SJR 2001-21

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BOBBY C. BILLIE; SHANNON LARSEN; and THE SIERRA CLUB,

Petitioners,

v.

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

Respondents.
_____/

AP

AMR-CLOS

DOAH Case Nos. 00-2230
00-2231

SJRWMD F.O.R. Nos. 2000-29
2000-30

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable P. Michael Ruff, held a formal administrative hearing in the above-styled case on October 11-12, 2000, and December 20, 2000, in St. Augustine, Florida.

A. APPEARANCES

For Petitioner The Sierra Club:

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For Petitioners/Intervenors Bobby C. Billie and Shannon Larsen:	Deborah Andrews, Esquire 11 N. Roscoe Blvd. Ponte Vedra Beach, FL 32082
For Respondent St. Johns River Water Management District:	Thomas I. Mayton, Jr., Esquire Mary Ellen Jones, Esquire P.O. Box 1429 Palatka, FL 32178-1429
For Respondent Hines Interests Limited Partnership:	Marcia Parker Tjoflat, Esquire John G. Metcalf, Esquire Pappas, Metcalf, Jenks & Miller P.A. 200 West Forsyth Street, Suite 1400 Jacksonville, Florida 32202

On April 9, 2001, the Honorable P. Michael Ruff ("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, Bobby C. Billie and Shannon Larsen, timely filed joint exceptions to the Recommended Order. Petitioner, The Sierra Club, timely filed exceptions to the Recommended Order. Respondent, St. Johns River Water Management District ("District") timely filed exceptions to the Recommended Order. All parties timely filed responses to exceptions. This matter then came before the Governing Board on June 12, 2001 for final agency action.

B. STATEMENT OF THE ISSUES

This case involves the issue of whether Hines Interests Limited Partnership's ("Hines" or "applicant") 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.

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)(l), F.S. (2000), 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); Heifetz 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 of fact were based did not comply with essential requirements of law. Section 120.57(1)(l), F.S., Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 24 Fla. L. Weekly D1399 (Fla. 4th DCA June 16, 1999).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss,

supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the finding is supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

The Governing Board in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification 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)(l), F.S. (2000). Furthermore, the Governing Board's authority to modify a Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. 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, Bobby C. Billie and Shannon Larsen, jointly filed 22 exceptions to the ALJ's findings of fact and conclusions of law and adopted the exceptions filed by The Sierra Club. Petitioner, The Sierra Club, filed 14 exceptions to the ALJ's findings of fact and conclusions of law and adopted the exceptions filed by Billie and Larsen. District staff filed two exceptions to the ALJ's findings of fact and conclusions of law and pointed out four typographical errors. The parties' exceptions to the Recommended Order have been reviewed and are addressed below.

Hereinafter, references to testimony will be made by identifying the witness by surname followed by transcript page number (e.g. Frye Vol. IV: 303-04). 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 31: 30). Other references to the transcript will be indicated with a "T" followed by the page number (e.g. T. Vol. I: 104). Referenced to the Prehearing Stipulation will be designated by "Prehrg. Stip." followed by the page number, then paragraph number (e.g. Prehrg Stip.: p. ___, ¶ ___). References to the Recommended Order will be designated by "R.O." followed by the page number (e.g. R.O.: 13).

RULINGS ON PETITIONER, THE SIERRA CLUB's, EXCEPTIONS

The Sierra Club's Exception No. 1

Sierra Club takes exception to recommended conclusions of law number 59 through 62 wherein the ALJ determined that the provisions of Section 12.2.1.2(b), Applicant's Handbook, are applicable to this case and that Hines does not need to implement practicable design modifications to eliminate or reduce wetland impacts. Sierra Club argues that as a result of this interpretation, Hines will be allowed to fill in a small tributary wetland system to Marshall Creek and the Tolomato River Estuarine System to allow for additional residential development even though the wetland impacts could be avoided. Sierra Club further maintains that adoption of the ALJ's conclusions will result in the District's requirement for reduction and elimination of wetland impacts to become "a policy relic of the past." Sierra Club also contends that the "out" provision in section 12.2.1.2(b) is vague and ambiguous and that this case more than amply shows the need for the District to review the rule.[1]

To the extent that Sierra's Exception No. 1 attempts to challenge the legality of section 12.2.1.2(b), A.H., such exception is improper because this is a section 120.57, F.S., administrative licensing challenge case, not a section 120.56, F.S., administrative rule challenge case. Sierra Club has not met the pleading requirements for a rule

[1] Sierra also asserts that the "out' provision should be "strictly construed" based on Pal-Mar Water Management District v. Martin County, 384 So.2d 232 (Fla. 4th DCA 1980). We agree with Sierra Club on this point. We disagree with District staff who argue without citing any controlling law that only "exemptions" must be strictly construed. Staff contends that because the "out" provision is an "exception", it need not be strictly construed. Such a distinction would be contrary to the purpose of strictly construing exemptions (or exceptions) against those who seek to avail themselves of the exemption. Although some may draw distinctions, exceptions and exemptions have the same operational effect - - they both obviate the need to comply with a particular requirement. Moreover, both Federal and Florida courts have used the terms interchangeably. See, U.S. v. Allen, 163 U.S. 499, 504 (1986) and

challenge under section 120.56, F.S. Neither the ALJ nor the Governing Board have jurisdiction to entertain such a rule challenge in a proceeding brought under section 120.569, F.S. See, Save the St. Johns River v. SJRWMD, 1991 WL 832961, DOAH No. 90-5247, F.O.R. 90-939 (SJRWMD Final Order 8/15/91) ("If Mr. Auth wishes to challenge the validity of the rule, that must be done in another proceeding on another day.") The case law of Florida holds that a state agency must comply with its own rules, until they are duly amended or abolished. See, DeCarion v. Martinez, 557 So.2d 1083, 1084 (Fla. 1st DCA 1989). Thus, the District must follow current section 12.2.1.2(b), A.H., until that rule is amended or abolished. Id. To the extent that Sierra's Exception No. 1 attempts to add new requirements to current section 12.2.1.2(b), A.H., the Governing Board may not do so in this case. Id.

The Governing Board finds that the ALJ's conclusion regarding the "out" provision of the reduction and elimination requirement of section 12.2.1.2(b), A.H., was proper and comports with the Governing Board's interpretation of this rule. Moreover, the Governing Board finds that the record contains competent substantial evidence to support the factual underpinnings that form the basis of the ALJ's conclusion.

To qualify for an ERP, generally, an applicant must first eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed system, by implementing practicable design modifications as described in section 12.2.1.1, A.H. However, section 12.2.1.1, A.H., only requires an elimination and reduction analysis when: (1) a "proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the

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State v. Norse, 340 So.2d 966, 969 (Fla. 3rd DCA 1976). In any event, we conclude that the applicant meets the "out" provision even when strictly construed.

requirements of subsections 12.2.2 through 12.2.3.7," or (2) neither exception within section 12.2.1.2, A.H., applies. Section 12.2.1.2, A.H., provides:

> **12.2.1.2** The District will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:
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> a. the ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site specific analysis using the factors in subsection 12.2.2.3, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or
>
> b. the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

As part of its determination whether one of the two exceptions in section 12.2.1.2 applies, the District must evaluate the long term ecological value of the mitigation proposed by the applicant. If the mitigation is not adequate under the relevant parts of sections 12.3 through 12.3.8, A.H., to offset the adverse impacts of the proposed system, then it is unlikely either exception in section 12.2.1.2 will apply. The question of whether mitigation is "adequate" is separate, albeit related, to the question of whether mitigation provides greater long-term ecological value than a wetland that is proposed to be impacted.

In this case, the proposed filling of part of Wetland E will eliminate the ability of that wetland area to provide functions to fish and wildlife. Hines' plan -- preserving existing wetlands and protecting them with a surrounding upland buffer, preserving uplands adjacent to wetlands, and creating wetlands contiguous to existing wetlands -- will fully replace the types of functions that the part of Wetland E proposed to be

impacted provides to fish and wildlife. Hines' mitigation plan will offset the adverse impacts that its Project will have on the value of functions provided to fish and wildlife by the impacted part of Wetland E. The issue of the adequacy of the proposed mitigation is discussed more fully in our ruling on Sierra's Exception No. 2 below.

In this case, the first exception, under section 12.2.1.2 (a), A.H., does not apply to the Project: the issue is whether the ALJ correctly concluded that the second exception, under section 12.2.1.2(b), A.H., applies.

There are two requirements for section 12.2.1.2(b) to apply. First, the proposed mitigation must implement "all or part of a plan that provides regional ecological value." Second, the proposed mitigation must provide "greater long-term ecological value than the area of wetland or other surface water to be adversely affected."

The term "regional" has a generally understood meaning under part IV of Chapter 373, F.S., as referring to an area within a regional watershed or drainage basin.[2] For instance, the term "regional ecological value" is used in the definition of "offsite regional mitigation." See, §373.403(22), F.S. Section 373.4135(1)(c), F.S., regarding "offsite regional mitigation" and mitigation banks, states that "[o]ffsite mitigation, including offsite regional mitigation, may be located outside the regional watershed in which the adverse impacts of an activity regulated under this part is located... ." [Emphasis added]. Section 373.4136, F.S., establishes standards for mitigation banks, including the amount of mitigation credits awarded. To obtain a mitigation bank permit an applicant must show, among other things, that "[t]he proposed mitigation bank will improve

[2] The District has established regional watersheds in Appendix M, A.H., and drainage basins in figure 12.2.8-1, A.H. The District's regional watersheds and drainage basins are identical. Compare Appendix M, A.H., with Figure 12.2.8-1, A.H. The Project, the Marshall Creek DRI area, Marshall Creek, and Stokes Creek are all located in the same drainage basin.

ecological conditions of the regional watershed." [Emphasis added]. See, §373.4136(1)(a), F.S. In determining the degree of improvement in ecological value when awarding mitigation credits, the District must consider, among other things, the following factor:

> The proximity of the mitigation bank to areas with regionally significant resources or habitats, such as national or state parks, Outstanding National Resource Waters and associated watersheds, Outstanding Florida Waters and associated watersheds, and lands acquired through governmental or nonprofit land acquisition programs for environmental conservation; and the extent to which the mitigation bank established corridors for fish, wildlife, or listed species to those resources or habitats.

