



For Applicant: David A. Acton, Esquire  
Senior Assistant County Attorney  
Martin County Administrative Center  
2401 Southeast Monterey Road  
Stuart, Florida 34996-3397

STATEMENT OF THE ISSUES

The issues presented for decision in this case are:

(1) whether Martin County should be granted the re-issuance of Water Use Permit No. 43-00752W for the Tropical Farms Water Treatment Plant and associated wells; and (2) whether Martin County should be granted Water Well Construction Permit No. SF032696B for the construction of Well No. 10 of the Tropical Farms Water Treatment Plant, pursuant to the permitting criteria of Chapter 373, Parts II and III, Florida Statutes; Chapters 40E-2 and 40E-3, Florida Administrative Code; and the Basis for Review for Water Use Permit Applications of the South Florida Water Management District.

PRELIMINARY STATEMENT

The Petitioner initiated this proceeding by filing a petition, and later an amended petition, challenging the issuance and reissuance of certain permits by the South Florida Water Management District ("SFWMD"). The timeliness of the challenge to the water use permit was litigated separately in an earlier hearing, conducted on April 27, 2001. An order was entered on that issue on August 2, 2001. The order of August 2, 2001, reads as follows, in pertinent part:

On April 27, 2001, an evidentiary hearing was conducted in this case by means of televideo connection between Tallahassee and West Palm Beach, Florida. By pre-hearing order, the issues in this case were bifurcated, and the evidentiary hearing on April 27, 2001, was limited to the issue of whether the Petitioner had timely challenged the water use permit which is associated with the well construction permit at issue in this case. All parties agree that the challenge to the issuance of the well construction permit was timely filed. Both Respondents argue that the Petitioner failed to challenge the water use permit in the original petition and that the Petitioner cannot, at a time more than 21 days after notice of the use permit, amend his petition to add a challenge to the use permit. The timeliness issue has been raised in a motion to strike and in a motion seeking leave to amend the petition.

Upon consideration of the evidence received at the hearing on April 27, 2001, and careful review of the pleadings in the file and the proposed recommended orders submitted by all parties following the hearing, the undersigned is of the view, on the present state of the record, that the allegations of the original petition in this case were sufficient to put the Respondents on notice that the Petitioner was challenging the water use permit, as well as the well construction permit. The original petition is by no means a model to be followed by others who seek to challenge water use permits, but it appears to be legally sufficient to notify the Respondents that the Petitioner was challenging the water use permit. This view of the sufficiency of the original petition is founded in large part upon the many references in the original petition to matters related to the "use of Well Number 10." Any fair-minded reading of the original petition will lead to the

conclusion that the Petitioner was objecting to and challenging the use of the well.

In view of the foregoing, it is ORDERED:

1. That the motion to strike portions of the original petition is denied.

2. That the motion to amend the original petition is granted, and this case will go forward on the issues raised in the Amended Petition for Administrative Hearing which was filed on November 2, 2000.

3. That a final hearing will be conducted in this case at the earliest practicable date following a reasonable opportunity for all parties to prepare for hearing on all issues raised in the amended petition. Following a final hearing on the merits of the case, a Recommended Order will be prepared containing findings of fact and conclusions of law addressed to all issues, including the issues addressed at the hearing on April 27, 2001.

At the final hearing on January 23-25, 2002, the County and SFWMD presented the testimony of four witnesses: William S. Burns, Director of Water Use Regulation for SFWMD; John Polley, Director of the Utilities and Solid Waste Department of the County; James Mercurio, Treatment Superintendent of the same County department; and Linda Horn, a Water Facilities Administrator with the Florida Department of Environmental Protection and former hydrogeologist for the County. The County and SFWMD also offered Exhibits 1-5 and Exhibits 1-4 into evidence, respectively, all of which were admitted.

Mr. Slusher presented the testimony of three witnesses: Mr. Slusher, the Petitioner; Mrs. Diane Slusher, wife of the Petitioner; and Gerhardt M. Witt, a self-employed

hydrogeologist. Mr. Slusher also marked 14 exhibits for identification, eight of which were admitted into evidence.

