STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOBBY C. BILLIE; SHANNON LARSEN; and THE SIERRA CLUB,	)	
Petitioners,	)	
vs.	)	Case Nos. 00-2230 00-2231
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and HINES INTERESTS LIMITED PARTNERSHIP,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, this cause was heard on October 11 and 12, 2000, and December 20, 2000, in St. Augustine, Florida, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioners Bobby C. Billie, Shannon Larsen, and The Sierra Club:

Deborah Andrews, Esquire
11 North Roscoe Boulevard
Ponte Vedra Beach, Florida 32082

For Petitioner The Sierra Club:

Peter Belmont, Esquire
102 Fareham Place, North
St. Petersburg, Florida 33702

For Respondent St. Johns River Water Management District:

Thomas I. Mayton, Jr., Esquire
Mary Ellen Jones, Esquire
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For Respondent Hines Interest Limited Partnership:

Marcia Parker Tjoflat, Esquire
John G. Metcalf, Esquire
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STATEMENT OF THE ISSUES

The issues to be resolved in this proceedings concern whether Environmental Resource Permit (ERP) No. 4-109-0216-ERP, should be modified to allow construction and operation of a surface water management system (project) related to the construction and operation of single-family homes on "Marshall Creek" (Parcel D) in a manner consistent with the standards for issuance of an ERP in accordance with Rules 40C-4.301 and 40C-4.302, Florida Administrative Code.

PRELIMINARY STATEMENT

This case concerns an application for modification of a previously issued ERP, which has provided for the construction of a portion of the Marshall Creek Development of Regional Impact (DRI). That permit had been previously issued by the St. Johns River Management District (District) and on April 18, 2000, the District noticed its intent to grant the modification

application as to that permit. That modification would authorize construction of a 29.9-acre, single-family, residential development with an associated surface water management system, including modifications to a previously permitted stormwater pond and with an associated wetland mitigation area.

The above-named Petitioners filed Petitions opposing the proposed grant of the modification of the permit on or about May 12, 2000. The dispute thereafter was referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge, in accordance with Subsection 120.57(1), Florida Statutes.

The cause came on for hearing as noticed. At the hearing, the applicant presented testimony from witnesses Lee Alford, a civil engineer with a specialty in water resource engineering; Harvey H. Harper, Ph.D., an expert in water quality, hydrology and stormwater management; Anne Stokes, Ph.D., an expert in archeology and cultural resource management; Nancy C. Zyski, an expert in biology, wetlands habitat, wetlands mitigation and wildlife; William Michael Dennis, Ph.D., an expert in wetlands ecology, wetlands mitigation and wildlife; and testimony by deposition of Laura Kammerer, State of Florida Deputy State Historic Preservation Officer. The applicant (Hines) had exhibits one through six, nine through sixteen, eighteen through

twenty-two, twenty-seven, twenty-eight, thirty-one, thirty-five, thirty-six, forty, forty-two through forty-five, forty-nine through fifty-one admitted into evidence.

The District presented testimony from Walter Esser, an expert in wetland and wildlife ecology, mitigation planning and wetland delineation; Everett M. Frye, an expert in water resources engineering and the deposition testimony of David C. Heil, Bureau Chief of the Bureau of Agriculture Environmental Services of the Florida Department of Agriculture and Consumer Services. The District offered exhibits one through fourteen, which were received into evidence.

The Petitioners' witnesses were: Michael McElveen, an expert in real estate appraisal and economic evaluation of real estate development; Robert Bullard, an expert in civil engineering, hydrology and water resource engineering; Robert Livingston, Ph.D., an expert in wetlands ecology, aquatic ecology, estuarine ecology, pollution biology, water quality and ecology of stormwater ponds; Roger Lloyd, Ph.D., an expert in zoology and marine biology; Laurie MacDonald, an expert in conservation biology and wildlife ecology with an emphasis on the Florida Black Bear; Daniel h. Donaldson; George William Hamilton, III, an expert in pesticides and trees; and Bobby C. Billie, an expert in indigenous culture in Florida.

Petitioners' exhibits one through twelve were received into evidence.

Upon conclusion of the proceeding the parties obtained a Transcript of the proceedings and availed themselves of the right to submit Proposed Recommended Orders. Proposed Recommended Orders were timely filed and have been considered in the rendition of this Recommended Order. Because of the result reached herein, the post-hearing motions and objections filed by the Respondents, concerning the Petitioner's excession of the page limit for the Proposed Recommended Order and concerning evidence filed after conclusion of the hearing, need not be addressed.

FINDINGS OF FACT

The Project

1. The project is a 29.9-acre residential development and associated stormwater system in a wetland mitigation area known as "Parcel D." It lies within the much larger Marshall Creek DRI in St. Johns County, Florida, bounded on the northeast by Marshall Creek, on the south and southeast by a previously permitted golf course holes sixteen and seventeen, and on the north by the "Loop Road." The project consists of thirty residential lots of approximately one-half acre in size; a short segment of Loop Road to access Parcel D; an internal road system; expansion of previously permitted Pond N, a wet

detention stormwater management pond lying north of the Loop Road and wetland mitigation areas.

2. Approximately 1.15 acres of wetlands are located on the Parcel D site. The project plan calls for filling 0.63 acres of the wetlands for purposes of constructing a road and residential lots for Parcel D. Part of that 0.63-acre impact area, 0.11 acres, is comprised of a 760-foot-long, narrow drainageway, with 0.52 acres of adjacent wetland. Downstream of the fill area, 0.52 acres of higher quality wetland is to be preserved.

3. Hines proposes to preserve 4.5 acres of existing wetland and 2.49 acres of upland, as well as to create .82 acres of forested wetland as mitigation for the proposed impact of the project. Additionally, as part of the project, Hines will implement a nutrient and pesticide management plan. The only pesticides to be used at the project will be approved by the Department of Agriculture for use with soil types prevailing at the site and only pesticides approved by the Environmental Protection Agency may be used on the site. All pesticides to be used on the project site must be selected to minimize impacts to ground and surface water, including having a maximum 70-day half-life.

Stormwater Management System

4. The majority of surface runoff from Parcel D will be diverted to a stormwater collection system and thence through

drainage pipes and a swale into Phase I of Pond N. After treatment in Pond N, the water will discharge to an upland area adjacent to wetlands associated with Marshall Creek and then flow into Marshall Creek. The system will discharge to Marshall Creek.