[Emphasis added]. See, §373.4136(4)(c), F.S.

In this case, there is competent substantial evidence in the record to support the ALJ's finding that the "Plan" for consideration under section 12.2.1.2(b), A.H., consists of three parts: (1) the preservation of certain wetlands and uplands on site, as required by the Marshall Creek DRI Development Order; (2) the creation, enhancement, and preservation of certain wetlands on site and the preservation of certain uplands on site, as required by prior permits issued by the District; and (3) the mitigation proposed for this project. (R.O.: ¶ 28, pp. 17-18; Zyski Vol. II: 241-242; Esser Vol. III: 134, 136, 152-154, 163-164, 173, 196-199, 206; Dennis Vol. VII: 866-871; Petitioners 2). The ALJ found that the Plan provides regional ecological value because the land encompassed therein is either adjacent to or in close proximity to the following regionally significant ecological resources or habitats: (1) the Guana River State Park; (2) an Outstanding Florida Water; (3) the 55,000-acre Guana-Tolomato-Matanzas National Estuarine Research Reserve; (4) an Aquatic Preserve; (5) the Guana Wildlife Management Area; and (6) the 22,000-acre Cummer Tract Preserve. (R.O.: ¶ 30, p. 19). The ALJ also

found that the Plan will provide for a wildlife corridor between these resources, preserve their habitat and ensure protection of water quality for these regionally significant resources. (R.O.: ¶ 30, p. 19). The ALJ's findings to support his conclusion that the "out" provision in section 12.2.1.2(b), A.H., applies, are supported by competent substantial evidence and, as such, cannot be disturbed. (Esser Vol. III: 131-138, 198; Harper Vol. I: 131-133; District 11: 3). As to the ALJ's interpretation of this rule, the Governing Board finds that it is a proper interpretation and is consistent with this Board's prior interpretations. See, Griffin v. St. Johns River Water Management District, DOAH Case Nos. 98-0818 and 98-0819, (SJRWMD December 11, 1998) (on-site preservation of river floodplain and associated uplands, in concert with the applicant's contribution [approximately 200 acres] toward acquiring a 3,456-acre conservation easement provides regional ecological value and provides greater long-term ecological value than the areas impacted.) Sierra Club argues that while the record establishes that the mitigation areas will be "close" to other regionally significant resources, the "plan" does not connect these resources. We disagree. First, however, the Governing Board wants to make clear that it is not our position that any time a mitigation plan is "close" to regionally significant resources, the mitigation plan necessarily qualifies for the "out" provision. To the contrary, many mitigation plans "close" to, in the proximity of, or in the regionally significant resources do not qualify for the "out". The specific facts of each case must be analyzed to determine whether the "out" applies. Here, we are not persuaded merely by the location of the mitigation plan at issue. Instead, we find particularly compelling the fact that the mitigation "plan" provides for a wildlife corridor between several regionally significant resources that cover tens of thousands of acres

and that the mitigation plan is extensive. (Esser Vol. III: 131-138, 198; District 11: 3; Petitioners 2). (Approximately 260 acres of wetland preservation, 66 acres of upland preservation, and additional wetland creation and enhancement.) (R.O.: ¶29, p. 18). As to Sierra's argument that the ALJ's interpretation would render the reduction and elimination requirement a "policy relic of the past," we disagree. As we have articulated above, the determination of whether the "out" provision applies must be determined based on the facts of each individual case. Mere proximity of mitigation to regional resources in itself is not sufficient. Thus, we agree with the ALJ that the mitigation is part of a "plan" that provides regional ecological value.

As to the second part of the "out" provision, the ALJ found that the mitigation for the Project will provide greater long-term ecological value to fish and wildlife than the part of Wetland E that is proposed to be filled because: (1) the proposed mitigation 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. (R.O.: ¶ 32, p. 20). The Governing Board agrees with the ALJ that the mitigation provides greater long-term ecological value than the wetland to be impacted. The Plan and proposed mitigation meet the requirements of section 12.2.1.2(b), A.H. Accordingly, Sierra Club's Exception No. 1 is rejected.

The Sierra Club's Exception No. 2

Sierra Club takes exception to recommended conclusions of law number 43 wherein the ALJ concluded that the mitigation will offset the adverse impacts expected to occur as a result of the proposed project and that the mitigation will provide greater

functional value and greater long-term ecological value than the wetland to be impacted. Sierra Club argues that such a conclusion is in conflict with the applicant's own mitigation/impact analysis which, taken in the light most favorable to the applicant, establishes that the mitigation will be equal to, but not provide greater value than, the area to be impacted. In further support of this exception, Sierra Club adopts paragraphs number 131 through 158 from its Proposed Recommended Order. The determination of whether mitigation for a proposed project is sufficient is an ultimate conclusion of law and rests with the agency. Florida Power Corp. v. State Dept. of Envtl. Regulation, 638 So.2d 545, 561 (Fla. 1st DCA 1994); VanWagoner v. Dept. of Transportation, 18 FALR 2277 (DEP 1996) [1996 WL 405159, 16], *approved*, 700 So.2d 113 (Fla. 2nd DCA 1997); 1800 Atlantic Developers v. Dept. of Envtl. Regulation, 552 So.2d 946, 955 (Fla. 1st DCA 1989). The Governing Board upholds the ALJ's conclusion that the proposed mitigation will compensate for the project's adverse impacts to wetlands and surface waters. 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, A.H.

The proposed mitigation will offset the wetland functions and values lost through the wetland impact on Parcel D. (Zyski Vol. II: 250; Esser Vol. III: 101-102, 110-112, 131-132; Dennis Vol. VII: 857-858; District 11: 3). The mitigation for the Project lies within the Tolomato River Basin, in the same drainage basin as where the Project is located, and that basin includes both Marshall Creek and Stokes Creek. (Zyski Vol. II: 259; Dennis Vol. VII: 936; District 11: 1; Prehrg. Stip.: p. 6, ¶ 28). The mitigation offered

to offset wetland impacts associated with Parcel D includes: (i) wetland preservation of 0.52 acres of bottomland forest along the northeast property boundary (Wetland Ep); (ii) wetland preservation of 3.98 acres of bottomland forest on a tributary of Marshall Creek contained in the DRI boundaries (Wetlands EEE and HHH); (iii) 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; (iv) a wetland creation area of 0.82 acres, contiguous with the wetland preservation area; and (v) an upland buffer located adjacent to the wetland creation area. (R.O.: ¶ 31, pp. 19-20; Zyski Vol. II: 243-250; District 11: 3-4; Hines 14 and 21). The wetland creation area will be graded to match the grades and soils of the adjacent bottomland swamp and planted with wetland tree species that include cypress, tupelo, sweetbay, loblolly bay and pond pine. (Zyski Vol. II: 247; District 11: 2-3; Hines 21). 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. (Zyski Vol. II: 250; District 11: 3). 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. (Zyski Vol. II: 247-249, 254; Hines 21). The wetland creation area is designed so as to not de-water the adjacent wetlands. (Alford Vol. VII: 779-782). All of the mitigation lands (both wetland and upland) will be encumbered with a conservation easement consistent with the requirements of Section 704.06, F.S. (Hines 5; District 11: 4, and 12: 7). Preservation of these areas prevents them from being timbered or otherwise impacted, and ensures they will not be developed in the future. (Zyski Vol. II: 241-242).

The functional values of the Parcel D Mitigation area mimic and enhance those of the impacted on-site wetland. (Zyski Vol. II: 250). The Parcel D Mitigation area will function more like an entire system. (Zyski Vol. II: 250). The on-site wetland to be impacted does not have high productivity, and does not provide any unique or special wetland functions that cannot be replaced by the mitigation plan. (Esser Vol. III: 127-128). The proposed Parcel D Mitigation will provide greater functional value than the on-site wetland to be impacted because: (i) if the on-site wetland were left intact, its functional values would diminish; (ii) a larger wetland area will be created; (iii) the preserved lands will be protected in perpetuity; and (iv) the area will provide a migratory path for wildlife species. (Esser Vol. III: 101-101; 129-132). The Parcel D Mitigation will more than compensate for the impacts to detrital export because more wetlands are being added than are being impacted. (Dennis Vol. VII: 850-854; 858). Impacts to the water quantity and water quality functions served by the on-site wetland are addressed in the stormwater system design. (Dennis Vol. VII: 854-855; 858). The Parcel D Mitigation will provide more habitat for more species. (Dennis Vol. VII: 858). Thus, the Governing Board finds that 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. The ALJ's proposed conclusion is consistent with his findings at R.O. ¶¶ 28-32 and that the ALJ's interpretation of the District's mitigation rules was proper and comports with this Board's view of those rules.

With regard to the portion of Sierra Club's Exception No. 2 dealing with the issue of whether the mitigation will provide greater functional value and greater long-term

ecological value than the wetland to be impacted, the Governing Board finds that there is competent substantial evidence to support the factual underpinnings for the ALJ's conclusion and the Governing Board finds that the ALJ properly applied the District rules. Expert testimony in the record demonstrates that 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, whereas the wetland to be impacted is part of a fragmented system; 3) the wetland to be impacted will be unlikely to maintain its function in the long-term; 4) the mitigation includes creating approximately one-third more wetlands than will be impacted; 5) the mitigation area provides additional habitat for animal species not present in the wetland to be impacted; and 6) the mitigation area provides a direct connection to Marshall Creek for organisms to migrate. (Zyski Vol. II: 254-257; Esser Vol. III: 101-102, 131-132; Dennis Vol. VII: 861-862, 885-887; Hines 21; District 11: 2-3). Accordingly, Sierra Club's Exception No. 2 is rejected.