A transcript of the final hearing was prepared and filed with the Division of Administrative Hearings on February 25, 2002. The parties timely filed their proposed recommended orders with the Division on April 8, 2002. All of the proposed recommended orders submitted by the parties have been carefully considered during the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner James W. Slusher, Jr., and his wife, Diane L. Slusher, own a residential lot located in unincorporated Martin County at 2376 SW Ranch Trail, Stuart, Florida 34997. On the lot is a single family home. The size of the residential lot is approximately 2.25 acres.

2. Mr. and Mrs. Slusher purchased the subject residential lot and home in September of 1994 from Mrs. Stella Kassinger.

3. Mrs. Kassinger and her late husband (the "original owners") had the home built on the residential lot in approximately 1980.

4. When the original owners built the home, they had a hole or "pit" dug in the rear portion of the lot.

5. From aerial photographs taken at the time (1979-1980), and based upon the common practice in the area, it appears that the material from the "pit" was spread on-site to provide

additional elevation for, and to minimize the potential for flooding of, the home and driveway that were constructed on the lot. Thus, the original "design function" of the "pit" was to provide fill for construction.

6. The original owners thereafter allowed the "pit" to accumulate water and stocked it with fish so that Mr. Kassinger could use it recreationally as a fishing pond. The "design function" of the original "pit" was thus changed so that it would serve as a recreational amenity on the property.

7. During the subsequent 14 years that the original owners lived in the home, they did nothing further to alter or improve the fishing pond. Over the years, the area immediately around the fishing pond became heavily vegetated and was used from time to time by various wild birds and animals.

8. The fishing pond was used by the original owners for fishing and for observing the wildlife it attracted.

9. After purchasing the home, Mr. Slusher also stocked the fishing pond with various fish over the years so that he and his family could continue to use it recreationally. The fishing pond continued to be used by the Slushers for fishing, for observing wildlife, and as a swimming area for their dogs.

10. Currently, the overall dimensions of the fishing pond are approximately 90 feet wide, by 122 feet long, by 10 feet

deep at its deepest part, when filled to the level that was natural prior to the operation of Water Well No. 10.

11. Potable water for the Slusher home is obtained from a well drilled on the property, not from the public water system of the County. The Slusher well is located approximately 33 feet from the home. It is attached by PVC pipe to a pump located next to the home. The original owners caused the well to be drilled.

12. The record in this case does not contain any persuasive evidence regarding the details of the Slusher residential water well. Specifically absent are such details as the depth to which the well was originally drilled, the material from which the well tube was made (i.e., cast iron or PVC), and the current physical condition of the sub-surface portions of the well.

13. Mr. Slusher has not done anything to repair or replace the well since he and his wife purchased the home.

14. On August 2, 2000, Mr. Slusher filed a petition with the SFWMD challenging the issuance of Water Well Construction Permit No. SF032696B, and the "use of the well."

15. On November 3, 2000, Mr. Slusher filed an amended petition with the Division of Administrative Hearings, challenging the issuance of Water Use Permit No. 43-00752W and Water Well Construction Permit No. SF032696B.

16. Martin County ("the County") is a political subdivision of the State of Florida, established in 1925 pursuant to Section 7.43, Florida Statutes, and Section 1, Chapter 10180, Laws of Florida.

17. SFWMD is an independent state agency, operating pursuant to Chapter 373, Florida Statutes.

18. SFWMD originally issued Water Use Permit No. 43-00752W to the County on April 15, 1993. The "water use permit" was for wells and associated equipment at the Tropical Farms Water Treatment Plant ("Tropical Farms WTP").

19. SFWMD re-issued Water Use Permit No. 43-00752W to the County on March 14, 1996. The re-issued "water use permit" allowed additional wells to be drilled and additional draws of water by the County at the Tropical Farms WTP.

20. One of the additional wells included in the re-issued water use permit was "Well No. 10."

21. SFWMD issued Water Well Construction Permit No. SF032696B to the County on March 28, 1996, allowing the construction of Well No. 10 at the Tropical Farms WTP.

22. In accordance with the restrictions imposed by the water well construction permit, the County drilled Well No. 10 on a site located at least 100 feet in distance from the fishing pond on the Slushers' property. The physical location of Well No. 10 is essentially "adjacent to" the Slusher property.

