

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA AUDUBON SOCIETY,)	
INCORPORATED, d/b/a AUDUBON)	
OF FLORIDA; NATIONAL PARKS)	
CONSERVATION ASSOCIATION,)	
INCORPORATED; THE EVERGLADES)	
TRUST, INC.; and THE)	
EVERGLADES FOUNDATION, INC.;)	
)	
Petitioners,)	
)	
vs.)	Case No. 02-1629
)	
SOUTH FLORIDA WATER)	
MANAGEMENT DISTRICT and)	
LENNAR HOMES, INC.,)	
)	
Respondents.)	
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RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in West Palm Beach, Florida, on August 19-21, 2002.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Respondent Lennar Homes, Inc., is entitled to an environmental resource permit to construct a 516-acre residential development in Miami-Dade County known as Lakes by the Bay South Commons Project and, if so, under what conditions.

PRELIMINARY STATEMENT

On May 18, 2001, Respondent Lennar Homes, Inc., filed an application for an environmental resource permit authorizing the concept and initial construction of a 516-acre residential development in Miami-Dade County known as Lakes by the Bay South Commons Project. On March 13, 2002, Respondent South Florida Water Management District issued a Notice of Proposed Agency Action, in which the staff report recommends that the Governing Board of District issue an environmental resource permit, subject to various conditions.

On April 3, 2002, Petitioners filed a petition objecting to the issuance of the environmental resource permit and requesting an administrative hearing.

On August 16, 2002, the parties filed their Joint Prehearing Stipulation. In the stipulation, the parties described this case as a "de novo" proceeding, under Sections 120.569 and 120.57(1), Florida Statutes, to resolve the following issues:

1. Whether the project would be contrary to the public interest in contravention of Section 373.414(1), Florida Statutes, or Rule 40E-4.302(2), F.A.C., because the proposed development is located in an area necessary for implementation of the Biscayne Bay Coast Wetlands component of the Comprehensive Everglades Restoration Plan.
2. Whether the project would be harmful to the water resources of the SFWMD in

contravention of Sections 373.413 and 373.416, Florida Statutes, because the proposed development is located in an area necessary for implementation of the Biscayne Bay Coastal Wetlands component of the Comprehensive Everglades Restoration Plan.

3. Whether the project would be inconsistent with the overall objectives of the District in contravention of Section 373.416, Florida Statutes, because the proposed development is located in an area necessary for implementation of the Biscayne Bay Coastal Wetlands component of the Comprehensive Everglades Restoration Plan.

4. Whether the District erroneously shifted the burden of providing reasonable assurances that the proposed project will comply with all applicable permitting criteria by not requiring a factual basis that the goals and objectives of the Biscayne Bay Coastal Wetlands project can be achieved, notwithstanding the project's construction on the last undeveloped parcel suitable for intercepting and treating flows from the C-1 canal.

5. Whether the project will cause adverse secondary impacts to the water resources in violation of Rule 40E-4.301(f), F.A.C.

6. Whether the project will adversely affect the public health, safety, or welfare or the property of others.

7. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity, as a result of the project's interference with the Biscayne Bay Coastal Wetlands project.

8. Whether the project will adversely affect the current condition and relative value of functions being performed by areas affected by the project, because of its

adverse impact upon restoration of Biscayne Bay's coastal wetlands.

9. Whether the District should have required the applicant to demonstrate that the project was clearly in the public interest because of its potential to degrade an Outstanding Florida Water.

10. Whether the project will adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters in violation of Rule 40E-4.301(d), F.A.C. as a result of interference with the restoration goals of the Biscayne Bay Coastal Wetlands project.

11. Whether the implementation of CERP to the extent that it is approved, authorized, and funded by Florida law, the Florida Legislature, and the Governing Board of the South Florida Water Management District is in the public interest pursuant to Section 373.414, Florida Statutes.

12. Whether the goals and objectives of CERP are the restoration, preservation and protection of the Everglades and the South Florida ecosystem while providing and balancing for other water-related needs of the region.

13. Whether the goals of CERP generally include improvements in freshwater deliveries to major water bodies including Biscayne Bay.

14. Whether and to what extent the Biscayne Bay Coastal Wetlands project is a project component of CERP.

15. Whether the Biscayne Bay Coastal Wetlands project as discussed in the BBCW PMP is made up of 5 subcomponents known as "Deering Estates"; "Cutler Wetlands"; "L-1E Flow Way"; "North Canal Flow Way"; and

"Barnes Sound Wetlands," and whether these subcomponents were identified by a Restudy Planning Group because of the conceptual project's overall size and complexity.

16. Whether a conceptual primary purpose of Biscayne Bay Coastal Wetlands project is to redistribute freshwater runoff from the watershed into Biscayne Bay and an overall estimated project cost is approximately \$300 million.

17. Whether the general geographic extent of the Biscayne Bay Coastal Wetlands project is along the mainland coast of southern Biscayne Bay from the Deering Estate at C-100C south into the undeveloped lands of Homestead and Florida City known as the Model Land Basin.

