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**BEFORE THE GOVERNING BOARD  
SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

AP

JOSEPH BELANGER, PATRICIA  
BELANGER, JEROME STRAUSS,  
and SUSAN STRAUSS,

Petitioners,  
v.

DOAH CASE NO. 02-0116  
SFWMD Permit Application #010223-5  
Silver Lakes RV and Golf Resort  
**SFWMD ORDER NO. 2002-147 FOF ERP**

DRA-CWS

CONQUEST DEVELOPMENTS USA, L.C. and  
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Respondents,

**FINAL ORDER**

This matter was presented before the Governing Board of the South Florida Water Management District (SFWMD) on September 12, 2002, for consideration of the Recommended Order issued July 24, 2002, by Administrative Law Judge (ALJ), Donald R. Alexander (attached hereto as Exhibit "A"). Petitioners, Joseph Belanger, Patricia Belanger, Jerome Strauss and Susan Strauss (Petitioners) timely filed Exceptions to the Recommended Order on August 7, 2002. Respondent, South Florida Water Management District, timely filed a Response to those Exceptions on August 19, 2002. At the Governing Board meeting, Petitioners were represented by Anthony P. Pires, Jr., Esquire, South Florida Water Management District was represented by Susan Martin, Esquire, and Conquest Developments USA, L.C. was represented by Kenneth Cuyler, Esquire. Counsel for Petitioners and South Florida Water Management District and Conquest Developments USA, L.C. presented oral argument.

## **SUMMARY OF THE RECOMMENDED ORDER**

An administrative hearing was conducted on May 29, 2002 to determine whether a modification of Environmental Resource Permit No. 11-00950-S should be issued to Conquest Developments USA, L.C., to modify an existing surface water management system serving a residential development known as Silver Lakes RV and Golf Resort, Collier County, Florida.

Based on the testimony and evidence presented, the ALJ issued a Recommended Order on July 24, 2002, concluding that the Applicant, Conquest Developments USA, L.C., (hereinafter referred to as "Applicant"), established by a preponderance of the evidence, that the proposed modifications to the existing system comply with all requirements of Chapter 373, Florida Statutes, the associated rules in Chapters 40E-4 and 40E-400, Florida Administrative Code, and the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (hereinafter referred to as "Basis of Review"), and recommending the District enter a final order granting Permit Application No. 010223-5 to Conquest Developments USA, L.C., for modification of Environmental Resource Permit No. 11-00950-S.

## **GOVERNING BOARD'S STANDARD OF REVIEW FOR FINDINGS OF FACT**

Before responding to the Exceptions filed in this proceeding, it is critical to understand an agency's standard of review relative to an ALJ's Findings of Fact. As a matter of law, Section 120.57(1)(l), Florida Statutes, prohibits an agency from rejecting or modifying an administrative law judge's findings of fact unless it determines from reviewing the entire record, and states with particularity in the order, that the findings of

fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. DeWitt v. Sch. Bd. of Sarasota County, 799 So. 2d 322 (Fla. 2d DCA 2001).

"Competent, substantial evidence" has been defined as "such evidence sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1975); Gulf Coast Elec. Co-op v. Johnson, 727 So. 2d 259 (Fla. 1999). The decision to accept one expert's testimony over that of another is left to the discretion of the administrative law judge and cannot be altered absent a complete lack of competent, substantial evidence from which the finding could reasonably be inferred. Florida Chapter of Sierra Club v. Orlando Utility Commission, 436 So. 2d 383, 389 (Fla. 5th DCA 1983).

The sufficiency of the facts required to form the opinion of an expert must normally reside with the expert himself and any deficiencies in the facts required to form an opinion relate to the weight of the evidence. Gershanik v. Dept. of Professional Regulation, 458 So. 2d 302 (Fla. 3d DCA 1984); rev. denied 462 So. 2d 1106 (Fla. 1985); H.K. Corp. v. Estate of Miller, 405 So. 2d 218, 219 (Fla. 3d DCA 1981). Therefore, any exceptions which assert that a finding is "contrary" to evidence presented should not be granted unless there is no substantial, competent evidence within the record to support the administrative law judge's finding.

Factual inferences are to be drawn by the ALJ as trier of fact. Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1283 (Fla. 1st DCA 1985). An agency is not authorized to reweigh evidence, judge credibility, or

otherwise interpret the evidence to fit its desired conclusion. Id. at 1281; Greseth v. Dep't of Health & Rehab. Serv., 573 So. 2d 1004 (Fla. 4th DCA 1991).