5. In addition to the area served by Pond N, a portion of lots fourteen though twenty drain through a vegetated, natural buffer zone and ultimately through the soil into Marshall Creek. Water quality treatment for that stormwater runoff will be achieved by percolating water into the ground and allowing natural soil treatment. The fifty-foot, vegetated, natural buffer is adequate to treat the stormwater runoff to water quality standards for Lots 14, 15 and 20. Lots 16, 17, 18 and 19, will have only a twenty-five foot buffer, so additional measures must be adopted for those lots to require either that the owners of them direct all runoff from the roofs and driveways of houses to be constructed on those lots to the collection system for Pond N or placement of an additional twenty-five foot barrier of xeriscape plants, with all non-vegetated areas being mulched, with no pesticide or fertilizer use. An additional mandatory permit condition, specifying that either of these measures must be employed for Lots 16, 17, 18 and 19, is necessary to ensure that water quality standards will be met.

6. Pond N is a wet detention-type stormwater pond. Wet detention systems function similarly to natural lakes and are permanently wet, with a depth of six to twelve feet. When stormwater enters a wet detention pond it mixes with existing water and physical, chemical and biological processes work to remove the pollutants from the stormwater.

7. Pond N is designed for a twenty-five year, twenty-four-hour storm event (design storm). The pre-development peak rate of discharge from the Pond N drainage area for the design storm event is forty cubic feet per second. The post-development peak rate of discharge for the design storm event will be approximately twenty-eight cubic feet per second. The discharge rate for the less severe, "mean annual storm" would be approximately eleven cubic feet per second, pre-development peak rate and the post-development peak rate of discharge would be approximately five cubic feet per second. Consequently, the post-development peak rate of discharge does not exceed the pre-development peak rate of discharge.

8. Pond N is designed to meet the engineering requirements of Rule 40C-42.026(4), Florida Administrative Code. Because the pond is not designed with a littoral zone, the permanent pool volume has been increased by fifty-percent. Additionally, because Pond N discharges to the Class II waters of Marshall

Creek, an additional fifty-percent of treatment volume is included in the pond design.

9. The system design addresses surface water velocity and erosion issues through incorporation of best management practices promulgated by the District to prevent erosion and sedimentation, including; designing side slopes of 4:1; siding and seeding disturbed areas to stabilize soil; and the use of riprap at the outfall from Pond N. During construction, short-term water quality impacts will be addressed through installation of silt fences and hay bales.

10. The majority of the eighteen-acre drainage basin which flows into the Parcel D wetland lies to the south and southwest of Parcel D. In accordance with the prior permit, water from those off-site acres will be intercepted and routed to stormwater ponds serving golf course holes sixteen and seventeen.

11. The system design will prevent adverse impacts to the hydroperiod of remaining on-site and off-site wetlands. The remaining wetlands will be hydrated through groundwater flow. Surface waters will continue to flow to the wetlands adjacent to lots fourteen through twenty because drainage from those lots will be directed across a vegetated, natural buffer to those wetlands. There is no diversion of water from the natural drainage basin, because Pond N discharges to a wetland adjacent

to Marshall Creek, slightly upstream from the current discharge point for the wetland which is to be impacted. This ensures that Marshall Creek will continue to receive that fresh-water source. An underground "PVC cut-off wall" will be installed around Pond N to ensure that the pond will not draw down the water table below the wetlands near the pond.

12. Pond N has been designed to treat stormwater prior to discharge, in part to remove turbidity and sedimentation. This means that discharge from the pond will not carry sediment and that the system will not result in shoaling. There will be no septic tanks in the project.

13. The system is a gravity flow system with no mechanical or moving parts. It will be constructed in accordance with standard industry materials readily available and there will be nothing extraordinary about its design or operation. The system is capable of being effectively operated and maintained and the owner of the system will be the Marshall Creek Community Development District (CDD).

Water Quality

14. Water entering Pond N will have a residence time of approximately 200 days or about fifteen times higher than the design criteria listed in the below-cited rule. During that time, the treatment and removal process described herein will occur, removing most of the pollutants. Discharge from the pond

will enter Marshall Creek, a Class II water body. The discharges must therefore meet Class II water quality numerical and anti-degradation standards. The design for the pond complies with the design criteria for wet detention systems listed in Rule 40C-42.026(4), Florida Administrative Code.

15. In addition to meeting applicable design criteria, the potential discharge will meet water quality standards. The pond will have low levels of nitrogen and phosphorous resulting in low algae production in the pond. The long residence time of the water in the pond will provide an adequate amount of time for pesticides to volatilize or degrade, minimizing the potential for pesticide discharge. Due to the clear characteristics of the water column, neither thermal stratification nor chemical stratification are expected.

16. Periodically, fecal coliform and total coliform levels are exceeded under current, pre-development conditions. These are common natural background conditions. Because the detention time in the pond will be an average of 200 days, and because the life span of fecal coliform bacteria is approximately seven to fourteen days the levels for coliforms in the pond will be very low. Discharges from the pond will enhance water quality of the Class II receiving waters because the levels of fecal coliform and total coliform will be reduced.

17. The discharge will be characterized by approximately 100 micrograms per liter total nitrogen, compared with a background of 250 micrograms per liter presently existing in the receiving waters of Marshall Creek. The discharge will contain approximately three micrograms per liter of phosphorous, compared with sixty-three micrograms per liter presently existing in Marshall Creek. Total suspended solids in the discharge will be less than one-milligram per liter compared with seventy-two milligrams per liter in the present waters of Marshall Creek. Biochemical oxygen demand will be approximately a 0.3 level in the discharge, compared with a level of 2.4 in Marshall Creek. Consequently, the water quality discharging from the pond will be of better quality than the water in Marshall Creek or the water discharging from the wetland today. The pollutant loading in the discharge from the stormwater management system will have water quality values several times lower than pre-development discharges from the same site. Comparison of pre-development and post-development mass loadings of pollutants demonstrates that post-development discharges will be substantially lower than pre-development discharges.