18. Whether the District has the authority, pursuant to Sections 373.413, 373.414, and 373.416, Florida Statutes, to consider the potential impacts an ERP application may have on the Comprehensive Everglades Restoration Plan (CERP) projects.

19. Whether the District has the authority and discretion to review and determine whether a proposed ERP application will be inconsistent with the overall objectives of the District.

20. Whether the District has the authority and discretion to review and determine whether a proposed ERP application will be harmful to water resources.

21. Whether the District has the authority and discretion to review and determine whether a proposed ERP application will be contrary to the public interest.

Following the filing of Petitioners' challenge to the issuance of the permit, Respondent South Florida Water

Management District has twice amended its original staff report, which was issued on March 13, 2002. On August 9, 2002, Respondent South Florida Water Management District issued an Addendum to Staff Report adding Special Condition #24, which creates a flowage easement. On September 5, 2002, Respondent South Florida Water Management District issued a Revised Addendum to Staff Report revising Special Condition #24 and adding Special Conditions ##25 and 26.

At the hearing, Petitioner National Parks Conservation Association, Inc., called one witness. Petitioner Florida Audubon Society, Incorporated, d/b/a Audubon of Florida, called one witness. Petitioners The Everglades Trust, Inc., and The Everglades Foundation, Inc., called no witnesses. Respondent South Florida Water Management District called three witnesses, including one witness whose testimony was taken after the conclusion of the remainder of the hearing. Respondent Lennar Homes, Inc., called four witnesses. The parties jointly offered into evidence 27 exhibits: Joint Exhibits 1-5 and 7-28. Petitioners offered into evidence 26 exhibits: Petitioners Exhibits 47-49, 72.b-72.v, and 75-76. Respondent South Florida Water Management District offered into evidence four exhibits: District Exhibits 72.a, 72.w, 91, and 94. Respondent Lennar Homes, Inc., offered into evidence 12 exhibits: Applicant

Exhibits 101.a-101.d, 103-107, 109, 110.a, 111, and 112. All exhibits were admitted.

The Administrative Law Judge admitted District Exhibit 72.a, which is the August 9, 2002, Addendum to the Staff Report. During the deposition of the witness who testified after the hearing, Respondent South Florida Water Management District offered into evidence District Exhibit 72.w, which is the September 5, 2002, Revised Addendum to Staff Report. The Administrative Law Judge overrules all objections to District Exhibit 72.w, as well as objections to the other exhibits offered during the post-hearing eliciting of testimony.

The court reporter filed the transcript on October 4, 2002. The Administrative Law Judge granted the parties an extension of time within which to file proposed recommended orders, which were filed by October 24, 2002.

On November 6, 2002, Petitioners filed a Motion to Strike Lennar's Closing Argument. The Administrative Law Judge denies the motion.

On November 6, 2002, Respondent South Florida Water Management District filed a Motion to Strike Certain Findings of Fact in Petitioners' Proposed Recommended Order. On November 15, 2002, Petitioners filed a response and Motion to Supplement the Record. The Administrative Law Judge grants the motion to strike and denies the motion to supplement the record.

FINDINGS OF FACT

1. On May 18, 2001, Respondent Lennar Homes, Inc. (Lennar Homes), filed an application with Respondent South Florida Water Management District (District) for an environmental resource permit (ERP) for a 516-acre residential development in Miami-Dade County known as Lakes By The Bay (Project). On June 12, 2002, Lennar Homes filed a revised ERP application for the Project. The application, as revised, is for an ERP conceptually approving the construction of a surface water management system to serve the Project and authorizing the construction to clear the site, excavate the wet retention areas, and expand an existing lake. Providing 3300 single-family residences, the Project is the last phase of a master planned residential development, which presently contains over 1500 residences north and west of the Project.

2. The Project is bordered by Southwest 97th Avenue to the west, Southwest 87th Avenue to the east, Southwest 216th Street to the north, and Southwest 232nd Street to the south. Immediately south of the Project are a regional wastewater treatment plant and county solid waste landfill. These facilities occupy opposing banks of the C-1 Canal, which runs a short distance from the southwest corner of the Project.

3. The Project site is drained, cleared, and infested with Brazilian pepper and melaleuca. The Project will impact 135

acres of wetlands, but these wetlands are severely degraded due to the construction of roads, berms, and canals. No evidence suggests that the site is presently used by any listed species. At present, drainage across the site is from west to east, where stormwater is intercepted by the L-31E levy and canal running along the west side of Southwest 87th Avenue. At its nearest point (the southeast corner), the Project is about one mile from the southern part of Biscayne Bay.

4. Biscayne Bay is an Outstanding Florida Water. Much of its central and southern parts, including the area closest to the Project site, are within Biscayne National Park. In contrast to the northern part of Biscayne Bay, the central and southern parts contain significant mangrove-lined coastal wetlands. The bay bottom in southern Biscayne Bay hosts dense seagrass beds, and coral reefs within Biscayne National Park support a diverse community of marine life.

