

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

MARTIN COUNTY AND ST. LUCIE  
COUNTY,

Petitioners,

and

TOWN OF ST. LUCIE VILLAGE,

Intervenor,

vs.

Case Nos. 16-5718  
17-2566

ALL ABOARD FLORIDA - OPERATIONS,  
LLC; FLORIDA EAST COAST RAILWAY,  
LLC; AND SOUTH FLORIDA WATER  
MANAGEMENT DISTRICT,

Respondents.

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RECOMMENDED ORDER

The final hearing in this case was held on May 30 to June 2, 2017, in West Palm Beach; on June 8 and 9 in Tallahassee; and on June 12 through 15, 2017, in West Palm Beach, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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Florida East Coast Railway, LLC:

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South Florida Water Management District  
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## STATEMENT OF THE ISSUES

The issues to be determined in these consolidated cases are whether All Aboard Florida - Operations, LLC ("the Applicant"), and Florida East Coast Railway, LLC ("FECR"), are entitled to an Environmental Resource Permit Modification authorizing the construction of a stormwater management system and related activities to serve railway facilities, and a verification of exemption for work to be done at 23 roadway crossings (collectively referred to as "the project").

## PRELIMINARY STATEMENT

On August 19, 2016, the South Florida Water Management District ("District") gave notice of its intent to grant Environmental Resource Permit Modification No. 13-05321-P ("the ERP Modification"). The original ERP authorized the construction and operation of a stormwater management system and bridge modifications within the portion of the FECR corridor between Miami and West Palm Beach. The ERP Modification authorizes the construction and operation of a stormwater management system and certain culvert and bridge modifications within Segment D09, which extends from West Palm Beach to the northern border of St. Lucie County.

On March 31, 2017, the District issued a separate notice of its intent to issue a Verification of Exemption to the Applicant for improvements to 23 roadway crossings within Segment D09 ("the 2017 Exemption").

Martin County and St. Lucie County jointly filed petitions challenging the ERP Modification and the 2017 Exemption. The two cases were consolidated. The Town of St. Lucie Village was granted leave to intervene in opposition to the challenged agency actions.

At the final hearing, Petitioners presented the testimony of Andrew Woodruff, an expert in wetlands and environmental, wildlife, and biological assessments; Catherine Riiska, M.S., P.W.S., an expert in ecology and county planning; Janet M. Peterson, P.G., an expert in geology and site contamination assessment and remediation; Jonathan T. Ricketts, P.E., an expert in stormwater engineering; Patrick Dayan, P.E., an expert in professional and civil engineering; Michael O'Brien, P.S.M., an expert in surveying; Kenneth R. Craig, P.E., an expert in navigable channel maintenance; Richard T. Creech, P.E., P.S.M., an expert in civil engineering and surveying; George A. Gavalla, an expert in rail safety; Ronald Parish, an expert in emergency services planning and public safety administration; and Daniel Wouters, an expert in emergency services planning and public safety administration. Petitioners also presented the deposition testimony of Douglas Rogers, Chris Vandello, and Rob Rossmanith. Petitioners' Exhibits 1a3, 1b, 1c, 1d, 2c1, 2c22, 2c29, 3t, 5a, 5b, 5c, 5h, 7f, 8n, 8t, 9b, 10x, 16aa, 16bb, 16gg, 17c, 17d, 17e, 17f, 17s, 19a, 40, 57, 60-73, and 78 were admitted into evidence.

Intervenor Town of St. Lucie Village presented the testimony of William G. Theiss. Intervenor's Exhibits 3k and 3m were admitted into evidence.

The Applicant presented the testimony of Adrian Share, P.E.; Bruce H. McArthur, P.E., an expert in stormwater engineering; W. Michael Dennis, Ph.D., an expert in ecology; Shannon McMorrow, an expert in ecology; and Jeremy Paris, an expert in ecology. The testimony of Mr. Paris was presented by deposition. The Applicant's Exhibits 6-30, 35-40, 70, 74, 75, 128, 140, 156, and 157 were admitted into evidence.

The District presented the testimony of Barbara Conmy, an expert in wetland ecology; Trisha Stone, an expert in wetland ecology; and Jesse Markle, an expert in stormwater engineering. District Exhibits 1, 2, and 4 were admitted into evidence.

Joint Exhibits 1 through 25 were also admitted into evidence and official recognition was taken of sections 120.569, 120.57, 163.3161(3), 163.3177(6)(d), and chapters 373 and 403, Florida Statutes; Florida Administrative Code Chapters 40E-4 and 62-4; Florida Administrative Code Rules 62-302, 62-303, 62-304, 62-330, 62-345, 62-520, 62-550, and 62-777; and the ERP Applicant's Handbook, Volumes I and II.

The 17-volume Transcript of the final hearing was filed with DOAH. The parties submitted proposed recommended orders which were considered in preparing this Recommended Order.

## FINDINGS OF FACT

### The Parties

1. Petitioners Martin County and St. Lucie County are political subdivisions of the State of Florida. Petitioners have substantial interests that could be affected by the District's proposed authorizations.

2. Intervenor Town of St. Lucie Village is a political subdivision of the State of Florida. Intervenor has substantial interests that could be affected by the District's proposed authorizations.

3. The Applicant, All Aboard Florida - Operations, LLC, is a Delaware limited liability company based in Miami. All Aboard Florida is part of a group of corporate entities formed for the principal purpose of developing and operating express passenger train service in Florida.

4. Co-applicant Florida East Coast Railway, LLC, is a Florida limited liability company based in Jacksonville. FECR owns the existing railway corridor the passenger train service will use between Miami and Cocoa.

5. South Florida Water Management District is a regional agency granted powers and assigned duties under chapter 373, part IV, Florida Statutes, including powers and duties related to the regulation of construction activities in wetlands. The proposed activities are within the boundaries of the District.

## Background

6. The objective of the All Aboard Florida Project is to establish express passenger train service connecting four large urban areas: Miami, Fort Lauderdale, West Palm Beach, and Orlando.

7. Most of the passenger service route, including the portion which will pass through Martin County and St. Lucie County, will use an existing railroad right-of-way used since the late 1800s.

8. The FECR rail corridor runs along Florida's east coast from Miami to Jacksonville. It supported passenger and freight operations on shared double mainline tracks from 1895 to 1968. The passenger service was terminated in 1968 and portions of the double track and certain bridge structures were removed. The freight service continued and remains in operation today.