23. County Well No. 10 is approximately 120 feet deep and draws water from the surficial aquifer. It commenced operation in December of 1996.

24. It is uncontested that the operation of the well field, especially County Well No. 10, has caused drawdowns of the pond level and of the groundwater in the area of Mr. Slusher's residential water well. The MODFLOW model used by the County in support of its application indicates a maximum drawdown of 7.4 feet.

25. The persuasive expert opinion evidence in this case indicates that maximum draw downs of 7 or 8 feet would be expected in the area of Mr. Slusher's residential water well. The County has acknowledged that the operation of Well No. 10 has had a significant effect on the drawdown of the water table in the area of the pond.

26. County Well No. 10 appears to have been constructed in a manner consistent with the applicable rules. The well was properly drilled and grouted, the correct materials were used, and the well was constructed in a manner that did not result in harm to the water resources. The water use permit was issued prior to the well construction permit, as is appropriate.

27. Although permitted originally in 1993 and again in 1996, the Tropical Farms WTP did not begin regular operations until June of 1997. It is now part of a consolidated system

which includes four other water treatment plants, all operated by the County for the purpose of obtaining and providing potable water to the public county-wide.

28. In support of its applications for the issuance and re-issuance of the water use permit, the County provided SFWMD with so-called "MODFLOW calculations" done by a professional engineering firm retained by the County. MODFLOW was developed by the U.S. Geologic Survey and is considered the standard for assessment of ground water resource impacts.

29. The results of the three-dimensional MODFLOW modeling showed that the drawdown effect on the water table of the proposed wells for the Tropical Farms WTP would be unlikely to cause any adverse effect on typical wells used by homeowners, even if the latter were located within the same small "square" as one of the County's wells.

30. Prior to the commencement of the operation of Well No. 10 by the County, the water level in the fishing pond on the Slusher property would vary only a few inches up or down during the course of a typical year. After the County began to operate County Well No. 10, Mr. Slusher observed and videotaped much greater variations in the water level in the fishing pond on his property. After County Well No. 10 began to operate, the pond water level dropped to the extent that it would become virtually empty of water from time to time. At other times, however, the

fishing pond would refill with water, such as in September of 1999, and in August of 2001.

31. When the water in Mr. Slusher's pond gets very low, it has an adverse impact on the fish in the pond; the fish die because they have insufficient water. Mr. Slusher has not done anything over the years since the operation of County Well No. 10 began to attempt to prevent the variations in the water level of the fishing pond, or to mitigate the occurrence of such variations.

32. The County (together with the rest of southern Florida) has experienced several periods of severe drought over the past few years. Yet other "ponds" on other properties in the same neighborhood as the Slusher property have not experienced the significant variance in water level that has occurred in the fishing pond on the Slusher property since the County began drawing water from Well No. 10.

33. The County does not operate Well No. 10 continuously. Rather, it has attempted to reduce its use of the well.

34. SFWMD has never issued any notice to the County that any mitigation was required on the Slusher property pursuant to the limiting conditions of the water use permit.

35. The County does not dispute that its operation of Well No. 10 has contributed to a drawdown in the level of the water table in the surrounding area, nor that such a drawdown has

contributed to the variance in the water level in the pond on the Slusher property. Indeed, the drawdown of the water table generally was fully anticipated and predicted in the materials submitted by the County to SFWMD.

36. The use of County Well No. 10 to draw water from the surficial aquifer is not the only factor contributing to the variances in the water level of the fishing pond on the Slusher property. Evaporation and natural variances in the level of the water table also contribute to changes in the water level of the fishing pond.

37. Bentonite is a naturally occurring clay that is mined for a variety of uses, including the "lining" or "waterproofing" of reservoirs, lagoons, ponds, ditches, and other man-made bodies of water in order to seal them and to prevent or minimize seepage or percolation of the water into the ground. Even repeated wetting and drying of the clay does not reduce its effectiveness. Bentonite is widely used and has not been found to have any harmful or toxic effects on either human beings or wildlife.

38. In some applications, bentonite clay is a superior lining material when compared to a man-made liner, such as a plastic or polymer sheet. In a small scale application where the volume of water in a lined pond is relatively low, a man-

made liner could be forced away ("balloon up") from the bottom of the pond by the pressure of a rising natural water table.

