

1-10-03

BEFORE THE GOVERNING BOARD OF THE  
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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DIVISION OF  
ADMINISTRATIVE  
HEARINGS

FLORIDA AUDUBON SOCIETY, INC.,  
/dba/ AUDUBON OF FLORIDA;  
NATIONAL PARKS CONSERVATION  
ASSOCIATION, INC.; THE EVERGLADES  
TRUST, INC., and THE EVERGLADES  
FOUNDATION, INC.,

AP

SFWMD ORDER NO. 2003-013 FOF ERP

DOAH CASE NO. 02-1629

REM-CDS

Petitioners

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT  
and LENNAR HOMES, INC.,

Respondents.

FINAL ORDER

This matter was presented before the Governing Board of the South Florida Water Management District (SFWMD) on February 13, 2003, for consideration of the Recommended Order issued January 10, 2003 (attached and incorporated hereto as Exhibit A), by Administrative Law Judge (ALJ), Robert E. Meale. Petitioners, Florida Audubon Society, Inc., /dba/ Audubon of Florida and National Parks Conservation Association, Inc. (Petitioners), Respondents, Agency/SFWMD and Permit Applicant/Lennar Homes, Inc. (Lennar), timely filed Exceptions to the Recommended Order on January 27, 2003. On February 6, 2003, the Petitioners and SFWMD timely filed responses to exceptions. Respondent, Lennar, untimely filed responses to exceptions on February 7, 2003, but those responses were accepted. Additionally, the SFWMD Staff's and Lennar Homes, Inc.'s Joint Motion for Enlargement of Time for Oral

Argument Before the Governing Board was filed on February 4, 2003 and SFWMD's Motion to Strike Respondent, Lennar Homes, Inc.'s Response to Petitioners' and SFWMD's Exceptions to Recommended Order was filed on February 10, 2003. Both motions were denied. Oral argument was presented at the Governing Board meeting by Frank Matthews, Esquire, on behalf of Lennar, Richard Grosso, Esquire, on behalf of Petitioner, National Parks Conservation Association, Inc., Erin Deady, Esquire, on behalf of Petitioner, Florida Audubon Society, /dba/ Audubon of Florida and Luna Phillips, Esquire, on behalf of SFWMD Staff.

#### **Summary of Recommended Order**

An administrative hearing was conducted on August 19-21, 2002, to determine whether Lennar is entitled to an Environmental Resource Permit (ERP) to construct a 516-acre residential development in Miami-Dade County known as Lakes by the Bay South Commons Project ("Permit"). The case centered around two key issues (1) Whether the SFWMD has the authority under Chapter 373, Fla. Stat. to consider the potential impacts of a proposed project on an existing or future Comprehensive Everglades Restoration Plan ("CERP") Project and; (2) Whether in exercising this authority, SFWMD staff appropriately added special conditions to the permit, including a Flowage Easement to provide for the future construction of a 200-acre flowway needed for the Cutler Wetlands sub-component of Biscayne Bay Coastal Wetlands ("BBCW") CERP Project (intended to flow water from the C-1 Canal north of the Miami-Dade Landfill and Stormwater Treatment Plant to the east of the L-31E levee).

Based on the testimony and evidence presented, the ALJ issued a Recommended Order on January 10, 2003, recommending that the SFWMD enter a final order issuing the ERP with Flowage Easement and new special conditions as modified by the Recommended Order.

### **Standard of Review**

Subsection 120.57(1)(l), Fla. Stat., prescribes that an agency reviewing a Division of Administrative Hearings ("DOAH") recommended order may not reject or modify the findings of fact of an administrative law judge, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Subsection 120.57(1)(l), Fla. Stat., also provides that an agency may reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction."

A reviewing agency may not reweigh the evidence presented at a DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. These evidentiary matters are within the province of the administrative law judges, as the triers of the facts. Belleau v. Dep't of Env'tl. Protection, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Fla. Dep't of Corrections v. Bradley, 510 So. 2d 1122 (Fla. 1st DCA 1987); Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Furthermore, a reviewing agency is not free to modify the findings of fact in a DOAH recommended order by interpreting the evidence or drawing inferences therefrom in a manner proposed by a party

that is different from the reasonable interpretations made and inferences drawn by a hearing officer. Heifetz, 475 So. 2d at 1281-1282.