9. The passenger service will use the FECR right-of-way from Miami to Cocoa and then turn west on a new segment to be constructed from Cocoa to Orlando. The railway corridor will be operated as a joint facility, with passenger and freight trains sharing the double mainline tracks.

10. The Applicant is upgrading the portion of the corridor between Miami and Cocoa by, among other things, replacing existing railroad ties and tracks, reinstalling double mainline tracks, and improving grade crossings. The Applicant is also installing Positive Train Control systems which provide integrated command and control of passenger and freight train

movements and allow the trains to be directed and stopped remotely or automatically in the event of operator error or disability, or an obstruction on the track.

11. The All Aboard Florida Project is being developed in two phases, Phase I extends from Miami to West Palm Beach, and Phase II from West Palm Beach to Orlando. This proceeding involves a segment within Phase II, known as Segment D09, which runs from just north of West Palm Beach to the northern boundary of St. Lucie County.

12. The railway corridor in Segment D09 passes through Jonathan Dickinson State Park in Martin County and the Savannas Preserve State Park, parts of which are in both Martin County and St. Lucie County. Surface waters within these state parks are Outstanding Florida Waters ("OFWs"). The railway in Segment D09 also passes over the St. Lucie River using a bridge that can be opened to allow boats to pass.

13. The Applicant plans to run 16 round trips per day between Miami and Orlando, which is about one train an hour in each direction, starting early in the morning and continuing to mid-evening.

14. In 2013, the District issued the Applicant an exemption under section 373.406(6), which exempts activities having only minimal or insignificant adverse impacts on water resources. The 2013 exemption covers proposed work in approximately 48 of the 65 miles which make up Segment D09, and includes replacement of existing tracks and re-establishment of a second set of mainline



tracks where they were historically located. The 2013 exemption covers all but 24 of the roadway crossings within Segment D09 where work is to be done in connection with the All Aboard Florida Project.

15. In 2015, the District issued the Applicant a general permit under rule 62-330.401, which authorizes activities that are expected to cause minimal adverse impacts to water resources, for the installation of fiber optic cable along the rail bed within Segment D09.

16. The 2013 exemption and 2015 general permit were not challenged and became final agency action.

#### The Proposed Agency Actions

17. The ERP Modification covers work to be done in approximately 17 of the 65 miles which make up Segment D09. The work will consist primarily of replacing existing tracks, installing new tracks, making curve modifications in some locations to accommodate faster trains, culvert modifications, and work on some fixed bridge crossings over non-navigable waters.

18. The 2017 Exemption at issue in this proceeding covers improvements to 23 of the 24 roadway crossings that were not covered by the 2013 exemption. Proposed improvements at Southeast Florida Street in Stuart will be permitted separately. The improvements covered by the 2017 Exemption include upgrading existing safety gates and signals; installing curbs, guardrails,

and sidewalks; resurfacing some existing paved surfaces; and adding some new paving.

19. Petitioners argue that, because the District's staff report for the ERP Modification states that the ERP does not cover work at roadway crossings, track work at roadway crossings has not been authorized. However, the staff report was referring to the roadway improvements that are described in the 2017 Exemption. The proposed track work at the roadway crossings was described in the ERP application and was reviewed and authorized by the District in the ERP Modification.

"Segmentation"

20. Petitioners claim it was improper for the District to separately review and authorize the proposed activities covered by the 2013 exemption, the 2015 general permit, the ERP Modification, and the 2017 Exemption. Petitioners contend that, as a consequence of this "segmentation" of the project, the District approved "roads to nowhere," by which Petitioners mean that these activities do not have independent functionality.

21. Petitioners' argument is based on section 1.5.2 of the Applicant's Handbook, Volume 1,<sup>1/</sup> which states that applications to construct phases of a project can only be considered when each phase can be constructed, operated, and maintained totally independent of future phases. However, the activities authorized by the four agency actions are not phases of a project. They are all parts of Phase II of the All Aboard Florida Project, which is the passenger railway from West Palm Beach to Orlando.

22. Section 1.5.2 is not interpreted or applied by the District as a prohibition against separate review and approval of related activities when they qualify under the District's rules for exemptions, general permits, and ERPs.

23. Much of Phase II is outside the District's geographic boundaries and, therefore, beyond its regulatory jurisdiction. The District can only review and regulate a portion of Phase II. The District is unable to review this portion as a stand-alone railway project that can function independently from other project parts.

#### The Proposed Stormwater Management System

24. Where the Applicant is replacing existing tracks or re-establishing a second set of tracks, it will be laying new ties, ballast, and rail on previously-compacted earth. In those areas, no stormwater management modifications were required by the District.

25. The Applicant's new proposed stormwater management system will be located in a five-mile area of the corridor where an existing siding will be shifted outward and used as a third track. In this area, swales with hardened weir discharge structures and skimmers will be installed to provide stormwater treatment beyond what currently exists. The weir discharge structures will serve to prevent erosion at discharge points. The skimmers will serve to capture any floating oils or refuse.

26. Because the FECR right-of-way is not wide enough in some three-track areas to also accommodate swales, the proposed

stormwater management system was oversized in other locations to provide compensating volume. The District determined that this solution was an accepted engineering practice for linear systems such as railroads.

27. Petitioners argue that the Applicant's proposed stormwater management system is deficient because some of the proposed swales do not meet the definition of "swale" in section 403.803(14) as having side slopes equal to or greater than three feet horizontal to one foot vertical (3:1).

28. The statute first defines a swale to include a manmade trench which has "a top width-to-depth ratio of the cross-section equal to or greater than 6:1." The swales used in the proposed stormwater management system meet this description.

29. Petitioners showed that the plans for one of the 46 proposed swales included some construction outside the FECR right-of-way. In response, the Applicant submitted revised plan sheets to remove the swale at issue.

#### The Emergency Access Way

30. The ERP application includes proposed modifications to portions of an existing unpaved emergency access way which runs along the tracks in some areas. The access way is a private dirt road for railroad-related vehicles and is sometimes used for maintenance activities.

31. At the final hearing, Petitioners identified an inconsistency between an application document which summarizes the extent of proposed new access way construction and the

individual plan sheets that depict the construction. The Applicant resolved the inconsistency by correcting the construction summary document.

32. Petitioners also identified an individual plan sheet showing proposed access way modifications to occur outside of the FEER right-of-way. This second issue was resolved by eliminating any proposed work outside the right-of-way.

33. Petitioners believe the proposed work on the access way was not fully described and reviewed because Petitioners believe the access way will be made continuous. However, the access way is not continuous currently and the Applicant is not proposing to make it continuous. No District rule requires the access way segments to be connected as a condition for approval of the ERP.