18. Currently, Marshall Creek periodically does not meet Class II water quality standards for dissolved oxygen. Construction and operation of the project will improve water quality in the creek concerning dissolved oxygen values because

discharges from Pond N will be subjected to additional aeration. This results from design features such as discharge from the surface of the system, where the highest level of dissolved oxygen exists, and the discharge water draining through an orifice and then free falling to a stormwater structure, providing additional aeration.

19. Discharges from the system will maintain existing uses of the Class II waters of Marshall Creek because there will be no degradation of water quality. Discharges will not cause new violations or contribute to existing violations because the discharge from the system will contain less pollutant loading for coliform and will be at a higher quality or value for dissolved oxygen.

20. Discharges from the system as to water quality will not adversely affect marine fisheries or marine productivity because the water will be clear so there will be no potential for thermal stratification; the post-development discharges will remain freshwater so there will be no change to the salinity regime; and the gradual pre-development discharges will be replicated in post-development discharges. Several factors minimize potential for discharge of pesticide related pollutants: (1) only EPA-approved pesticides can be used; (2) only pesticides approved for site-specific soils can be used; (3) pesticides must be selected so as to minimize impacts

on surface and groundwater; (4) pesticides must have a maximum half-life of 70 days; and (5) the system design will maximize such pollutant removal.

Archaeological Resources

21. The applicant conducted an archaeological resource assessment of the project and area. This was intended to locate and define the boundaries of any historical or archaeological sites and to assess any site, if such exists, as to its potential eligibility for listing in the National Register of Historic Places (National Register). Only a portion of one archaeological site was located on the project tract. Site 8SJ3473, according to witness Anne Stokes, an expert in the field of archaeological assessment, contains trace artifacts dating to the so-called "Orange Period," a time horizon for human archaeological pre-history in Florida dating to approximately 2,300 B.C. The site may have been only a small campsite, however, since only five pottery fragments and two chert flakes, residuals from tool-making were found. Moreover, there is little possibility that the site would add to knowledge concerning the Orange Period or pre-history because it is a very common type of site for northeast Florida and is not an extensive village site. There are likely other campsites around and very few artifacts were found. No artifacts were found which would associate the site with historic events or persons.

22. The applicant provided the findings of its cultural resource assessment, made by Dr. Stokes, to the Florida Division of Historical Resources. That agency is charged with the responsibility of reviewing cultural resource assessments to determine if significant historic or archaeological resources will be impacted. The division reviewed the survey techniques used by Dr. Stokes, including shovel testing, sub-surface testing and pedestrian walk-over and investigation. The division determined that the site in question is not of a significant historical or archaeological nature as a resource because it does not meet any of the four criteria for inclusion in the National Register.[1] Thus the referenced agency determined that the site in question is not a significant historical or archaeological resource and that construction may proceed in that area without further investigation, insofar as its regulatory jurisdiction is concerned.

Wetlands

23. The wetlands to be impacted by the project consist of a 1,000 foot drainage-way made up of a 0.11 acre open-water channel, approximately four feet wide, and an adjacent vegetated wetland area of approximately 0.52 acres containing fewer than 30 trees. The open-water channel is intermittent in that it flows during periods of heavy rainfall and recedes to a series of small, standing pools of water during drier periods.

24. The Parcel D wetland is hydrologically connected to Marshall Creek, although its ephemeral nature means that the connection does not always flow. The wetland at times consists only of isolated pools that do not connect it to Marshall Creek. Although it provides detrital material export, that function is negligible because the productivity of the adjacent marsh is so much greater than that of the wetland with its very small drainage area. Because of the intermittent flow in the wetland, base flow maintenance and nursery habitat functions are not attributed to the wetland.

25. The Parcel D wetland is not unique. The predominant tree species and the small amount of vegetated wetland are water oak and swamp bay. Faunal utilization of the wetland is negligible. The wetland drainage-way functions like a ditch because it lacks the typical characteristics of a creek, such as a swampy, hardwood floodplain headwater system that channelizes and contains adjacent hardwood floodplains.

26. The location of the wetland is an area designated by the St. Johns County comprehensive plan as a development parcel. The Florida Natural Areas Inventories maps indicate that the wetland is not within any unique wildlife or vegetative habitats. The wetland is to be impacted as a freshwater system and is not located in a lagoon or estuary. It contains no vegetation that is consistent with a saltwater wetland. The

retaining wall at the end of the impact area is located 1.7 feet above the mean high water line.

Wetland Impacts

27. The proposed 0.63 acre wetland impact area will run approximately 760 linear feet from the existing trail road to the proposed retaining wall. If the wetland were preserved, development would surround the wetland, adversely affecting its long-term functions. Mitigation of the wetland functions is proposed, which will provide greater long-term ecological value than the wetland to be adversely affected. The wetland to be impacted does not provide a unique or special wetland function or good habitat source for fish or wildlife. The wetland does not provide the thick cover that would make it valuable as Black Bear habitat and is so narrow and ephemeral that it would not provide good habitat for aquatic-dependent and wetland-dependent species. Its does not, for instance, provide good habitat for woodstorks due to the lack of a fish population and its closed-in tree canopy. Minnow sized fish (Gambusia) and crabs were seen in portions of the wetland, but those areas are downstream of the proposed area of impact.

Mitigation

28. Mitigation is offered as compensation for any wetland impacts as part of an overall mitigation plan for the Marshall Creek DRI. The overall mitigation plan is described in the

development order, the mitigation offered for the subject permit and mitigation required by prior permits. A total of 27 acres of the more than 287 acres of wetlands in the total 1,300-acre DRI tract are anticipated to be impacted by the DRI. Approximately 14.5 acres of impacted area out of that 27 acres has already been previously authorized by prior permits. The overall mitigation plan for the DRI as a whole will preserve all of the remaining wetlands in the DRI after development occurs. Approximately one-half of that preserved area already has been committed to preservation as a condition of prior permits not at issue in this case. Also, as part of prior permitting, wetland creation areas have been required, as well as preserved upland buffers which further protect the preserved wetlands.