In addition, an agency may not create findings of fact or add to findings of fact, since it is not acting in the capacity of the trier of fact. Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345 (Fla. 1st DCA 1987). The agency's role is to insure that the findings of fact made by the administrative law judge are based upon evidence contained in the record.

The findings made by the ALJ, based upon the record in this case, should not be disturbed unless, from a review of the entire record, the agency determines that there is no competent, substantial evidence which supports these findings.

#### **GOVERNING BOARD'S STANDARD OF REVIEW FOR CONCLUSIONS OF LAW**

Section 120.57(1)(l), Florida Statutes, provides that an agency may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. See, Deep Lagoon Boat Club Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001). In Deep Lagoon, the First DCA noted that this section should be interpreted as limiting the scope of agency review to matters within the administrative authority or substantive expertise of the agency. Id. at 1142, footnote 2.

In this case, the District's Governing Board still has jurisdiction to review the ALJ's conclusions of law interpreting District administrative rules over which the District has substantive jurisdiction, such as Chapter 373, Florida Statutes, and Title 40E, Florida Administrative Code. These provisions are discussed with particularity and specificity, *infra*.

## ORDER

Having considered the Recommended Order, Petitioners' Exceptions to Recommended Order, South Florida Water Management District's Response to the Exceptions, the oral argument presented, and being otherwise fully advised in the premises, it is hereby **ORDERED AND ADJUDGED** that Petitioners' Exceptions are accepted in part and rejected in part for the reasons set forth below and, accordingly, the Recommended Order issued July 24, 2002, is hereby adopted and incorporated herein, with the following modifications:

1. Petitioners take exception to statements in the Recommended Order's Preliminary Statement and in the Findings of Fact, paragraph a.1, reflecting the date the District issued its Notice of Intended Agency Action. Petitioners' exception is correct in that the date the District issued its Notice of Intended Agency Action is November 29, 2001, rather than August 15, 2001, as reflected in the Recommended Order. However, the error in the date is simply a clerical error and does not alter the outcome of this proceeding, as the parties have not disputed the timeliness of the petition in this matter. In addition, there is no competent substantial evidence in the record to support the ALJ's Finding of Fact. For these reasons, Petitioners' Exception 1 is accepted and the first sentence in the Recommended Order's Preliminary Statement is modified as follows: "This matter began on November 29, 2001, when Respondent, South Florida Water Management District, issued its written Notice of Intended District Decision on Permit Application 010223 authorizing Respondent, Conquest Developments USA, L.C., to modify an existing stormwater management system serving a residential development in Collier County, Florida." The last sentence in the Recommended

Order's Findings of Fact, paragraph a.1 is also modified as follows: "Preliminary action approving the application was taken by the District on November 29, 2001."

2. Petitioners argue that the ALJ failed to reference or incorporate in the Recommended Order's Preliminary Statement, the stipulation between the parties conceding that certain named residents within the Silver Lakes Development have sighted threatened and endangered species in and around an area known as the 40-acre site, which is the subject property in this proceeding. It is unclear, from the record, what stipulation the Petitioners are referencing. The pretrial stipulation does not include such a stipulation. It is therefore assumed that the Petitioners are referencing the stipulations found on pages 357 and 372 of the hearing transcript.

The Recommended Order's Findings of Fact, paragraph c.15 states: "The evidence shows that listed and endangered species such as ... have been spotted on infrequent occasions on the 40-acre site by the residents of Silver Lake". This statement acknowledges the facts in the stipulation. Petitioners' exception requesting the inclusion of specific language of the stipulation is merely a request to supplement a finding of fact.

As stated in the Standard of Review for Findings of Fact above, an agency may not create findings of fact or add to findings of fact, since it is not acting in the capacity of the trier of fact. Friends of Children v. Department of Health and Rehabilitative Services, 504 So. 2d 1345 (Fla. 1st DCA 1987). The agency's role is to insure that the findings of fact made by the ALJ are based upon evidence contained in the record. Petitioners' Exception 2 seeks to add facts to the findings of fact, therefore it is rejected as beyond the District's standard of review.