A reviewing agency also has no authority to evaluate the quantity and quality of the evidence presented at formal hearing, beyond making a determination that the evidence is competent and substantial. Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Thus, if the record in this case discloses any competent substantial evidence supporting a finding of fact in the Recommended Order, the Governing Board is bound by such factual finding in preparing this Final Order. Bradley, 510 So. 2d at 1123.

#### **SUPPLEMENTAL CONCLUSION OF LAW**

The ALJ throughout the conclusions of law in the Recommended Order, limits his analysis of the SFWMD's authority to consider the potential impacts of a proposed project on an existing or future CERP Project to a statutory analysis of §373.414(1), Fla. Stat. While the Governing Board concurs with the ALJ's analysis, that analysis does not adequately reflect SFWMD's interpretation of the relevant statutory provisions. Specifically, §§373.413 and .416, Fla. Stat., further provide authority to consider the potential impacts of a proposed project on an existing or future CERP Project. Therefore, the Recommended Order is supplemented and modified to reflect the Governing Board's interpretation. This conclusion of law is not inconsistent with the ALJ's conclusions of law and is as or more reasonable than those conclusions of law.

## RULINGS ON EXCEPTIONS

### Lennar's Exception No. 1

Lennar takes exception to Findings of Fact 35 and 36, in which the ALJ articulates factors that he considered in determining whether the ERP requested by Lennar and originally approved by the SFWMD "would be inconsistent with the overall objective of the SFWMD to implement CERP," and concludes that the ERP should be issued only with the Flowage Easement and new special conditions. Lennar does not address the appropriateness or relevance of the factors identified by the ALJ to be specific to this particular case, but argues that there is no competent substantial evidence to support the ALJ's "conclusion" that the project is likely to be constructed.

"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, 262 (Fla. 1999). Findings of fact, such as accepting the testimony of expert witnesses, is an evidentiary matter within the sound discretion of the ALJ, who is the trier of fact in these proceedings. Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995). Findings of fact made by an ALJ cannot be altered by the Governing Board unless there is no competent substantial evidence in the record from which the challenged factual finding could reasonably be inferred. §120.57(1)(l), Fla. Stat.; See, Collier Medical Center v. State, Dep't of HRS, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

Contrary to Lennar's assertions, the record is replete with evidence that supports the ALJ's findings that the BBCW Project is likely to be constructed. The ALJ relied on SFWMD staff's testimony regarding the importance of rehydrating the estuarine waters of Biscayne Bay. (Findings of Fact ("FOF") 36; Transcript ("Tr.") 296:24-300:15). The importance of the BBCW Project, coupled with the need to place the flowway across Lennar's property due to the location of the landfill and water treatment plant in relation to the C-1 Canal is sufficient competent substantial evidence to support the ALJ's findings of fact. (FOF 21, 23; Tr. 745:13-20; 779:4-13).

Because competent substantial evidence exists to support Findings of Fact 35 and 36, Lennar's Exception No. 1 is rejected.

**Lennar's Exception No. 2**

Lennar takes exception to Findings of Fact 37 and 47. The ALJ, in these findings of fact, specifically found that in the absence of the Flowage Easement, with modifications identified by the ALJ, the issuance of the requested ERP would be inconsistent with the overall objectives of the SFWMD to implement CERP and would substantially impact the ability of the SFWMD to restore Biscayne Bay. This factual basis is the underpinning of the ALJ's conclusion that the condition requiring the Flowage Easement is a necessary and justified exercise of the SFWMD's authority to ensure that regulated activities are not inconsistent with the overall objectives of the SFWMD.

First, Lennar argues that the record is devoid of evidence that the CERP objectives could not be achieved if the ERP is issued to Lennar without the Flowage Easement and related special conditions. This is precisely why the ALJ found that a flowage easement on Lennar's property was necessary to implement BBCW and that finding is supported by competent substantial evidence. (FOF 21, 23; Tr. 745:13-20; 779:4-13). If no evidence exists in the record supporting Lennar's position, then Lennar failed to carry their burden of persuasion in this permitting case to prove to the ALJ that their permit should be issued without a flowage easement. Fla. Dep't of Transp. v. JWC, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

Next, Lennar argues that the Flowage Easement and revised special conditions "inordinately burden" Lennar. The Flowage Easement is superimposed over the same area of land already designated by Lennar as conservation easement lands. (FOF 38). In their exceptions, Lennar acknowledges that the conservation easement "would be conducive to the movement of freshwater." Further, the ALJ's proposed modifications to the special conditions were aimed at eliminating any such burden from Lennar. (FOF 39-41). Lennar's exception is nothing more than another request to reweigh the evidence. Since there is competent substantial evidence in the record, Lennar's Exception No. 2 is rejected.