29. The mitigation area for the project lies within the Tolomato River Basin. The development order governing the total DRI requires that 66 acres of uplands must also be preserved adjacent to preserved wetlands. The overall mitigation plan for the DRI preserves or enhances approximately 260 acres of wetlands; preserves a minimum of 66 acres of uplands and creates enhancement or restores additional wetlands to offset wetland impacts. The preserved wetlands and uplands constitute the majority of Marshall Creek, and Stokes Creek which are tributaries of the Tolomato River Basin, a designated

Outstanding Florida Water (OFW). Preservation of these areas prevents them from being timbered and ensures that they will not be developed in the future.

30. The overall DRI mitigation plan provides regional ecological value because it encompasses wetlands and uplands they are adjacent to and in close proximity to the following regionally significant resources: (1) the 55,000 acre Guana-Tolomato-Matanzas National Estuarine Research Reserve; (2) the Guana River State Park; (3) the Guana Wildlife Management Area; (4) an aquatic preserve; (5) an OFW; and (6) the 22,000 acre Cummer Tract Preserve. The mitigation plan will provide for a wildlife corridor between these resources, preserve their habitat and insure protection of the water quality for these regionally significant resources.

31. The mitigation offered to offset wetland impacts associated with Parcel D includes: (1) wetland preservation of 0.52 acres of bottom land forest along the northeast property boundary (wetland EP); (2) wetland preservation of 3.98 acres of bottom land forest on a tributary of Marshall Creek contained in the DRI boundaries (Wetlands EEE and HHH); (3) upland preservation of 2.49 acres, including a 25-foot buffer along the preserved Wetlands EEE and HHH and a 50-foot buffer adjacent to Marshall Creek and preserved Wetland EP; (4) a wetland creation area of 0.82 acres, contiguous with the wetland preservation

area; and (5) an upland buffer located adjacent to the wetland creation area. The wetland creation area will be graded to match the grades of the adjacent bottomland swamp and planted with wetland tree species. Small ponds of varying depths will be constructed in the wetland creation area to provide varying hydrologic conditions similar to those of the wetland to be impacted. The wetland creation area is designed so as to not de-water the adjacent wetlands. All of the mitigation lands will be encumbered with a conservation easement consistent with the requirements of Section 704.06, Florida Statutes.

32. The proposed mitigation will offset the wetland functions and values lost through the wetland impact on Parcel D. The wetland creation is designed to mimic the functions of the impact area, but is located within a larger ecological system that includes hardwood wetland headwaters. The long-term ecological value of the mitigation area will be greater than the long-term value of the wetland to be impacted because; (1) the mitigation area is part of a larger ecological system; (2) the mitigation area is part of an intact wetland system; (3) the wetland to be impacted will be unlikely to maintain its functions in the long-term; and (4) the mitigation area provides additional habitat for animal species not present in the wetland to be impacted.

33. Certain features will prevent adverse secondary impacts in the vicinity of the roadway such as: (1) a retaining wall which would prevent migration of wetland animals onto the road; (2) a guard rail to prevent people from moving from the uplands into wetlands; and (3) a vegetated hedge to prevent intrusion of light and noise caused by automotive use of the roadway.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding pursuant to Section 120.57, Florida Statutes.

35. This is a de novo proceeding intended to formulate final agency action. See Department of Transportation v. J.W.C., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). The burden is on the applicant to prove entitlement to the permit modification by a preponderance of evidence. J.W.C. 396 So. 2d at 788. To carry that initial burden, the applicant must provide reasonable assurances through presentation of credible evidence of entitlement to the permit. The burden is one of reasonable assurances and not absolute guarantees. City of Sunrise v. Indian Trace Community Dev. Dist., 14 F.A.L.R. 866, 869 (South Florida Water Management Dist., January 16, 1990).

36. Once an applicant has carried the burden of a preliminary showing of entitlement, the burden of presenting

contrary evidence shifts to the Petitioner. Hoffert v. St. Joe Paper Co., 12 F.A.L.R. at 4972, 4987 (Dep't of Envtl. Regulation, December 6, 1990). A Petitioner is required to present evidence of equivalent quality and prove the truth of the facts alleged in the Petition. See Hoffert at 4987. When an applicant has established prima facie evidence of entitlement, the permit cannot be defeated unless the Petitioner presents contrary evidence of equivalent value. Ward v. Okaloosa County, 11 F.A.L.R. 217, 236 (Dep't Envtl. Regulation, June 29, 1989). A Petitioner's burden cannot be met by mere speculation of what "might" occur. Chipola Basin Protective Group, Inc., v. Florida Chapter of Sierra Club, 11 F.A.L.R. 467, 480-81 (Dep't of Envtl. Regulation, December 29, 1988).

37. The conditions for issuance of an ERP are contained in Rules 40C-4.301 and 40C-4.302, Florida Administrative Code. These conditions are further explained in the "Applicant's Handbook: Management and Storage Surface Waters" (A.H.), adopted by reference in Rule 40C-4.091(1), Florida Administrative Code. Rule 40C-4.301, Florida Administrative Code, Conditions of Issuance of ERP:

38. Concerning water quantity impacts, Rule 40C-4.301(1), Florida Administrative Code, and Sections 9.1.1(a) and 10.2, A.H., require that construction and operation of the system must not cause adverse water quantity impacts to receiving waters and

adjacent lands. Pursuant to Section 10.2.1, A.H., a presumption is created that this standard is satisfied if: (1) the post-development peak rate of discharge does not exceed the pre-development peak rate of discharge for a 25-year, 24-hour storm design; (2) for systems which discharge to landlocked lakes, the post-development volume of water discharged does not exceed the pre-development volume of water discharged; (3) for projects located on a stream or water course of five square miles or greater, floodplain storage conveyance protection measures are undertaken; and (4) where applicable, low and base flow criteria are met. All of the applicable criteria are met for the presumption to arise. The post-development peak rate of discharge of twenty-eight cubic feet per second (CFS) for the 25-year, 24-hour storm event is less than the pre-development rate of 40 CFS. The system will not discharge to a landlocked lake and therefore the volume standard is not applicable. The project is not located in a stream or water course with an upstream drainage area of five square miles or greater. Therefore, the floodplain encroachment criterion is not applicable. Under pre-development conditions, the wetland to be impacted periodically goes dry. Therefore, there is no low flow or base flow to be maintained and the low flow criterion is not applicable. Hines and the District have provided reasonable assurances of compliance with the above criteria and the

presumption is created that construction and operation of the system will not cause adverse water quantity impacts to receiving waters and adjacent lands. No contrary evidence was presented as to these matters and these criteria are satisfied.