The Sierra Club's Exception No. 3

Sierra Club takes exception to recommended conclusions of law numbers 54 and 55 wherein the ALJ found that the proposed project satisfies the statutory and rule requirements for cumulative impacts. In support of this exception, the Sierra Club adopts paragraphs 100 through 101 and 188 through 191 from its Proposed Recommended Order and also adopts the arguments set forth in Petitioner's Response to Hines Interests Limited Partnership's Memorandum of Law Regarding Cumulative Impact Analysis. The Governing Board finds that the ALJ's interpretation of the cumulative impacts requirement is proper and comports with this Board's previous

interpretations of its rules. For edification purposes, the Governing Board reiterates its position on cumulative impacts here.

Under subsection 373.414(8) of the Florida Statutes (1999), the District is required to consider cumulative impacts when reviewing an application requesting an Environmental Resources Permit. The Legislature enacted subsection 373.414(8) in 1993. See, Ch. 93-213, §30, Laws of Florida. The District promulgated rule 40C-4.302(1)(b), F.A.C., to implement the statutory requirement of subsection 373.414(8). Rule 40C-4.302(1)(b) provides in pertinent part:

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

The criteria for determining whether unacceptable cumulative impacts would occur under rule 40C-4.302(1)(b) are located in subsections 12.2.8 through 12.2.8.2 of the Applicant's Handbook: Management and Storage of Surface Waters (A.H.).

The Governing Board has consistently interpreted the rules at subsections 12.2.8 through 12.2.8.2, A. H., such that a project will not be found to have unacceptable cumulative impacts if the mitigation offsets the adverse impacts to wetland functions and the mitigation is to be undertaken in the same drainage basin as the wetlands to be impacted. 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 and Sierra Club and Bobby C. Billie and Shannon Larsen v. Hines Interests Limited Partnership and St. Johns River Water Management District, DOAH Cases 99-1905, 99-3933 and 99-3934, (rendered February 9, 2000) at 48-49.

During the 2000 Legislature session, the Florida Legislature amended Section 373.414(8) of the Florida Statutes (which addresses cumulative impacts) in Chapter 2000-133, § 4, p. 191, Laws of Florida. The amendment became effective on May 17, 2000. This amendment effectively codified the District's legal interpretation regarding its existing cumulative impacts rules at subsections 12.2.8 through 12.2.8.2, A. H. The Governing Board agrees with the applicant and District staff that C.S.H.B. 2365 and new subsection 373.414(8)(b), Florida Statutes (2000), apply in this proceeding. Although the amendment did not become effective until after Hines' application became complete and after District staff issued its recommendation to the District Governing Board, the amendment was effective long before the hearing and the parties proceeded to hearing under the amended law. Petitioners' requests for a hearing commenced a *de novo* proceeding intended to formulate final agency action, rather than review action taken earlier and preliminarily. See, Department of Transportation v. J.W.C., Co., Inc., 396 So.2d 778, 786-87 (Fla. 1st DCA 1981).

Notably, "Florida follows the general rule that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted." Lavernia v. Dep't of Prof'l Reg., 616 So.2d 53, 54 (Fla. 1st DCA 1993). In Lavernia, Dr. Lavernia applied for a license and the Board of Medicine issued an intent to deny based in part

upon a change in a licensing statute that occurred after Dr. Lavernia had filed his application. Id. at 53. The First District Court of Appeal affirmed the Board's final order of denial (after an administrative hearing) even though that final order was based on the amended licensure statute. Id. at 55. The First District Court of Appeal relied on the reasoning of the United States Supreme Court in the case of Ziffrin, Inc. v. United States, 318 U.S. 73, 78, 63 S. Ct. 465, 469, 87 L.Ed. 621, 625 (1943), and stated that "just as a change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation to a permit for the doing of a future act." Id. at 54. "Otherwise, ... the administrative body would be issuing a permit contrary to existing legislation." Id.; See also, Agency for Health Care Administration v. Mount Sinai Medical Center of Greater Miami, 690 So.2d 689, 692-93 (Fla. 1st DCA 1997) (court extended the reasoning of Lavernia to a change in the status of a rule and stated that it was reaching "the same result with regard to a change in relevant agency rules after the application is complete but before a final decision is made.")[emphasis added].

Similarly, in the instant case, the Florida legislature has expressed its intention that the cumulative impacts associated with a proposed project be considered acceptable (permittable) where the proposed mitigation is located within the same drainage basin and such mitigation offsets the adverse impacts of the proposed project. It would be contrary to existing law for the District to require an applicant to prove up the cumulative impacts issue through a detailed analysis of past, present, and future impacts as described in 12.2.8(a) and (b) when the proposed mitigation meets

the two requirements of new paragraph 373.414(8)(b)(2000). Therefore, Chapter 2000-133, Laws of Florida, now paragraph 373.414(8)(b), Florida Statutes (2000), applies to the application in this proceeding.

Petitioners contend that the District's pre-existing rule[3] on cumulative impacts should control over the later statutory amendment on the same subject. However, this contention is contrary to paragraph 120.54(1)(c), Florida Statutes (2000), which provides:

> No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of the implementing rules.

There is no express statutory provision that prohibits the application of new paragraph 373.414(8)(b) until the District's rule is amended to implement the statutory change. Moreover, as discussed above, the Governing Board's interpretation of its existing cumulative impacts rule would yield the same result as the application of the new section 373.414(8)(b). Thus, the ALJ's interpretation is not only consistent with the new 373.414(8)(b), F.S., but is also entirely consistent with this Governing Board's previous interpretations of its cumulative impact rules. To require an applicant to perform an analysis of past, present, and future impacts of 12.2.8(a) and (b) when the applicant's activity is deemed not to cause unreasonable adverse cumulative impacts under section 373.414(8)(b), F.S., would lead to an absurd result. It would be absurd and wasteful to require applicants to conduct such analyses, knowing that as a matter of law, such analyses would have no bearing on the determination of whether the applicant meets

[3] The District has begun rulemaking to amend subsection 12.2.8.2 of the Applicant's Handbook: Management and Storage of Surface Waters to conform that subsection to new paragraph 373.414(8)(b).

the substantive requirements of 373.414(8), F.S. Such absurd results are not tolerated by Florida law. See, Agrico Chemical Co. v. State Dept. of Envtl. Regulation, 365 So.2d 759, 766 (Fla. 1st DCA 1978), *cert. denied*, 376 So.2d 74 (Fla. 1979). Accordingly, Sierra's Exception No. 3 is rejected.

The Sierra Club's Exception No. 4

In this exception, Sierra Club adopts the exceptions to the conclusions of law jointly filed by Bobby C. Billie and Shannon Larsen. These exceptions are addressed in the rulings on the exceptions of Bobby C. Billie and Shannon Larsen. Those rulings are incorporated by reference herein.

The Sierra Club's Exception No. 5

Sierra Club takes exception to recommended finding of fact number 27 wherein the ALJ found that if the wetland proposed to be impacted would be preserved, then development would surround it and adversely affect its long-term functions. Sierra contends that it was ultimately undisputed by Hines' experts that it is possible to design a residential development around the stream so as to prevent adverse impacts to it. (Alford Vol. VII: 793-794). First, the Governing Board finds that there is competent substantial evidence in the record to support the ALJ's finding that if the wetland were preserved, development would surround the wetland, adversely affecting its long-term functions. (Esser Vol. III: 101, 131, 192; Hines 21). Although Sierra Club does point out some conflicting evidence from the record, as long as the ALJ's finding is supported by any competent substantial evidence, we are not free to reweigh the evidence or disturb the finding. Regardless, the issue of surrounding development adversely affecting the

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See attached Exhibit B --excerpts of the District's Notice of Proposed Rule Development published in the

long-term ecological value of the wetland to be impacted was only one of the several reasons articulated by the ALJ for concluding that the mitigation will provide greater functional value and greater long-term ecological value than the wetland to be impacted. Additional reasons articulated by the ALJ include: 1) the mitigation area will be part of a larger ecological unit; 2) the mitigation area will be larger than the wetland impacted; 3) the creation area will have a direct connection to Marshall Creek; 4) the creation area will provide better, more diverse habitat than that provided by the wetland to be impacted; 5) the wetland to be impacted does not provide a quality habitat resource for fish and wildlife; and 6) the mitigation area will be part of an intact wetland system. (R.O.: ¶¶ 43 and 61, pp. 26 and 45-46). The Governing Board finds that based on the competent substantial evidence in the record, there is a reasonable basis for the ALJ concluding that the mitigation will provide greater long-term ecological value than the wetland to be impacted even without considering impacts from future development if the wetland to be impacted were preserved. Therefore, Sierra Exception No. 5 is rejected.

