

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITY OF WEST PALM BEACH,

Petitioner,

vs.

Case No. 16-1861

PALM BEACH COUNTY, DEPARTMENT OF
TRANSPORTATION, AND SOUTH
FLORIDA WATER MANAGEMENT
DISTRICT,

Respondents.

RECOMMENDED ORDER

The final hearing in this case was held on August 23-26 and November 29-30, 2016, in West Palm Beach, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF ISSUE

The issue to be determined in this case is whether the Respondents, Florida Department of Transportation ("FDOT") and Palm Beach County (also referred to as "the Applicants"), are entitled to the issuance of an Environmental Resource Permit ("ERP") to construct an extension of State Road 7 ("SR 7") and its associated surface water management system in Palm Beach County.

PRELIMINARY STATEMENT

On February 15, 2016, South Florida Water Management District ("District") issued its Notice of Intended Agency Action to approve Permit No. 50-05422-P to FDOT and Palm Beach County for construction of a road and surface water management system with on-site and off-site mitigation for wetland impacts.

On March 22, 2016, the City of West Palm Beach ("City") filed a petition challenging the proposed permit. The petition was subsequently amended. The District referred the City's amended petition to DOAH to conduct an evidentiary hearing and issue a Recommended Order. On June 20, 2016, the City filed a Second Amended Petition.

On or about August 19, 2016, FDOT and the County made modifications to their application.

At the final hearing, the City presented the testimony of four expert witnesses: Harvey Harper, III, Ph.D.; Evelyn Gaiser, Ph.D.; Kevin Erwin, C.E.; and Thomas E. Lodge, Ph.D. The City called Scott Kelly, P.E., as a fact witness. City Exhibits 1-5, 7, 7a, 8-19, 21, 22, 22a, 24-27, 29, 34, 44, 47-49, 53, 61, 63, 74-77, 79, 81, 84, 100, 102, 104, 105, 111, 112, 124, 133, 136-138, 140, 141, 143, 145, 149, 151, 173, 174, 174a, 175-180, 184, 185, 188, 191, 191a, 192, 193a, 194, 195, 198, 201, 202, 205, 208, 212, 219a, 226-235, 240, 244-248, 250, and 251 were admitted into evidence.

FDOT presented the testimony of three expert witnesses: Hian Kor, P.E.; Patricia Gertenbach, P.G.; and Michael Garau, P.E. FDOT called Ann Broadwell as a fact witness. FDOT Exhibits 1, 4-9, 11, 12, 14, 28-30, and 32-34 were admitted into evidence.

Palm Beach County presented the testimony of expert witness Robert Robbins, P.W.S., and fact witness George Webb. County Exhibits 1, 11, and 12e were admitted into evidence.

The District presented the testimony of three expert witnesses: Anthony Waterhouse, P.E.; Melinda Parrott, P.W.S.; and Zachariah Welch, Ph.D. District Exhibits 1, 2, 3, 16, 21, 22a, 24, and 35 were admitted into evidence. City Exhibits 164, 220, and 221 were accepted as proffers.

Joint Exhibits 1-27 were admitted into evidence. Official recognition was granted for the Administrative Complaints and Orders for Corrective Action filed in SFWMD vs. City of West Palm Beach, SFWMD No. 2016-056-DAO-ERP, and SFWMD vs. Northern Palm Beach County Improvement District, SFWMD No. 2016-057-DAO-ERP.

A time was set aside for receiving public comments and several members of the public spoke, some for and some against the proposed permit. Two documents were submitted by members of the public and placed in the record. The public comments and the two submitted documents are not part of the evidentiary record.

The 14-volume Transcript of the final hearing was filed with DOAH. The parties filed Proposed Recommended Orders that were

considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. The City is a municipality incorporated under Florida law.

2. The District is a regional agency with the authority to regulate the construction, operation, and maintenance of any surface water management system pursuant to chapter 373, Part IV, Florida Statutes, and Florida Administrative Code Titles 40E and 62.

3. FDOT is an agency of the state of Florida charged with the establishment, maintenance, and regulation of public transportation. It is a co-applicant for the ERP permit.

4. Palm Beach County is a political subdivision of the State of Florida, and is a co-applicant for the ERP permit.

II. Background

A. State Road 7 Extension

5. The ERP was issued by the District for an 8.5-mile extension of SR 7 between Okeechobee Boulevard and Northlake Boulevard in Palm Beach County.

6. The purpose of the proposed roadway is to relieve traffic now moving through rural residential areas and two large residential developments known as The Acreage and Jupiter Farms.

The proposed roadway would also improve hurricane evacuation by providing additional capacity and connectivity, and reduce emergency response time in the rural residential areas.

7. The proposed roadway alignment was selected by FDOT after a multiyear corridor study under a National Environmental Protection Policy Act process. Four corridors were considered using federal selection criteria that addressed social, environmental, property, physical, and financial impacts.

8. There are two segments of the proposed roadway covered by the ERP. The southern segment would add two more lanes to the existing two-lanes of SR 7 from Okeechobee Boulevard North to 60th Street North, just south of the M-Canal. This segment is 4.4 miles long. The southern segment is not at issue in this case.

9. The northern segment would extend four lanes of SR 7 east from 60th Street North about one mile, and then north 3.1 miles to Northlake Boulevard. This is the roadway segment challenged by Petitioner. Hereafter, all references to "the Project" are to the northern segment.

10. The Project includes a raised roadway, median, sidewalks, bike lanes, and stormwater swales. It also includes a bridge over the M-Canal and a bridge over a water control outfall.

11. The Project would be constructed in an existing right-of-way ("ROW"). FDOT owns a ROW that is approximately 200 feet wide. The County owns an adjacent 120-foot-wide ROW, so that the total width of the Project ROW is 320 feet.

12. Running north/south within the ROW is a dirt service road, a ditch, and a fence.

13. Much of the vegetation in the ROW is dominated by invasive and exotic plant species, including Melaleuca, Carolina Willow, Brazilian Pepper, and Australian Pine.