Flooding

39. Pursuant to Rule 40C-4.301(1)(b), Florida Administrative Code, and Sections 9.1.1(b) and 9.1.3, A.H., an applicant must provide reasonable assurance that construction and operation of a system will not cause adverse flooding to on-site or off-site property. The parties have stipulated that the applicant has provided reasonable assurance that the project will not cause adverse flooding to on-site or off-site property.

Surface Water Storage and Conveyance

40. Rule 40C-4.301(1)(c), Florida Administrative Code, and Sections 9.1.1(c) and 10.5, A.H., require that the applicant provide reasonable assurance that construction and operation of the system will not cause adverse impacts to existing surface water storage and conveyance capabilities. This criterion is only applied to projects located on a stream or water course where the upstream drainage area is five square miles or greater. The wetland to be impacted does not have an upstream drainage area of five square miles or greater; consequently, this standard is not applicable.

Fish and Wildlife

41. Rule 40C-4.301(1)(d), Florida Administrative Code in Sections 9.1.1(d), 12.1.1(a) and 12.2, et. seq., A.H., require that construction and operation of the system must not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. The applicant is proposing to fill 0.63 acres of freshwater wetland as part of the project. Section 12.2.2.3, A.H., requires consideration of the relative functional values of the wetlands to be impacted. The current quality of the wetland to be impacted is moderate to moderately low. The wetland functions would be diminished if the wetland were left intact and development were to occur around it. It is not a unique wetland and it is in an area designated for development by the St. Johns County Comprehensive Plan. The area to be impacted is an ephemeral or intermittent freshwater wetland which has little or no use by wildlife although saltwater areas downstream are used by estuarine species.

42. Additionally, pursuant to Section 12.2.2.4, A.H., cut-off walls have been designed to surround Pond N and will assure that the pond will not change the hydroperiod of adjacent wetlands so as to adversely affect wetland functions.

43. Pursuant to Section 12.3, A.H., mitigation may be required to offset adverse impacts to wetland functions and

values. To offset the impacts to 0.63 acres of wetlands, the applicant will create 0.82 acres of wetlands, preserve 4.5 acres of wetlands and preserve 2.5 acres of uplands. The functions and values of the wetland to be impacted will be replaced or compensated by the mitigation plan. The mitigation will provide greater functional value and greater long term ecological value in the wetland to be impacted because: (1) the mitigation area will be part of a larger ecological unit; (2) the actual wetland will be larger than the impacted wetland; (3) the creation area will have a direct connection to Marshall Creek; (4) the creation area will provide habitat which is not provided by the wetland to be impacted; and wetlands and uplands will be preserved. Therefore, the wetland values and functions for fish and wildlife will not be adversely impacted.

Water Quality

44. Pursuant to Rule 40C-4.301(1)(e), Florida Administrative Code, an applicant must provide reasonable assurances that construction and operation of a system will not adversely affect the quality of receiving waters such that water quality standards will be violated. The surface water management system for the project discharges to Class II surface water. Therefore, the system must meet Class II water quality standards.

45. Pursuant to Section 10.7.2., A.H., adopted by the above-cited rule, an applicant must provide reasonable assurances that construction and operation of a system will not degrade water quality below water quality standards and that the quantity of water discharged offsite will not cause adverse environmental or water quality impacts. The quality of stormwater discharge to receiving waters is presumed to meet the water quality standards if the system requires a permit pursuant to Chapter 40C-42, Florida Administrative Code, and is in compliance with that Chapter. See Section 10.7.2., A.H. The design of the system is in compliance with the applicable design criteria for wet detention, stormwater management systems contained in Rule 40C-42.026(4), Florida Administrative Code, giving rise to the presumption in Section 10.7.2. A.H., that discharges from the system meet water quality standards. See Rule 40C-42.023(2)(a), Florida Administrative Code. Further, both the applicant and the District presented site-specific analyses of the system which demonstrate that Class II water quality standards will be met at the point of discharge and that water quality in the receiving waters will actually improve for the parameters which are currently out of compliance in the receiving waters. Post-development pollutant loadings and pollutant concentrations will be less than those of pre-development circumstances; this results in an improvement in the

water quality in the Class II receiving waters. Discharges in the system will not result in adverse impacts to the temperature or salinity regime in the receiving waters. Thus, reasonable assurances have been provided that construction and operation of the system will not adversely affect the quality of receiving waters in a way that will result in violation of state water quality standards.

46. Pursuant to Section 12.2.4, A.H., such a system must be evaluated using a five-part test:

(1) Short-Term Water Quality Considerations - The applicant here will implement erosion control best management practices prescribed by the District, including the use of turbidity barriers during construction, stabilizing newly created slopes or surfaces in or adjacent to wetlands and other surfaces, and the prevention of other discharges or releases of pollutants during construction that will prevent water quality standards from being violated. Thus this factor has been satisfied.

(2) Long-Term Water Quality Considerations - Pursuant to Section 12.2.4.2, A.H., the applicant must address long term water quality impacts of the proposed system. In light of the conclusions made in paragraph 1, next above, reasonable assurances have been provided that construction and operation of the system will not adversely affect the quality of receiving

water such that state water quality standards will not be violated in the long term either.

(3) The tests appearing at 12.2.4.3 and 12.2.4.4, A.H., involve water quality considerations regarding docking facilities and mixing zones. Neither of such factors is proposed or at issue in this case, so these two tests or considerations do not apply.

(4) Section 12.2.4.5, A.H., concerns circumstances where ambient water quality does not meet standards. If the proposed receiving waters do not meet applicable water quality standards for any parameter, then an applicant is required to demonstrate that, in addition to other water quality requirements, the proposed activity will not contribute to the existing violation for the parameters which do not meet the standards. Water quality sampling data from Marshall Creek indicate that the receiving waters do not currently meet Class II water quality standards for total and fecal coliform and dissolved oxygen. Due to the size of Pond N, the long residence time of water in the pond and the design of the pond, reasonable assurances have been demonstrated that the system will serve to improve water quality in the receiving waters for total and fecal coliform bacteria and for dissolved oxygen. Thus, this test has been satisfied.