The Sierra Club's Exception No. 6

Sierra Club takes exception to recommended finding of fact number 28 to the extent that it provides that 27 acres of more than 287 acres of wetlands are anticipated to be impacted by the Marshall Creek DRI. Sierra Club contends that the DRI Development Order requires 241 acres of wetlands to be preserved and that, therefore, more than 27 acres of wetlands can be expected to be impacted under the DRI Mitigation Plan. Although the record does reflect some conflicting evidence regarding the exact number of wetlands to be impacted under the DRI, the decision on which of

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October 27, 2000 edition of the Florida Administrative Weekly, pages 4928 and 4933.

the conflicting evidence to credit is left to the ALJ 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. 5th DCA 1983). These are evidentiary matters within the province of the ALJ. Fla. Dept. of Corrections v. Bradley, 510 So.2d at 1122 (Fla. 1st DCA 1987). 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 ALJ's findings. South Florida Water Management District v. Caluwe, 459 So.2d 390 (Fla. 4th DCA 1989). The Governing Board finds that there is competent substantial evidence in the record to support the ALJ's finding of fact. (Ziski Vol. II: 241; Dennis Vol. VII: 882-883; Hines 14). In addition, there is competent substantial evidence in the record that the DRI Development Order requires Hines to preserve all of the remaining wetlands in the DRI tract after development occurs. (Ziski Vol. II: 239-240; Petitioner's 2: 15). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Sierra's Exception No. 6 is rejected.

The Sierra Club's Exception No. 7

Sierra Club takes exception to recommended finding of fact number 29 wherein the ALJ found that the wetlands and uplands required to be preserved under the overall mitigation plan for the Marshall Creek DRI constitute the majority of Marshall Creek and Stokes Creek which are tributaries to the Tolomato River. In footnote 11 to its Exception No. 7, Sierra also notes that it disputes this finding as reiterated in recommended conclusion of law number 59 in which the ALJ states:

> 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 . . .
>
> * * * The preserved wetlands are tributaries of the Tolomato River, on [sic] OFW.

Sierra contends that there is no competent substantial evidence in the record describing the geographical extent of Marshall and Stokes Creeks and thus it is not possible for the ALJ to find that the majority of Stokes and Marshall Creeks will be preserved. The Governing Board disagrees and finds that there is competent substantial evidence in the record to support the ALJ's finding that the majority of Stokes and Marshall Creeks will be preserved. Specifically, the District's Technical Staff Report states that "[t]he preserved wetlands and associated uplands constitute the majority of Marshall and Stokes Creeks." (District 11: 3). In addition, there is competent substantial evidence in the record to support the finding of fact that Marshall Creek and Stokes Creek are both located within the Tolomato River Basin. The District's Technical Staff Report states that "These creek systems [Marshall and Stokes] are both tributaries to the Tolomato River, an Outstanding Florida Waters." (District 11: 3). Expert witness Ziski testified that the project site is within the Tolomato River Basin (Ziski Vol. II: 259; District 11: 1). Expert witness Dennis testified that Marshall Creek and Stokes Creek are in the same drainage basin (Dennis Vol. VII: 936). Moreover, in the Prehearing Stipulation, the parties stipulated that Marshall Creek is a tributary to the Tolomato River (Prehrg. Stip.: p. 4, ¶ 4). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l),

F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Sierra Club's Exception No. 7 is rejected.

The Sierra Club's Exception No. 8

Sierra Club takes exception to the last sentence of recommended finding of fact number 30 which states that "[t]he mitigation plan will provide for a wildlife corridor between these resources, preserve their habitat and ensure protection of the water quality for these regionally significant resources." The "regionally significant resources" referred to in this finding are the Guana-Tolomato-Matanzas National Estuarine Research Reserve; the Guana River State Park; the Guana Wildlife Management Area; an Aquatic Preserve; an Outstanding Florida Waters; and the 22,000-acre Cummer Tract Preserve. Sierra Club argues that there is no competent and substantial evidence supporting the recommended finding as to the DRI mitigation plan providing for a wildlife corridor between the natural resource areas identified in the recommended finding. The Governing Board disagrees and finds that there is competent substantial evidence in the record in the form of expert testimony and exhibits to support this finding of fact. (Ziski Vol. III: 53-54; Esser Vol. III: 131-132, 135-139, 198-199; Hines 14; Hines 21). Moreover, expert witness Esser testified that the plan will provide and preserve at least one wildlife corridor from the mitigation area to a regionally significant resource, the Guana-Tolomato-Matanzas Estuarine Research Reserve, which is part of Marshall Creek (Esser Vol. III: 135). The mitigation proposed for the project provides "direct connection to Marshall Creek" for wildlife. (Esser Vol. III: 131-132, 135; Hines 21). Esser also testified that once the State buys the Cummer Trust property, there will be an additional opportunity to preserve a corridor connecting the mitigation to the other

property of the Cummer Trust. (Esser Vol. III: 138-139). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Sierra Club's Exception No. 8 is rejected.

The Sierra Club's Exception No. 9

Sierra Club takes exception to the first sentence of recommended finding of fact number 30 wherein the ALJ finds that the overall DRI mitigation plan provides regional ecological value. There is competent substantial evidence in the record that the "Plan" for consideration under section 12.2.1.2(b), A.H., consists of three parts: (1) the plan of preservation contained within the Marshall Creek DRI Development Order; (2) mitigation required by prior District permits consisting of the creation of 11.5 acres of wetlands, enhancement of 4.5 acres of wetlands, preservation of 112 acres of wetlands, and preservation of 41 acres of uplands; and (3) the proposed mitigation for the Project. (Zyski Vol. II: 241-242; Esser Vol. III: 134, 136, 152-154, 163-164, 173, 196-199, 206; Dennis Vol. VII: 866-871; Hines 14 and 21; District 11: 3; Petitioner 2). The Marshall Creek DRI Development Order requires on-site preservation of: (i) 241 acres of wetlands; (ii) 66 acres of uplands; and (iii) all remaining wetlands on site after development occurs. (Zyski Vol. II: 239-40; Dennis Vol. VII: 882-883; Hines 14; District 11: 3; Petitioner 2: 15-19; Prehrg. Stip. p. 5 ¶ 18). Of that preservation required by the DRI Development Order, approximately one-half already has been committed to preservation as a condition of prior District permits. (Zyski Vol. II: 241; Esser Vol. III: 139-140; Hines 14 and 16). The preserved wetlands and uplands within the Marshall Creek DRI site constitute the majority of Marshall Creek and Stokes Creek, which are

tributaries of the Tolomato River, a designated Outstanding Florida Water ("OFW") and Class II water. (District 11: 3).

The record contains competent substantial evidence to support the ALJ's finding that the Plan provides regional ecological value because it encompasses wetlands and uplands that are adjacent to, and in close proximity of, the following six regionally significant resources: (1) the Guana River State Park; (2) an OFW and Class II water; (3) the 55,000-acre Guana-Tolomato-Matanzas National Estuarine Research Reserve; (4) the Guana River Marsh Aquatic Preserve; (5) the Guana Wildlife Management Area; and (6) the 22,000-acre Cummer Tract Preserve. (Esser Vol. III: 134-138; District 11: 3). Notably, the District had tried to purchase the Marshall Creek DRI site for land conservation. (Esser Vol. III: 137-138). The mitigation plan will (i) provide for a wildlife corridor between these resources; (ii) preserve habitat; and (iii) ensure protection and improvement of water quality for these regionally significant resources both North and South of the Project. (Harper Vol. I: 131-133; Esser Vol. III: 138-139, 198). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Sierra's Exception No. 9 is rejected.

The Sierra Club's Exception No. 10

Sierra Club takes exception to recommended finding of fact number 31 in that it describes the mitigation to offset wetland impacts as including 2.49 acres of upland preservation. Sierra Club maintains that the upland preservation credited to offsetting wetland impacts should be 0.53 acres and that an additional 1.96 acres of upland preservation has been offered to mitigate for secondary impacts. There is competent

substantial evidence in the record that 0.53 acres of uplands are to be preserved for wetland impact mitigation and that 1.96 acres of uplands are to be preserved to prevent secondary impacts to the wetland preservation/creation areas. (Hines 21: 7). Sierra apparently believes that preservation of land to prevent secondary impacts from occurring cannot also be considered mitigation offered to offset wetland impacts. Sierra Club is incorrect. Section 12.3.2.3, A.H., provides that "Upland habitat which is proposed to be preserved in order to prevent secondary or cumulative impacts can be considered as part of the mitigation plan to offset other adverse impacts of the system." Therefore, it was proper for the ALJ to include the 1.96 acres of upland preservation offered to prevent secondary impacts as part of the total upland preservation for mitigation. In any event, the Governing Board finds there is competent substantial evidence in the record to support this finding. (District 11:2). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Sierra Club's Exception No. 10 is rejected.

The Sierra Club's Exception No. 11

Sierra Club takes exception to recommended finding of fact number 31 to the extent that the ALJ finds that the ponds to be dug out in the wetland creation area will provide hydrologic conditions similar to those of the wetland to be impacted. The Governing Board finds that there is competent substantial evidence in the record to support this finding. (Ziski Vol. II: 247-250, 254; Ziski Vol. III: 11-12; Esser Vol. III; 73-74, 125-132; Dennis Vol. VII: 852-855; Hines 21). Sierra Club points out alleged contradictory testimony offered by Petitioner's witnesses to argue that the ALJ's Finding

of Fact Number 31 should be rejected. The Governing Board is not free to reweigh the evidence where there is competent substantial evidence in the record to support the ALJ's finding of fact. It is not within our purview to determine whether the record contains evidence contrary to the ALJ'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 ALJ'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)(l), F.S. (1999); Berry, supra; Fla. Chapter of Sierra Club, supra. Therefore, Sierra Club's Exception No. 11 is rejected.