B. The Ibis Development

14. West of the Project ROW is the 1,958-acre Ibis Golf and Country Club residential development ("Ibis"). In 1989, an ERP was issued for Ibis' surface water management system ("the Ibis system"). The Ibis system includes almost 300 acres of interconnected lakes that provide water management and water quality treatment for Ibis.

15. The 1989 permit required the Ibis system to be sized to receive and treat runoff from a segment of Northlake Boulevard and from an existing two-lane road off of Northlake Boulevard that serves the commercial area of Ibis, which is directly north of the Ibis residential area.

16. The Ibis system was also required to receive and provide water treatment and storage for the stormwater runoff from 46.8 acres of the ROW for SR 7.

17. The parties introduced evidence about modifications to the 1989 permit, which the City contends reduced the treatment capabilities of the system. It is found from the preponderance of the evidence that the original system and its modifications continued to meet design requirements to store and treat future runoff from 46.8 acres of the SR 7 ROW.^{1/}

18. When the water in the Ibis lakes reaches elevation 17.5 feet NGVD (National Geodetic Vertical Datum), pumps at two pump stations at the south end of Ibis begin pumping water over a berm into Ibis Preserve, a 366-acre natural area directly south of Ibis.

19. Water is retained in Ibis Preserve unless it exceeds an elevation of 18.5 feet, when it then passes over an outfall structure into the Grassy Waters Everglades Preserve ("Grassy Waters") to the east.

20. Ibis Preserve provides additional water quality treatment for the water pumped from Ibis, but this additional treatment was not part of the calculation of water quality management for Ibis. The Ibis system was required to meet District permitting criteria before discharge to Ibis Preserve.

21. The North Palm Beach County Improvement District ("Improvement District") owns and has operational and maintenance responsibility for the Ibis system. It also owned and managed

Ibis Preserve, but transferred ownership and management of Ibis Preserve to the City in 2004.

C. Grassy Waters/Water Catchment Area

22. To the east of the Project is the City-owned "Water Catchment Area," which covers about 14,700 acres or 23 square miles.

23. The Water Catchment Area is owned by the City and is part of its public drinking water supply system. Water in the Water Catchment Area flows to Lake Mangonia where it is withdrawn, treated, and then delivered to residents and businesses in the City, the Town of Palm Beach, and the Town of South Palm Beach.

24. There is a statement in the Project application that Grassy Waters refers only to the open water marsh within the Water Catchment Area. The Water Catchment Area includes other habitat types besides open marsh. Most of the information in the record indicates that Grassy Waters and the Water Catchment Area have the same boundaries. Therefore, in this Recommended Order, Grassy Waters and the Water Catchment Area are treated as being two names for the same area.

25. Grassy Waters was once connected to the Everglades and large portions of it have the same characteristics, being an open water marsh with an extended hydroperiod. It is oligotrophic,

meaning it is low in nutrients and has an ecosystem adapted to low nutrient conditions.

26. It was undisputed that most areas of Grassy Waters are of high or even pristine environmental quality.

27. Grassy Waters has periphyton, an assemblage of algae that only survive in phosphorous levels of less than 10 parts per billion ("ppb"). Periphyton is the base of the food chain in the open water marsh area of Grassy Waters and is consumed by apple snails and many invertebrates and fish.

28. Grassy Waters has a visitor and nature center and provides recreational opportunities, such as canoeing, hiking, and bird watching.

29. There appeared to be disagreement about whether the Project ROW is located in Grassy Waters or adjacent to it. The ROW is not within Grassy Waters, it is adjacent. However, the wetlands and other surface waters within the ROW are hydrologically connected to Grassy Waters.

30. In the western part of Grassy Waters, which ends at the Project ROW, there are hammock islands and hydric pine flatwoods. The City contends these areas and the rest of the ROW were historically open water marsh, but were changed by human activities. The more persuasive evidence is that this western area was not all open marsh, historically. It was an area of natural transition from open water marsh to other habitat types.

D. Ibis Impacts to Grassy Waters

31. The parties disputed whether the Ibis system is a "failed system." This is not a technical or defined term. The relevant issue is whether the Ibis system is operating in conformance with the requirements of its permit.

32. The City contends the Ibis lakes are eutrophic and that sediment accumulation in the lakes is releasing phosphorus back into the water, which ends up in Grassy Waters. However, the City's expert witness, Dr. Harper, admitted that the phosphorus concentration being discharged from the Ibis system, about 40 ppb, is typical for surface water management systems serving large residential developments, although that concentration is at the high end of the range.

33. The phosphorus concentration is closer to 30 ppb in discharges from Ibis Preserve into Grassy Waters, showing that Ibis Preserve provides additional treatment to the waters coming out of Ibis.

34. The characterization of the nutrient loading from the Ibis system as "typical" did not address the additional nutrients in the drainage that the Ibis system is required to accept from the SR 7 ROW. The record does not show that the nutrient concentrations from the Ibis system would still be typical if all of the ROW drainage were added without pre-treatment, as was contemplated by the 1989 Ibis permit.

35. Because Grassy Waters is an oligotrophic ecosystem, it can be adversely affected by phosphorus levels above 10 ppb. When phosphorus is introduced into an oligotrophic system in concentrations over 10 ppb, the system begins to change to denser wetland vegetation, which can include invasive and nuisance species, such as cattail.

36. There is denser vegetation and cattails in Grassy Waters near the Ibis Preserve outfall. There is also more phosphorus in sediments near the outfall. These effects decrease with distance from the outfall, but some effects were detected as far as a half mile from the outfall.

37. The City's expert witness, Dr. Gaiser, testified that periphyton is dissolved by high nutrient levels and replaced by weedy algae. She found adverse effects on periphyton near the outfall.

38. Dr. Gaiser also found microcystis near the outfall. Microcystis is a toxic algae caused by high elevations of phosphorous. Microcystis comprised over 10 percent of the cell density of the algal community near the outfall.

39. The District's witness, Mr. Waterhouse, conceded that there is a problem with nuisance vegetation at the discharge point into Grassy Waters. He said the District was not aware of the problem before information was developed for this case.