Secondary Impacts

47. Pursuant to Rule 40C-4.301(1)(f), Florida Administrative Code, and Sections 9.1.1(f), 12.1.1(f) and 12.2.7, A.H., an applicant must provide reasonable assurances that a regulated activity will not cause adverse secondary impact to water resources. If secondary impacts cannot be prevented then mitigation may be offered to offset those impacts. A four-part test is employed in evaluating secondary impacts:

(1) Construction, Alteration and Intended Use of Uplands - As part of the Secondary Impacts Test, the applicant must provide reasonable assurances that secondary impacts for the construction and use of the project will not cause violations of water quality standards or adverse impacts to the functions of wetlands. When a design provides for an upland buffer of an average 25 feet, then upland activities will not be considered adverse unless additional measures are needed for protection of wetlands used by listed species for nesting or denning or critically important feeding habitat. See Section 12.2.7(a), A.H. A 50-foot buffer has been provided along the wetlands adjacent to Marshall Creek remaining after the project is constructed, except for the end of the cul-de-sac at the location of the retaining wall. To address adverse secondary impacts in the retaining wall area, the following measures have

been undertaken: (a) the retaining wall prevents migration of wetland animals onto the road; (b) a guardrail will prevent people from moving from the uplands to the wetlands; and (c) a vegetated hedge will prevent intrusion from noise and lighting when automobiles use the roadway. No wetlands on the site are used by listed species for nesting, denning or critically important feeding habitat and, therefore, no additional measures for protection of such areas are needed. The project will comply with state water quality standards and the pesticide management plan assures that the use of pesticides on the project will not result in violation of water quality standards. Consequently, this portion of the Secondary Impacts Test is satisfied.

(2) Ecological Value of Uplands for Nesting or Denning of Aquatic or Wetland Dependent Listed Animal Species - In order to pass the Secondary Impact Test Hines must provide reasonable assurance that construction alteration and use of the 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. Consideration for areas needed for foraging or wildlife corridors will not be required, except as necessary for ingress and egress to a nest or den site from the wetland or other surface water. Section 12.2.7(b), A.H. Since none of the

listed aquatic or wetland dependent species use the project site for nesting or denning, this portion of the Secondary Impacts Test is satisfied.

(3) Significant Historical and Archaeological Resources - As part of the Secondary Impacts Test, the District must consider any other relevant activities that are very closely linked and causally related to any proposed dredging or filling which will cause impacts to significant historical and archaeological resources. Section 12.2.7(c), A.H. The applicant presented a cultural resource assessment prepared and conducted by Dr. Stokes, a professional archaeologist, which indicates that no significant historical or archaeological resources will be impacted by the project. The Florida Division of Historical Resources advised the District that it concurred in that determination. Consequently, reasonable assurances have been provided that the project will not result in adverse secondary impacts to significant historical or archaeological resources and this portion of the secondary impacts test is also satisfied.

(4) Future Activities - As part of the Secondary Impacts Test, Section 12.2.7(d), A.H., requires that the applicant provide reasonable assurances that the following future activities will not result in water quality violations or adverse impacts to the functions of wetlands or other surface

waters: (1) Future phases; (2) Activities regulated under ERP which are very closely linked or causally related. Reasonably expected future phases of the DRI have been shown, along with the associated overall mitigation plan. No adverse secondary impacts are anticipated from expansion of the proposed system. Mitigation will be required for future wetland impacts, consistent with the District rules and a conservation easement will be placed on the wetlands remaining on the project site and adjacent upland areas, so those areas will not be impacted in the future. This factor in the Secondary Impacts Test has been satisfied, thus the four-part Secondary Impacts Test criteria have been met.

(5) Maintenance of Flows and Levels Established by Chapter 40C-8, Florida Administrative Code -

48. Pursuant to Rule 40C-4.301(1)(g), Florida Administrative Code, and Section 9.1.1(g), A.H., reasonable assurances must be provided that construction, operation or alteration of a proposed system will not adversely affect the maintenance of surface or groundwater levels or surface water flows established in Chapter 40C-8, Florida Administrative Code. No such flows or water levels pursuant to Chapter 40C-8, Florida Administrative Code, have been established for the area of the project and therefore, this criterion is not applicable to this proceeding and application.

Works of the District

49. Pursuant to Rule 40C-4.301(1)(h), Florida Administrative Code, and Section 9.1.1(h), A.H., an applicant must provide reasonable assurance that construction and operation of a proposed system will not cause adverse impacts to a work of the District established pursuant to Section 373.086, Florida Statutes. No work of the District has been established in the area of the project and therefore, this criterion is not applicable.

Performance and Function

50. Pursuant to Rule 40C-4.301(1)(i), Florida Administrative Code, and Section 9.1.1(i) A.H., an applicant must provide reasonable assurances that, based on generally accepted engineering and scientific principles, the proposed system will be capable of being performed and of functioning as proposed. The system is a gravity flow system, with no mechanical or moving parts. It will be constructed with standard industry materials which are readily available. There is nothing extraordinary about the drainage or collection system. It is capable of being effectively operated and maintained by the owner and operator, which will be the related Community Development District (CDD). The CDD has the ability financially and operationally to maintain the system and operate

it. Therefore, reasonable assurances have been provided that this criterion will be satisfied.

Financial, Legal and Technical Capability

51. Pursuant to Rule 40C-4.301(1)(j), Florida Administrative Code, and Rule 9.1.1(j), A.H., an applicant must provide reasonable assurances that construction and operation of the system 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. The applicant, Hines Interest Limited Partnership, has the means to complete the work and to operate the system successfully. A CDD will provide for the operation and maintenance of the system and the parties have stipulated that the CDD has the financial capability to undertake the operation and maintenance. It also has the legal power to enforce compliance with the permits and the ability to hire qualified engineers and contractors to undertake the work authorized by the permit. Thus, reasonable assurances have been provided that this criterion is satisfied.

Special Basin Criteria

52. Pursuant to Rule 40C-4.301(1)(k), Florida Administrative Code, and Section 9.1.1(k), A.H., an applicant is required to provide reasonable assurances that construction and operation of the system will comply with any applicable special

basin criteria or geographic area criteria established in Chapter 40C-41, Florida Administrative Code. No such special criteria have been implemented in the geographical area of the project and thus this is not applicable.