5. The L-31E levy and canal redirect stormwater from the Project site south to the C-1 Canal, which runs, in this area, in a northwest-to-southeast direction before emptying into Biscayne Bay. The C-1 Canal drains an extensive area to the north and northwest of the Project. The landfill and water treatment plant are a short distance downstream of the Proposed Project.

6. The parties have stipulated that the Project meets the following ERP criteria (with minor rephrasing from the stipulation):

1. The Project will not adversely affect significant historical and archaeological resources.
2. The Project is not located within an Outstanding Florida Water and will not result in the direct discharge of surface water into an Outstanding Florida Water.
3. Lennar has proposed mitigation to offset the adverse impacts of the Project, and the mitigation is in the same drainage basin as the adverse impacts. Therefore, the Project will not generate unlawful cumulative impacts, in violation of Section 373.414(8)(a)-(b), Florida Statutes.
4. The Project will not cause adverse water quality impacts to receiving waters and adjacent lands, in violation of Rule 40E-4.301(a), Florida Administrative Code.
5. The Project will not cause adverse flooding to onsite or offsite property, in violation of Rule 40E-4.301(b), Florida Administrative Code.
6. The Project will not cause adverse impacts to existing surface water storage and conveyance capabilities, in violation of Rule 40E-4.301(c), Florida Administrative Code.
7. The Project will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Section 373.042, Florida Statutes, in violation of Rule 40E-4.301(g), Florida Administrative Code.

8. The Project will not cause adverse impacts to a work of the District established pursuant to Section 373.086, Florida Statutes, in violation of Rule 40E-4.301(h), Florida Administrative Code.

9. The Project will be conducted by an entity with sufficient financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, as required by Rule 40E-4.301(j), Florida Administrative Code.

10. No special basin or geographic area criteria established in Chapter 40E-41, Florida Administrative Code, are applicable to the Project.

11. The Project will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling, as prohibited by Section 373.414(1)(a)3, Florida Statutes.

12. The Project will be permanent, as addressed by Section 373.414(1)(a)5, Florida Statutes.

7. The District issued its Staff Report on March 13, 2002.

The Staff Report approves the proposed mitigation plan, which would enhance or create and preserve 135 acres of onsite wetlands by creating an upland buffer, emergent marsh and transitional herbaceous shrub areas, and tree island areas. Much of the proposed mitigation area will occupy the southern half of the perimeter of the Project site. As proposed in the mitigation plan, Lennar Homes will grant the District a conservation easement over the mitigation area and will be required to meet certain mitigation performance conditions.

8. Shortly prior to the commencement of the final hearing in this case, the District decided to change the proposed permit regarding mitigation. The purpose of the change was to require Lennar Homes to allow the mitigation area to be used as a flowway between the C-1 Canal, upstream of the nutrient loads deposited by the landfill and water treatment plant, and an area to the east of the Project site. The receiving area consists of vestigial tidal creeks leading to presently remaining tidal creeks that empty into small embayments within Biscayne Bay. The general purpose of the change was to remediate the loss of freshwater flows into these tidal creeks, the embayments, and Biscayne Bay that resulted from the construction of drainage canals and levies, such as C-1 and L31-E.

9. Accordingly, the District issued an Addendum to Staff Report on August 9, 2002. The Addendum adds an easement to the original mitigation plan by adding Special Condition #24, which states:

No later than 30 days after permit issuance and prior to commencement of construction resulting in wetland impacts, the permittee shall submit two certified copies of the recorded flowage easement for the mitigation area and associated buffers and a GIS disk of the recorded easement area The recorded easement shall be in substantial compliance with Exhibit 41. Any proposed modifications to the approved form must receive prior written consent from the District. The easement must be free of encumbrances or interests in the easement

which the District determines are contrary to the intent of the easement. . . .

10. Exhibit 41 (actually Exhibit 41A) is entitled, "Perpetual Flowage, Inundation, Construction, and Access Easement." Representing a grant from Lennar Homes to the District, the easement (Flowage Easement) is

for any and all purposes deemed by [the District] to be necessary, convenient, or incident to, or in connection with, the unrestricted right to regularly, or at any time, and for any length of time[,]
overflow, flood, inundate, flow water on, across, and through, store water on, and submerge the [encumbered property], together with the unrestricted right at any time to enter upon and access the [encumbered property], with any and all vehicles and equipment, including but not limited to the right to move, transport, store, operate, and stage equipment, materials and supplies, in order to construct, operate, and maintain any and all structures, improvements, equipment, pumps, ditches and berms upon the [encumbered property] deemed by [the District] to be necessary, convenient, incident to or in connection with the implementation of the BBCW Project on the [encumbered property], or in connection with any project in the interest of flood control, water management, conservation, environmental restoration, water storage, or reclamation, and allied purposes, that may be conducted now or in the future by the [District], or to carry out the purposes and intent of the statutory authority of the [District], presently existing or that may be enacted in the future, together with all right, title, and interest in and to the [BBCW] Project Structures.

* * *

This Easement shall at no time be construed to alleviate or release [Lennar Home's] responsibilities and require [sic] under ERP Permit No. _____ to construct and maintain an on-site mitigation area as described and authorized in the ERP Permit.