3. Petitioners take exception to the third paragraph of the Recommended Order's Preliminary Statement, reflecting when Petitioners filed their Proposed Findings of Fact and Conclusions of Law (hereinafter referred to as PRO). Petitioners' exception is correct in that the date the Petitioners filed their PRO is July 11, 2002, rather than July 15, 2002, as reflected in the Recommended Order. However, the error in the date the Petitioners filed their PRO is simply a clerical error and does not alter the outcome of this proceeding as the ALJ accepted the Petitioners' PRO as timely filed and further considered their PRO when preparing the Recommended Order. (See the third paragraph of the Recommended Order's Preliminary Statement.) For this reason, Petitioners' Exception 3 is accepted and the third paragraph of the Recommended Order's Preliminary Statement is modified as follows: "Proposed Findings of Fact and Conclusions of Law were filed by the South Florida Water Management District and Petitioners on July 10 and 11, 2002, respectively."

4. Petitioners argue that the number of wetland acres that will be adversely impacted in the western portion of the 40-acre site is 7.02 acres, not 9.9 acres as reflected in the Recommended Order's Findings of Fact paragraph b.8. Petitioners' exception is correct in that the actual number of impacted wetland acres in the western portion of the 40-acre site is 7.02 acres. However, the error in the amount of wetland acres does not alter the outcome of this proceeding, as the 7.02 acres of impacted wetlands is less than the 9.9 acres the ALJ considered when he found that the proposed mitigation for the project adequately offsets the impacts of the 40-acre site, and that the impacts from other permitted projects in the basin area had been sufficiently offset. In addition, there is no competent substantial evidence in the record

to support the ALJ's Finding of Fact. For these reasons, Petitioners' Exception 4 is accepted and the Recommended Order's Findings of Fact, paragraph b.8 is modified as follows: "If the application is approved, there will be adverse impacts to 7.02 acres of wetlands in the western portion of the site (where the storage facility will be located) and to 3.37 acres in the southeastern portion of the site."

5. Petitioners argue that the Applicant proposed to place the storage area in the western portion of the 40-acre site in the original application. The testimony of Cory Peck clarifies that the application originally submitted to the District proposed to place the storage area in the western portion of the 40-acre site, however, during a pre-application meeting, the Applicant provided plans proposing to place the storage area in the eastern portion of the 40-acre site (See Transcript, page 82, lines 2 through 14). Petitioners' Exception 5 is accepted because there is no competent substantial evidence in the record to support the ALJ's Finding of Fact, and the Recommended Order is modified to accurately reflect the events from the time the project was initially proposed until the time the application was actually submitted. The last sentence of the Recommended Order's Findings of Fact, paragraph b.9 is modified as follows: "Prior to submitting the original application, the Applicant proposed to place the storage area in the eastern part of the site and to create a larger storage area."

6. Petitioners argue that the eastern area of the site is not "adjacent to other undeveloped lands" as there is a developed area to the northeast. The existence of a developed area to the northeast is not inconsistent with the finding of fact. The language of the finding of fact states that there are "other undeveloped lands". It does not state that there is no development in the eastern area of the site, merely that there



are some undeveloped areas. Therefore, the existence of a developed tract to the northeast is not contrary to the language found in the Recommended Order's Finding of Fact paragraph b.10. Petitioners' Exception 6 is rejected as the Recommended Order's Finding of Fact paragraph b.10 is supported by competent and substantial evidence (See Transcript, pages 40-41).

7. Petitioners argue that the ALJ erred in his finding that the Applicant has provided reasonable assurances that wetland impacts "have been eliminated or reduced to the greatest extent practicable". Although, in an earlier finding of fact, the ALJ considered this to be the standard of review generally applied, section 4.2.1 of the Basis of Review for Environmental Resource Permit Applications Within The South Florida Water Management District (hereinafter referred to as Basis of Review") regarding Reduction and Elimination of Impacts sets forth the standard as follows:

"... Design modification to reduce or eliminate adverse impacts must be explored as described in subsection 4.2.1.1. Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation as described in subsections 4.3-4.3.9."

Section 4.2.1.1, Basis of Review states:

"Except as provided in subsection 4.2.1.2, if the proposed system will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of sections 4.2.2 through 4.2.3.7, the District in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts."

In the challenged Finding of Fact (b.12), the ALJ actually finds that the Applicant "provided reasonable assurances that the wetland impacts from the proposed activities will be eliminated or reduced as required by Section 4.2.1 of the Basis of Review". This finding of fact correctly cites to the applicable rule.