Finally, the issues raised by Lennar regarding the applicability of §70.001, Fla. Stat., are outside the jurisdiction and scope of this permit proceeding. Fla. Hospital v. Agency for Health Care Admin., 823 So. 2d 844 (Fla. 1st DCA 2002).

### **Lennar's Exception No. 3**

Lennar takes exception to the ALJ's Conclusion of Law No. 55 wherein the ALJ upholds the SFWMD's interpretation of §373.414, Fla. Stat., that the SFWMD has the authority to consider and regulate impacts an ERP project may have on a CERP project, or for that matter, any of the SFWMD's overall objectives. Lennar argues that the ERP provisions in Part IV, Chapter 373, Fla. Stat., should be strictly construed, arguing that, to do otherwise, would result in "standardless delegation" without the "safeguards imposed by Chapter 120."

The case before us implicates statutory interpretation. The Legislature has clearly mandated that Chapter 373, Fla. Stat., be broadly and liberally construed to effectuate its environmental purposes. §373.616, Fla. Stat.; See, Osceola County v. St. Johns River Water Mgmt. Dist., 486 So. 2d 616 (Fla. 5th DCA 1986); Pinellas County v. Lake Padgett Pines, 333 So. 2d 472 (Fla. 2d DCA 1976), cert. dismissed, 352 So. 2d 172 (Fla. 1977). (Chapter 373, Fla. Stat., is to be liberally construed for effectuating the purposes described in the chapter and these purposes clearly mandate consideration of the total environment.)

The ALJ simply and correctly conducted a statutory analysis of the relevant statutes and agreed with the SFWMD's interpretation that "the overall objectives of the district" includes objectives stated throughout all of Chapter 373, Fla. Stat. The case law is well settled that an agency has the primary responsibility for interpreting statutes within its



regulatory jurisdiction and expertise. Pub. Employees Relation Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985); Fla. Pub. Employee Council, 79 AFSCME v. Daniels, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). It is also well settled that great deference should be accorded to agency interpretations of statutes which they are required to enforce, and that such interpretations should not be overturned unless they are clearly erroneous. Gross v. Dep't of Health, 819 So. 2d 997, 1002 (Fla. 5th DCA 2002); Dep't of Env'tl. Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985); Stuart Yacht Club & Marina v. Dep't of Natural Resources, 625 So. 2d 1263, 1267 (Fla. 4th DCA 1993). These interpretations of statutes by agencies charged with their enforcement do not have to be the only ones, or even the most desirable interpretations. It is enough if the agency interpretations are permissible ones. Stuart Yacht Club, 625 So. 2d at 1267; Little Munyon Island v. Dep't. of Env'tl. Regulation, 492 So. 2d 735, 737 (Fla. 1st DCA 1986).

It is important to note that this issue of the SFWMD considering the potential impacts of a proposed project on an existing or future CERP project is one of first impression for the agency. While rulemaking is not a matter of agency discretion, the SFWMD has not had sufficient time to acquire the knowledge and experience reasonably necessary to address this issue by rulemaking. Additionally, related matters are not sufficiently resolved to enable the SFWMD to address such a statement by rulemaking. Furthermore, it is not reasonable under these circumstances for the SFWMD to establish principles, criteria, or standards for agency decisions with sufficient detail or precision required for rulemaking.

Conclusion of Law No. 55 is consistent with the plain meaning of Chapter 373, Fla. Stat., and the SFWMD's interpretation of the statute. Therefore, Lennar's Exception No. 3 is rejected.

**Lennar's Exception No. 4**

Lennar takes exception to Conclusion of Law No. 57 wherein the ALJ emphasizes the importance of CERP as a SFWMD objective and in doing so references a legislative funding scheme for CERP. Lennar's entire exception is limited to the ALJ's reference to the legislative funding and the accuracy of that statement. Lennar loses sight of the fact that the inclusion of the funding statement is made only to emphasize the importance of the CERP objective as a SFWMD objective. Even if that statement were excluded from the ALJ's order, it would not alter the conclusion that CERP is an important SFWMD objective and is recognized as such by the Florida Legislature.