The Sierra Club's Exception No. 12

Sierra Club takes exception to recommended finding of fact number 32 and recommended conclusion of law number 43 that the long-term ecological value of the mitigation area will be greater than the long-term value of the wetland to be impacted. The Governing Board finds that the ALJ's finding of fact that the long-term ecological value of the mitigation area will be greater than the long-term value of the wetland to be impacted is supported by competent substantial evidence in the record. Specifically, there is evidence in the record that: 1) the mitigation area is part of a larger ecological system; 2) the mitigation area is part of an intact wetland system, whereas the wetland

to be impacted is not intact; 3) the wetland to be impacted will be unlikely to maintain its functions in the long-term; 4) the mitigation includes creating approximately one-third more wetlands than will be impacted; 5) the mitigation area provides additional habitat for animal species not present in the wetland to be impacted; and 6) the mitigation area provides a direct connection to Marshall Creek for organisms to migrate. (Zyski Vol. II: 254-257; Esser Vol. III: 101-102, 131-132; Dennis Vol. VII: 861-862; Hines 21; District 11: 2-3). In addition, the Governing Board incorporates by reference its rulings on Sierra Club's Exception No. 2 regarding the long-term ecological value. Accordingly, Sierra Club's Exception No. 12 is rejected.

The Sierra Club's Exception No. 13

Sierra Club takes exception to the first sentence of recommended finding of fact number 32 that the proposed mitigation will offset the wetland functions and values lost. Although presented in the findings of fact section of the ALJ's Recommended Order, the determination of whether mitigation will offset wetland functions and values is a conclusion of law and the Governing Board has exclusive final authority to determine such issue. Sierra Club also takes exception to recommended conclusion of law number 43 that the functions and values of the wetland to be impacted will be replaced or compensated by the mitigation plan. The Governing Board finds that the ALJ's recommended conclusion of law is proper for the reasons described in our rulings on Sierra Club's Exception Nos. 2 and 13. Accordingly, Sierra Club's Exception No. 13 is rejected.

The Sierra Club's Exception No. 14

In this exception, Sierra Club adopts the exceptions to the finding of facts jointly filed by Bobby C. Billie and Shannon Larsen. These exceptions are addressed in the Rulings on the Exceptions filed by Bobby C. Billie and Shannon Larsen. Those rulings are incorporated by reference herein.

RULINGS ON PETITIONERS BILLIE AND LARSEN's (hereinafter "Billie") EXCEPTIONS

Billie's Exception No. 1

Billie takes exception to recommended finding of fact number 14 in which the ALJ found that due to the long residence time of Pond N, that most of the pollutants will be removed. Billie contends that the applicant did not offer evidence on all pollutants that will be introduced into the watershed as a result of the development activities and, therefore, any conclusion regarding most pollutants is speculative at best. Billie appears to argue that the applicant is required to provide evidence on all pollutants that might possibly occur in the stormwater. There is no requirement in the District rules that an applicant analyze every possible pollutant. Instead, the District rules require that an applicant provide reasonable assurances that the discharge will not cause or contribute to a violation of state water quality standards. Moreover, Dr. Harper testified that modeling was performed for the most common parameters associated with stormwater. (Harper Vol. I: 128). In any event, the Governing Board finds that the ALJ's finding is supported by competent substantial evidence by expert witness Harper. Specifically, Dr. Harper testified that the pond achieves excellent removal efficiencies primarily based upon the very long detention time within the pond which will remove the vast

majority of pollutants in the pond water. (Harper Vol. I: 120-121). In addition, Dr. Harper testified that wet detention systems such as Pond N have physical, chemical and biological processes which remove the majority of pollutants that enter from the stormwater run-off. (Harper Vol. I: 110). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Billie's Exception No. 1 is rejected.

Billie's Exception No. 2

Billie takes exception to recommended finding of fact number 17 in which the ALJ concludes that the pollutant loading in the discharge from the stormwater management system will have water quality values several times lower than the preedevelopment discharges from the same site. Billie asserts that the applicant did not offer evidence on all pollutants that will be introduced into the watershed as a result of the development activities and, therefore, any general conclusion regarding pollutants is speculative at best.

Although Billie focuses on the last sentence of Finding of Fact 17 in which the ALJ makes the general statement that a comparison of pre-development and post-development mass loadings of pollutants demonstrates that post-development discharges will be substantially lower than pre-development discharges, a reading of the entirety of Finding of Fact 17 shows that the ALJ was specifically analyzing the pollutants: total nitrogen, phosphorus, total suspended solids, and biochemical oxygen demand. There is competent substantial evidence in the record to support the ALJ's findings that for these pollutants the post-development loadings will be substantially

lower than the pre-development loadings. (Harper Vol. I: 120-130). In addition, the record shows that Hines analyzed a number of other pollutants, including fecal coliform, total coliform and dissolved oxygen levels. There is competent substantial evidence in the record by expert witness Harper that for each of the pollutants, nitrogen phosphorus, total suspended solids, biological oxygen demand, fecal coliform, and total coliform, the post-development mass loadings of pollutants will be substantially lower than the pre-development discharges and that post-development dissolved oxygen levels will be higher. (Harper Vol. I: 120-134). Moreover, as discussed in our ruling on Billie's Exception No. 1, there is no District requirement that every possible pollutant be analyzed. Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Thus, Billie's Exception No. 2 is rejected.

Billie's Exception No. 3

Billie takes exception to recommended finding of fact number 19 in which the ALJ found that there will be no degradation of water quality because the 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. Billie contends that the applicant did not offer evidence on all pollutants that will be introduced into the watershed as a result of the development activities and, therefore, any general conclusion regarding pollutants is speculative at best.

There is competent substantial evidence in the record by expert witness Harper's testimony that the discharges from the surface water management system will not

cause new violations or contribute to existing violations of water quality standards (Harper Vol. I: 133-134). Moreover, there is competent substantial evidence that the levels of fecal coliform and total coliform discharging from the property will be reduced (Harper Vol. I: 131) and that levels of dissolved oxygen will be higher in the post-development condition (Harper Vol. I: 132). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Thus, Billie's Exception No. 3 is rejected.

Billie's Exception No. 4

Billie takes exception to recommended finding of fact number 20 in which the ALJ found that discharges from the system as to water quality will not adversely affect marine fisheries or marine productivity. Billie argues that this is a conclusion of law rather than a finding of fact. In addition, Billie contends that the post-development rate of discharge should replicate the pre-development rate of discharge. The finding of fact at issue addresses the District's ERP requirement in Section 40C-4.302(1)(a)4, F.A.C., which provides that a system located in, on, or over wetlands or other surface waters not be inconsistent with the public interest. In making this determination, the District must balance several criteria including whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the area. This finding is in the nature of an ultimate fact and, thus, necessarily embodies an interpretation and application of the District's rule. Consequently, it should be considered a mixed question law and fact. District staff correctly point out that whether this finding should be treated as a conclusion of law instead of a finding of fact is not a

basis for rejecting it, but rather determines the Governing Board's ability to modify it. See, Berger v. Dept. of Professional Regulation, 653 So.2d 479-480 (Fla. 3rd DCA 1995). To the extent that this finding involves a finding of fact, it is supported by competent substantial evidence in the record by expert witness Harper whose expert opinion is that the engineering aspects of the project will not adversely affect water quality in a manner as to adversely affect fisheries or marine productivity. (Harper Vol. I: 134). Expert witness Esser also provided testimony that the project would not degrade fishing, recreational values, or marine productivity. (Esser Vol. III: 89). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. To the extent that finding involves conclusions of law regarding the interpretation of the public interest test, the Governing Board agrees with the ALJ's conclusion. With regard to Billie's argument that the post-development rate of discharge should replicate the pre-development rate of discharge, we find that there is no District requirement regarding replication of flow rates. Therefore, Billie's Exception No. 4 is rejected.

Billie's Exception No. 5

Billie takes exception to recommended finding of fact number 21 in which the ALJ found that there is little possibility that the archaeological 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 it is not an extensive village site. There is competent substantial evidence in the record by expert witness Stokes that the archaeological evidence on the project site offers little possibility that it will add to our knowledge of the

Orange Period because it is a common type of site in Northeast Florida, it is not a village site, there are likely other camp sites in the area, it is a small site with very few artifacts, and professionals already have sufficient knowledge about this type of site (Stokes Vol. I: 164-165, 169-170). In addition, there is competent substantial evidence in the record in the form of Hines' Exhibit Nos. 28 and 31 to support this finding.

In addition, in Exception No. 5, Billie argues that the Governing Board should, as a matter of law, substitute the findings of another ALJ from a prior proceeding for those of the ALJ in this proceeding. Billie cites no legal authority for the Governing Board to take such action. The instant proceeding is a de novo proceeding intended to formulate final agency action in this permitting proceeding. See, J.W.C., 396 So.2d at 786-87. We are bound by the findings of fact made by the ALJ in the instant proceeding based on the record of the instant proceeding, to the extent such findings of fact are supported by competent substantial evidence. As discussed above, we have determined that the ALJ's finding of fact contested in Billie's Exception No. 5 is supported by competent substantial evidence. Our analysis must end there. Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra.

Finally, in Exception No. 5, Billie asserts that the archaeological methods used are insufficient. The determination of whether a particular property should be subject to an archaeological survey is a professional determination based upon site-specific facts. (Hines 31: 17-18). In this instance, a cultural resource assessment ("survey") was conducted by professional archaeologists, and a report prepared and submitted to the Division of Historical Resources. (Hines 28; Hines 31: 22; District 14). The Division

reviewed the survey and issued a clearance letter, stating that the Parcel D project does not contain significant historical or archaeological resources. (Esser Vol. III: 97-99; District 14; Hines 31: 28-30). The ALJ found the archaeological methods used to be sufficient. The District rules do not specify the specific archaeological methods to be used. Accordingly, the Governing Board is not free to reject the ALJ's findings of facts. Thus, Billie's Exception No. 5 is rejected.

Billie's Exception No. 6

Billie takes exception to recommended finding of fact number 22 in which the ALJ found that the Division of Historical Resources determined that the site 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. The Governing Board finds that there is competent substantial evidence in the record to support the ALJ's finding of fact (Stokes Vol. I: 155-156, 161, 165, 190-191; Hines 31: 29-30). Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Therefore, Billie's Exception No. 6 is rejected.