#### Water Quantity Impacts

34. An applicant for an ERP must provide reasonable assurance that the construction, operation, and maintenance of a proposed project will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impacts to existing surface water storage and conveyance capabilities.

35. The District's design criterion to meet this requirement for water quantity management is a demonstration that the proposed stormwater system will capture the additional runoff caused during a 25-year/3-day storm event. The Applicant's proposed stormwater system meets or exceeds this requirement.

36. Petitioners argue that the Applicant failed to provide reasonable assurance because the ERP application materials did not include a calculation of the discharge rates and velocities for water discharging from the swales during the design storm.

37. The ERP application contains the information required to calculate the discharge rates and velocities and the Applicant's stormwater expert, Bruce McArthur, performed the calculations and testified at the final hearing that in the areas where there will be discharges, the discharge rates and velocities would be "minor" and would not cause adverse impacts. The District's stormwater expert, Jesse Markle, shared this opinion.

38. Petitioners argue that this information should have been provided to the District in the permit application, but this is a de novo proceeding where new evidence to establish reasonable assurances can be presented. Petitioners did not show that Mr. McArthur is wrong.

39. Petitioners failed to prove that the proposed project will cause adverse water quantity impacts, flooding, or adverse impacts to surface water storage and conveyance capabilities.

#### Water Quality Impacts

40. To obtain an ERP, an applicant must provide reasonable assurance that the construction, operation, and maintenance of a regulated project will not adversely affect the quality of receiving waters, such that state water quality standards would be violated.

41. The District's design criteria for water quality required the Applicant to show that its proposed stormwater system will capture at least 0.5 inches of runoff over the developed area. To be conservative, the Applicant designed its proposed system to capture 1.0 inch of runoff in most areas.

42. Under District rules, if a stormwater system will directly discharge to impaired waters or OFWs, an additional 50 percent of water quality treatment volume is required. The proposed stormwater system will not directly discharge to either impaired waters or OFWs.

43. In some locations, there is the potential for stormwater discharged from the proposed stormwater system to reach OFWs by overland flow, after the stormwater has been treated for water quality purposes. The Applicant designed its proposed stormwater system to provide at least an additional 50 percent of water quality treatment volume in areas where this potential exists.

44. To ensure that the proposed construction activities do not degrade adjacent wetlands, other surface waters, or off-site areas due to erosion and sedimentation, the Applicant prepared an Erosion and Sediment Control Plan. Temporary silt fences and turbidity barriers will be installed and maintained around the limits of the construction.

45. The District's design criteria for water quality do not require an analysis of individual contaminants that can be contained in stormwater, except in circumstances that do not apply to this project. Compliance with the design criteria

creates a presumption that water quality standards for all potential contaminants are met. See Applicant's Handbook, V. II, § 4.1.1.

46. Although not required, the Applicant provided a loading analysis for the proposed swales which could potentially discharge overland to impaired waters or OFWs. The analysis compared pre- and post-development conditions and showed there would be a net reduction in pollutant loading.

47. Petitioners believe the pollutant loading analysis was inadequate because it did not specifically test for arsenic and petroleum hydrocarbons. However, the analysis was not required and adequate treatment is presumed. Petitioners did not conduct their own analysis to show that water quality standards would be violated.

48. Petitioners' expert, Patrick Dayan, believes the compaction of previously undisturbed soils in the emergency access way would increase stormwater runoff. However, he did not calculate the difference between pre- and post-construction infiltration rates at any particular location. His opinion on this point was not persuasive.

49. Petitioners failed to prove that the proposed project will generate stormwater that will adversely affect the quality of receiving waters such that state water quality standards would be violated. The preponderance of the evidence shows the project complies with District design criteria and will not cause water quality violations.



### Soil and Sediment Contamination

50. Petitioners argue that the ERP Modification does not account for the disturbance of existing contaminants in soils and sediments that could be carried outside of the right-of-way and into OFWs. Petitioners' argument is based on investigations by their geologist, Janet Peterson, who collected soil, sediment, and surface water samples at 13 sites along the FEER rail corridor in the vicinity of OFWs, or surface waters that eventually flow into OFWs.

51. During her sampling visits, Ms. Peterson saw no visual evidence of an oil spill, fluid leak, or other release of hazardous materials.

52. Ms. Peterson compared her soil sample results to the Residential Direct Exposure Soil Cleanup Target Levels ("SCTLs") established in rule 62-777. The SCTLs are the levels at which toxicity becomes a human health concern and the residential SCTLs assume soil ingestion of 200 mg/day for children, and 100 mg/day for adults, 350 days a year, for 30 years.

53. Some of the soil sampling results showed exceedances of SCTLs, but the SCTLs are not applicable here because none of the sample sites are locations where children or adults would be expected to ingest soil at such levels for such lengths of time. Petitioners did not show that the contaminants are likely to migrate to locations where such exposure would occur.

54. Ms. Peterson compared her soil sample results to the Marine Surface Water Leachability SCTLs, but she did not develop

site-specific leachability-based SCTLs using DEP's approved methodology. Nor did she show that the proposed project will cause the soils to leach the contaminants.

55. Ms. Peterson collected sediment samples from shorelines, but not where construction activities are proposed. She compared her sediment sample results to the Florida Department of Environmental Protection's ("DEP") Sediment Quality Assessment Guidelines ("SQAGs"). These guidelines are not water quality standards. Any exceedance of these guidelines requires further analysis to determine potential water quality impacts. Ms. Peterson did not conduct the analysis.

56. Ms. Peterson acknowledged that there are numerous sources for these pollutants at or near her sample sites, such as high-traffic roads, vehicular bridges, commercial and industrial facilities, boatyards, and golf courses. She did not establish baselines or controls.

57. Ms. Peterson collected surface water samples at seven sites, some of which were located outside the FECR right-of-way. The results showed levels of phosphorous and nitrogen above the criteria for nutrients at some locations. Phosphorous, nitrogen, and the other nutrients are prevalent in the waters of Martin County and St. Lucie County and come from many sources.

58. Petitioners' evidence focused on existing conditions and not expected impacts of the proposed project. The evidence was insufficient to prove the proposed project will cause or contribute to water quality violations.

Functions Provided by Wetlands and Other Surface Waters

59. An applicant for an ERP must provide reasonable assurance that a proposed project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

60. Petitioners claim the Applicant and District should not have relied on Florida Land Use Cover and Forms Classification System ("FLUCCS") maps to identify and characterize wetlands and other habitat areas because the maps are too general and inaccurate. However, the FLUCCS maps were not used by the Applicant or District to evaluate impacts to wetlands or other habitats.