Therefore, Lennar's Exception No. 4 is rejected.

**Lennar's Exceptions No. 5, 6 and 7**

Lennar takes exception to Conclusion of Law 58 that the overall objectives of the SFWMD extend past merely preventing harm to the water resources but also include restoring the water resources. The ALJ correctly interpreted §373.414, Fla. Stat., recognizing the need for evolving SFWMD objectives and finding that serving those objectives also meets the legislative intent regarding CERP. A statute need not specify

every type of authority or, in this case, objective that the SFWMD can regulate. Southwest Florida Water Mgmt. Dist. v. Save the Manatee, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000). The ALJ's conclusion that the statute anticipates evolving objectives is a reasonable interpretation of the statute.

In addition to the second part of Lennar's exception to Conclusion of Law No. 58, Lennar takes exception to Conclusions of Law Nos. 59, 60 and 63, arguing that the flowage easement is a regulatory taking. As a matter of law, an ALJ does not have jurisdiction to determine constitutional issues such as takings. Fla. Hospital v. Agency for Health Care Admin., 823 So. 2d 844 (Fla. 1st DCA 2002). Likewise, administrative agencies are not empowered to adjudicate constitutional questions. See, e.g., Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987). This argument is outside the scope of this proceeding and should not be considered.

For these reasons, Lennar's Exceptions Nos. 5, 6 and 7 are rejected.

### **Petitioners' Exceptions Nos. 1 and 2**

Petitioners take exception to Findings of Fact Nos. 25, 26 and 27 wherein the ALJ accepts the SFWMD's position that rehydrating the remnant tidal creeks is the feasible and desirable manner in which to implement the BBCW project. Petitioners, who advocate rehydration of the coastal wetland area, as well as the tidal creeks, disagree with the ALJ's findings of fact. There is competent substantial evidence to support these findings of fact. (Tr. 304:3-307:25; 473:18-475:9). Essentially, Petitioners are

asking the Governing Board to reweigh the evidence and enter a finding consistent with their position. However, this goes beyond the Governing Board's authority. Heifetz, 475 So. 2d 277.

Petitioners take exception to Conclusion of Law No. 62, arguing that this conclusion is contrary to Findings of Fact Nos. 18 and 20. Conclusion of Law No. 62 rejected the Petitioners' position that the larger area of coastal wetlands needed to be rehydrated. This Conclusion of Law is consistent with Findings of Fact 25-27 and is not inconsistent with Findings of Fact Nos. 18 and 20. The objectives of the BBCW project, as stated in the Project Management Plan, are subject to change and refinement as more scientific information regarding the feasibility and environmental benefits of each CERP project is generated. (Tr. 453:24-454:9).

Therefore, Petitioners' Exceptions Nos. 1 and 2 are rejected.

### **Petitioners' Exception No. 3**

Petitioners take exception to the ALJ's finding regarding the adequacy of Lennar's mitigation and request the Governing Board to enter a Final Order that requires a mitigation area of at least 200 acres on Lennar's property.

While the SFWMD has the exclusive authority to determine the sufficiency of mitigation proposed by the applicant, the ALJ has the authority to make findings of fact regarding any factual disputes underlying the mitigation measures proposed. Collier Dev. Corp. v.

Dep't of Env'tl. Regulation, 592 So. 2d 1107, 1109 (Fla. 2d DCA 1991). See also, 1800 Atlantic Developers v. Dep't of Env'tl. Regulation, 552 So. 2d 946, 955 (Fla. 1st DCA 1989) (As the hearing officer's function was only that of a fact finder, it was the hearing officer's function to make findings of fact regarding disputed factual issues underlying the conditions set by DER and the implementation of and compliance with the mitigative conditions set by DER).

In this instance, the ALJ's findings in Finding of Fact No. 28 are not contrary to the conclusion that sufficient mitigation has been required. Therefore, Petitioners' Exception No. 3 is rejected.

#### **Petitioners' Exception No. 4**

Petitioners take exception to Finding of Fact No. 39, claiming that the finding is vague. This finding of fact addresses the need for modification of the special conditions regarding the Flowage Easement, but does not provide express language for such modification. Petitioners' request that the Governing Board ensure the mitigation does not limit the future operation of the flowway and allows for the maximization of the BBCW project.