Billie's Exception No. 7

Billie takes exception to recommended finding of fact number 27 in which the ALJ found that "[i]f the wetland were preserved, development would surround the wetland, adversely affecting its long-term functions." Billie asserts that this is both speculation and also requires a conclusion of law. We have addressed this issue in our ruling on Sierra's Exception No. 5. As described in our ruling on Sierra Club's Exception No. 5,

there is competent substantial evidence in the record to support the ALJ's finding. Therefore, this finding cannot be disturbed. Accordingly, Billie's Exception No. 7 is rejected.

Billie's Exception No. 8

Billie takes exception to recommended conclusion of law number 38 wherein the ALJ concludes that there is no low flow or base flow to be maintained and that the low flow criterion is not applicable. Billie maintains that the "finding" that this criterion does not apply is actually a "conclusion of law." Billie asserts that the ALJ did not make a factual finding that there was no low flow or base flow from the creek, and that therefore, there is no factual basis upon which to conclude that this criterion does not apply. Billie also cites to record evidence that Billie believes is contrary to such a finding. Billie is mistaken. In fact, in conclusion of law number 38, in explaining the rationale for why this criterion does not apply, the ALJ makes the specific factual finding that "[u]nder pre-development conditions, the wetland to be impacted periodically goes dry. Therefore, there is no low flow to be maintained . . ." The fact that this statement is contained in a section entitled "Conclusions of Law", does not change the fact that it is indeed a factual finding. Battaglia Properties, Ltd. v. Fla. Land and Water Adjudicatory Comm'n., 629 So.2d 161 (Fla. 5th DCA 1994)(an agency is not bound by labels affixed by an ALJ to findings or conclusions of law). This finding is supported by competent substantial evidence that provides the factual underpinnings for the ALJ's conclusion of law. Moreover, the ALJ found that the open channel of the on-site wetland to be impacted 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. (R.O.: ¶ 23, p. 15).

Further, the ALJ found that the ephemeral nature of the wetland to be impacted means that the connection does not always flow and that the wetland at times consists only of isolated pools that do not connect to Marshall Creek. (R.O.: ¶ 24, p. 16). It is not within our purview to determine whether the record contains evidence contrary to the ALJ'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 ALJ'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)(l), F.S. (1999); Berry, supra; Fla. Chapter of Sierra Club, supra. Thus, for all of the reasons discussed above, Billie's Exception No. 8 is rejected.

Billie's Exception No. 9 (labeled as No. 11)

Billie takes exception to recommended conclusion of law number 45 wherein the ALJ concludes that since post-development pollutant loadings and pollution concentrations will be less than those of pre-development circumstances, there will be an improvement in water "quantity" impacts. As support for this exception, Billie incorporates its Exceptions No. 1 through 3 and Petitioner's Joint Proposed Recommended Order at paragraphs 177 through 184. The ALJ's Finding of Fact No. 45 actually addresses water "quality" impacts rather than water "quantity" impacts as is

stated in Billie's Exception No. 9. Given the language of Finding of Fact No. 45 and the context of Billie's Exception No. 9, we assume that the word "quantity" was a typographical error and that Billie intended the word "quality." For the same reasons as discussed in our Rulings on Billie's Exceptions No. 1 through 3, we reject this portion of Billie's Exception No. 9. There is competent substantial evidence in the record to support the ALJ's conclusion that post-development pollutant loadings and pollution concentrations will be less than those of pre-development circumstances. (Harper Vol. I: 120-134).

In Billie's Exception No. 9, Billie also takes exception to the ALJ's conclusion that discharges will not result in adverse impacts to the temperature regime of receiving waters. Billie contends that there is no finding as to the ambient temperature of the receiving water and that the only finding regarding temperature was the temperature of the pond as it relates to thermal stratification. We find that there is competent substantial evidence in the record such that the ALJ could reasonably conclude that there will be no adverse impacts to the temperature of receiving waters. (Esser Vol. III: 89). Moreover, there is competent substantial evidence from which the ALJ could draw this conclusion in the form of Dr. Harper's testimony that "[t]he pond is going to be very clear so that there is no potential of buildup of thermal stratification which may impact downstream waters." (Harper Vol. I: 134) [emphasis added]. Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See, paragraph 120.57(1)(l), F.S.; Berry, supra; Fla. Chapter of Sierra Club, supra. Accordingly, Billie's Exception No. 9 is rejected.

Billie's Exception No. 10 (labeled as No. 12)

Billie takes exception to recommended conclusion of law number 46(2) in which the ALJ concludes that because short-term water quality considerations will be met, long-term water quality considerations will be met for the same reasons. The Governing Board agrees with Billie that District rules require consideration of long-term water quality, as well as short-term water quality considerations. The District's rules at sections 12.2.4.1 and 12.2.4.2, A.H., state in part that reasonable assurances regarding water quality must be provided for both the short and the long-term. Despite the ALJ's statement under the paragraph labeled "Long-Term Water Quality Considerations" that short-term water quality considerations form the basis for a finding that long-term water quality considerations have been met, the ALJ did make a number of specific findings of fact related to long-term water quality considerations. These findings of fact can be found in the ALJ's Findings of Fact Nos. 4 through 20 (R.O.: 6-14). Thus the ALJ did make the necessary findings of fact necessary to conclude that long-term water quality considerations have been met. These findings of fact are supported by competent substantial evidence in the record. (Harper Vol. I: 119-135; Harper Vol. VII: 818-826). Accordingly, the Governing Board, therefore, hereby modifies the ALJ's Conclusion of Law No. 46(2) as follows:

> 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. Hines has provided reasonable assurance that this requirement is met through the design of its surface water management system, its long-term maintenance plan for this system, and the long and short-term erosion and turbidity control measures it proposes. Therefore, this factor has been satisfied. ~~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.~~

The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion.

Billie's Exception No. 11

Billie takes exception to recommended conclusion of law number 46(4) wherein the ALJ concludes that since the pond will have a long residence time, that water quality will be improved for dissolved oxygen. Billie argues that there is no competent substantial evidence to support the proposition that dissolved oxygen is improved by long detention time.

The Governing Board agrees with Billie that there is no competent substantial evidence in the record to support a finding that the size of the pond and long residence time in the pond impact the level of dissolved oxygen. However, the Governing Board finds that there is competent substantial evidence in the record to support the conclusion that reasonable assurances have been demonstrated that the system will serve to improve water quality in the receiving waters for dissolved oxygen. (Harper Vol. I: 132). Accordingly, the Governing Board hereby modifies the ALJ's recommended conclusions of law number 46(4) as follows:

> 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 dissolved oxygen~~. Due to the design of the pond, reasonable assurances have been demonstrated that the system will serve to improve water quality in the receiving waters for dissolved oxygen.

This change is consistent with the ALJ's Finding of Fact number 18, in which the ALJ found that 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 (R.O.: 12-13). The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion.

Billie's Exception No. 12

Billie takes exception to recommended conclusion of law number 47(3) wherein the ALJ concludes that there will be no adverse secondary impacts to significant historical or archaeological resources. Billie relies on arguments made in previous exceptions as the basis for this exception. As discussed in our Rulings on Billie's Exceptions No. 5 and 6, there is competent substantial evidence in the record to conclude that there are no significant historical or archaeological resources on the project site. Consequently, we agree with the ALJ's conclusion that there will be no adverse impacts to significant historical or archaeological resources. Accordingly, Billie's Exception No. 12 is rejected.

Billie's Exception No. 13

Billie takes exception to recommended conclusion of law number 53(2) regarding the conservation of fish and wildlife including endangered or threatened species or their habitats, wherein the ALJ concludes that the wetland impacts are compensated for by the proposed mitigation and, therefore, this criterion is neutral. Specifically, Billie contends that section 12.3.1.1, A.H., has not been met since the mitigation does not create wetlands "similar to those being impacted." Billie contends that the creation of

.82 acres of head-water wetlands does not offset the lost functions and values of the creek system that will be destroyed. The Governing Board has addressed the issue of the sufficiency of the mitigation in our rulings on Sierra's Exceptions 2 and 13. Those rulings are incorporated by reference here.

Further, for edification, we note that section 12.3.1.1, A.H., does not create an absolute requirement as Billie appears 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 offset the adverse impacts to the functions as identified in sections 12.2 through 12.2.8 caused by the regulated activities. Section 12.3, A.H. This determination is made on a case-by-case basis. In this case, we concur with the ALJ that the mitigation plan offsets the project's adverse impacts. Accordingly, Billie's exception number 13 is rejected.

Billie's Exception No. 14

Billie takes exception to recommended conclusion of law number 53(3) regarding navigation, the flow of water, erosion or shoaling, wherein the ALJ concludes that because there are no navigable waters in the impact area, sedimentation control measures during construction will be implemented to prevent shoaling, and there are no surface water diversions of water from one basin to another, this public interest factor is neutral. Billie argues that consideration of surface water diversion is not appropriate under section 12.2.3.3, A.H. In addition, Billie maintains that there has been no analysis of water flow from the creek to the pond.