The evidence in the record shows that the Applicant has implemented practicable design modifications by reducing the number of acres impacted and moving the location of the storage area from what was initially proposed. The Recommended Order's Finding of Fact paragraph b.12 is supported by competent and substantial evidence and may not be rejected. (DeWitt v. Sch. Bd. of Sarasota County, 799 So.2d 322 (Fla. 2d DCA 2001)).

8. Petitioners' Exception 8 (A) takes exception to the Recommended Order's Finding of Fact paragraph c.15 which states: "it is fair to infer that there is limited or no use of the property by protected wildlife species". Petitioners attempt to reargue the facts by alleging that the Recommended Order ignores testimony regarding sightings of black bear and the potential for the site to function as a wildlife corridor. Testimony that a black bear has been sighted is not inconsistent with the finding of "limited use". Further the finding of limited use is supported by the testimony of Karen Johnson on page 142 through 143 of the hearing transcript.

In addition, the ALJ's finding that the Applicant has given reasonable assurances that the requirements of section 4.2.2 of the Basis of Review have been satisfied, is based on the two special conditions that have been incorporated into the permit to protect endangered, threatened or other listed species. (See Recommended Order's Findings of Fact paragraph c.16). Specifically, Special Condition 25 has been incorporated to protect any endangered or threatened species if there are ever any found on the property. Special Condition 25 reads:

25. Although the project site does not contain preferred habitat for endangered species, threatened species and/or species of special concern, it shall be the permittee's responsibility to coordinate with the

Florida Fish and Wildlife Conservation Commission and/or the U.S. Fish and Wildlife Service for appropriate guidance, recommendations and/or necessary permits to avoid impacts to listed species that may be encountered.

The Recommended Order's Finding of Fact paragraph c.16 is supported by competent and substantial evidence and may not be rejected. (DeWitt v. Sch. Bd. of Sarasota County, 799 So. 2d 322 (Fla. 2d DCA 2001)).

9. Although unclear, it appears that Petitioners' Exception 8 (B) takes exception to the ALJ's Finding of Fact f. 30. Finding of Fact f. 30 regarding the creation of a 50-foot buffer along the southern boundary of the storage area found that implementation of the buffer will require additional consultation with the District and must be in accordance with the staff report. Since this Finding of Fact is supported by competent substantial evidence (See Transcript, pages 151-152, 185-186, 226, 228, 233-234), it may not be overturned.

10. Petitioners' Exception 9 refers to section 5 of ALJ's Findings of Fact. However, the Recommended Order does not contain a section 5 or any numbered sections. Paragraph Number 5 under the Findings of Fact, does not refer to violations or enforcement. It is assumed that Petitioners' intention is to take exception to the Recommended Order's Findings of Fact paragraph g. 31, regarding past enforcement. In addition to improperly citing the Recommended Order, the language in the exception is unclear making it impossible to determine the basis of the objection.

Rule 40E-4.302(2), F.A.C., referenced by the Petitioners, requires the District to take into account the applicant's violation of applicable rules. The rule is correctly paraphrased in the Recommended Order. The statement in the Recommended Order

that no enforcement action has been taken by the District against the Applicant for any violation of ERP requirements is also supported in the record (See Transcript, page 118, lines 7 through 16). The finding of fact which further states that an inspection by District personnel revealed that there were unpermitted activities, but those unpermitted activities were "not significant", is also supported by the record (See Transcript, page 118, lines 3 through 6). These unpermitted activities were considered and remedied through imposition of Special Condition 23 of the permit.

Petitioners' Exception 9 is totally unclear and has no bearing on the outcome of this proceeding, therefore it is rejected.

11. Petitioners' Exception 10 challenges the Conclusion of Law that the Applicant has met its proof, by a preponderance of the evidence and that it is entitled to the referenced permit. As reflected in the Recommended Order's Conclusions of Law paragraph 35, an applicant must give reasonable assurance that the conditions for the issuance of an ERP have been met. The ultimate question of whether reasonable assurances have been provided is a conclusion of law. 1800 Atlantic Developers v. Florida Department of Environmental Regulation, 552 So. 2d 946 (Fla. 1st DCA 1989). rev. denied, 562 So. 2d 345 (Fla. 1990)(reasonable assurances that the project is clearly in the public interest is ultimately a question of law for the agency to determine). In this case, Conquest Developments USA, L.C., has provided reasonable assurances that the proposed project will comply with the applicable criteria. Petitioners do not properly state their exception to the law applied by the ALJ, but merely take exception to the ALJ's conclusion. Therefore, Petitioners' Exception 10 is rejected and the

Governing Board affirms the ALJ's Conclusion of Law that the Applicant has met its burden by a preponderance of the evidence of its entitlement to the permit.