61. The Applicant began its evaluation of impacts to wetlands and other habitat areas by field-flagging and surveying the wetland and surface water boundaries in the project area using a GPS device with sub-meter accuracy. It then digitized the GPS delineations and overlaid them with the limits of construction to evaluate anticipated direct impacts to wetlands and other surface waters. The District then verified the delineations and assessments in the field.

62. The Applicant and District determined that there are a total of 4.71 acres of wetlands within the FEER right-of-way, including tidal mangroves, freshwater marsh, and wet prairie. They also determined the proposed project will directly impact 0.35 acres of wetlands, consisting of 0.09 acres of freshwater marsh and 0.26 acres of mangroves.

63. Petitioners contend that the Applicant failed to account for all of the project's wetland impacts, based on the wetland delineations made by their wetland expert, Andrew Woodruff. Most of the impacts that Mr. Woodruff believes were not accounted for are small, between 0.01 and 0.05 acres. The largest one is 0.20 acres.

64. The Applicant's delineations are more reliable than Mr. Woodruff's because the methodology employed by the Applicant had greater precision. It is more likely to be accurate.

65. Petitioners argue that the 2013 exemption and the 2015 general permit did not authorize work in wetlands and, therefore, the impacts they cause must be evaluated in this ERP Modification. However, Petitioners did not prove that there are unaccounted-for wetland impacts associated with those authorizations.

66. Any impacts associated with best management practices for erosion control, such as the installation of silt fences, would be temporary. The District does not include such temporary minor impacts in its direct, secondary, or cumulative impacts analyses.

67. Most of the wetlands that would be directly impacted by the ERP Modification are degraded due to past hydrologic alterations and soil disturbances from the original construction and historical use of the FECR railway corridor, and infestation by exotic plant species. Most of these wetlands are also

adjacent to disturbed uplands within or near the rail corridor. The functional values of most of the wetlands that would be affected have been reduced by these disturbances.

68. The Applicant provided reasonable assurance that the project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

#### Secondary Impacts

69. Section 10.2.7 of the Applicant's Handbook requires an applicant to provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed activity (a) will not cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters; (b) will not adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland-dependent listed animal species for nesting or denning by these species; (c) will not cause impacts to significant historical or archaeological resources; and (d) additional phases for which plans have been submitted, and closely linked projects regulated under chapter 373, part IV, will not cause water quality violations or adverse impacts to the functions of wetlands or other surface waters.

70. The proposed work will be entirely within the limits of the existing railway corridor where secondary impacts to wetlands and other surface waters caused by noise, vibration,

fragmentation of habitats, and barriers to wildlife have existed for decades. The preponderance of the evidence shows that any increase in these kinds of impacts would be insignificant and would not reduce the current functions being provided.

71. Because the affected wetlands are not preferred habitat for wetland-dependent, endangered, or threatened wildlife species, or species of special concern, and no such species were observed in the area, no adverse impacts to these species are expected to occur.

72. Petitioners contend that adverse impacts will occur to the gopher tortoise, scrub jay, and prickly apple cactus. These are not aquatic or wetland-dependent species. However, the preponderance of the evidence shows any increase in impacts to these species would be insignificant.

73. When the train bridges are closed, boats with masts or other components that make them too tall to pass under the train bridges must wait for the bridge to open before continuing. Petitioners contend that the current "stacking" of boats waiting for the bridges to open would worsen and would adversely impact seagrass beds and the West Indian Manatee.

74. However, it was not shown that seagrass beds are in the areas where the boats are stacking. The available manatee mortality data does not show a link between boat stacking and boat collisions with manatees. Mr. Woodruff's opinion about increased injuries to manatees caused by increased boat stacking was speculative and unpersuasive.

75. The preponderance of the evidence shows that the adverse effects on both listed and non-listed wildlife species, caused by faster and more numerous trains would be insignificant.

76. The activities associated with the 2013 exemption and the 2015 general permit for fiber optic cable were based on determinations that the activities would have minimal or insignificant adverse impacts on water resources. These determinations are not subject to challenge in this proceeding.

77. The Applicant provided reasonable assurance that the secondary impacts of the project will not cause or contribute to violations of water quality standards, adversely impact the functions of wetlands or other surface waters, adversely impact the ecological value of uplands for use by listed animal species, or cause impacts to significant historical or archaeological resources.

#### Elimination and Reduction of Impacts

78. Under section 10.2.1.1 of the Applicant's Handbook, if a proposed activity will result in adverse impacts to wetlands and other surface waters, the applicant for an ERP must implement practicable design modifications to eliminate or reduce the impacts, subject to certain exceptions that will be discussed below.

79. Petitioners argue that this rule requires the Applicant and District to evaluate the practicability of alternative routes through the region, routes other than the existing railway corridor in Segment D09. As explained in the Conclusions of Law,

that argument is rejected. The evaluation of project modifications to avoid impacts was appropriately confined to the railway corridor in Segment D09.

80. The Applicant implemented practicable design modifications in the project area to reduce or eliminate impacts to wetlands and other surface waters. Those modifications included the shifting of track alignments, the elimination of certain third-track segments, and the elimination of some proposed access way modifications.

81. However, the project qualified under both "opt out" criteria in section 10.2.1.2 of the Applicant's Handbook so that design modifications to reduce or eliminate impacts were not required: (1) The ecological value of the functions provided by the area of wetland or surface water to be adversely affected is low, and the proposed mitigation will provide greater long-term ecological value; and (2) the applicant proposes mitigation that implements all or part of a plan that provides regional ecological value and provides greater long-term ecological value.

#### Mitigation

82. The Applicant proposes to mitigate for impacts to wetlands by purchasing mitigation credits from four District-approved mitigation banks: the Bluefield Ranch, Bear Point, Loxahatchee, and F.P.L. Everglades Mitigation Banks. Each is a regional off-site mitigation area which implements a detailed management plan and provides regional long-term ecological value.



83. The number of mitigation credits needed to offset loss of function from impacts to wetlands was calculated using the Modified Wetland Rapid Assessment Procedure ("MWRAP") or Wetland Assessment Technique for Environmental Review ("WATER"), as prescribed in the state permit for each mitigation bank. Applying these methods, the Applicant is required to purchase 0.21 mitigation credits.