The ALJ's conclusion of law at issue involves section 40C-4.302(1)(a)3, F.A.C., which requires the District to consider whether the activity in, on, or over wetlands or

other surface waters will adversely affect navigation, the flow of water, or will cause harmful erosion or shoaling. Nothing in this rule prohibits the District from considering the inter basin flow of water when applying this rule. Moreover, it is important to note that the issue of surface water diversion was only one of three bases for the ALJ's conclusion that this factor is neutral. The record is replete with competent substantial evidence from which the ALJ could reasonably infer that the activities in, on, or over wetlands or surface waters will not adversely affect navigation, the flow of water, or cause harmful erosion or shoaling. With regard to effects on navigation, competent substantial evidence was presented at the hearing indicating that the project will not adversely affect navigation. (Frye Vol. IV: 323). There are no navigable waters within the wetland area to be impacted. (Frye Vol. IV: 323). Furthermore, the parties stipulated that the construction and operation of the project will not adversely affect navigation by the boating public. (Prehrg. Stip. p. 6: 3(b) 23). With regard to erosion and shoaling, there was competent substantial evidence presented at the hearing that the Hines Erosion Control Plan will be implemented so that harmful erosion and shoaling will not occur. (Alford Vol. I: 41, 44; Frye Vol. IV: 323). The plan includes the temporary installation of hay bales and silt screens to control sediment resulting from construction activity. (Alford Vol. I: 41, 44; Frye Vol. IV: 323). In order to prevent erosion, the surface water management system has also been designed in accordance with best management practices: (i) construction of ponds, side slopes with a ratio of 4 to 1; (ii) sodding and seeding of disturbed areas to stabilize soil; and (iii) installation of rip rap at the outfall of Pond N to lower flow velocities. (Alford Vol. I: 36, 39-41; Frye Vol. IV: 323). Furthermore, the parties stipulated that the construction and operation of

the project will not cause shoaling. (Prehrg. Stip. 6: 3(b) 24). With regard to the issue of whether the activities in, on, or over water will adversely affect the flow of water, the applicable rule criteria can be found in section 12.2.3.3(c), A.H. This section provides that applicants must address significant obstructions to sheet flow by assessing the need for structures which minimize the obstruction such as culverts or spreader swales in fill areas. This section goes on to state that compliance with the water quantity criteria found in subsection 12.2.2.4, A.H., shall be an important consideration in addressing this criterion. The ALJ found that the applicant had complied with the water quantity criteria found in subsection 12.2.2.4, A.H. Moreover, in Finding of Fact No. 11, the ALJ specifically found that there will be 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. The ALJ went on to find that this assures that Marshall Creek will continue to receive that fresh water source. Thus, the Governing Board finds that the ALJ properly concluded that this public interest factor is neutral. Accordingly, Billie's Exception No. 14 is rejected.

Billie's Exception No. 15

Billie takes exception to recommended conclusion of law number 53(4) regarding fishing and recreational values and marine productivity in the vicinity of the activity wherein the ALJ concludes that the fishing and marine productivity portion of the public interest is neutral since there is no on-site fishery nursery habitat to be degraded or eliminated. Billie also contends that the test required an analysis of the impacts to marine productivity in the "vicinity" of the activity, not merely "on-site."

Apparently, Billie's argument is that because neither the applicant nor the District staff offered an expert specifically qualified in marine or estuarine science, that the applicant and District did not provide competent substantial evidence regarding fishing and marine productivity. The Governing Board disagrees and finds that there is competent substantial evidence in the record in the form of testimony by four qualified experts to support the ALJ's conclusion that there would be no adverse impacts to fishery habitat and marine productivity. (Harper Vol. I: 134; Esser Vol. III: 89; Ziski Vol. II: 228; Dennis Vol. VII: 850-852). Specifically, expert witnesses testified that the project will not result in changes to thermal stratification, thermal regime, or salinity so as to adversely affect fisheries or marine productivity (Harper Vol. I: 134; Esser Vol. III: 89); that detrital export from the wetland to be impacted is negligible and, therefore, the impact would not result in a significant change in detrital export (Zyski Vol. II: 228; Dennis Vol. VII: 850-852); and that base flow maintenance is not an issue because the wetland to be impacted is an ephemeral wetland (Zyski Vol. II: 228-229).

As to Billie's argument that the ALJ did not consider impacts to marine productivity in the "vicinity" of the activity, this argument is without merit. In fact, the ALJ found that the on-site wetland to be impacted does not contribute significant values for detrital export, temperature regimes, or to normal salinity regimes. (R.O.: 38 [emphasis added]). This finding was not limited to "on-site" values but, instead, included the contribution off-site habitats. Thus, recommended conclusion of law no. 53(4) addresses both potential impacts to on-site and off-site fishery habitat and marine productivity.

In Exception No. 15, Billie also takes exception to the ALJ's conclusion that the minimal values will be replaced by the wetland mitigation. The Governing Board finds that there is competent substantial evidence in the record that the applicant's mitigation proposal would off-set any adverse impacts to fishery habitat or marine productivity. (Ziski Vol. II: 228; Livingston Vol. IV: 373; Dennis Vol. VII: 854; Ziski Vol. II: 228; Esser Vol. III: 89; Dennis Vol. VII: 854-859). Accordingly, Billie's Exception 15 is rejected.

Billie's Exception No. 16

Billie takes exception to recommended conclusion of law number 53(6) regarding significant historical and archaeological resources wherein the ALJ concludes that since the Division of Historical Resources commented on the site and believes that there are no significant archaeological or historical resources on the project, that reasonable assurances have been provided that there will be no adverse affects to significant sites. Billie incorporates by reference Exceptions 5 and 6 and the argument at the Petitioners' Joint Proposed Recommended Order, paragraphs 123 through 127. To the extent that the Governing Board has previously ruled on Exceptions 5 and 6 regarding the significance of archaeological resources on the site, we incorporate those rulings herein. With regard to Billie's argument that the public interest test does not require the District to "blindly" follow the conclusion of another agency, the Governing Board finds that the ALJ properly applied District Rules. Section 12.2.3.6, A.H., requires that the District provide copies of all conceptual, individual, and standard general 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 archaeological resources. The District staff properly followed

this rule and reasonably followed the advice provided by the experts of the Division of Historical Resources. Moreover, as discussed previously in our ruling on Billie's Exceptions 5 and 6, there is competent substantial evidence in the record to support a finding that there are no significant historical or archaeological resources on this site and the ALJ's finding regarding the opinion of the Division of Historical Resources is not the only finding which supports the conclusion that significant historical and archaeological resources will not be adversely affected. (See, R.O. ¶¶ 21-22, pp. 14-15). Accordingly, Billie's Exception No. 16 is rejected.

Billie's Exception No. 17

Billie takes exception to recommended conclusion of law number 53(7) regarding the current condition and relative value of functions part of the public interest test wherein the ALJ concludes that the functions the creek currently provides will be diminished if left intact, but with development occurring around it. Billie incorporates by reference Exception No. 7. As to Billie's assertion that the ALJ improperly considered the value of the functions of the wetland if it were left intact but with development around it, the Governing Board agrees and grants this portion of the exception. The portion of the public interest test at issue in this exception is found at rule 12.2.3.7. This rule requires the District to consider the "current condition and relative value of the function performed by the wetlands and other surface waters affected by the proposed regulated activity." [emphases added] This rule provides that the District should take into account "past" legal alterations or occurrences that degrade the value of the wetland function. However, in determining whether this public interest factor is positive, negative, or neutral, the District is not to consider the potential future impacts to the

value of the wetland if left intact by the proposed regulated activity. Therefore, the Governing Board strikes the third sentence of recommended conclusion of law number 53(7) which states "[t]he functions that the wetland currently provides will be diminished if it were left in tact but development occurred around it." Although there may be evidence in the record to support this statement, it is immaterial to this rule and, therefore, such evidence is not "competent substantial" evidence. DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). For the same reasons, as well as the reasons articulated in our ruling on Sierra's Exception No. 5, the Governing Board strikes the portion of the fifth sentence of conclusion of law number 53(7), which states "development around the wetland to be impacted would diminish its already low functional value." The remainder of this sentence will remain intact. The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion. Nevertheless, the Governing Board finds that the remainder of the ALJ's recommended conclusion of law number 53(7) properly concludes that this public interest factor is neutral. The majority of this conclusion of law addresses the fact that the proposed mitigation will offset impacts to the current condition and relative value of the functions provided by the wetland to be impacted. The adequacy of the mitigation is addressed on our rulings on Sierra's Exception Nos. 2 and 13. Accordingly, the Governing Board rejects the remainder of Billie's Exception No. 17.

Billie's Exception No. 18

Billie takes exception to recommended conclusion of law number 54 wherein the ALJ concludes that the project satisfies the cumulative impact requirement. The Governing Board has previously discussed the issue of cumulative impacts in its ruling

on Sierra Club's Exception No. 3. As discussed in our ruling on Sierra Club's Exception No. 3, the ALJ properly followed the current statute regarding cumulative impacts found at section 373.414(8)(b), F.S. (2000). Petitioner's argument that the applicant must analyze all past, present, and future impacts within the drainage basin is in error. Such analysis is not required by section 373.414(8), F.S., because the mitigation proposed by the applicant will be sufficient to offset impacts to functions provided by wetlands, will be on-site, and will be within the same drainage basin as the project, the project meets the cumulative impact criteria of section 373.414(8)(b), F.S., 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 requirement.

As discussed at length on our ruling on Sierra Club's Exception No. 3, we find that the mitigation proposed does fully offset the impacts proposed within the same drainage basin as the adverse impacts to be mitigated. No further analysis is required under section 373.414(8), F.S. Accordingly, Petitioner's Exception No. 18 is rejected.

Billie's Exception No. 19

Billie takes exception to recommended conclusion of law number 55 wherein the ALJ concludes that although the District did not amend its cumulative impacts rule (Section 12.2.8, A.H.) after section 373.414(8)(b), F.S. (2000), was amended, the District's interpretation of that rule was consistent with section 373.414(8)(b), F.S. Billie mischaracterizes this conclusion as a conclusion that the District's past interpretation of its rules under unadopted policy is permissible. Billie argues that the District cannot continue to follow an unadopted policy and must follow the plain meaning of the statute.