12. Petitioners' Exception 11 challenges the ALJ's Recommendation that the South Florida Water Management District enter a final order granting Permit Application 010223-5 to Conquest Developments USA, L.C., for an Environmental Resource Permit. Petitioners' exception is merely a general statement that they disagree with the ALJ's recommendation, therefore Petitioners' Exception 11 is rejected and the Governing Board affirms the ALJ's recommendation.

#### **NOTICE OF RIGHTS**

Section 120.569(1), Fla. Stat. (2001), requires that "each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply." Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

#### **Petition for Administrative Proceedings**

1. A person whose substantial interests are affected by the South Florida Water Management District's (SFWMD) action has the right to request an administrative hearing on that action. The affected person may request either a formal or an informal hearing, as set forth below. A point of entry into administrative proceedings is governed by Rules 28-106.111 and 40E-1.511, Fla. Admin. Code, (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109), as set forth below. Petitions are deemed filed upon receipt of the original documents by the SFWMD Clerk.

##### **a. Formal Administrative Hearing:**

If a genuine issue(s) of material fact is in dispute, the affected person seeking a formal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for

hearing pursuant to Sections 120.569 and 120.57(1), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-106.201(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

##### **b. Informal Administrative Hearing:**

If there are no issues of material fact in dispute, the affected person seeking an informal hearing on a SFWMD decision which does or may determine their substantial interests shall file a petition for hearing pursuant to Sections 120.569 and 120.57(2), Fla. Stat. or for mediation pursuant to Section 120.573, Fla. Stat. within 21 days, except as provided in subsections c. and d. below, of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions

must substantially comply with the requirements of Rule 28-106.301(2), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

c. Administrative Complaint and Order:

If a Respondent objects to a SFWMD Administrative Complaint and Order, pursuant to Section 373.119, Fla. Stat. (1997), the person named in the Administrative Complaint and Order may file a petition for a hearing no later than 14 days after the date such order is served. Petitions must substantially comply with the requirements of either subsection a. or b. above.

d. State Lands Environmental Resource Permit: Pursuant to Section 373.427, Fla. Stat., and Rule 40E-1.511(3), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), a petition objecting to the SFWMD's agency action regarding consolidated applications for Environmental Resource Permits and Use of Sovereign Submerged Lands (SLERPs), must be filed within 14 days of the notice of consolidated intent to grant or deny the SLERP. Petitions must substantially comply with the requirements of either subsection a. or b. above.

e. Emergency Authorization and Order:

A person whose substantial interests are affected by a SFWMD Emergency Authorization and Order, has a right to file a petition under Sections 120.569, 120.57(1), and 120.57(2), Fla. Stat., as provided in subsections a. and b. above. However, the person, or the agent of the person responsible for causing or contributing to the emergency conditions shall take whatever action necessary to cause immediate compliance with the terms of the Emergency Authorization and Order.

f. Order for Emergency Action: A person whose substantial interests are affected by a SFWMD Order for Emergency Action has a right to file a petition pursuant to Rules 28-107.005 and 40E-1.611, Fla. Admin. Code, copies of which are attached to this Notice of Rights, and Section 373.119(3), Fla. Stat., for a hearing on the Order. Any subsequent agency action or proposed agency action to initiate a formal revocation proceeding shall be separately noticed pursuant to section g. below.

g. Permit Suspension, Revocation, Annulment, and Withdrawal: If the SFWMD issues an administrative complaint to suspend, revoke, annul, or withdraw a permit, the permittee may request a hearing to be conducted in accordance with Sections 120.569 and 120.57, Fla. Stat., within 21 days of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Petitions must substantially comply with the requirements of Rule 28-107.004(3), Fla. Admin. Code, a copy of the which is attached to this Notice of Rights.

2. Because the administrative hearing process is designed to formulate final agency action, the filing of a petition means that the SFWMD's final action may be different from the position taken by it previously. Persons whose substantial interests may be affected by any such final decision of the SFWMD shall have, pursuant to Rule 40E-1.511(2), Fla. Admin. Code (also published as an exception to the Uniform Rules of Procedure as Rule 40E-0.109(2)(c)), an additional 21 days from the date of receipt of notice of said decision to request an administrative hearing. However, the scope of the administrative hearing shall be limited to the substantial deviation.