40. No evidence was presented about what consideration the District gave in 1989, when Ibis was permitted, to the potential adverse impacts of discharging phosphorus into the oligotrophic ecosystem of Grassy Waters. Based on the evidence that a phosphorus concentration of 30 ppb is expected for this kind of surface water management system, it must be concluded that the Ibis system was not designed to prevent harm to oligotrophic receiving waters.

41. Respondents presented evidence to show that phosphorus loadings from the M-Canal could be the cause of the adverse impacts found near the Ibis Preserve outfall. The M-Canal was constructed by the City for the primary purpose of delivering water from Lake Okeechobee, via connection to the L-8 Canal, to the Water Catchment Area for public water supply. For most of its length, the M-Canal runs through Grassy Waters.

42. The City generally maintains the water level in the M-Canal below the elevation of Grassy Waters so water in the canal will not flow into Grassy Waters. However, on some occasions, water flows from the M-Canal into Grassy Waters. High phosphorus concentrations have been recorded in the M-Canal; as high as 300 ppb. Nuisance vegetation is growing in the area where the M-Canal connects to the Water Catchment Area.

43. The preponderance of the evidence establishes that the adverse impacts described by the City's experts in the area of

the Ibis Preserve outfall are caused primarily by discharges from Ibis Preserve.

44. There are three other developments adjacent to Grassy Waters that occasionally discharge to Grassy Waters. These discharges are likely to contain some nutrients, but the amount of nutrients and their effects, if any, on Grassy Waters were not described in the record.

45. The Water Catchment Area is a Class I waterbody because it is used for public water supply. The water quality standard for phosphorus and other nutrients in a Class I waterbody is set forth in Florida Administrative Code Rule 62-302.530(48)(b):

In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.

46. Grassy Waters was designated by the Department of Environmental Protection ("DEP") as a stream. Rule 62-302.531(2)(c) states that the narrative criterion "shall be interpreted as being achieved in a stream segment where information on chlorophyll a levels, algal mats or blooms, nuisance macrophyte growth, and changes in algal species composition indicates there are no imbalances in flora or fauna."

47. The City presented some evidence regarding nuisance macrophyte growth and changes in algal species composition in Grassy Waters near the Ibis Preserve outfall.

48. Little evidence was presented regarding the practice of DEP or the District in the application of the narrative nutrient standard, but the preponderance of the evidence indicates the agency practice is to consider a stream segment as a whole to determine whether it exhibits an imbalance in natural populations of aquatic flora and fauna.^{2/}

49. During the course of this proceeding, the District issued administrative complaints against the Improvement District and the City, which include Orders for Corrective Action. The complaints were issued pursuant to section 373.119, Florida Statutes, which authorizes such action when a water management district believes that a violation of any provision of chapter 373 or district rule has occurred. However, at the final hearing, the District was reluctant to say the Improvement District had violated any law or permit condition.

50. The Improvement District did not challenge the enforcement action against it and, therefore, the District's enforcement order became final. The Improvement District is required to address the accumulation of sediment in the Ibis Lakes, develop a nutrient source control plan, eliminate and reduce the use of herbicides containing copper sulfate, and reassess pumping schedules.

51. There is no target nutrient limit specified in the District's Orders for Corrective Action.

52. The District's enforcement action against the City seeks to require the City to increase secondary treatment and retention in Ibis Preserve, provide a plan to remove the exotic/invasive vegetation at the outfall, provide a vegetation monitoring plan, and develop source control measures for residential developments that discharge into Grassy Waters. The City challenged the enforcement action and it remains pending.

E. Snail Kites

53. The Everglades snail kite gets its name from its primary food, the apple snail. In the Everglades, snail kites also feed on an exotic island snail, which occurs there in about equal numbers as apple snails. There was no evidence presented that there are exotic island snails in Grassy Waters.

54. Snail kite habitat is dependent on conditions conducive to apple snails, which are the open marsh and oligotrophic conditions where periphyton flourish. If a sufficient number of apple snails are present, snail kites will find suitable nesting nearby.

55. Dense wetland vegetation is not good forage for snail kites because, even if apple snails are present, the apple snails will be difficult or impossible for the snail kites to see.

56. Dr. Welch, who was the state snail kite conservation coordinator at the Florida Fish and Wildlife Conservation Commission and wrote the snail kite management plan for Florida,

testified for the District, where he is now employed as a senior scientist. He said field surveys of snail kite nests in Grassy Waters indicate their numbers are relatively low compared to other areas where snail kites are found. There were only ten successful nests (eggs laid) observed from 2000 to 2016.

57. The City's Everglades expert, Dr. Lodge, speculated that the low nest counts could be due to difficulty in seeing the nests, but he was not familiar with the survey techniques used and, therefore, his opinion that the numbers could be materially underestimated is not credited.

58. Snail kites nest throughout the Water Catchment Area, but primarily in the open marsh areas of the central and eastern portions of the Water Catchment Area. Over 90 percent of snail kite nests are more than a mile from the Project ROW.

59. Dr. Lodge said there are four snail kite nests within 800 feet of the Project, but he was not more specific about their locations. Most nests are closer to Northlake Boulevard, State Road 710, and the Florida Turnpike.

60. The major factor that adversely affects successful nesting by snail kites and production of offspring is predation, usually by raccoons and rat snakes. "Cold snaps" and drought are also factors.

III. Impacts of The Proposed Project

A. Water Quantity Impacts

61. Water storage for the Project, which was going to be handled in the Ibis system under the 1989 Ibis permit, would be provided in the roadside swales. The Project is designed to retain water volumes greater than typically required for roadways.

62. Stormwater would not flow out of the Project into the Ibis system except in unusually large storm events, in excess of six inches of rainfall.

63. The City did not dispute the Project's compliance with the applicable water quantity criteria in the District rules.

B. Water Quality Impacts

64. To address the City's concerns about adverse impacts caused by the Ibis system, the Applicants expanded the roadside swales by ten feet and raised the outfall elevation by 0.05 feet. With these modifications, the Project would provide water quality treatment for its stormwater and no longer rely on the Ibis system for treatment. The swales would provide treatment in excess of the treatment required by District rules.