11. Other provisions of the Flowage Easement impose all risk of loss in connection with the flowway upon Lennar Homes, which indemnifies the District from all losses, costs, damages, and liability in connection with the flowway.

12. On September 5, 2002, after the hearing, but a few days before the taking of the post-hearing testimony, the District issued a Revised Addendum to Staff Report. The Revised Addendum restates Special Condition #24 with a few relatively minor changes and adds Special Conditions ##25 and 26. Special Condition #25 attempts to harmonize the Flowage Easement with the original mitigation plan contemplated by the Staff Report. Special Condition #25 provides that when the District exercises its rights under the Flowage Easement, other special conditions shall be deleted, so as, for example, to relieve Lennar Homes of its obligations to maintain the mitigation area (except for a 25-foot buffer) and post a mitigation-performance bond. Special Condition #26 changes the language in the conservation easement, which was contemplated by the original Staff Report and mitigation plan, to harmonize this easement with the Flowage Easement.

13. Lennar Homes has submitted a version of the Revised Addendum to Staff Report that would satisfy its concerns. The Lennar Homes version would require the District, within 30 days after issuing the ERP to Lennar Homes, to obtain permits from the U.S. Army Corps of Engineers and the local environmental regulatory agency, although not the Florida Department of Environmental Protection, which, under state law, would have to issue an ERP to the District before it could construct the flowway. The Lennar Homes version would also give the District only 90 days after issuing the ERP to Lennar Homes within which to exercise its right to construct the flowway and would sequence events so that Lennar Homes would not spend the estimated \$2 million on wetland enhancement and creation and then lose the investment due to the inundation of the mitigation site with water, as authorized by the Flowage Easement.

14. The Comprehensive Everglades Restoration Plan plays a crucial role in this case. But for this plan, the District would not have attached the additional conditions contained in the Addendum to Staff Report and Revised Addendum to Staff Report--without which conditions, the District now contends that Lennar Homes is not entitled to the ERP.

15. Congress initially authorized the Central and Southern Florida (C&SF) Project in 1948. Objectives of the C&SF Project included flood control, water supply for municipal, industrial,

and agricultural uses, prevention of saltwater intrusion, and protection of fish and wildlife. The C&SF Project attained these objectives, in part, through a primary system of 1000 miles each of levees and canals, 150 water-control structures, and 16 major pump stations. Unintended consequences of the C&SF Project have included the irreversible loss of vast areas of wetlands, including half of the original Everglades; the alteration in the water storage, timing, and flow capacities of natural drainage systems; and the degradation of water quality and habitat due to over-drainage or extreme fluctuations in the timing and delivery of freshwater into the coastal wetlands and estuaries.

16. In 1992, Congress authorized the C&SF Project Comprehensive Review Study (Restudy). The objective of the Restudy was to reexamine the C&SF Project to determine the feasibility of modifying the project to restore the South Florida ecosystem and provide for the other water-related needs of the region.

17. Completed in April 1999, the Central and Southern Florida Project Comprehensive Review Study Final Integrated Feasibility Report and Programmatic Environmental Impact Statement (Restudy Report) notes that, among the unintended consequences of the C&SF Project, was "unsuitable freshwater flows to Florida and Biscayne bays and Lake Worth Lagoon [that]

adversely impact salinity and physically alter fish and wildlife habitat." The Restudy Report states that, absent comprehensive, new restoration projects, the "overall health of the [South Florida] ecosystem will have substantially deteriorated" by 2050.

18. The Restudy Report recommends a comprehensive plan for the restoration, protection, and preservation of the water resources of Central and South Florida. This plan is known as the Comprehensive Everglades Restoration Plan (CERP). Acknowledging the complex dynamics of the restoration goals identified in CERP, the Restudy Report establishes Project Implementation Reports to tie together CERP and the detailed design necessary for the construction of individual restoration projects and adaptive assessments to monitor the performance of individual components, incorporate new data, and refine future components.

19. The Restudy Report is, among other things, a programmatic environmental impact statement. The Restudy Report states: "Due to the conceptual nature of [CERP] and the associated uncertainties, many subsequent site-specific environmental documents will be required for the individual separable project elements."

20. In May 2002, the District and U.S. Army Corps of Engineers completed a draft of the Project Management Plan for

the Biscayne Bay Coastal Wetlands (BBCW PMP). Noting that a "major goal of [CERP] is to improve freshwater deliveries to Biscayne Bay," the BBCW PMP identifies the BBCW project as the means by which to restore some of the coastal wetlands and tributaries in south Dade County. The BBCW PMP states that the primary purpose of the BBCW project, which is one of sixty projects contained in CERP, is to "redistribute freshwater runoff from the watershed into Biscayne Bay, away from the canal discharges that exist today and provide a more natural and historic overland flow through existing and or improved coastal wetlands."

21. The Cutler Wetlands subcomponent of the BBCW project encompasses the Project site. One of the objectives of the Cutler Wetlands subcomponent is to divert water from the C-1 Canal upstream of the landfill and water treatment plant to the east of the L-31E levy and canal.