3. Pursuant to Rule 40E-1.511(4), Fla. Admin. Code, substantially affected persons entitled to a hearing pursuant to Section 120.57(1), Fla. Stat., may waive their right to such a hearing and request an informal hearing before the Governing Board pursuant to Section 120.57(2), Fla. Stat., which may be granted at the option of the Governing Board.

4. Pursuant to Rule 28-106.111(3), Fla. Admin. Code, persons may file with the SFWMD a request for extension of time for filing a petition. The SFWMD, for good cause shown, may grant the extension. The request for extension must contain a certificate that the petitioner has consulted with all other parties, if any, concerning the extension and that the SFWMD and all other parties agree to the extension.

#### CIRCUIT COURT

5. Pursuant to Section 373.617, Fla. Stat., any substantially affected person who

claims that final agency action of the SFWMD relating to permit decisions constitutes an unconstitutional taking of property without just compensation may seek judicial review of the action in circuit court by filing a civil action in the circuit court in the judicial circuit in which the affected property is located within 90 days of the rendering of the SFWMD's final agency action.

6. Pursuant to Section 403.412, Fla. Stat., any citizen of Florida may bring an action for injunctive relief against the SFWMD to compel the SFWMD to enforce the laws of Chapter 373, Fla. Stat., and Title 40E, Fla. Admin. Code. The complaining party must file with the SFWMD Clerk a verified complaint setting forth the facts upon which the complaint is based and the manner in which the complaining party is affected. If the SFWMD does not take appropriate action on the complaint within 30 days of receipt, the complaining party may then file a civil suit for injunctive relief in the 15<sup>th</sup> Judicial Circuit in and for Palm Beach County or circuit court in the county where the cause of action allegedly occurred.

7. Pursuant to Section 373.433, Fla. Stat., a private citizen of Florida may file suit in circuit court to require the abatement of any stormwater management system, dam, impoundment, reservoir, appurtenant work or works that violate the provisions of Chapter 373, Fla. Stat.

#### **DISTRICT COURT OF APPEAL**

8. Pursuant to Section 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.

#### **LAND AND WATER ADJUDICATORY COMMISSION**

9. A party to a "proceeding below" may seek review by the Land and Water Adjudicatory Commission (LAWAC) of SFWMD's final agency action to determine if such action is consistent with the provisions and purposes of Chapter 373, Fla. Stat. Pursuant to Section 373.114, Fla. Stat., and Rules 42-2.013 and 42-2.0132, Fla. Admin.

Code, a request for review of (a) an order or rule of the SFWMD must be filed with LAWAC within 20 days after rendition of the order or adoption of the rule sought to be reviewed; (b) an order of the Department of Environmental Protection (DEP) requiring amendment or repeal of a SFWMD rule must be filed with LAWAC within 30 days of rendition of the DEP's order, and (c) a SFWMD order entered pursuant to a formal administrative hearing under Section 120.57(1), Fla. Stat., must be filed no later than 20 days after rendition of the SFWMD's final order. Simultaneous with filing, a copy of the request for review must be served on the DEP Secretary, any person named in the SFWMD or DEP final order, and all parties to the proceeding below. A copy of Rule 42-2.013, Fla. Admin. Code is attached to this Notice of Rights.

#### **PRIVATE PROPERTY RIGHTS PROTECTION ACT**

10. A property owner who alleges a specific action of the SFWMD has inordinately burdened an existing use of the real property, or a vested right to a specific use of the real property, may file a claim in the circuit court where the real property is located within 1 year of the SFWMD action pursuant to the procedures set forth in Subsection 70.001(4)(a), Fla. Stat.

#### **LAND USE AND ENVIRONMENTAL DISPUTE RESOLUTION**

11. A property owner who alleges that a SFWMD development order (as that term is defined in Section 70.51(2)(a), Fla. Stat. to include permits) or SFWMD enforcement action is unreasonable, or unfairly burdens the use of the real property, may file a request for relief with the SFWMD within 30 days of receipt of the SFWMD's order or notice of agency action pursuant to the procedures set forth in Subsections 70.51(4) and (6), Fla. Stat.