39. Lining the pond on the Slusher property with Bentonite (or some similar clay) would create a virtually impervious layer that would separate the water in the pond on the Slusher property from the surrounding water table. With such a lining in place, County Well No. 10 would have no significant effect on the water level of the pond.

40. The water level in the pond on the Slusher property could also be stabilized at or near its normal level prior to the operation of County Well No. 10 by installation of a water supply that would add water to the pond whenever the pond dropped below a specified level.

41. Mr. Slusher first complained to the County about the effect of the County's operation of Well No. 10 in 1997, when he spoke with Jim Mercurio, a County water utilities employee.

42. Mr. Slusher also complained at about the same time to SFWMD, which resulted in a "field investigation" in September 1997. At that time, Mr. Slusher complained about the lowering of the water level in the pond on his property, but specifically denied any adverse effect on the water from his residential water well.

43. Mr. Slusher began to complain about the water quality and water pressure in his residential water well sometime in

2000. The water flowing from Mr. Slusher's residential water well now has an unpleasant odor, taste, and color, and the water causes rust stains. The water pressure of the water flowing from Mr. Slusher's residential water well is less than it was before the construction of County Well No. 10.

44. The rust stains, odor, taste, and color are all due to iron oxidation of the water drawn from the well on the Slusher property.

45. The County regularly experiences similar problems with iron oxidation in the water that it draws from its own wells in the same area as the Slusher property, which the County must treat at the Tropical Farms WTP. The problem of iron oxidation (and accompanying odor and taste deficiencies) in the water is thus not unique to the water drawn from the well on the Slusher property. Iron oxidation in well water is not harmful to human beings.

46. The evidence in this case does not include any evidence of any testing of the water quality of the water coming from the Slusher residential well. Similarly, there is no persuasive evidence as to the current condition of the sub-surface portions of the Slusher residential well. Further, the evidence regarding the cause of any deterioration of the water quality and/or the water pressure of the Slusher residential water well is both anecdotal and speculative, and is not a

persuasive basis for determining the cause of any deterioration of the water quality and/or water pressure of the subject residential well. Specifically, the evidence is insufficient to establish that the water quality and water pressure deterioration complained of by Mr. Slusher are a result of the operation of County Well No. 10. Such deterioration could be caused by other circumstances or conditions, including the uninspected sub-surface condition of Slusher's residential water well. The water quality and water pressure problems currently experienced by Mr. Slusher could be minimized or eliminated by connecting his residence to the residential water supply system operated by the County. A branch of the County's public water system already exists in Mr. Slusher's neighborhood within a few hundred feet of his property.

47. The application and information provided to SFWMD by the County were determined by SFWMD to provide "reasonable assurances" that existing legal users would not be adversely affected by the proposed wells or water treatment facility.

#### CONCLUSIONS OF LAW

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

49. Petitioner, as the owner of property "adjacent to" the site of the County's Well No. 10 and as a legal user of water from the well on his own property, has standing to initiate this proceeding.

50. SFWMD, as the agency of the state with the responsibility and authority to review and act upon the permits in question in this proceeding, pursuant to Chapter 373, Parts II and III, Florida Statutes, is a proper Respondent to the amended petition.

51. Martin County, as the applicant for both of the permits in question in this proceeding, has standing to intervene in this proceeding.

52. The issuance of a water use permit to the County by SFWMD is governed by the conditions found in Chapter 373, Part II, Florida Statutes, and in Chapter 40E-2, Florida Administrative Code, and in the Basis for Review of Water Use Permit Applications of the South Florida Water Management District.

53. The issuance of a well construction permit to the County by SFWMD is governed by the conditions found in Chapter 373, Part III, Florida Statutes, and in Chapter 40E-3, Florida Administrative Code.

54. As the applicant and the party asserting an affirmative entitlement to issuance of the permits in question

by SFWMD, the County has the burden of showing by a preponderance of the credible evidence that it is entitled to the permits. See Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

55. The proper standard for the County's burden of proof is one of providing "reasonable assurances," not absolute guarantees, that applicable water quality standards and the public interest criteria will be met by its construction and use of County Well No. 10. See Manasota-88, Inc. v. Agrico Chemical Co. and FDEP, 12 FALR 1319 (February 19, 1990).