The ALJ has, in fact, followed this statute. As described above in our ruling on Billie's Exception No. 18, the applicant fully complied with the statutory requirements of section 373.414(8)(b), F.S., by demonstrating that the proposed mitigation offsets impacts to the wetlands to be mitigated in the same drainage basin. Therefore, no further analysis of past, present, and future impacts is necessary to assess cumulative impacts. To the extent that Petitioner is attempting to challenge the District's interpretation of its rule as an "unadopted rule", this argument is not properly at issue in this proceeding. Petitioners have not complied with the pleading requirements for challenging an alleged unadopted rule under 120.56(4), F.S., and have failed to plead any claim under 120.57(1)(e), F.S. Specifically, neither Sierra Club nor Billie and Larsen's petition raise any issue regarding an unadopted rule and the Prehearing Stipulation contains no mention of an alleged unadopted rule. Accordingly, Petitioner's Exception No. 19 is rejected.

Billie's Exception No. 20

Billie takes exception to recommended conclusion of law number 56 wherein the ALJ concludes that since the project is above the mean high water line and there are no salt water species within the project, that reasonable assurances exist that none of the project activities are located in water approved to any degree or restricted to any degree as to shellfish harvesting and, therefore, section 12.2.5, A.H., does not apply.

The Governing Board agrees with Billie that rule 12.2.5, A.H., is applicable to this proceeding. Therefore, Billie's Exception No. 20 is granted to the extent that the ALJ improperly stated that the requirements of subsection of 12.2.5, A.H., do not apply. What the ALJ should have said was that because the project activities are not directly

located in waters classified as approved, conditionally approved, restricted, or conditionally restricted for shellfish harvesting, section 12.2.5(c), A.H., is not applicable. The Governing Board finds that sections 12.2.5(a) and (b), A.H., are applicable. However, the ALJ's findings of fact support the conclusion that the requirements of 12.2.5(a) and (b), A.H., have indeed been met. Specifically, the ALJ found that the applicant submitted plans and detailed measures for restricting the application of pesticides and fertilizers (R.O.: 6); that the applicant will implement erosion and turbidity controls (R.O.: 9); that the design of the surface water management system will provide the higher level of treatment required for Class II waters (R.O.: 8-9). These measures support a conclusion that the applicant has complied with section 12.2.5(a) in that the applicant has provided a plan to detail the measures to be taken to prevent significant damage to the immediate project area and the adjacent area and to provide reasonable assurance that the standards for Class II waters will not be violated. These measures also support a conclusion that the applicant has met the requirements of 12.2.5(b) in that the applicant has submitted a plan which demonstrates that the regulated activity will not have a negative effect on Class II waters and will not result in violations of water quality standards in Class II waters. Accordingly, the Governing Board amends the ALJ's recommended conclusion of law number 56 as follows:

> . . . Therefore, the requirements of subsection 12.2.5(c), A.H., do not apply. Hines has satisfied the requirements of sections 12.2.5.(a)-(b), A.H., by submitting plans and detailed measures which include restricting the application of pesticides and fertilizers, implementing erosion and turbidity controls, and designing the stormwater management system to provide the higher level of treatment required for Class II waters. These measures will prevent significant damage to the immediate project area and adjacent area. The Project will not have a negative effect on Class II waters.

The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion.

Billie's Exception No. 21

Billie takes exception to recommended conclusion of law number 57 wherein the ALJ concludes that since the retaining wall is located above the mean high water line, it is not located in the estuary. The Governing Board agrees that the location of the mean high water line is not dispositive of whether the water body is an estuary. Section 373.403(15), F.S., defines an estuary as a "semi-enclosed, naturally existing coastal body of water which has a free connection with the open sea and within which sea water is measurably diluted with fresh water derived from riverine systems." In contrast, a lagoon is defined as a "naturally existing coastal zone depression which is below mean high water and which has permanent or ephemeral communications with the sea, but which is protected from the sea by some type of naturally existing barrier." Section 373.403(16), F.S. [emphasis added]. As the ALJ correctly pointed out in Conclusion of Law Number 57, pursuant to rule 40C-4.302(1)(d), F.A.C., 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 12.2.6, A.H. The ALJ went on to find that the evidence establishes that the retaining wall at the edge of the wetland impact area is located in fresh water above mean high water line and, thus, is not located in an estuary or lagoon as a matter of law. Although Petitioner Billie is correct that mean high water line is not dispositive of whether a water body is an estuary, Billie apparently misreads the ALJ's conclusion.

The ALJ clearly found that the retaining wall at the edge of the wetland impact area is both in fresh water and above the mean high water line. The fact that the wall is in fresh water, rather than "sea water measurably diluted with fresh water," means that it is not in an estuary under the definition of estuary in section 373.403(15), F.S., quoted above. The fact that the wall is above mean high water is dispositive that the wall will not be in a lagoon as defined by section 373.403(16), F.S., quote above. Thus, Billie's Exception No. 21 is rejected.

Billie's Exception No. 22

Billie adopts and incorporates by reference the exceptions contained in Co-Petitioner Sierra Club's Exceptions. These exceptions are addressed in the section of the Final Order ruling on the Sierra Club's Exceptions. Those rulings are hereby incorporated by reference.

RULINGS ON DISTRICT'S EXCEPTIONS

District's Exception No. 1

District staff take exception to recommended conclusion of law number 47 wherein the ALJ states that when a design provides for an upland buffer of an average of 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. District staff point out that under section 12.2.7, A.H., the design must not only provide an upland buffer averaging 25 feet in width, but the buffer must also be a minimum of 15 feet in width. Therefore, District staff recommend that this sentence of conclusion of law number 47 be modified to state that

> "When a design provides for an upland buffer ~~of~~ with a minimum width of 15 feet and an average width of 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, denning or critically important feeding habitat."

We agree with District staff. District's Exception No. 1 is granted and Conclusion of Law No. 47 is hereby modified to include the language quoted above. The Governing Board finds that the modified conclusion of law is as or more reasonable than the ALJ's conclusion.

District's Exception No. 2

District staff take exception to the ALJ's recommendation that a Final Order be entered granting the subject application for modification of permit number 4-109-0216AERP 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 vegetative natural buffers for Lots 16 through 19 described and determined above. District staff maintain that although the ALJ has described the modification that is necessary for his recommendation of approval, he has not included language for the permit condition that implements this modification. Accordingly, District staff propose language for the permit condition that implements this modification for the Governing Board to adopt. The Governing Board grants District's Exception No. 2 with one change. There is competent substantial evidence in the record to support the majority of District staff's proposed condition (Frye Vol. IV: 312-313); however, the Governing Board finds no competent substantial evidence in the record to support the requirement

that the mulch bed be a minimum of two inches. Accordingly, the Governing Board adds the following permit condition:

> Prior to sale or commencement of any clearing activity for Lots 16, 17, 18 or 19 as shown on the neighborhood drainage plan (Sheet 10 of 27 in the engineering plan submitted to the District on September 20, 2000), permittee shall revise and record in the Public Records of the Circuit Court in St. Johns County the Declaration of Covenants and Restrictions affecting those lots to require that for those lots, either: a) run-off from houses and driveways shall be routed to the stormwater collection system; or b) within the 25-foot building set back immediately upland of the upland edge of the 25-foot wide upland buffer as shown on the neighborhood drainage plan, i) only native xeriscape plants may be planted; ii) the ground plane must be covered with a bed of mulch material; and iii) the use of any chemical products "including pesticides and fertilizers" shall be prohibited.

In addition to the two exceptions filed by District staff, District staff also point out four typographical errors, these errors are corrected in the section of the Final Order titled "Typographical Corrections."

TYPOGRAPHICAL CORRECTIONS

1) In the third line of Finding of Fact No. 30, the word "they" is hereby replaced with the word "that".

2) In the fifth line of Conclusion of Law No. 53, the word "my" is hereby replaced with the word "may".

3) In the thirteenth line of Conclusion of Law No. 54, the reference to subparagraph 373.414(b), F.S., is hereby changed to subparagraph 373.414(8)(b), F.S..

4) In Conclusion of Law No. 60, the reference to subsection to 12.2.1(b), A.H., is hereby changed to subsection 12.2.1.2(b), A.H.

5) In the fourth line of Finding of Fact No. 9, the word "siding" is hereby replaced with the word "sodding".

6) In the fifth line of Finding of Fact No. 26, the words "The wetland is to be impacted as a freshwater system . . ." is hereby replaced with the words "The wetland to be impacted is a freshwater system."

7) In the tenth line of Conclusion of Law No. 59, the words "on OFW" are hereby replaced with the words "an OFW."

8) In the ninth line of Conclusion of Law No. 43, the words "in the wetland" are hereby replaced with the words "than the wetland."

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

As to the ERP application, the Recommended Order dated April 9, 2001, 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 Petitioners, Bobby C. Billie and Shannon Larsen's, Exceptions 10, 11, 17, and 20, District's Exceptions 1, 2, and the typographical corrections noted above. Hines' application number 4-109-0216AM5–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 September 26, 2000, attached hereto, with the addition of the following condition:

> Prior to sale or commencement of any clearing activity for Lots 16, 17, 18 or 19 as shown on the neighborhood drainage plan (Sheet 10 of 27 in the engineering plan submitted to the District on September 20, 2000), permittee shall revise and record in the Public Records of the Circuit Court in St. Johns County the Declaration of Covenants and

Restrictions affecting those lots to require that for those lots, either: a) run-off from houses and driveways shall be routed to the stormwater collection system; or b) within the 25-foot building set back immediately upland of the upland edge of the 25-foot wide upland buffer as shown on the neighborhood drainage plan, i) only native xeriscape plants may be planted; ii) the ground plane must be covered with a bed of mulch material; and iii) the use of any chemical products "including pesticides and fertilizers" shall be prohibited.

DONE AND ORDERED this 13th day of June, 2001, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
William W. Kerr
CHAIRMAN

RENDERED this 14th day of June, 2001.

BY: Sandra Bertram
SANDRA BERTRAM
DISTRICT CLERK

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