#### **MEDIATION**

12. A person whose substantial interests are, or may be, affected by the SFWMD's action may choose mediation as an alternative remedy under Section 120.573, Fla. Stat. Pursuant to Rule 28-106.111(2), Fla. Admin. Code, the petition for mediation shall be filed within 21 days of either written notice through mail or posting or publication of notice that the SFWMD has or intends to take final agency action. Choosing mediation will not adversely affect the

right to an administrative hearing if mediation does not result in settlement.

Pursuant to Rule 28-106.402, Fla. Admin. Code, the contents of the petition for mediation shall contain the following information:

- (1) the name, address, and telephone number of the person requesting mediation and that person's representative, if any;
- (2) a statement of the preliminary agency action;
- (3) an explanation of how the person's substantial interests will be affected by the agency determination; and
- (4) a statement of relief sought.

As provided in Section 120.573, Fla. Stat. (1997), the timely agreement of all the parties to mediate will toll the time limitations imposed by Sections 120.569 and 120.57, Fla. Stat., for requesting and holding an administrative hearing. Unless otherwise agreed by the parties, the mediation must be concluded within 60 days of the execution of the agreement. If mediation results in settlement of the dispute, the SFWMD must enter a final order incorporating the agreement of the parties. Persons whose substantial interest will be affected by such a modified agency decision have a right to petition for hearing within 21 days of receipt of the final order in accordance with the requirements of Sections 120.569 and 120.57, Fla. Stat., and SFWMD Rule 28-106.201(2), Fla. Admin. Code. If mediation terminates without settlement of the dispute, the SFWMD shall notify all parties in writing that the administrative hearing process under Sections 120.569 and 120.57, Fla. Stat., remain available for disposition of the dispute, and the notice will specify the deadlines that then will apply for challenging the agency action.

#### **VARIANCES AND WAIVERS**

13. A person who is subject to regulation pursuant to a SFWMD rule and believes the application of that rule will create a substantial hardship or will violate principles of fairness (as those terms are defined in Subsection 120.542(2), Fla. Stat.) and can demonstrate that the purpose of the underlying statute will be or has been achieved by other means, may file a petition with the SFWMD Clerk requesting a variance from or waiver of the SFWMD rule. Applying for a variance or waiver does not substitute or extend the time for filing a petition for an administrative hearing or exercising any other right that a person may have concerning the SFWMD's action.

Pursuant to Rule 28-104.002(2), Fla. Admin. Code, the petition must include the following information:

- (a) the caption shall read: Petition for (Variance from) or (Waiver of) Rule (Citation)
- (b) The name, address, telephone number and any facsimile number of the petitioner;
- (c) The name, address telephone number and any facsimile number of the attorney or qualified representative of the petitioner, (if any);
- (d) the applicable rule or portion of the rule;
- (e) the citation to the statute the rule is implementing;
- (f) the type of action requested;
- (g) the specific facts that demonstrate a substantial hardship or violation of principles of fairness that would justify a waiver or variance for the petitioner;
- (h) the reason why the variance or the waiver requested would serve the purposes of the underlying statute; and
- (i) a statement of whether the variance or waiver is permanent or temporary, If the variance or waiver is temporary, the petition shall include the dates indicating the duration of the requested variance or waiver.

A person requesting an emergency variance from or waiver of a SFWMD rule must clearly so state in the caption of the petition. In addition to the requirements of Section 120.542(5), Fla. Stat. pursuant to Rule 28-104.004(2), Fla. Admin. Code, the petition must also include:

- a) the specific facts that make the situation an emergency; and
- b) the specific facts to show that the petitioner will suffer immediate adverse effect unless the variance or waiver is issued by the SFWMD more expeditiously than the applicable timeframes set forth in Section 120.542, Fla. Stat.

#### **WAIVER OF RIGHTS**

14. Failure to observe the relevant time frames prescribed above will constitute a waiver of such right.

#### **28-106.201 INITIATION OF PROCEEDINGS (INVOLVING DISPUTED ISSUES OF MATERIAL FACT)**



(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and

(f) A demand for relief.

**28-106.301 INITIATION OF PROCEEDINGS**  
(NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT)

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding, and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief; and

(e) A demand for relief.

**28-107.004 SUSPENSION, REVOCATION, ANNULMENT, OR WITHDRAWAL**

(3) Requests for hearing filed in accordance with this rule shall include:

(a) The name and address of the party making the request, for purposes of service;

(b) A statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and

(c) A reference to the notice, order to show cause, administrative complaint, or other communication that the party has received from the agency.