56. "Reasonable assurances" contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade Co. v. Coscan Florida, Inc., 609 So. 2d 644 (Fla. 3rd DCA 1992). An applicant for a permit is not required to eliminate all contrary possibilities or address impacts which are only theoretical and cannot be measured in real life. See Hoffert v. St. Joe Paper Co., 12 FALR 4972 (October 29, 1990).

57. In the context of potential harm to natural resources, the Florida courts have allowed state agencies such as SFWMD considerable flexibility in interpreting "reasonable assurances" and in applying individual permit standards based upon a totality of the circumstances. See Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So. 2d 10 (Fla. 1st DCA 1986).

58. If the County makes a prima facie showing of reasonable assurances, then the burden shifts to Mr. Slusher to go forward and present evidence of equivalent quality consistent with the allegations of his amended petition. Such evidence cannot be merely speculative and involve allegations of what "might" have occurred. See Chipola Basin Protective Group, Inc. v. Dep't of Environmental Regulation, 11 FALR 467 (December 30, 1988).

59. If the contrary evidence offered by Mr. Slusher is not at least of "equivalent quality" to that presented initially by the County (and SFWMD), then the permits in question must be approved. See Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981). There is no "presumption of correctness" in the mere fact that SFWMD made a preliminary determination to issue the permits in question.

60. The construction and operation of Well No. 10 by the County is clearly in the public interest. Also clearly in the public interest is the operation of the Tropical Farms Water Treatment Plant.

61. The only evidence presented on the well construction permit was that by Scott Burns, who was accepted as an expert in water well construction permitting. The evidence establishes that Well No. 10 was properly drilled and grouted, the correct materials were used, and the well was constructed in a manner

that did not result in harm to the water resources. The water use permit was issued prior to the well construction permit. Consequently, reasonable assurances were provided that the requirements in Chapter 40E-3, Florida Administrative Code, were met, and the County is entitled to have the well construction permit issued.

62. The operation of a public water well, such as Well No. 10 of the County's Tropical Farms WTP, requires a water use permit from SFWMD. See Rule 40E-2.041, Florida Administrative Code.

63. A single private water well that has been drilled and is being used solely for the domestic needs of a single family residence, such as the well on the Slusher property, constitutes a "legal use" of water which does not require a permit from SFWMD. See Rule 40E-2.051(1), Florida Administrative Code.

64. Through its outside engineering consultant and the studies done with generally acceptable computerized modeling techniques, which included consideration of direct, secondary and cumulative impacts, the County provided "reasonable assurances" to SFWMD that the construction and operation of the entire Tropical Farms WTP, including Well No. 10, would comply with all applicable water quality, water quantity, and environmental permitting criteria, would not cause any reasonably foreseeable adverse water resource impacts on other

legal users, and would comply with the applicable provisions of Part II of Chapter 373, Florida Statutes, with the applicable parts of Chapter 40E-2, Florida Administrative Code, and with the Basis for Review of Water Use Permit Applications of the South Florida Water Management District.

65. Mr. Slusher's residential water well constitutes a "legal use" of water that had to be considered. See Rule 40E-2.301(1)(f), Florida Administrative Code. However, there is no legal requirement for a permit applicant to identify each such "legal use" separately and provide "reasonable assurances" directed solely to that particular "legal use." Such an obligation could become quite onerous to applicants, especially where the "legal uses" are exempt from any permitting requirements themselves and therefore could be unknown to both the applicant and the agency in the absence of a door-to-door inquiry of every property owner within the vicinity of the proposed new water use. A generalized study, using professionally acceptable techniques and standards, that examines the potential impacts on all possible "legal users," such as the County provided to SFWMD in this case, is legally sufficient to provide the necessary "reasonable assurances" required by law.

66. The evidence in this case is insufficient to establish that the construction and operation of County Well No. 10 was

the cause of any adverse impact to the quality and quantity of water produced by Slusher's residential well. In this regard it is significant to note that Mr. Slusher did not complain to anyone about the quality or the quantity of water from his residential water well until sometime in 2000, which was several years after the County initiated its use of Well No. 10 in December of 1996.