22. In connection with the Cutler Wetlands subcomponent and the possible role of the flowway identified in this case, the District retained Dr. John Meeder, a Biscayne Bay ecologist associated with the Southeast Environmental Resource Center at Florida International University, to perform an abbreviated study and issue a report concerning the conditions required for the restoration of the coastal wetlands in the vicinity of the

coastal wetlands to the north of the C-1 canal and east of the Project site (Meeder Report).

23. The Meeder Report studies two feasible freshwater delivery options and prefers a bypass flowway along Southwest 224th Street, across roughly the middle of the Project site and north of most of the proposed mitigation area, to the L-31E levy and canal. The distribution system resulting from the preferred route would use the natural grade of the land to divert the water to the coastal wetlands and tidal creeks to the east and south that are targeted for rehydration. The alternative flowway route would run along Southwest 232nd Street, in the approximate area of the Flowage Easement, but would require pumping to distribute the water north along the L-31E levy and canal for release to the targeted coastal wetlands and tidal creeks. Obviously, the District has chosen the less-preferred route to minimize the impact on the Project.

24. The Meeder Report considers the amount of freshwater required for two rehydration options. In the first option, water diverted from the C-1 Canal and passing through the flowway would rehydrate only the tidal creeks, which then empty into the embayments that lead to Biscayne Bay. In the second option, water diverted from the C-1 Canal and passing through the flowway would rehydrate the tidal creeks and the surrounding coastal wetlands. To maintain an appropriate salinity range and

rehydrate only the tidal creeks, the flowway would need to deliver 70 acre/feet per day in the dry season and 95 acre/feet per day in the wet season. To maintain an appropriate salinity range and rehydrate the tidal creeks and surrounding coastal wetlands, the flowway would need to deliver 209 acre/feet per day in the dry season and 1139 acre/feet per day in the wet season.

25. Several factors militate against an attempt to rehydrate the coastal wetlands surrounding the targeted tidal creeks. Potential errors in data and analysis increase in magnitude with the larger freshwater diversions needed to rehydrate the tidal creeks and surrounding coastal wetlands, and Dr. Meeder admitted that the largest value was very approximate. Potentially serious impacts upon salinity and associated vegetative communities increase in likelihood with the larger freshwater diversions needed to rehydrate the tidal creeks and surrounding coastal wetlands.

26. Also, the diversion of larger volumes of water from the C-1 Canal may have adverse impacts on downstream conditions. At the point of the C-1 Canal where it first enters the landfill and wastewater treatment plant (just downstream from the flowway), the average flow of the C-1 Canal is 350 acre/feet per day, but the median flow is only 160 acre/feet per day. (The average flow rate is skewed by occasional, very high daily flows

of 4000 acre/feet during large storm events.) The larger volumes diverted to rehydrate the tidal creeks and surrounding coastal wetlands would, at times, withdraw a relatively large portion of the water from the C-1 Canal.

27. For these reasons, the District justifiably elected to seek a flowway that would rehydrate only the tidal creeks, including the vestigial tidal creeks, but not the surrounding coastal wetlands.

28. Petitioners and Lennar Homes have raised numerous other issues about the flowway that the District seeks to obtain. The District requires a 200-acre flowway to rehydrate adequately the vestigial tidal creeks, the presently remaining tidal creeks, the small embayment, and then the subject area of Biscayne Bay, but the mitigation area potentially available on the Project site is limited to about 135 acres, and some uncertainty exists as to whether the District can obtain control of the remaining land necessary to assemble a 200-acre flowway. Even the 200-acre flowway is probably insufficient to accommodate significant water treatment, so water quality issues remain outstanding, notwithstanding the better water quality upstream of the landfill and water treatment plant.

29. Other issues arise from the requirement that the District obtain an ERP from the Florida Department of Environmental Protection, as well as one or more federal

agencies, before it could construct the flowway. To the extent that this requirement delays and possibly precludes the construction of the flowway, this requirement militates against the inclusion of the Flowage Easement and new special conditions in the ERP. To the extent that this requirement insures that the flowway will not cause flooding or adverse water quality in the tidal creeks, embayment, and ultimately Biscayne Bay, this requirement militates in favor of the inclusion of the Flowage Easement and new special conditions in the ERP; the absence of detailed specifications for the design and construction of the flowway precludes any assurance that the flowway would not flood or otherwise damage the upland portion of the Project site, so subsequent permit-review is essential to the present inclusion of the Flowage Easement and new special conditions in the ERP.

30. It is impossible to credit the District's evidence that various transition-zone wetland species would survive inundation under unknown flow rates, of variable depths, and of unknown and possibly indefinite duration. Lennar Homes legitimately is concerned that its substantial investment in mitigation, pursuant to the original mitigation plan, would be wasted if the District constructs the flowway. As presently drafted, the Flowage Easement and new special conditions contemplate that Lennar Homes would construct the original mitigation, at a substantial cost, and the District would later

construct and inundate the flowway through largely the same area.