**42-2.013 REQUEST FOR REVIEW PURSUANT TO SECTION 373.114 OR 373.217**

(1) In any proceeding arising under Chapter 373, F.S., review by the Florida Land and Water Adjudicatory Commission may be initiated by the Department or a party by filing a request for such review with the Secretary of the Commission and serving a copy on any person named in the rule or order, and on all parties to the proceeding which resulted in the order sought to be reviewed. A certificate of service showing completion of service as required by this subsection shall be a requirement for a determination of sufficiency under Rule 42-2.0132. Failure to file the request with the Commission within the time period provided in Rule 42-2.0132 shall result in dismissal of the request for review.

(2) The request for review shall identify the rule or order requested to be reviewed, the proceeding in which the rule or order was entered and the nature of the rule or order. A copy of the rule or order sought to be reviewed shall be attached. The request for review shall state with particularity:

(a) How the order or rule conflicts with the requirements, provisions and purposes of Chapter 373, F.S., or rules duly adopted thereunder;

(b) How the rule or order sought to be reviewed affects the interests of the party seeking review;

(c) The oral or written statement, sworn or unsworn, which was submitted to the agency concerning the matter to be reviewed and the date and location of the statement, if the individual or entity requesting the review has not participated in a proceeding previously instituted pursuant to Chapter 120, F.S., on the order for which review is sought;

(d) If review of an order is being sought, whether and how the activity authorized by the order would substantially affect natural resources of statewide or regional significance, or whether

the order raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from a standpoint of agency precedent, and all the factual bases in the record which the petitioner claims support such determination(s); and

(e) The action requested to be taken by the Commission as a result of the review, whether to rescind or modify the order, or remand the proceeding to the water management district for further action, or to require the water management district to initiate rulemaking to adopt, amend or repeal a rule.

**28-107.005 EMERGENCY ACTION**

(1) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency action, the agency shall summarily suspend, limit, or restrict a license.

(2) the 14-day notice requirement of Section 120.569(2)(b), F. S., does not apply and shall not be construed to prevent a hearing at the earliest time practicable upon request of an aggrieved party.

(3) Unless otherwise provided by law, within 20 days after emergency action taken pursuant to paragraph (1) of this rule, the agency shall initiate a formal suspension or revocation proceeding in compliance with Sections 120.569, 120.57, and 120.60, F.S.

**40E-1.611 EMERGENCY ACTION**

(1) An emergency exists when immediate action is necessary to protect public health, safety or welfare; the health of animals, fish or aquatic life; the works of the District; a public water supply, or recreational, commercial, industrial, agricultural or other reasonable uses of land and water resources.

(2) The Executive Director may employ the resources of the District to take whatever remedial action necessary to alleviate the emergency condition without the issuance of an emergency order, or in the event an emergency order has been issued, after the expiration of the requisite time for compliance with that order.

**DONE AND SO ORDERED**, this 12th day of September, 2002, in West Palm Beach, Palm Beach County, Florida.



SOUTH FLORIDA WATER MANAGEMENT DISTRICT  
BY ITS GOVERNING BOARD

John J. Fumero  
General Counsel

ATTEST:

BY:

DATE: September 20, 2002

**CERTIFICATE OF SERVICE**

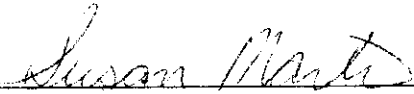
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Regular U.S. Mail this 26<sup>th</sup> day of September, 2002, to:

Administrative Law Judge Donald R. Alexander, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee FL 32399-3060;

Anthony Pires, Jr, Esquire, Woodward, Pires & Lombardo, 3200 Tamiami Trail North, Suite 200, Naples, FL 34103;

Robert Murrell, Esquire, Samouce, Murrell & Francoeur, 800 Laurel Oak Drive, Suite 300, Naples, Florida, 34109; and

Kenneth Cuyler, Esquire, Goodlette, Coleman & Johnson, 4001 Tamiami Trail North, Suite 300, Naples, FL 34103.

BY:   
Susan Roeder Martin, Esquire  
South Florida Water Management District  
3301 Gun Club Road, MSC 1410  
West Palm Beach FL 33406  
(561)682-6251