The ALJ has provided sufficient specificity as to the infirmities he has identified in Findings of Fact 39-41 to enable the Governing Board to modify the special conditions. Therefore, Petitioners' exception that the Finding of Fact is vague is rejected.

### **SFWMD Staff's Exception No. 2<sup>1</sup>**

SFWMD staff argue that the ALJ erred in relying on §373.414 and §373.416, Fla. Stat., and not including §373.413, Fla. Stat., as the basis for the SFWMD's authority to condition ERP permits so as not to interfere with CERP. Since the ALJ concluded that the SFWMD does have the authority to do so, it is unnecessary to modify the ALJ's conclusions of law to reflect any additional authority §373.413, Fla. Stat., may provide. Therefore, SFWMD Staff's Exception No. 2 is rejected.

### **SFWMD Staff's Exception No. 3**

SFWMD staff takes exception to the ALJ's Finding of Fact No. 33 regarding the use of the harm to the water resources test when conditioning ERP permits so as not to interfere with CERP. SFWMD staff correctly points out that, although the ALJ has set forth the rationale in a finding of fact, it is actually a conclusion of law. Section 120.57(1)(l), Fla. Stat., 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.

The ALJ has misinterpreted the plain language of §373.414, Fla. Stat., by creating a presumption that compliance with ERP criteria satisfies the separate and distinct harm to the water resources test. As stated above in response to Lennar's Exception No. 3, an agency has the primary responsibility for interpreting statutes within its regulatory

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<sup>1</sup> SFWMD staff's Exception No. 1 is actually proposed special condition language that is addressed in the following section along with Lennar's proposed special condition language.

jurisdiction and expertise. Pub. Employees Relation Comm'n, 467 So. 2d at 989; Fla. Pub. Employee Council, 79 AFSCME, 646 So. 2d at 816. Great deference should be accorded to agency interpretations of statutes that they are required to enforce, and such interpretations should not be overturned unless they are clearly erroneous. Gross, 819 So. 2d at 1002; Goldring, 477 So. 2d at 534; Stuart Yacht Club & Marina, 625 So. 2d at 1267. These interpretations of statutes by agencies charged with their enforcement do not have to be the only ones, or even the most desirable interpretations. It is enough if the agency interpretations are permissible ones. Stuart Yacht Club, 625 So. 2d at 1267; Little Munyon Island, 492 So. 2d at 737.

To the extent that the ALJ concluded that compliance with ERP criteria constitutes meeting the harm to the water resources test, that conclusion is rejected. Instead, it is concluded that the harm to the water resources test is a separate test from the compliance with the ERP criteria or consistency with the SFWMD's overall objectives tests. The Governing Board finds that this substituted conclusion of law is as or more reasonable than that which was made by the ALJ. Therefore, SFWMD Staff's Exception No. 3 is granted, for the reasons set forth herein.

### **SFWMD Staff and Lennar's Proposed Special Conditions**

Both SFWMD staff and Lennar proposed special condition language to address issues raised by the ALJ. The following special conditions address the ALJ's issues:

Special Condition # 24

Lennar shall, within 30 days of permit issuance and prior to commencement of construction resulting in wetland impacts, place into escrow an executed Flowage Easement for the mitigation area. The executed Flowage Easement to be delivered in escrow shall be in substantial conformance with Exhibit 41A (excepting out the 25-foot buffer as stated in special condition No. 25). Any proposed modifications to the approved form must receive prior written consent from the SFWMD. The easement must be free of encumbrances or interests in the easement that are contrary to or incompatible with the intent of the Flowage Easement. In the event it is later determined that there are encumbrances or interests in the flowage easement which the SFWMD determines are contrary to the intent of the easement, Lennar shall be required to provide release or subordination of such encumbrances or interests.

Special Condition #25

The SFWMD shall notify the Permittee 90 days in advance of its intention to exercise its rights under the flowage easement to alter the mitigation area. At such time, the SFWMD shall also modify the permit to delete special conditions 13, 15, 17, 18, 20 and 21. The SFWMD shall also modify this permit to delete special condition 16, except that it shall remain the responsibility of the permitted operating entity to maintain in perpetuity the 25-foot wide upland buffer areas adjacent to the residential areas. Implementation of the Flowway and/or the Flowage Easement shall be deemed to occur upon the recordation of the Flowage Easement in the Public Records of Miami-Dade County.