31. Marketing of parcels in close proximity to the flowway might be complicated by the uncertainty concerning what will occupy the area beyond a resident's backyard--a benign passive mitigation area or a flowway that may range from a intermittently wet slough or glade to a placid lake to a raging swollen river--and by the probability that the District would not construct the flowway until 2009.

32. The District justifies the Flowage Easement and new special conditions on two grounds. First, the District contends that the ERP without the Flowage Easement and new special conditions is harmful to the District's water resources. Second, the District contends that the ERP without the Flowage Easement and new special conditions is inconsistent with the overall objectives of the District.

33. The first argument misses the mark. A project that is otherwise permissible, except for the fact that it interferes with the establishment of a restoration project, does not harm the water resources of the District; such a Project interferes with the improvement of the water resources of the District. In this case, the parties have stipulated that the Project will not cause adverse impacts due to the original mitigation plan. If

adverse impacts means anything, it means harm to the water resources of the District.

34. The second argument requires the identification of the District's objectives. The Florida Legislature has declared at Section 373.1502(2)(a), Florida Statutes, that CERP implementation is "in the public interest and is necessary for restoring, preserving and protecting the South Florida ecosystem" In May 2000, the Florida Legislature enacted the Everglades Restoration Investment Act, which commits Florida to contribute over \$2 billion for the implementation of CERP-- Florida's share for the first ten years of implementation. The Florida Legislature has made the implementation of CERP an overall objective of the District.

35. Several factors are important in determining whether the ERP without the Flowage Easement and new special conditions would be inconsistent with the overall objective of the District to implement CERP. These factors require consideration of the purpose of the proposed restoration project; the extent of completion of the project's design, permitting, and construction; if the project has not yet been designed or permitted, the likelihood of construction; when the project would be constructed; the impact of the ERP without the Flowage Easement and new special conditions upon the proposed restoration project; and the existence of feasible alternatives

to accomplish the same objectives as those achieved by the proposed restoration project.

36. These factors generally favor the issuance of the ERP, but only with the Flowage Easement and new special conditions. The flowway project would rehydrate a portion of the estuarine waters of southern Biscayne Bay that are sufficiently healthy to respond vigorously to the new freshwater infusions, so the project is important. The C-1 Canal appears to be the only readily available source of sufficient volumes of freshwater to achieve the rehydration of the tidal creeks, and the proposed path through the Lennar Homes mitigation area appears to be the only readily available means by which to divert the freshwater to the targeted tidal creeks. If the flowway project is limited to the tidal creeks and does not extend to the surrounding coastal wetlands, the likely environmental impacts appear to be positive on the receiving areas and the downstream portion of the C-1 Canal. For these reasons, even though the project is at an early conceptual stage and construction would not start for six years, it seems likely to be constructed. The apparent difficulty in securing the necessary additional 65 acres may yet be overcome through property acquisition, and, if not, the District may be able to increase the capacity of the flowway without jeopardizing the adjacent uplands.

37. For the reasons stated in the Conclusions of Law below, other factors in determining whether the ERP without the Flowage Easement and new special conditions would be inconsistent with the overall objective of the District to implement CERP require consideration of the impact upon Lennar Homes in accommodating the Flowage Easement and new special conditions. With two exceptions, the Flowage Easement and new special conditions do not impose an inordinate burden upon Lennar Homes.

38. The flowway would occupy the portion of the Project site that would have been subject to the conservation easement that was part of the original mitigation plan. Lennar Homes' responsibility for maintenance is considerably lessened if the District constructs the flowway, whose special maintenance needs can only be met by the District or its contractors. Although Lennar Homes may experience some sales resistance due to the uncertainty of the use of the mitigation area, the assurances gained from the subsequent permitting process, during which the District will seek an ERP from the Florida Department of Environmental Protection for the construction of the flowway, should allay reasonable concerns about flooding and other damage to the adjacent uplands.

39. In three respects, though, the District has abused its discretion in preparing the Flowage Easement and new special

conditions. First, the District abused its discretion in requiring Lennar Homes to perform mitigation work in the mitigation area, pursuant to the original mitigation plan, to the extent that the products of such work will likely be destroyed or substantially harmed by the construction and operation of the flowway. The value of mitigation rests largely in the functions that it can support through longterm viability. The construction and operation of the surface water management system, the posting of a sufficient bond to guarantee future performance under either mitigation scenario, the execution and delivery into escrow of deeds and other legal instruments sufficient to meet the requirements of the Flowage Easement and new special conditions (subject to the two matters discussed in this and the two following paragraphs), and the construction of the portion of the original mitigation that would not be impacted by the flowway sufficiently respond to the need for mitigation, until the District finally determines the need for it to exercise its rights under the Flowage Easement.

40. Second, the District abused its discretion by omitting any timeframe for the District to exercise its rights under the Flowage Easement and new special conditions. The timeframe proposed by Lennar Homes for the District to make this final determination of whether to proceed with the flowway is unreasonable and ignores the substantial period of time required

to design, fund, and permit the flowway. But a timeframe may be especially important if Lennar Homes encounters more marketing resistance than might be reasonably anticipated. Therefore, the new conditions should provide that if construction of the flowway is not substantially completed by 2011, then the Flowage Easement shall be released and returned to Lennar Homes, upon its commencement, without delay, of the construction of any of the original mitigation that it did not already complete.