65. Respondents contend that, when the treatment provided by the Ibis system is added, the total treatment provided for the Project stormwater is more than twice as much as required by District rules. The City, on the other hand, claims that no

additional water quality treatment can be provided by the Ibis system because the Ibis Lakes are eutrophic. The preponderance of the evidence supports a finding that Project runoff to the Ibis system would receive additional water quality treatment in the Ibis system and in Ibis Preserve before flowing to Grassy Waters.

66. The effect of the Project's on-site treatment of its stormwater is that the amount of nutrients that would otherwise flow into the Ibis system from SR 7 would be reduced. Therefore, the effect of the Project is to reduce the nutrient load that the Improvement District was permitted to discharge to Ibis Preserve and Grassy Waters.

67. The City did not dispute the Applicants' evidence that the Project exceeds the District's design criteria for water quality. The City focused instead on its contention that, despite its compliance with water quality design criteria, the Project would result in additional nutrient loading to Grassy Waters, which would cause additional adverse impacts to its flora and fauna.

68. The Applicants and the City performed nutrient loading analyses even though such analyses are only required by the District when the receiving waters have been designated by the Department as "impaired" by nutrients or in the case of certain

other specially designated waters. Grassy Waters does not have any of these special designations.

69. The Applicants' nutrient loading analysis concluded that the post-development loading of phosphorus and nitrogen from the Ibis system would be less than the pre-development condition, so there would be a net decrease in nutrients discharged into Grassy Waters. Petitioner's expert witness, Dr. Harper, believes the Project would increase nutrient loading to Grassy Waters, even if stormwater from the Project did not carry additional nutrients, because the increased volume of water moving through the Ibis system would entrain more nutrients from sediments in the Ibis lakes.

70. Dr. Harper believes the Project would also cause nutrient loading via groundwater seepage through the roadway swales into Grassy Waters. The preponderance of the evidence does not support his opinion that groundwater seepage would cause additional nutrient loading.^{3/}

71. Dr. Harper believes another source of nutrient loading from the Project would be from surface flow down the roadway embankments. On the eastern embankment, this flow would enter the mitigation area 150 feet from Grassy Waters.

72. Dr. Harper's estimated total loading from all sources is not persuasive. The estimate gives a false sense of precision. It is based on a number of variable assumptions, some of which

are not widely known or in use by experts in the field. In addition, Dr. Harper's opinion did not appear to appropriately account for the modifications to the Project's storage capacity.

73. Dr. Harper's estimated loading was not translated into physical effects in Grassy Waters.

74. The Applicants' estimate of total nutrient loading also gives a false sense of precision, but it is based on a well-known and widely used methodology. The City failed to prove that the Project would result in more nutrient loading to Grassy Waters than is currently contributed by the ROW. Because the Project would not rely on the Ibis system for stormwater treatment, the Project would reduce the loading that the Improvement District was permitted to discharge to Grassy Waters.

75. To address potential vehicular spills into Grassy Waters, FDOT produced a Spill Response Plan. The swales would capture and contain any material spilled on the roadway or swale. The curb and gutter, a guardrail, gravity wall, and fence also provide protection against spills. The bridge over the M-Canal would use a 54-inch traffic barrier, which is higher than FDOT specifications for the design speed for the bridge.

76. The City did not present evidence to show that the protective measures proposed by the Applicants are less than what is usually considered adequate under similar circumstances, or fails to meet a relevant safety standard.

C. Wetland Impacts

Direct Impacts

77. The Project would directly impact 52.37 acres of wetlands and 7.86 acres of surface waters. The impacted wetlands are fresh water marsh, mixed shrubs, and hydric pine flatwoods. The surface waters affected consist of vegetated ditches and un-vegetated channels or canals. The impacted wetlands include 11.77 acres of freshwater marsh. The impacted surface waters are ditches. Most of these wetlands are disturbed and their functional values have been reduced.

Secondary Impacts

78. District rules require an applicant to account for the secondary impacts caused by a project that could adversely affect the functions of adjacent wetlands or other surface waters. The Applicant's Handbook defines secondary impacts to include impacts on wetland functions, water quality, and endangered species, including impacts on areas needed by endangered species for foraging.

79. Part of the Applicants' assessment of secondary impacts of the Project was made by reviewing the effects of the Acreage Reliever Road on Pond Cypress Preserve, a 1,737-acre conservation area managed by the County that is immediately south of the proposed Project.

80. The County has been monitoring the effect of the Acreage Reliever Road on hydrology, vegetation, and species compensation ever since the road was built. The County found no adverse secondary impacts caused by the road. The species that use the wetlands near the road, including wading birds, appear to be unaffected by the road.

81. The scoring of secondary impacts for the Projects, using the Uniform Mitigation Assessment Methodology ("UMAM"), was conservative, meaning that assumptions were made at the high side of the potential range of impacts. This resulted in more mitigation being required.

82. The Applicants claim the Project would "maintain a 300-foot buffer between the project's construction boundary and [Grassy Waters]." This appears to be a misstatement. The Applicants' combined ROW is only 320 feet wide. Going east from the limits of construction, it is 160 feet to Grassy Waters. The Project's buffer is 160 feet wide.

83. The District accounted for secondary impacts to wetland dependent species, including snail kites, from noise and lights that might discourage use of the area. The Project would provide a tree buffer that will reduce noise and light impacts to Grassy Waters. The roadway lighting plan is also intended to reduce light penetration into Grassy Waters.

84. Most of the threatened and endangered bird species are tolerant of roadways for foraging and roosting, but not for nesting.

85. Section 10.2.7 requires the Applicants to provide reasonable assurances that any future phase of a project or project-related activities will not result in adverse impacts to the functions of wetlands or water quality violations. The Applicants satisfied this requirement by releasing of FDOT ROW north and south of the Project.

Cumulative Impacts

86. An applicant must provide reasonable assurance that a regulated activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activity for which a permit is sought.

87. Some of the proposed mitigation for the Project is out-of-basin. If an applicant proposes to mitigate impacts in another drainage basin, District rules require consideration of factors such as "connectivity of waters, hydrology, habitat range of affected species, and water quality" to determine whether there are unacceptable cumulative impacts.

88. The Project is located in the eastern Palm Beach County Basin, which has approximately 21,000 acres of wetlands. About 89 percent of the wetlands in the basin are publicly-owned

conservation lands, which means their wetland functions will continue into the future.