Public Interest Test

53. Pursuant to Rule 40C-4.302(1)(a), Florida Administrative Code, and Sections 12.1.1(b), 10.1.1(a) and 12.2.3, A.H., the construction and operation of those portions of the system located in, on or over wetlands or other surface waters my not be contrary to the public interest as determined by balancing the following criteria[2]:

(1) Public health, safety or welfare or the property of others - Pursuant to Rule 40C-4.302(1)(a)1, and Sections 10.1.1.(a)1, 12.2.3(a) and 12.2.3(1), A.H., the District must consider whether the proposed activity located in, on or over wetlands or other surface waters will adversely affect the public health, safety or welfare or the property of others. This analysis requires consideration of whether the activity will cause an environmental hazard to public health, safety or improvements to public health or safety with respect to environmental issues. The project does not present an environmental hazard to public health and safety. The project is not located directly in a classified shellfish harvesting area nor will it cause closure or additional restrictions on

shellfish waters. There will be no flooding on the property of others. Cut-off walls around the stormwater ponds assure that the project will not cause groundwater to be drawn down in off-site wetlands. Thus, this factor is considered neutral.

(2) The conservation of fish and wildlife, including endangered or threatened species, or their habitats - Pursuant to Rule 40C-4.302(1)(a), Florida Administrative Code, and Sections 10.1.1(a)2, 12.2.3(b) and 12.2.3.2, A.H., the District must consider whether the activity proposed in, on or over wetlands or surface waters will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats. Although the wetland impact results in adverse impact to certain wetland values and functions, that impact is compensated for by the proposed wetland mitigation. Additionally, there is no indication that endangered or threatened species use the wetlands to be impacted. Thus, this factor is also considered neutral.

(3) Navigation, the flow of water, erosion or shoaling - Pursuant to Rule 40C-4.302(1)(a)3, Florida Administrative Code, and Sections 10.1.1(a)3, 12.2.3(c) and 12.2.3.3, A.H., the District must consider whether the activity involving wetlands or other surface waters will adversely affect navigation, flow of water or cause harmful erosion or shoaling. There are no navigable waters in the impact area and sedimentation control

measures during construction will ensure that there will be no shoaling. There are no surface water diversions of water from one basin to another and erosion and sediment control measures are adequately included in the design. Thus, this factor is considered to be neutral.

(4) Fishing and recreational values, and marine productivity in the vicinity of the activity - Pursuant to Rule 40C-4.302(1)(a)4, Florida Administrative Code, and Sections 10.1.1(a), 12.2.3(d) and 12.2.3.4, A.H., the District must consider whether the activity located in or over wetlands or other surface waters will adversely affect fishing or recreational values or marine productivity. This factor is considered neutral since there is no on-site fishery nursery habitat to be degraded or eliminated and the on-site wetland to be impacted does not contribute significant values for detrital export, temperature regimes or to normal salinity regimes. Any minimal values which may be impacted will be replaced by the wetland mitigation effort and installation.

(5) Temporary or permanent nature - In accordance with Rule 40C-4.302(1)(a)5, Florida Administrative Code, it must be considered whether the activity will be of a temporary or permanent nature. It is of a permanent nature and although the wetland impacts are thus permanent, the mitigation is also

permanent in alleviating any adverse impacts and thus, this factor is a neutral one as well.

(6) Significant historical and archaeological resources - Pursuant to Rule 40C-4.302(1)(a)6, Florida Administrative Code, the District must consider whether the activity located in, on or over wetlands or surface waters will adversely affect or enhance significant historical and archaeological resources under the provision of Section 267.061, Florida Statutes. Pursuant to subparagraph (2)(a) of that Section, the District as a permitting agency must consider the effect of any permitting action on any historic property that this is included in, or eligible for inclusion in the National Register of Historic Places. The District is thus required to afford the Division of Historical Resources of the Department of State a reasonable opportunity to comment with regard to the project. Although a portion of one archaeological site is located on the property, the site is a minor one, not of significant archaeological significance. It is not eligible for listing on the National Register of Historic Places. The District notified the Division of the pending permit application and the Division has concurred that no significant archaeological or historical sites are recorded for the site of the project or are likely to be affected by it. Thus, reasonable assurances have been provided

that no such significant sites will be adversely affected and this factor is neutral as well.

(7) Current condition and relative value functions - Pursuant to Rule 40C-4.302(1)(a)7, Florida Administrative Code, the District is required to consider the current conditions and relative value of functions being performed in the areas affected by the proposed activity involving wetlands or other surface waters. The wetland mitigation proposed will compensate for and maintain the current conditions and relative values and functions of the wetland to be impacted by the project. The functions that the wetland currently provides will be diminished if it were left intact but development occurred around it. The wetland mitigation is part of an overall plan that will provide regional ecological value. The project mitigation will provide greater long-term benefits than the on-site wetland can provide because development around the wetland to be impacted would diminish its already fairly low functional value, the wetland creation will be approximately one-third larger in size than the impacted area and conservation easements will ensure that four and one-half acres of wetlands and two and one-half acres of uplands will be preserved permanently. Thus, this factor is a neutral consideration as well. Therefore, all factors of the public interest "balancing test" are determined to be neutral. Therefore, the portions of the project located in, on or over

wetlands or other surface waters are not considered to be contrary to the public interest.

Cumulative Impacts

54. In accordance with Subsection 373.414(8), Florida Statutes (2000), Rule 40C-4.302(1)(b), Florida Administrative Code, and Sections 10.1.1(b) and 12.2.8, A.H., Hines must provide reasonable assurances that the project, when considered in conjunction with past, present and future activities in that drainage basin will not result in unacceptable, cumulative impacts to water quality or wetland functions. The relevant drainage basin the project lies in is the Tolomato River Basin. The applicant has proposed mitigation which lies within that drainage basin which offsets the adverse impacts caused by the project. Subsection 373.414(8), Florida Statutes, was amended by Chapter 2000-133, Laws of Florida, to add subparagraph 373.414(b), which provides:

> If an Applicant proposes mitigation within the same drainage basin as the adverse impacts to be mitigated, and if the mitigation offsets those adverse impacts, the governing board and department shall consider the regulated activity to meet the cumulative impact requirements . . .