84. The Applicant proposed to mitigate the adverse impacts to freshwater marsh wetlands by purchasing 0.01 freshwater herbaceous credits from the Bluefield Ranch Mitigation Bank, and 0.06 freshwater herbaceous credits from the Loxahatchee Mitigation Bank. The adverse impacts to tidal mangrove wetlands would be mitigated by purchasing 0.12 saltwater credits from the Bear Point Mitigation Bank, and 0.02 saltwater credits from the F.P.L. Everglades Mitigation Bank.

85. The Applicant committed to purchase an additional 0.29 freshwater herbaceous credits from the Bluefield Ranch Mitigation Bank, for a total of 0.50 mitigation credits.

86. The proposed mitigation implements a plan that will provide greater long-term ecological value than is provided by the wetlands that will be impacted.

87. The Applicant proved by a preponderance of the evidence that the project complies with the District's mitigation requirements.

### Cumulative Impacts

88. To obtain an ERP, an applicant must provide reasonable assurance that a regulated activity will not result in unacceptable cumulative impacts to water resources. This assurance can be provided by proposing to fully mitigate the impacts within the same basin. However, when an applicant proposes mitigation in another drainage basin, the applicant must demonstrate that the regulated activity will not cause unacceptable cumulative impacts.

89. The proposed project will adversely impact 0.02 acres of freshwater marsh wetlands and 0.21 acres of tidal mangrove wetlands in the St. Lucie River basin. The impacts to the freshwater marshes must be mitigated out-of-basin because there are no mitigation banks in the basin which offer freshwater herbaceous mitigation credits.

90. The proposed project will adversely impact 0.07 acres of the freshwater marshes and 0.05 acres of the mangrove wetlands in the Loxahatchee River basin. Those impacts must also be mitigated out-of-basin because there are no mitigation banks in the Loxahatchee River basin.

91. Because some of the Applicant's proposed mitigation must be provided out-of-basin, the ERP application included a cumulative impact analysis. The analysis evaluated whether the proposed project, when considered in conjunction with other possible development within the St. Lucie River and Loxahatchee

River drainage basins, would result in unacceptable cumulative impacts considering each basin as a whole.

92. There are approximately 10,068 acres of freshwater marshes within the St. Lucie basin, of which an estimated 4,929 acres are not preserved and would be at risk of potential future development. The proposed project will adversely impact 0.02 of those acres, which is only 0.0004 percent of the total at-risk acreage.

93. There are about 34,000 acres of freshwater marshes within the Loxahatchee River basin, of which an estimated 7,463 acres are at risk of future development, and approximately 564 acres of tidal mangrove wetlands, of which an estimated 75 acres are at risk of future development. The project will adversely impact 0.07 acres of the freshwater marshes (0.0009 percent), and 0.05 acres of the tidal mangrove wetlands (0.0667 percent).

94. Petitioners contend the Applicant's analysis did not account for impacts from proposed activities authorized in the 2013 and 2015 general permit. However, Petitioners failed to prove there are unaccounted-for wetland impacts.

95. The preponderance of the evidence supports the District's determination that the proposed project will not cause unacceptable cumulative impacts to wetlands and other surface waters.

Public Interest

96. When an applicant seeks authorization for a regulated activity in, on, or over wetlands or surface waters, it must provide reasonable assurance that the activity will not be contrary to the public interest, or if the activity is within or significantly degrades an OFW, is clearly in the public interest, as determined by balancing the following criteria set forth in section 373.414(1)(a):

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

97. The proposed work is not within an OFW, but entirely within the FECR corridor. The potential for overland flow and

indirect impacts to OFWs is addressed by additional treatment of the stormwater prior to discharge. The proposed project would not significantly degrade an OFW. Therefore, the applicable inquiry is whether the project is contrary to the public interest.

Factor 1: Public Safety, Safety, and Welfare

98. Petitioners contend that the proposed project will adversely affect public health, safety, and welfare by impacting water quantity, water quality, and certain non-environmental matters such as emergency response times, traffic congestion, and potential train collisions with pedestrians and vehicles.

99. Potential environmental impacts have been addressed above and, by a preponderance of the evidence, the District and the Applicant showed that such impacts would be insignificant or would be mitigated.

100. As to the potential for non-environmental impacts associated with train operations, it is explained in the Conclusions of Law that the public interest test does not include consideration of non-environmental factors other than those expressly articulated in the statute, such as navigation and preservation of historical or archaeological resources. However, because evidence of non-environmental impacts was admitted at the final hearing, the issues raised by Petitioners will be briefly addressed below.

101. The regulatory agency with specific responsibility for railroad safety is the Federal Railroad Administration ("FRA"). The FRA reviewed the safety features associated with the proposed passenger train operations, and approved them.

102. Public safety will be enhanced at roadway crossings because of the proposed improvements and the use of modern technology in monitoring and managing the movement of trains.

103. Petitioners contend that the addition of the passenger rail service will impede emergency response times in Martin County and St. Lucie County due to more frequent roadway closures. However, freight trains currently impede emergency response times due to their length and slow speed. The passenger trains will be much shorter in length and faster so that roadway crossing closures for passing passenger trains will be much shorter than for freight trains. The ERP Modification and 2017 Exemption do not affect freight train operations. The preponderance of the evidence shows that passenger rail service is unlikely to cause a material increase in the occurrence of circumstances where an emergency responder is impeded by a train. The current problem must be addressed through changes in freight train operations.

104. Petitioners also contend that the passenger rail service will interfere with hurricane evacuation. The persuasive evidence does not support that contention. Train service would cease when a hurricane is approaching.

105. Petitioners contend the trains will have to be "staged" on either side of the two moveable bridges while other trains cross, thereby blocking road intersections. However, this was a matter of speculation. The Applicant does not propose or want to stage trains at the bridges.

106. Petitioners contend that the project will cause hazards to boaters on the St. Lucie River because there will be more times when the train bridge will be closed to allow the passage of passenger trains. Although there were many statistics presented about the number of boats affected, the evidence was largely anecdotal with respect to the current hazard associated with boaters waiting for the passage of freight trains and speculative as to the expected increase in the hazard if shorter and faster passenger trains are added.

#### Factor 2: Conservation of Fish and Wildlife

107. As previously found, the proposed activities will not adversely affect the conservation of fish and wildlife, including threatened or endangered species. The preponderance of the evidence shows the project will have only insignificant adverse impacts on water resources and wildlife.