89. The cumulative impact analysis was conservative, meaning that the actual impacts are likely to be fewer.

90. Petitioner contends that Respondents' cumulative impact analysis did not account for the unique nature of the Grassy Waters ecosystem as the only remaining low nutrient oligotrophic wetland in the region. The preponderance of the evidence shows that the historical wetland types in the Project area were not all like the open marsh found in the central and eastern portion of Grassy Waters. Respondents accounted for the loss of open water marsh that would be caused by the Project.

D. On-Site Mitigation

91. There would be 52.4 acres of on-site mitigation within a 160-foot-wide strip of land along the eastern limits of proposed construction.

92. This area of the ROW would be managed by removing or treating the exotic vegetation, such as Brazilian Pepper and Maleleuca. Removing the exotic vegetation seed source would prevent further spread of these nuisance species into Grassy Waters.

93. Where native habitats have been altered with ditches and berms, the land would be graded to create a slope from the limits of construction eastward to the edge of the ROW. The

eastern elevation would be similar to the adjacent marsh or hydric pine areas of Grassy Waters.

94. Then, native vegetation would be planted. The habitats enhanced, restored, or created would include freshwater marsh, hydric pine flatwoods and mixed forested wetlands, including cypress.

95. The planting of mixed, forested species would provide sound and light buffering for snail kites and other species in Grassy Waters.

96. Two wildlife passages would be created underneath the Project with fencing designed to direct wildlife to use the wildlife passages. Slats would be placed in the roadway fencing to prevent small animals from going through the fence and onto the roadway.

97. The on-site mitigation was scored using UMAM and determined to result in functional gain. The UMAM analysis was conservative, meaning that the actual functional gain is likely to be greater.

98. The City did not contest the UMAM scoring.

E. Off-site Mitigation

99. FDOT is applying mitigation credits from 210 acres at the Pine Glades Natural Area ("Pine Glades") to offset impacts to 15.7 acres of herbaceous marsh and 26.78 acres of forested wetland impacts.

100. Pine Glades is a regional off-site mitigation area located in the Loxahatchee River Basin and is owned and operated by Palm Beach County. Pine Glades consists of a mix of wet prairie, depression marshes, hydric pine flatwoods, and mesic flatwoods. The restoration work in Pine Glades has already been completed. Pine Glades implements a detailed management plan that provides regional ecological value.

101. Robbins testified that Pine Glades has similar habitats to Grassy Waters. Pine Glades has periphyton, apple snails, snail kites, wood storks, and sand hill cranes. Pine Glades has some areas with oligotrophic conditions.

102. Additional off-site mitigation to offset 52 acres of wetland impacts caused by the Project would be provided at the DuPuis Reserve ("DuPuis"). DuPuis is a regional off-site mitigation area located between the L-8 Canal and the C-44 Canal in western Palm Beach and Martin Counties, and is owned and operated by the District. DuPuis would provide mitigation with 34.71 acres of herbaceous wetlands and 43.8 acres of forested wetlands.

103. DuPuis is appropriate to offset the impacts associated with the Project because it provides similar habitats with similar values of functions for similar wildlife. DuPuis implements a detailed management plan that provides regional ecological value.

104. The City argues that there is little similarity between the Grassy Waters ecosystem and Pine Glades or DuPuis, so the mitigation there cannot offset the unique assemblage of plants and animals that would be lost in Grassy Waters. It is unnecessary for Pine Glades and DuPuis to be dominated by open water marshes like Grassy Waters. It is only necessary that they have some of these areas to offset Project impacts to open water marsh.

105. Proposed snail kite mitigation would provide 52.5 more acres of snail kite habitat than would be directly impacted by the Project. The mitigation for snail kites will be located in FDOT ROW adjacent to the Project, south of the M-Canal, and north of Northlake Blvd.

106. Erwin expressed concern about fragmentation of the ecosystems that would be caused by the Project. The areas that would be affected by the Project have already been fragmented by berms, ditches, and fences. Grassy Waters is surrounded by berms, a canal, and highways.

107. The Project would cause fragmentation, like all roads. However, the fragmentation was reduced where practicable, and the City did not show that the roadway would cause the loss of any significant "greenway" now used by wildlife.

F. Snail Kite Impacts

108. Section 10.2.2(a) requires an applicant to provide reasonable assurances that a proposed activity would not impact wetlands and other surface waters so as to reduce the abundance and diversity of listed species.

109. Snail kites, wood storks, sandhill cranes, white ibises, and little blue herons are listed species that have been observed within the Project corridor.

110. As explained in the Conclusions of Law, the UMAM process is designed to mitigate for wetland functional losses, not snail kite functional losses. However, the potential impact to any listed species warrants close attention to the issue of whether function-for-function wetland mitigation would be provided.

111. There will be 11.5 acres of direct impacts to snail kite habitat within the footprint of the Project area. Dr. Welch believes secondary impacts to wetland functions associated with snail kites could extend 800 feet east of the ROW.

112. Mitigation for snail kites would be located in the Rangeline corridor south of the M-Canal and north of Northlake Boulevard. Dr. Welch estimated there were about 64 acres of snail kite habitat in the Rangeline corridor similar to the 11.5 acres of habitat located in the Project footprint.

Dr. Welch conceded that he has no evidence that snail kites currently use the Rangeline, but he believes the habitat is suitable and is appropriate mitigation.

113. Petitioner claims there are studies of "similar birds" indicating that snail kites avoid highways due to noise. However, the studies were not of similar birds. More weight is given to Dr. Welch's testimony that snail kites are not particularly sensitive to roadway noise.

114. Dr. Welch stated that Pine Glades would likely have value for snail kites because it is near the Hungryland Wildlife Management Area, which has the same number of successful snail kite nests as Grassy Waters.

115. The City contends that Pine Glades is too far away from Grassy Waters to mitigate Project impacts to snail kites. However, snail kites range long distances to forage; several hundred miles in a few days. Satellite telemetry of snail kites shows snail kites from Grassy Waters are using Pine Glades for feeding.