41. Third, the District also abused its discretion in the Flowage Easement and new special conditions in the allocation of liability for the flowway, including apparently its construction, maintenance, and operation. The District would impose this liability upon Lennar Homes, which would have to indemnify the District for construction damage or any malfunctions in the operation of the flowway, such as damage to adjacent uplands by flooding, erosion, or contamination. The District has imposed this restoration project on Lennar Homes and has done so, not to avoid harm to the District's water resources, but to achieve the overall objective of the District to implement CERP. The District and its contractors, not Lennar Homes, will construct, maintain, and operate the flowway. The District, not Lennar Homes, has the expertise in the design, construction, and operation of water-control facilities of this type. This record does not disclose a single legitimate reason

to impose upon Lennar Homes the liability for any aspect of the flowway that does not result from the acts or omissions of Lennar Homes or its assignees as owners of the adjacent uplands.

42. Although, as stated in its proposed recommended order, the District does not object to the standing of Petitioners, Respondents did not stipulate to the standing of any Petitioners. Petitioners The Everglades Trust, Inc., and The Everglades Foundation, Inc., offered no witnesses concerning their standing, and no exhibits address the standing of these parties. The record thus fails to demonstrate that Petitioners The Everglades Trust, Inc., and The Everglades Foundation, Inc., are substantially affected by the proposed agency action.

43. Petitioner National Parks Conservation Association, Inc., (National Parks) is a not-for-profit corporation registered in Florida as a foreign corporation. The corporate purpose of National Parks is to protect and enhance America's national parks, including Biscayne National Park, for present and future generations. National Parks seeks the protection and enhancement of the Biscayne National Park through the successful implementation of CERP.

44. National Parks has 350,000 members, including 19,900 in Florida. Members of National Parks use Biscayne National Park for recreational boating, fishing, snorkeling, fish watching, scuba diving, and camping (on the barrier islands).

Members of National Parks are actively monitoring the implementation of CERP.

45. Petitioner Florida Audubon Society, Inc. (Florida Audubon), is a Florida not-for-profit corporation that was originally incorporated in Florida in 1900. The corporate purpose of Florida Audubon is to protect, conserve, and restore Florida's heritage through the preservation of the state's natural resources. Florida Audubon has adopted as its highest priority the design and implementation of CERP.

46. Florida Audubon has 32,000 members in Florida, including over 2100 members in Dade County. Numerous of these members engage in bird watching, recreation, and scientific research in Biscayne National Park. Florida Audubon organizes membership trips to Biscayne Bay, conducts its annual Bird-athon and Christmas Bird Count in the vicinity of Biscayne Bay, and conducts various environment educational programs in and concerning Biscayne Bay.

47. The issuance of the ERP without the Flowage Easement and new special conditions would substantially impact the ability of the District to restore this part of Biscayne Bay. Without such restoration, the functions of Biscayne Bay will slowly decline until eventually the overall health of the entire South Florida ecosystem will be substantially deteriorated. Thus, National Parks and Florida Audubon would be substantially

affected by the issuance of the ERP without the Flowage Easement and new special conditions.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.569 and 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes.)

49. Section 120.52(12)(b) defines a "party" as any "person . . . whose substantial interests will be affected by proposed agency action" National Parks and Florida Audubon have standing in this case. Petitioners The Everglades Trust, Inc., and The Everglades Foundation, Inc., have not proved their standing.

50. Lennar Homes has the burden of proving its entitlement to the ERP. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

51. Sections 373.414(1)(a) and (b) provide in part:

(1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), is not

contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite

mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136. It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity.

52. Courts have extended considerable deference to the environmental agency in applying the two most important provisions of Section 373.414. First, the determination of whether an applicant has provided "reasonable assurance" is a conclusion of law. Compare 1800 Atlantic Developers v. Department of Environmental Regulation, 552 So. 2d 946 (Fla. 1st DCA 1989) (per curiam), rev. denied, 562 So. 2d 345 (Fla. 1990), and Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140 (Fla. 2d DCA 2001), with Berry v. Department of Environmental Regulation, 530 So. 2d 1019 (Fla. 4th DCA 1988). Second, the adequacy of mitigation is a conclusion of law. See Save Anna Maria, Inc. v. Department of Transportation, 700 So. 2d 113 (Fla. 2d DCA 1997) and 1800 Atlantic Developers, supra.

53. Likewise, courts have extended deference to agencies interpreting the statutes that they are required to enforce. See, e.g., Reedy Creek Improvement District v. Department of Environmental Regulation, 486 So. 2d 642 (Fla. 1st DCA 1986).