#### Factor 3: Navigation of the Flow of Water

108. Petitioners claim the project will hinder navigation on the St. Lucie and Loxahatchee Rivers because of the increase in bridge closures if passenger trains are added. The U.S. Coast Guard is the agency with clear authority to regulate the opening

and closing of moveable train bridges over navigable waters in the interests of navigation. Petitioners' insistence that the District address the bridge openings is novel. No instance was identified by the parties where this District, any other water management district, or DEP has attempted through an ERP to dictate how frequently a railroad bridge must open to accommodate boat traffic.

109. The Coast Guard is currently reviewing the project's potential impacts on navigation and will make a determination about the operation of the moveable bridges. It has already made such a determination for the moveable bridge which crosses the New River in Ft. Lauderdale.

110. Petitioners point to section 10.2.3.3 of the Applicant's Handbook, which states that the District can consider an applicant's Coast Guard permit, and suggest that this shows the District is not limited to what the Coast Guard has required. However, Section 10.2.3.3 explains the navigation criterion in terms of preventing encroachments into channels and improving channel markings, neither of which encompasses the regulation of train bridges.

111. The preponderance of the evidence shows the project would not cause harmful erosion or shoaling or adversely affect the flow of water.



Factor 4: Fishing, Recreational Values, and Marine Productivity

112. The preponderance of the evidence shows that there would be no adverse impacts or only insignificant impacts to fishing or recreational values and marine productivity.

Factor 5: Permanent Impact

113. The proposed project will have both temporary and permanent impacts. The temporary impacts include the installation of silt fences and turbidity barriers designed to reduce water quality impacts and impacts to functions provided by wetlands and surface waters. The impacts due to track installation, construction and rehabilitation of the non-moveable bridges, at-grade crossing improvements, and stormwater system improvements are permanent in nature. The permanent impacts have been minimized and mitigated.

Factor 6: Historical or Archaeological Resources

114. Petitioners do not contend that the project will adversely affect significant historical or archaeological resources.

Factor 7: Wetland Functions in Areas Affected

115. Because the proposed work is within the limits of an existing railway corridor where impacts have been occurring for decades, and the majority of the wetlands to be affected are of a low to moderate quality, there would be only a small loss of functional values and that loss would be fully mitigated.

### Public Interest Summary

116. When the seven public interest factors are considered and balanced, the proposed project is not contrary to the public interest. Even if Petitioners' non-environmental issues are included, the project is not contrary to the public interest.

### Compliance With Other Permit Conditions

117. The project is capable, based on accepted engineering and scientific principles, of performing and functioning as proposed.

118. The Applicant demonstrated sufficient real property interests over the lands upon which project activities will be conducted. It obtained the required consent for proposed activities relating to bridge crossings over state-owned submerged lands.

119. The Applicant provided reasonable assurance of compliance with all other applicable permit criteria.

### Exemption Verification for Roadway Crossings

120. The Applicant's ERP application included a mixture of activities which required an individual permit, as well as activities in roadway crossings which the Applicant claimed were exempt from permitting. Pursuant to section 5.5.3.4 of the Applicant's Handbook, the Applicant requested a verification of exemption as to certain work to be done within 23 of those 24 roadway crossings. The District determined that the improvements for which an exemption was sought were exempt from permitting under rule 62-330.051(4)(c) for minor roadway safety

construction, rule 62-330.051(4) (d) resurfacing of paved roads, and rule 62-330.051(10) for “construction, alteration, maintenance, removal or abandonment of recreational paths for pedestrians, bicycles, and golf carts.”

121. The preponderance of the evidence shows the proposed work qualifies for exemption under these rules.

#### CONCLUSIONS OF LAW

##### Jurisdiction

122. DOAH has jurisdiction over the parties and the subject matter of this proceeding. See § 120.569, Fla. Stat.

123. This is a de novo proceeding designed to formulate final agency action. See § 120.57(1) (k), Fla. Stat. (2017); Capeletti Bros. v. Dep’t of Gen. Servs., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

##### Standing

124. Respondents stipulated that Petitioners and Intervenor have substantial interests which could be affected by the proposed activities within their respective geographic limits. Therefore, Petitioners and Intervenor have standing to challenge the ERP Modification and 2017 Exemption. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

125. Petitioners lack standing to challenge proposed activities outside their respective boundaries unless they can show an injury within their boundaries. See Osceola Cnty. v. St. Johns River Water Mgmt. Dist., 486 So. 2d 616, 617 (Fla. 5th DCA

1986); Vill. of Key Biscayne v. Dep't of Env'tl. Prot., 206 So. 3d 788, 790 (Fla. 3d DCA 2016) (A municipality must demonstrate an interest that exceeds the general interest of its citizens.).

Burden and Standard of Proof

126. The ERP Modification is a license issued pursuant to chapter 373 and, therefore, this proceeding is governed by section 120.569(2)(p), Florida Statutes, which provides for an abbreviated procedure for satisfying an applicant's prima facie case that it is entitled to a permit, and places the burden of ultimate persuasion on the challenger to prove its case in opposition to the permit.

127. Modifications can be made to an application after an agency issues its notice of intent to approve or deny a permit, even during the course of a final hearing, as long as due process is preserved. The modifications made by the Applicant before the final hearing and during the course of the hearing were made without violating the due process rights of Petitioners and Intervenor to prepare and offer evidence in rebuttal.

128. The 2017 Exemption Verification was also issued pursuant to chapter 373. It meets the definition of a license in section 120.52(10) because it is an authorization required by law. It is required by section 5.5.3.4 of the Applicant's Handbook. Therefore, the 2017 Exemption is subject to the abbreviated presentation and burden-shifting described in section 120.569(2)(p).

129. The Applicant made a prima facie showing that it meets all applicable requirements for issuance of the ERP Modification and the 2017 Exemption by entering into evidence the ERP application and supporting materials, the District's original and proposed amended staff reports, the request for verification of exemption and supporting materials, and the District's notice of intent to issue the permit and exemption. Therefore, Petitioners have the burden of ultimate persuasion in their case in opposition to the permit and exemption.

130. A challenger cannot meet its burden of ultimate persuasion merely by showing that the applicant's information does not preclude the possibility of contrary physical factors or effects. The challenger must prove by competent and substantial evidence that reasonable assurance has not been provided. Id.

131. Section 120.569(2)(p) does not mention surrebuttal, but judges have the discretion to allow surrebuttal when appropriate. Surrebuttal was determined to be appropriate in this case and was granted to Petitioners.

132. The applicable standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. (2017). Petitioners and Intervenor must prove by a preponderance of the evidence that the Applicant did not provide reasonable assurance of compliance with applicable requirements.