116. Dr. Welch reviewed snail kite nesting data to determine whether roads deterred nesting and found that snail kites frequently nested within 500 feet of major roadways.

117. Dr. Welch refuted the idea that Grassy Waters provided snail kite refuge during drought conditions, because Grassy

Waters is also subject to drought conditions that adversely affect snail kites.

118. There are conditions in the permit to limit potential impacts to snail kites during construction of the Project. If snail kite nesting is observed within 1,640 feet of construction, all Project construction must cease. Thereafter, monitoring of the nest and notification of the U.S. Fish and Wildlife Service is required. Construction cannot resume until that nest has been considered finished.

119. FDOT would place a conservation easement over 82.6 acres in the FDOT ROW between Okeechobee Boulevard and the M-Canal, south of the Project area that is the subject of this proceeding. The conservation easement would maintain connectivity between the Pond Cypress Natural Area and Grassy Waters and ensure that no future southern extension of the roadway will be constructed.

120. A conservation easement would be placed on the FDOT ROW between Northlake Boulevard and SR 710, an area of approximately 43.5 acres. Preserving this area protects a hydrologic connection between Loxahatchee Slough Natural Area and Grassy Waters. It also ensures no future northern extension of the roadway.

121. A conservation easement would be placed on a portion of the FDOT ROW between SR 710 and Jupiter Farms, an area of 44.5

acres. This section of ROW is in the Loxahatchee Slough and the release of the ROW would be a direct benefit to Loxahatchee Slough.

122. The preservation of these areas would benefit fishing and recreational values in the Pond Cypress Natural Area, Grassy Waters, and the Loxahatchee Slough Natural Area.

123. These conservation areas did not receive UMAM credits to reduce the wetland acreage needed to offset wetland functional losses, but they were included in the mitigation credit for benefits to snail kites and other wildlife.

G. Summary

124. The preponderance of the evidence established that the proposed mitigation offsets the impacts to wetlands and other surface waters that would be caused by the Project and exceeds the requirements of District rules.

H. Practicable Design Modifications

125. District rules require an applicant to consider alternatives that would avoid or reduce wetland impacts. The City claims the Applicants failed to comply with this rule because FDOT selected a roadway corridor that was expected to have greater environmental impacts than some of the other three corridors that were being considered.

126. As explained in the Conclusions of Law, this argument is misplaced. The District's review of the Applicants' measures

to avoid or minimize wetland impacts was appropriately confined to Corridor 3, the corridor selected by FDOT where the Project is proposed.

127. The Applicants reduced and eliminated impacts of the Project in several ways. For example, the footprint of the road was narrowed from six lanes to four lanes, wildlife underpasses were provided, retaining walls were used to narrow stormwater features, the median was reduced in size, and the design speed limit was reduced for the bridge at the M-Canal crossing.

128. Under two circumstances, District rules allow an applicant to avoid the requirement to implement practicable design modifications to reduce or eliminate wetland impacts, which are referred to as the "opt-out" provisions. Section 10.2.1.2, Volume I, of the Applicant's Handbook ("A.H.") provides:

(a) The ecological value of the functions provided by the area of wetland or other surface water to be adversely affected is low, based on a site specific analysis using the factors in section 10.2.2.3, below, and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected, or

(b) The applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and that provides greater long term ecological value than the area of wetland or other surface water to be adversely affected.

129. The District determined that the Applicants meet both tests. The preponderance of the evidence supports the District's determination.

130. The ecological value of the functions provided by the affected wetlands and surface is low and the proposed mitigation would provide greater long-term ecological value than the area being impacted. Pine Glades and DuPuis are part of a plan to restore the ecological value of Northern Palm Beach County and create an "ocean to lake" system of preserves and natural areas.

CONCLUSIONS OF LAW

Jurisdiction

131. DOAH has jurisdiction over the subject matter and the parties to this proceeding. § 120.57(1), Fla. Stat.

Standing

132. The City presented competent evidence to show it has substantial interests that could be affected by the proposed ERP. Therefore, it has standing to challenge the proposed permit. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

Burden and Standard of Proof

133. This is a de novo proceeding designed to formulate final agency action, not to review action taken preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-64, (Fla. 1st DCA 1983); § 120.57(1)(k), Fla. Stat.

134. Because the City challenged a permit issued pursuant to chapter 373, the procedure described in section 120.569(2) (p) is applicable:

For any proceeding arising under Chapter 373, Chapter 378, or Chapter 403, if a non-applicant petitions as a third party to challenge an agency's issuance of a license, permit, or conceptual approval, the order of presentation in the proceeding is for the permit applicant to present a prima facie case demonstrating entitlement to the license, permit, or conceptual approval, followed by the agency. This demonstration may be made by entering into evidence the application and relevant material submitted to the agency in support of the application, and the agency staff report or notice of intent to approve the permit, license, or conceptual approval. Subsequent to the presentation of the applicants prima facie case and any direct evidence submitted by the agency, the petitioner initiating the action challenging the issuance of the permit, license, or conceptual approval has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the license, permit, or conceptual approval through the presentation of competent and substantial evidence.

135. The statute contemplates an abbreviated presentation of the applicant's prima facie case. The permit application and supporting material that the agency determined was satisfactory to demonstrate the applicant's entitlement to the permit retains its status as satisfactory when it is admitted into evidence at the final hearing. It logically follows from the wording of the statute that the permit application and supporting materials may

be received into evidence for the truth of the matters asserted in them, without being subject to hearsay objections. If these documents could not be admitted into evidence except through witnesses with actual knowledge and requisite competence as to all statements in the documents, one of the primary purposes of the statute would be destroyed.

136. Section 120.569(2) (p) does not address the situation which sometimes occurs, and which occurred in this case, when a proposed permit is modified "after the fact," that is, after issuance of the agency staff report or notice of intent to approve the permit. There is no basis to presume that an after-the-fact modification is entitled to the abbreviated prima facie showing. Therefore, the Administrative Law Judge ruled that the modifications to the Project had to be proved in the "normal" manner; the principal difference being that hearsay evidence would not be admissible to demonstrate that the modification complies with applicable permitting criteria.

