5. The caption of the Recommended Order contains a misspelling of the name of Petitioner Bobby C. Billie. The spelling of Petitioner's name is hereby corrected to be "Bobby C. Billie."

6. The Recommended Order contains a misspelling of the name of Petitioner's hydrology expert Marie Zwicker. The spelling is hereby corrected to "Marie Zwicker."

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

As to the ERP application, the Recommended Order dated December 30, 1999, attached hereto, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the rulings on Petitioner's Exceptions 3 and 4, District's Exceptions 1, 2, 3, 4, 5 and 7(a-e) and Hines' Exceptions 1, 2, 3, 4, 5 and 7. Hines' application number 4-109-0216A-ERP for an individual environmental resource 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 7, 1999, attached hereto, with the addition of the following conditions:

1) Permittee shall install two thirty-inch culverts under the road crossing designated in the permitted plans as impact F-35.

2) The permittee shall install three box culverts under the road crossing designated in the permitted plans as impact F-36. Each culvert shall be designed to accommodate the passage of deer-sized animals along the creek bed. These plans must be reviewed and approved by the District staff prior to construction.

3) Prior to commencement of construction of any portion of golf hole 6, the permittee shall submit revised plans for the design of golf hole 6 to District staff for review and written approval. The revised plans must demonstrate that all surface water runoff will be directed to the storm water management system. This golf hole shall be designed in a fashion that avoids impacts to wetlands and may not be larger than proposed in the plan presented at the administrative hearing. The design shall be consistent with one of the two alternatives presented at the administrative hearing on the permit application.

4) To prevent secondary impacts from the use of golf hole 6, the permittee shall maintain a natural buffer that extends 25 feet landward from the edge of the wetlands adjacent to golf hole 6. The buffer shall consist of uplands except that the permittee may elect to include the areas designated M-15 and M-16 on the permitted plans as part of the buffer. In order to create and maintain a view of the marsh from the green at golf hole 6, the permittee is authorized to thin trees, including those located in the wetland or buffer, and to trim or replace shrubs, including those located in the wetland or buffer, so that the shrubs have a minimum height of at least three feet. The permittee shall depict the natural buffer on the design plans submitted to the District for golf hole 6. If the permittee decides to remove vegetation or trees as authorized by this condition, the permittee shall also submit a trimming and vegetation removal plan to the District for written approval by District staff prior to such removal. The plan shall depict the area around the green in which the permittee proposes to remove vegetation and describe the removal method and the amount and type of vegetation to be removed.

5) The permittee shall implement the mitigation plan presented at the administrative hearing. However, the approved mitigation plan included mitigation for a 2.08 acre impact designated as F-105 that is <u>not</u> authorized by this permit. The permittee may utilize the mitigation that was provided for this unauthorized impact to offset future impacts on the same property in accordance with Section 12.3 of the ERP Applicant's Handbook.

6) At least one qualified archeologist shall be present on the project site during the excavation of archeological sites

8SJ3474, 8SJ3473 and 8SJ3472. If the archeologist finds that the character of any of these sites warrants reporting and preservation or that the site is more significant than initially determined, excavation of the site shall be halted, the Permittee shall notify the District of such findings, and the Permittee shall consult with the Division of Historic Resources to develop and implement an appropriate plan for the site.

7) As part of any future permit application for the construction of a loop road that includes a crossing over Marshall Creek, the permittee shall design the crossing to allow the passage of deer and bear.

CUP

ORDER OF REMAND

The Governing Board is statutorily obligated to remand this proceeding to the Administrative Law Judge to provide appropriate conclusions of law regarding the consumptive use permit application and to make any additional findings of fact on the evidence presented at hearing in order to provide sufficient factual basis for these conclusions of law.

Therefore, it is ORDERED:

This case is hereby remanded to the Division of Administrative Hearings for the limited purpose of the Administrative Law Judge making conclusions of law related to the issue of whether the Consumptive Use Permit application of Respondent Hines Interests Limited Partnership should be granted, and making any additional findings of fact on the evidence presented at hearing in order to provide sufficient factual basis for these conclusions of law.

DONE AND ORDERED this 9th day of February, 2000, in Palatka, Florida.

ST. JOHNS RIVERWATER
MANAGEMENT DISTRICT

BY:_____
William W. Kerr
CHAIRMAN

RENDERED this 10th day of February, 2000.