67. There is no legal requirement for SFWMD to issue a permit prior to the creation of a man-made fishing pond on private property, such as the one in question in this case. Similarly, there is no legal obstacle to the elimination of such a man-made fishing pond on private property where, as in this case, it does not constitute a legally defined or jurisdictional "wetlands."

68. The definition of "impoundment" in the Basis of Review appears to include both natural and man-made features. However, according to the Basis of Review, the environmental features that SFWMD must evaluate when determining the impacts of water withdrawal include only the former: "Natural surface water bodies such as lakes, ponds, springs, streams, estuaries, or other watercourses." See Basis of Review, Section 3.3, pg. A-38.

69. Since the fishing pond on the Slusher property was not a naturally occurring surface feature, but was man-made in 1980

in conjunction with the construction of the home on the subject property, it is not a "natural surface water body" that must be considered by SFWMD in evaluating effects on off-site environmental features.

70. There is no evidence in this case that the fishing pond on the Slusher property falls within any of the other categories that must be considered by SFWMD when determining the impacts of water withdrawal such as the County's use of Well No. 10.

71. The provisions of Section 3.6 of the Basis of Review, concerning evaluation of impact on "existing offsite land uses" must also be considered in this case. It is in this context that the "designed function of the water body" is relevant. See Basis of Review, Section 3.6.A., pg. A-40.

72. As SFWMD interprets the applicable statutes and rules, a man-made fishing pond, stocked with fish by its owner and used primarily for the recreational benefit of the owner, does not constitute an "existing legal use" under Rule 40E-2.301(f), Florida Administrative Code, and therefore is not entitled to protection by SFWMD. A man-made fishing pond is neither required to have a water use permit nor expressly exempted by statute from needing one. Consequently, the corresponding provisions of the Basis or Review would not be considered.

73. Finally, when evaluating the "public interest" prong under Rule 40E-2.301(1)(j), Florida Administrative Code, the interpretation by SFWMD is that the "interest" of the "public" must be on a scale larger than that of an individual homeowner, "such as the restoration of the Everglades system, the protection of an endangered species, the provision of reliable water supply for a region for seasonal water supply-type activity." This is a reasonable interpretation, since it gives meaning to the apparent attempt to distinguish between the interest of an individual user and the interest of the public-at-large. There being no evidence that the fishing pond on Mr. Slusher's property is open to the public for general use, it does not appear to be encompassed within the protection afforded to the "public interest" by law.

74. In sum: For the reasons discussed above, the County is also entitled to the water use permit it seeks to have renewed.

75. In this case there does not appear to be any basis upon which to include as a condition for the issuance of the subject permits that the County take action to mitigate the adverse impacts to Mr. Slusher's fishing pond or to mitigate the changes in water pressure and water quality in Mr. Slusher's residential water well. It is nevertheless gratuitously noted that there are reasonable ways in which such conditions could be

mitigated by either the County or Mr. Slusher, should either choose to do so.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby recommended that the Governing Board of the South Florida Water Management District enter a final order issuing Water Well Construction Permit No. SF032696B and re-issuing Water Use Permit No. 43-00752W to Martin County, subject to the general and special conditions set forth therein.

DONE AND ENTERED this 31st day of May, 2002, in Tallahassee, Leon County, Florida.

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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 31st day of May, 2002.

COPIES FURNISHED:

Howard K. Heims, Esquire  
Virginia P. Sherlock, Esquire  
Littman, Sherlock & Heims, P.A.  
618 East Ocean Boulevard, Suite 5  
Post Office Box 1197  
Stuart, Florida 34995-1197

Douglas H. MacLaughlin, Esquire  
South Florida Water Management District  
3301 Gun Club Road  
Post Office Box 24680  
West Palm Beach, Florida 33416-4680

David A. Acton, Esquire  
Senior Assistant County Attorney  
Martin County Administrative Center  
2401 Southeast Monterey Road  
Stuart, Florida 34996-3397

Frank R. Finch, Executive Director  
South Florida Water Management District  
Post Office Box 24680  
West Palm Beach, Florida 33416-4680

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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