137. There is no mention in section 120.569(2) (p) of surrebuttal, but judges have always had discretion to allow surrebuttal when appropriate. Here, surrebuttal is appropriate because, otherwise, the challenger would not be afforded two presentations, which is a right afforded to petitioners in all other administrative proceedings, plaintiffs in all civil proceedings, and appellants in all appellate proceedings.

138. The Applicants met their burden to present a prima facie case for entitlement to the permit. Therefore, the burden of ultimate persuasion was upon the City to prove its case in opposition to the permit.

139. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. The City had to prove by a preponderance of the evidence that the Applicants did not provide reasonable assurance of compliance with applicable criteria.

140. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. See Metropolitan Dade Cnty v. Coscan Fla., Inc., 609 So. 2d 644 (Fla. 3d DCA 1992).

Waiver

141. Respondents argue that the City waived its right to challenge the 46.8 acres of drainage from the ROW that was provided for in the 1989 Ibis permit, because the City did not challenge the permit. If that were correct, it would mean the District was also required to permit the 46.8 acres of runoff from the Project. However, Ibis was issued a permit obligating it to treat and store runoff from the 46.8 acres; FDOT was not simultaneously issued a permit authorizing it to send its runoff to Ibis. The City has the right to raise any issue the District had the right to raise in its review of the Project.

ERP Permit Criteria

142. In order to provide reasonable assurances that a Project will not be harmful to the water resources of the District, the Applicants must satisfy the conditions for issuance set forth in rules 62-330.301 and 62-330.302, and the applicable sections of Volumes I and II of the Applicant's Handbook.

Impact Avoidance

143. Section 10.2.1, A.H., Vol. I, requires an applicant to eliminate or reduce impacts through practicable design modifications. The City argued that this rule required FDOT to select the corridor with the least environmental impacts from the corridors studied by FDOT in the federal review process. That argument is rejected.

144. The selection of a roadway corridor is made based on many factors other than environmental impacts. If FDOT were required to select the corridor projected to have the least environmental impact, then consideration of other factors would be meaningless. The evaluation of measures to avoid or reduce wetland impacts caused by the Project was appropriately confined to Corridor 3 where the Project is proposed.

145. This is the same way the rule applies to projects other than roads. For example, an applicant does not have to show the District that its project would have fewer impacts on the proposed site than on other properties the applicant might

own or control. The District appropriately reviews only the opportunities for avoiding or reducing wetland impacts for the same type of project on the proposed site.

146. The design modifications made by the Applicants to eliminate and reduce impacts within Corridor 3 satisfy the rule.

147. Moreover, the Applicants demonstrated they qualified to use the "opt out" provisions of Section 10.2.1.2, which allow an applicant to opt out of a showing of reduction or elimination of impacts when the ecological value of the functions of affected wetlands is low and the proposed mitigation will provide greater long-term ecological value, or when the mitigation implements all or part of a plan providing regional ecological value and greater long-term ecological value than the affected wetlands.

Water Quantity

148. The City failed to prove adverse water quantity impacts would result from the Project constituting a violation of any rule of the District. The Applicants provided reasonable assurance that the Project would not cause adverse flooding or adversely impact to off-site storage and conveyance capabilities.

Water Quality

149. The City does not dispute that the Project meets the District's design criteria for water quality protection. The Project's compliance with the design criteria creates a presumption that it meets water quality standards. Section

8.3.3., A.H., Vol. I. The City attempted to rebut the presumption by showing that, despite the Project's compliance with design criteria, the Project would cause adverse water quality impacts in Grassy Waters.

150. Rule 62-302.300(15) prohibits pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations.

151. Respondents argue that the rules of the District cannot prevent the Applicants from causing or contributing to water quality violations in Grassy Waters because the Applicants' runoff would be discharged to a surface water management system. This interpretation would be a substantial weakening of chapter 373 and rule 62-302.300.

152. The Respondents' citation to section 373.4142, which states that water quality standards do not apply within a stormwater management system, misses the point. Section 373.4142 also states that water management districts must prevent the water quality in a stormwater management system from adversely impacting adjacent waters. This statute and others show the Legislature's expectation that the District would not find reasonable assurances if the Applicants' discharge to the Ibis system caused a violation of water quality standards in adjacent Grassy Waters.

153. The District construed the issue as "whether an applicant can be required to provide reasonable assurances that a

downstream system does not have maintenance issues.” That is not the issue. An applicant does not have to make any showing about a “downstream system” in order to qualify for a presumption of reasonable assurances. The issue is whether the presumption can be rebutted when the District knows or a challenger shows the District that the applicant’s discharge will cause or contribute to a water quality violation in adjacent waters. The District’s argument is essentially that the presumption cannot be rebutted. That argument appears to conflict with chapter 373 and Florida’s antidegradation policy.^{4/}

154. However, this issue is made moot by the finding that the Project would not cause or contribute to a water quality violation in Grassy Waters.

155. The agency practice in applying the narrative nutrient standard for streams in rule 62-302.530 is to consider the stream segment as a whole to determine whether nutrient concentrations of a waterbody have been altered so as to cause an imbalance in natural populations of aquatic flora or fauna. This is a reasonable interpretation of the narrative standard because it is more logical for the term “nutrient concentrations of a water body,” and the term “natural populations,” to be references to the entire waterbody, not to the plants and animals in a small area.

156. It was undisputed that most of Grassy Waters continues to be of high or even pristine quality. Therefore, when Grassy Waters is considered as a whole, there is no imbalance in natural populations of aquatic flora and fauna.

157. Because a system-wide imbalance in natural populations of flora and fauna is necessary to establish a violation of the narrative nutrient standard, it makes the near-destruction of an ecosystem the line that must be crossed before the standard is violated. That is the reason DEP replaced the narrative standard with numerical nutrient criteria for most waterbodies in Florida. However, the narrative nutrient standard still applies to some waterbodies, including Grassy Waters.

158. The City cited general policy statements in statutes and rules expressing the desire to prevent "harm," "adverse impacts," or "degradation." However, the City did not show that any court or agency order has ever determined that harm, adverse impact, or degradation of water quality which fell short of violating a water quality standard, was a sufficient basis for denying a permit.