133. The term "reasonable assurance" means a demonstration that there is a substantial likelihood of compliance with

standards. See Metro. Dade Cnty. v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). It does not require absolute guarantees. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 117 (Fla. 2d DCA 1997).

"Segmentation"

134. The District's interpretation of Section 1.5.2 of the Applicant's Handbook, as not prohibiting the separate review of related activities that qualify for an exemption, general permit, or individual permit, is a reasonable interpretation of the rule. It is also consistent with section 5.5.3.4, which specifically allows for both permits and exemptions for related activities. The District was not required by section 1.5.2 to review as part of a single individual ERP permit application, the activities covered by the 2013 exemption, 2015 general permit, and 2017 Exemption.

135. The 2013 exemption was issued pursuant to section 373.406(6), which provides for the exemption from permitting of activities that the district determines will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district. The 2015 general permit was issued pursuant to rule 62-330.401, which is also for activities the District has determined will cause minimal individual and cumulative adverse impacts to the water resources. The minimal impacts from these activities and the 2017 Exemption do not require mitigation by the Applicant and do not have to be considered in the cumulative impacts analysis.

### ERP Criteria

136. For an applicant to be entitled to an ERP, it must provide reasonable assurance that the proposed activities meet the conditions for issuance set forth in rules 62-330.301 and 62-330.302, and the applicable provisions within the Applicant's Handbook, Volumes I and II.

137. Petitioners contend the Applicant and FECR failed to comply with rules 62-330.301(1)(a)-(f), (i), and (k), and rules 62-330.302(1)(a)(1)-(5) and (7), (1)(b), and (1)(c).

### Water Quantity

138. Rules 62-330.301(1)(a), (b), and (c) require reasonable assurance that the construction, operation, and maintenance of a proposed project will not cause adverse water quantity impacts to receiving waters and adjacent lands, adverse flooding to on-site or off-site property, or adverse impacts to surface water storage and conveyance capabilities.

139. The Applicant provided reasonable assurance of compliance with all applicable rules for managing water quantity and preventing flooding.

### Water Quality Impacts

140. Rule 62-330.301(1)(e) requires reasonable assurance that the construction, operation, and maintenance of a project will not adversely affect the quality of receiving waters such that state water quality standards, including anti-degradation standards and any special standards for OFWs, would be violated.

141. The proposed project complies with District design criteria for water quality protection, creating a presumption that the proposed project meets state water quality standards. See Applicant's Handbook, Vol. I, § 8.3.3, Vol. II, § 4.1.1. Petitioners failed to rebut that presumption.

142. The Applicant provided reasonable assurance of compliance with all applicable District requirements to protect water quality.

#### Functions Provided by Water Resources

143. Rules 62-330.301(1)(d) and (f) require reasonable assurance that a proposed project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and surface waters, or cause adverse secondary impacts to water resources.

144. In evaluating compliance with these rules and corresponding provisions of the Applicant's Handbook, de minimis or remotely related secondary impacts are not considered. See Applicant's Handbook, Vol. I, §§ 10.2.2, 10.2.7.

145. The Applicant provided reasonable assurance of compliance with all applicable requirements to protect water resource functions, taking into account secondary impacts.

#### Elimination and Reduction of Impacts

146. Section 10.2.1.1 of the Applicant's Handbook requires an applicant to implement practicable design modifications to eliminate or reduce impacts to wetlands and other surface waters,



unless the applicant qualifies to "opt out" pursuant to Section 10.2.1.2.

147. The requirement of Section 10.2.1 that an applicant consider "alignment alternatives" to avoid or reduce impacts does not require an evaluation of alternative routes in other areas of the region or state. An applicant's selection of a linear route involves many factors other than potential impacts on water resources, not least of which is project costs. The District cannot force an applicant to choose a route based on a single factor -- impacts on water resources -- solely because water resources are the basis of the District's regulatory jurisdiction. In this case, the evaluation of measures to eliminate or reduce water resource impacts was appropriately confined to the railway corridor in Segment D09, within which the project is proposed.

148. The Applicant implemented practicable design modifications to eliminate or reduce impacts to wetlands and other surface waters. Furthermore, the Applicant qualified under the opt out provisions of section 10.2.1.2 so that it was not required to implement design modifications. The Applicant showed that the ecological value of the functions provided by the impacted wetlands and other surface waters is low, and that the proposed mitigation is part of a plan that will provide greater regional long-term ecological value.

### Mitigation

149. If a proposed activity will cause a net adverse impact to the functions of wetlands or other surface waters, the impact must be offset by mitigation. See A.H. Vol. I, § 10.2.1.

150. Petitioners failed to prove that the Applicant's proposed mitigation is inadequate. The preponderance of the evidence supports the District's determination that adverse impacts will be fully offset by mitigation.

### Cumulative Impacts

151. Rule 62-330.302(1)(b) requires reasonable assurance that a regulated activity will not result in unacceptable cumulative impacts to wetlands and other surface waters. By a preponderance of the evidence, the Applicant showed that it satisfied this requirement.

### Public Interest

152. Under section 373.414(1)(a), an applicant proposing to engage in a regulated activity in, on, or over wetlands or surface waters must provide reasonable assurance that the activity will not be contrary to the public interest, or if the activity is within or significantly degrades an OFW, is clearly in the public interest. The Applicant's proposed project will not be within or significantly degrade an OFW, so the relevant showing is that the project is not contrary to the public interest.

153. The rules that govern the public interest test refer only to the "regulated activity." See § 373.414(1)(a), Fla. Stat.; Fla. Admin. Code R. 62-330.302(1)(a); Applicant's

Handbook, Vol. I, §§ 10.1.1(b). Section 2.0(a)(2) of the Applicant's Handbook defines the term "activity" to mean the construction, alteration, operation, maintenance, abandonment, or removal of any stormwater management system. For the ERP Modification, the "regulated activity" consists of the construction and operation of a stormwater management system and certain culvert and bridge modifications.

154. However, Petitioners and Intervenor were allowed to argue and present evidence in support of their position that the public interest test requires the District to consider non-environmental matters, especially public safety associated with the operation of high-speed passenger trains. A considerable amount of the final hearing was taken up with these matters.

155. The public interest test was created in 1985 and first codified in section 403.918. When the ERP Program was adopted in 1993, the public interest test was transferred to section 373.414(1). The "whereas" clauses in the law as it appeared in chapter 93-213, Laws of Florida, have environmental themes.

156. In section 373.414(1), the Legislature added a preamble stating that the test is to be "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."

§ 373.414(1), Fla. Stat. (1993). The overall objectives of a district relate to water resources, their management and

protection for flood control, water supply, and maintaining environmental quality. See § 373.016(3), Fla. Stat. (2017).