54. Supplementing these usual arguments favoring deference to the agency in cases of this type is the unique demand imposed

upon the District in implementing CERP. The Restudy Report amply describes the complexity of the task assigned to the District and the U.S. Army Corps of Engineers. These agencies must collect and analyze vast amounts of data, design and construct elaborate restoration projects, monitor the performance of these projects while continuing to collect and analyze other data, and refine their planned and already-built projects with the knowledge gained along the way. This dynamic process constantly repeats itself, as the agencies, at the same time, attempt to deal with the extra-scientific challenges, such as funding limitations and the acquisition of interests in land sufficient to allow the construction of the restoration projects. Even without regard to the expertise of these agencies, deference is indicated because the complexity of these daunting tasks demands the allocation of decisionmaking authority, to the greatest extent reasonably possible, to the smallest a number of entities.

55. The District correctly contends that Section 373.414(1) justifies the imposition of the Flowage Easement and new special conditions on the basis that the ERP must be consistent with the overall objectives of the District. Although nearly all ERP cases involve compliance with water quality standards and consistency with the public interest, which itself requires the balancing of the seven statutory

criteria, the statute itself warns that these requirements are only "part of an applicant's demonstration that an activity . . . will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district." If the tests involving water quality and public interest are only "part" of the applicant's demonstration, there must be another part.

56. This case does not require a determination of the extent to which an applicant may be required to make an additional demonstration that the activity will not harm the water resources. Obviously, the water-quality standards and seven public-interest criteria directly pertain to harm to water resources, so such a determination might prove problematic.

57. As noted in the Restudy Report, merely continuing to prevent harm to the District's water resources is insufficient to prevent the substantial deterioration of the South Florida ecosystem. In recognition of this fact, the Florida Legislature added to the objectives of the District the responsibility of designing and implementing CERP restoration projects, as reflected in Section 373.1501, which assigns the District the crucial role of the local sponsor of CERP projects. Unmistakably underscoring the importance of this new objective of the District, the Florida Legislature dedicated \$2 billion,

as Florida's contribution toward these restoration projects over the next ten years.

58. By not specifying District objectives, Section 373.414(1) anticipates evolving District objectives, which may, as here, extend past merely preventing harm to water resources to restoring water resources. Recognizing the flexibility inherent in the above-described language of Section 373.414(1) and the dedication of the Florida Legislature to the attainment of this important objective does not frustrate legislative intent in demarking carefully the limits of agency discretion, as Lennar Homes contends, but serves the legislative intent in protecting Florida's considerable investment in the implementation of CERP and achievement of the resulting improvements in water quality.

59. Equally misplaced, in this case at least, is the concern of Lennar Homes about the lack of definition of the concept of the "overall objectives of the district." As long as the District considers the factors described above with respect to the specific project whose viability may be implicated by a specific ERP, the addition of specific conditions to an ERP will not render the permitting process vague or unpredictable.

60. The better reading of Section 373.414(1) requires the District to balance the applicant's interests with the District's objectives, even when adding specific conditions

under the residual requirement of consistency with the overall objectives of the District. Although the balancing required under Section 373.414(1)(a) applies only when applying the public-interest test and the balancing inherent in the mitigation under Section 373.414(1)(b) applies only when an applicant fails the public-interest test, the concept of "reasonable assurance" implicitly attaches to the demonstration that an applicant must make under the residual requirement of consistency with the overall objectives of the District. Supporting this construction of Section 373.414(1), Section 373.416(1) provides that the District may impose such "reasonable conditions" as are necessary to assure that the operation of stormwater management system will not be inconsistent with the overall objectives of the District. Reasonableness requires consideration of the burdens imposed upon Lennar Homes by the Flowage Easement and new special conditions.

61. For the reasons stated in the preceding paragraph, the Flowage Easement and new special conditions are an appropriate exercise of the District's condition except for the requirements that Lennar Homes construct the mitigation under the original plan prior to the District's decision to exercise its rights under the Flowage Easement and new special conditions and that Lennar Homes bear the liability for the construction,

maintenance, and operation of the flowway. The Findings of Fact above cover in more detail the necessary revisions to the Flowage Easement and new specific conditions.

62. Petitioners' alternative represents an even less appealing encroachment upon the District's discretion in this case than do the alternatives proposed by Lennar Homes of no Flowage Easement and new special conditions or a highly restricted Flowage Easement and special conditions. First, notwithstanding potential water quality considerations, which, like the flooding conditions of particular interest to Lennar Homes, will be considered in the permitting process that precedes any construction of a flowway, the record suggests that the diversion of a volume of water from the C-1 Canal to the coastal wetlands surrounding the targeted tidal creeks may not be environmentally feasible or, even if environmentally feasible, financially feasible.

63. Second, the District must enjoy wide discretion in determining what lands to acquire in fee simple and with what landowners, and on what facts, to risk takings litigation. CERP funding is not unlimited, and the District, on these facts, has reasonably decided not to expend funds appropriated by the Florida Legislature in obtaining the fee simple to part or all of the Project site or litigating a takings claim with Lennar

Homes on the facts that would result from the position advocated by Petitioners.

RECOMMENDATION

It is

RECOMMENDED that the District issue the environmental resource permit with the Flowage Easement and new special conditions, as modified in accordance with the matters presented in paragraphs 39-41.

DONE AND ENTERED this 10th day of January, 2003, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.