This provision became effective on May 17, 2000. The project satisfies the statutory cumulative impact requirement.

55. The District rules, including the provisions of Section 12.2.8, A.H., were not amended after that statutory

change. Even prior to that change, however, the District's interpretation of its rules was consistent with the policy expressed in the statutory provision which became effective on May 17, 2000. In that vein, the District interpreted its rules such that no adverse cumulative impacts would be found if the offered mitigation offsets the adverse impacts of the project and the mitigation is to be undertaken on the project site and is to be undertaken in the same drainage basin. See Sarah H. Lee v. St. Johns River Water Management District and Walden Chase Developers, Ltd., DOAH Case No. 99-2215 at 47 (rendered September 27, 1999). All of these conditions are satisfied and thus, under both the revised statute and the District's rule interpretation, the project will not cause unacceptable cumulative impacts.

Class II Waters; Waters Approved for Shellfish Harvesting -

56. Pursuant to Rule 40C-4.302(1)(c), Florida Administrative Code, and Sections 10.1.1(c), 12.1.1(d) and 12.2.5, A.H., the applicant must provide reasonable assurances that, if any portion of the project is located in or adjacent to or in close proximity to Class II waters or Class III waters approved, restricted or conditionally restricted for shellfish harvesting by the Department of Agriculture and Consumer Services, that portion of the project must comply with the additional criteria set forth in Subsection 12.2.5, A.H. The

waters of Marshall Creek below the mean high water line are classified by that department as "Conditionally Restricted" for shellfish harvesting. However, all portions of the project are located above the mean high water line. Additionally, the species within the project boundaries are not saltwater species. Therefore, reasonable assurances exist that none of the project activities are located in waters approved to any degree or restricted to any degree as to shellfish harvesting. Therefore, the requirements of Subsection 12.2.5, A.H., do not apply.

Vertical Seawalls

57. Pursuant to Rule 40C-4.302(1)(d), Florida Administrative Code and Sections 10.1.1(d), 12.1.1(e) and 12.2.6, A.H., an applicant is required to provide reasonable assurances that vertical seawalls located in estuaries or lagoons will comply with the additional criteria of Subsection 12.2.4, A.H. The evidence establishes that the retaining wall at the edge of the wetland impact area is located in freshwater above mean high water line and is thus not located in an estuary or lagoon, as a matter of law. Thus, this criterion is not applicable.

Elimination or Reduction of Impacts

58. Pursuant to Section 12.2.1, A.H., the District must consider whether an applicant has implemented "practicable design modifications" to reduce or eliminate adverse impacts if

the proposed system will result in adverse impacts to wetland and surface water functions, and the proposed system does not meet the environmental criteria set forth in Subsection 12.2.2 through 12.2.3.7, A.H. In accordance with Subsection 12.2.1.2(b), A.H., however, consideration of practicable design modifications is not required when the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and provides greater long-term ecological value than the area of wetland or other surface water which would be adversely affected.

59. In recommending issuance of an ERP for the project, the District staff relied on the "out provision" of subsection 12.2.1.2(b), A.H. The overall mitigation plan for the DRI of which this project is a part, provides regional ecological value by providing for preservation of at least 241 acres of wetlands, including the majority of Marshall and Stokes Creeks; preservation of 66 acres of associated uplands; restoration and enhancement of wetlands adversely impacted by past activities and creation of additional wetlands. The preserved wetlands are tributaries of the Tolomato River, on OFW. Preservation of these wetlands and uplands insures that they will not be logged or developed in the future, The overall mitigation plan contained in the DRI provides regional ecological value because it encompasses uplands and wetlands that are adjacent to and in

close proximity to the regionally significant resources, the various reserves and preserves, such as the 22,000 acre Cummer Tract preserve, referenced in the above findings. The mitigation plan will help preserve habitat and water quality of these regionally significant resources and helps to provide a wildlife corridor between the various resources areas.

60. Preservation of a floodplain swamp as well as uplands can provide regional ecological value, especially where the preserved wetland is associated with an area designated with a special status. See Griffin v. St. Johns River Water Management District, ER F.A.L.R. '99:007, p. 6-9 (St. Johns River Water Management District December 9, 1998). When a mitigation plan is shown to have regional ecological value and is of greater ecological value than the wetland to be impacted, then the out provisions of Subsection 12.2.1(b), may be applied and the practicable alternative analysis is not required. See id.

61. The mitigation offered will provide greater long-term ecological value than the wetland to be impacted. The wetland to be impacted does not provide a quality habitat resource for fish and wildlife, it is moderate to moderately low quality wetland, whose functions and values will be diminished in the future by adjacent upland activities. A majority of its surface waters' hydrologic inputs has been diverted pursuant to the prior permit. The mitigation will replicate the functions of

the impacted wetland by providing similarly varying hydrologic conditions and drainage into Marshall Creek. The ecological value of the mitigation area will be greater than the wetland to be impacted because the mitigation area will be part of a larger ecological system; the mitigation area will be part of an intact wetland system; the wetland to be impacted will be unlikely to maintain its functions in the long-term and the mitigation area will provide habitat for animal species which do not currently use the wetland to be impacted.

62. The applicant has provided reasonable assurances that the proposed mitigation is part of a plan which provides regional ecological value and which will provide greater long-term ecological value than the wetland to be impacted. Consequently the applicant is not required to implement the practicable design modifications to reduce or eliminate impacts in accordance with Section 12.2.1, A.H.

RECOMMENDATION

Having considered the foregoing Findings of Fact and Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is

RECOMMENDED:

That a final order be entered granting the subject application for modification of Permit 4-109-0216A-ERP so as to

allow construction and operation of the Parcel D project at issue, with the addition of the inclusion of a supplemental permit condition regarding the vegetated natural buffers for Lots 16 through 19 described and determined above.

DONE AND ENTERED this 9th day of April, 2001, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of April, 2001.

ENDNOTES

[1/] See 36 Code of Federal Regulations, Section 60.4.

[2/] Because the project is not located within an OFW and does not significantly degrade an OFW, the standard is "not contrary to the public interest." See Rule 40C-40302(1)(a), Florida Administrative Code. This standard has been stipulated to be the correct one by the parties in the Prehearing Stipulation.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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