157. In a 2011 report of the Senate Committee on Environmental Preservation and Conservation regarding the ERP Program, it is stated that the first public interest criterion "considers only environmental factors, not economic or social factors." Fla. S. Comm. on Envntl. Pres. & Conservation, Statewide ERP Interim Report 2012-121, at 3 n.18 (2011).

158. The District's interpretation of the public interest test to limit the question "[w]hether the activity will adversely affect the public health, safety, or welfare of the property of others" to consideration of only environmental issues is clearly shown in Section 10.2.3.1 of the Applicant's Handbook:

In reviewing and balancing the criterion regarding public health, safety, welfare and the property of others in section 10.2.3(a), above, the Agency will evaluate whether the regulated activity located in, on, or over wetlands or other surface waters will cause:

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project. Examples of these issues include: mosquito control; proper disposal of solid, hazardous, domestic or industrial waste; aids to navigation; hurricane preparedness or cleanup; environmental remediation, enhancement or restoration; and similar environmentally related issues. For example, the installation of navigational aids may improve public safety and may reduce impacts to public resources;

(b) Impacts to areas classified by the Department of Agriculture and Consumer Services as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting. Activities that would cause closure or a more restrictive classification or management plan for a shellfish harvesting area would result in a negative factor in the public interest balance with respect to this criterion;

(c) Flooding or alleviate existing flooding on the property of others. There is at least a neutral factor in the public interest balance with respect to the potential for causing or alleviating flooding problems if the applicant meets the water quantity criteria in Part III of Volume II; and

(d) Environmental impacts to the property of others. For example, construction of a ditch that lowers the water table such that off-site wetlands or other surface waters would be partly or fully drained would be an environmental impact to the property of others. The Agency will not consider impacts to property values.

159. In construing the public interest test in section 403.918, the First District Court held that the reference to impacts on the "property of others" is confined to environmental impacts. Miller v. Dep't of Env't'l Reg., 504 So. 2d 1325, 1327 (Fla. 1st DCA 1987).

160. In Save Anna Maria, Inc. v. Department of Transportation, 700 So. 2d 113, 116 (Fla 2d DCA 1997), the Second District Court held that the "[r]eview of the public interest criteria is limited to environmental impacts."

161. Although the case of Avatar Development Corporation v. State, 723 So. 2d 199, 207 (Fla. 1998), involved a challenge to

DEP's authority to enforce permit conditions, the opinion of the Supreme Court is important for this discussion. In Avatar, the appellant argued that DEP's authority to enforce permit conditions pursuant to section 403.161 was an unconstitutional delegation of legislative authority because DEP was not adequately guided by statute. In holding that the Legislature had provided sufficient guidance for the exercise of DEP's authority, the Court pointed to the "specific policies" in section 403.021. Those policies relate exclusively to environmental matters. The Court noted that the public interest test in section 373.414 allows DEP to consider public health, safety, and welfare, but explained that DEP's authority is limited to "specific legislative intent" and gave examples of this intent in provisions of chapter 403 that articulate specific environmental objectives.

162. In Avatar, the Supreme Court determined that, despite the expansive connotation that may be associated with "public health, safety, and welfare," these words must be given a limited meaning in section 373.414 in order for the Legislature's delegation of authority to be constitutional. The delegation is constitutional because DEP's authority (and the authority of the water management districts) is limited to environmental matters for which there is legislative guidance in the statutes. There are no "specific policies" and there is no "specific legislative intent" in chapters 373 or 403 to guide DEP or the water management districts in making regulatory decisions based on non-

environmental factors associated with public health, safety, and welfare.

163. In Florida Wildlife Federation v. South Florida Water Management District, Case No. 04-3064 (Fla. DOAH Dec. 03, 2004; SFWMD Dec. 08, 2004), the Administrative Law Judge rejected an attempt to interject non-environmental factors in the public interest analysis:

The application of the public interest test does not involve consideration of non-environmental factors other than those expressly set forth in the statute such as navigation or preservation of historical or archaeological resources. Specifically, traffic concerns, congestion, quality of rural life, and school overcrowding are *not* within the seven factors contained in Section 373.414(1) (a).

R.O. at 49, ¶ 116. The District adopted the Recommended Order in toto, and the Fourth District Court affirmed per curiam, without opinion. Fla. Wildlife Fed. v. So. Fla. Water Mgmt. Dist., 902 So. 2d 812 (Fla. 4th DCA 2005).

164. Despite the case law, administrative orders have not been consistent on this issue. Some agency orders that were not appealed did not follow the judicial precedent. See e.g., Goldberg v. So. Fla. Water Mgmt. Dist., Case No. 16-1018 (Fla. DOAH Nov. 8, 2016; SFWMD Jan. 10, 2017) (concluding that public health, safety, and welfare allowed consideration of the public safety benefits of a proposed roadway project).

165. Although administrative orders addressing this issue have not been consistent, it is concluded that the consideration

of public health, safety, and welfare must be confined to environmental matters.

166. The preponderance of the record evidence shows the proposed project is not contrary to the public interest, even if Petitioners' and Intervenor's non-environmental factors are also considered.

#### Other ERP Criteria

167. The Applicant provided reasonable assurance of compliance with all other applicable permit criteria.

168. The Applicant demonstrated its entitlement to the ERP Modification.

#### The Exemption

169. Petitioners argue that the Applicant does not qualify for the 2017 Exemption issued under rule 62-330.051(4)(c), which applies to "minor roadway safety construction," because Petitioners claim the proposed work will not make the crossings safe. However, to qualify for this exemption, it is only necessary to show that the proposed work meets the description of "minor roadway safety construction." It is unnecessary to demonstrate how safe the resulting improvements will be. That is not within the District's expertise and is appropriately left to other agencies to determine. The proposed roadway crossing improvements meet the description in the rule and qualify for the exemption.

170. The Applicant demonstrated that it qualifies for the 2017 Exemption.



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 that:

(1) approves Environmental Resource Permit Modification No. 13-05321-P on the terms and conditions set forth in the District's Corrected Proposed Amended Staff Report of May 11, 2017; and

(2) approves the Verification of Exemption dated March 31, 2017.

DONE AND ENTERED this 29th day of September, 2017, in Tallahassee, Leon County, Florida.



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BRAM D. E. CANTER  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of September, 2017.

ENDNOTE

<sup>1/</sup> All references to the Applicant's Handbook are to Volume I unless otherwise indicated.

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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.