Special Condition #27

The SFWMD has until December 31, 2011, to substantially complete the construction of the Flowway. If construction of the Flowway is not substantially completed by the date, the Flowage Easement shall be released from escrow and returned to Lennar. Lennar shall, upon return of the Flowage Easement, begin, without delay, construction and compliance with the conditions and requirements of the Original Mitigation Plan.

Special Condition #28

Prior to the commencement of construction, the permittee shall submit to the SFWMD for review and approval a proposed mitigation plan for those areas that would not be adversely impacted by the flowway.

Special Condition #29

The District shall have the proposed mitigation area appraised to determine the value of the area as if it is encumbered by the conservation easement in Exhibits 12A-12M of the Staff Report and the value of the area encumbered by the conservation easement with the overlay of the flowage easement in Exhibit 41 A. To the extent there is a difference in value, the performance bond required by Special Condition #15 should be reduced by an amount equal to the difference in the value of the area encumbered by the conversation easement and the value of the area encumbered by the conservation easement with the overlay of a flowage easement.

### **SFWMD Staff's Proposed Flowage Easement**

SFWMD Staff proposed a revised flowage easement to address issues raised by the ALJ, which was attached as exhibit 41A to SFWMD's Exceptions to the Recommended Order. This revised flowage easement sufficiently addresses those issues. That flowage easement is attached and incorporated herein as Exhibit 41A and is the Exhibit 41A referred to in the special conditions set forth above.

### **ORDER**

Based on the foregoing, the Governing Board, having considered the Recommended Order, the Exceptions and Responses of the parties and the oral argument presented, and being otherwise fully advised in the premises, hereby

**ORDERS** that:

- (1) The Recommended Order as modified herein is hereby adopted *in toto*;
- (2) Lennar's Exceptions Nos. 1-7; Petitioners' Exceptions Nos. 1-4; SFWMD Staff's Exception No. 2 is rejected;
- (3) SFWMD Staff's Exception No. 3 is accepted for the reasons stated herein;
- (4) The Permit is hereby modified to include special condition 26 as set forth in the Revised Addendum to Staff Report dated September 5, 2002 and special conditions 24, 25, 27, 28 and 29 as set forth herein and the Flowage Easement attached as Exhibit 41A.

### **NOTICE OF RIGHTS**

Section 120.569(1), Fla. Stat. (1997), 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 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 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 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 principals 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 OF 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.

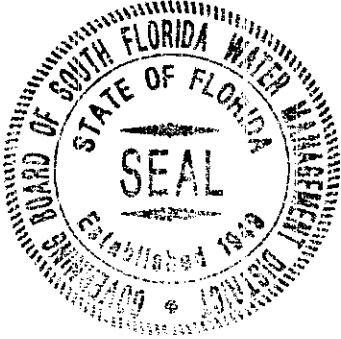
(3) Unless otherwise provided by law, within 20 days after emergency action taken pursuant to paragraph (1) of this rule, the agency shall initiate a formal suspension or revocation proceeding in compliance with Sections 120.569, 120.57, and 120.60, F.S.

**40E-1.611 EMERGENCY ACTION**

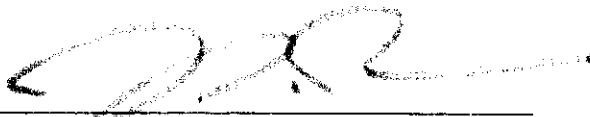
(1) An emergency exists when immediate action is necessary to protect public health, safety or welfare; the health of animals, fish or aquatic life; the works of the District; a public water supply, or recreational, commercial, industrial, agricultural or other reasonable uses of land and water resources.

(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 13<sup>th</sup> day of February, in West Palm Beach Florida.



**SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT  
BY ITS GOVERNING BOARD**


  
\_\_\_\_\_  
JOHN J. FUMERO, General Counsel

ATTEST:

BY:  \_\_\_\_\_

DATE: 2/21/03

Legal Form Approved  
SFWMD Office of Counsel

By:  Date: 2-21-03

**Certificate of Service**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of February 2003, true and correct

copies of the foregoing have been furnished to the following:

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