BY:_____
SANDRA BERTRAM
DISTRICT CLERK

ENDNOTES

1/ The finding is found under the heading "GOLF HOLE NO. 6" and states: To permit the vistas which a 'signature hole' requires, Hines should be permitted to reduce the existing vegetation along the marsh in the vicinity of the green of golf hole No. 6. However, in order to address the secondary impacts on the movement of animals along the shore, a 25-foot buffer should be maintained from the edge of the marsh shoreward along the shoreline. Hines should be permitted to trim or replace the scrubs [sic] to maintain a height of no less than 3 feet and to thin the trees to create and maintain a view of the marsh. This 25-foot buffer should be maintained all along the Tolomato River and Marshall Creek. (R.O.: 20).

2/ It should be noted that the District's rules do not contain any buffer requirements applicable to this case. Rather, Hines proposed buffers to prevent adverse secondary impacts and for mitigation. Unless additional measures are needed for the protection of listed species for nesting, denning or critically important feeding habitat, secondary impacts to wetland habitat functions associated with adjacent upland activities will not be considered adverse if wetland buffers with a minimum width of 15 feet and an average width of 25 feet are provided. See section 12.2.7(a), MSSW-A.H. Hines proposed such buffers in several locations. (R.O.: 21, Finding of Fact Number 44).

3/ Section 10.2.2. refers back to parts of sections 9.1.1 and 10.1.1, MSSW A.H.. These in turn describe the criteria listed in 40C-4.301 and 40C-4.302, Fla. Admin. Code., respectively.

4/ The relevant wetlands are those associated with impact areas F-40, F-55, F-56, F-57, F-58, F63, F-64, F-65, F-66, F-67, F-73, and F-74.

5/ Section 12.2.2.1, A.H. provides:

> Compliance with sections 12.2.2-12.2.3.7, 12.2.5 - 12.3.8 will not be required for isolated wetlands less than one half acre in size unless:

(a) the wetland is used by threatened or endangered species,

(b) the wetland is located in an area of critical state concern designated pursuant to chapter 380, Fla. Stat.

(c) the wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined acreage so connected is greater than one half acre, or

(d) the District establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are cumulatively, of more than minimal value to fish and wildlife.

6/ See, Sarah H. Lee v. St. Johns River Water Management District and Walden Chase Developers, Ltd., DOAH Case No. 99-2215 (rendered September 27, 1999) (Threatened and endangered species' incidental use of isolated wetlands less than 0.5 acres in size did not rise to level of Kuse" contemplated by section 12.2.2.1, MSSW-A.H.). Further, if an agency's interpretation of a rule is one of several permissible interpretations, the agency's interpretation must be upheld despite the existence of other reasonable alternatives. Suddath Van Lines. Inc. v. DEP, 668 So.2d 209, 211 (1st DCA 1996) See also, Falk v. Beard, 614 So.2d 1086 (Fla. 1993) (Construction of rule by agency charged with its enforcement and interpretation is entitled to great weight; courts should not depart from that construction unless it is clearly erroneous).

7/ Pursuant to sections 12.2.2.1 and 12.2.1.1, MSSW-A.H., Hines was not required to implement practicable design alternatives to eliminate or reduce adverse impacts to isolated wetlands less than 0.5 acres in size. Section 12.2.1.1, MSSW-A.H., only requires a reduction and elimination analysis when "a proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of sections 12.2.2 through 12.2.3.7." Section 12.2.2.1, MSSW-A.H., does not require compliance with these sections (i.e. 12.2.2 -12.2.3.7) except in limited circumstances that have been found not to be applicable in the instant case. Since section 12.2.2.1, MSSW-A.H., does not require compliance with the very sub-sections that determine whether a reduction and elimination analysis is even necessary, such an analysis is not required for isolated wetlands less than 0.5 acres in size that

are not covered by the exceptions contained in sections 12.2.2.1 (a)-(d), MSSW-A.H.

8/ Section 12.2.3.6, MSSW-A.H. provides in relevant part that "The District will provide copies of all . . . individual . . . permit applications to the Division of Historical Resources of the Department of State and solicit their comments regarding whether the regulated activity may adversely affect significant historical and archeological resources." The District's consideration of the Division of Historical Resources was therefore appropriate in making its determination of whether the Marshall Creek entry road and golf course project will adversely affect significant historical and archeological resources.

9/ 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. (Section 12.2.7(a), MSSW-A.H.) (Emphasis added). These buffers shall remain in an undisturbed condition, except for drainage features. (Section 12.2.7(a), MSSW-A.H.) (Emphasis added). The foregoing is often referred to as a "safe harbor." Where an applicant elects not to utilize buffers of the above described dimensions, buffers of different dimensions, measures other than buffers, or information may be proposed to provide the required reasonable assurance.

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