159. As stated above, the District takes the position that it cannot deny the Project even if the Project would cause a violation of water quality standards in Grassy Waters. If the District is wrong and it does have authority to prevent such harm, it was still not enough for the City to show that nutrient

loading from Ibis caused adverse impacts to Grassy Waters and additional loading from the Project would cause some unspecified additional harm. The City had to prove that the additional loading from the Project would result in an imbalance in the natural populations of flora and fauna in Grassy Waters. It failed to do so.

160. Additionally, section 373.414(1)(b)(3) provides:

If the applicant is unable to meet water quality standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by or acceptable to the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards.

The Applicants demonstrated that the Project would create a net improvement in water quality by treating its stormwater before discharge to the Ibis system.

Wetlands and Snail Kites

161. Section 10.2.1, A.H., Vol. I, states that, "an activity cannot cause a net adverse impact on wetland functions and other surface water functions that is not offset by mitigation."

162. The District argues that its determination whether proposed mitigation is sufficient is within its sole discretion, citing a 1996 final order of the Department. Cases decided before the adoption and use of UMAM should no longer be

controlling on this issue. UMAM established a quantifiable method for determining wetland functional losses and the amount of mitigation necessary to offset the losses. Because mitigation assessments are now quantified using a uniform methodology, deference to an agency's determination that proposed mitigation is sufficient is no longer necessary or appropriate.

163. However, the preponderance of the evidence supports the District's determination that the Applicants demonstrated all direct and secondary impacts to wetlands and other surface waters would be offset by mitigation. The Applicants also demonstrated that there would be no unacceptable cumulative impacts from the Project. Therefore, there would be no net adverse impact caused by the Project.

164. The Applicants provided reasonable assurance that the Project would comply with rule 62-330.301(1)(d), Section 10.2.2, A.H., Vol. I, and all other District rules requiring that the construction, operation, and maintenance of the Project not adversely impact the value of functions provided to fish, wildlife and listed species by wetlands and other surface waters.

165. Section 10.3.1.1 states that, for a degraded wetland, mitigation is best accomplished through creation, restoration, enhancement, or preservation of the ecological community that was historically present. The proposed mitigation appropriately

accounts for historically present habitats, including open water marsh.

166. The UMAM process is designed to mitigate for wetland functional losses, including losses associated with foraging, roosting, nesting, and other values by listed bird species. When functional loss units are offset by creating or restoring wetlands of similar type, it is assumed that all related functional values are mitigated, including values to listed species.

167. Potential impacts to Grassy Waters open marsh and to snail kites were appropriately evaluated. The Applicants provided reasonable assurance that the proposed mitigation would offset the impacts.

Public Interest Test

168. Permit applicants must demonstrate that projects in wetlands or surface waters are not contrary to the public interest, as determined by balancing seven factors set forth in section 373.414:

1. Whether the project will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the project will adversely affect the conservation of fish and wildlife, including endangered species, or their habitats;

3. Whether the project will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the project;
5. Whether the project will be of a temporary or permanent nature;
6. Whether the project 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.

169. The parties stipulated that factors 1 and 2 are not at issue. The parties also stipulated that the Project's impacts are permanent.

170. The Project would not adversely affect the public interest factors associated with wetlands and wildlife (factors 2 and 3) because the Project would not cause impacts which are not offset by mitigation.

171. The Project would not adversely impact public health, safety, and welfare associated with the City's public water supply in the Water Catchment area because the Project would have no effect on the City's water supply operations. In addition, there are reasonable protective measures to prevent a spill from entering the City's public water supply.

172. After balancing the public interest factors, it is concluded that the Project is not contrary to the public interest.

Other Permitting Criteria

173. Rule 62-300.301(1)(i) requires an applicant to provide reasonable assurance that the construction and operation of a proposed project will be capable, based on generally accepted engineering and scientific principles, of performing and functioning as proposed. The Applicants provided reasonable assurances that the Project satisfies this rule.

174. Rule 62-330.301(1)(j) requires a showing that the applicant has the financial, legal, and administrative capability of ensuring that the activity will comply with the terms and conditions of the permit. Because the Applicants both have the power of eminent domain, they satisfied the requirement to demonstrate legal capability to comply with requirements of the permit. The City did not show that the Applicants lack the necessary financial or administrative capability to implement the project in conformance with all permit conditions.

Summary

175. The City failed to meet its burden of ultimate persuasion to prove that the Project does not comply with all applicable permitting criteria. The Applicants demonstrated their

compliance with all applicable permitting criteria and their entitlement to the permit.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the South Florida Water Management District enter a final order approving Permit Number 50-05422-P on the terms and conditions set forth in the amended Staff Report, and the complete application for the Permit.

DONE AND ENTERED this 31st day of March, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of March, 2017.

ENDNOTES

^{1/} The City sought to move into evidence all of the permit modifications to the 1989 Ibis permit, as well as the entire permit application file, arguing that these materials show there are additional limitations that affect the Applicants' right to discharge Project runoff into the Ibis system. However, upon a

relevance objection from Respondents, the City was unable to identify a specific limitation in any of the offered documents. Therefore, the relevance objection was sustained. A portion of the documents were accepted only as a proffer.

^{2/} The parties reported that DEP was unwilling to allow an employee to be deposed for this purpose.

^{3/} Respondents contend the Administrative Law Judge must give deference to the District's interpretation of the statutes it administers. However, deference to an agency's interpretation is a judicial principle. It is not required by any provision of the Administrative Procedure Act, chapter 120, Florida Statutes. Deference to an agency's interpretation of law would be inconsistent with chapter 120's emphasis on *de novo* proceedings and its prohibition against an agency's rejection of an Administrative Law Judge's conclusion of law unless the agency makes a specific finding that its own interpretation of law is "as or more reasonable" than the rejected interpretation. See § 120.57(1)(1), Fla. Stat. There would be no occasion to reject an Administrative Law Judge's interpretation of a statute or rule if the judge were compelled to defer to the interpretation advanced by the agency.

^{4/} The City was restricted in its presentation of evidence regarding this claim because it was untimely and conflicted with other evidence already presented by the City.

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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 should be filed with the agency that will issue the Final Order in this case.