STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PELICAN ISLAND AUDUBON SOCIETY, GARRETT BEWKES, NED SHERWOOD, ORIN R. SMITH, STEPHANIE SMITH, AND CAROLYN STUTT,

Petitioners,

vs.

OCULINA BANK CORPORATION AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

OGC CASE NO. 15-0044
DOAH CASE NO. 15-0576

CONSOLIDATED FINAL ORDER

On June 1, 2016, an Administrative Law Judge (ALJ) with the Division of Administrative Hearings (DOAH) submitted a Recommended Order (RO) to the Department of Environmental Protection (DEP or Department) in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO was sent to counsel for the Petitioners, Pelican Island Audubon Society, Garrett Bewkes, Ned Sherwood, Orin R. Smith, Stephanie Smith, and Carolyn Stutt (Petitioners), and to counsel for the Respondents Oculina Bank Corporation (Oculina Bank) and DEP. On June 16, DEP filed its Exception to the RO and on June 27, the Petitioners' filed their Response to DEP's Exception. The Respondent Oculina Bank did

not file any exceptions, nor did the Petitioners. This matter is now on administrative review before the Secretary of the Department for final agency action.[1]

BACKGROUND

Respondent Oculina Bank has an undivided ownership interest in the project site located on the western shoreline of the Indian River Lagoon (Lagoon), where it intends to construct single-family homes, docks, and an access drive. The Indian River Mosquito Control District impounded the project site in the 1950s by excavating ditches and building earthen berms along the site boundaries. The impoundment berms decreased the frequency and duration of the project site's inundation by waters from the Lagoon. Oculina Bank's proposed project included a proposal to scrape down the impoundment berm to 0.78 feet or mean high water.

In February 2012, DEP gave notice of its intent to issue to Oculina Bank an Environmental Resource Permit and Sovereign Submerged Lands Authorization. Orin R. Smith, Stephanie Smith, Carolyn Stutt, and Robert Prosser jointly filed a petition challenging the permit. Michael Casale and E. Garrett Bewkes filed separate petitions. After referral to DOAH, the petitions were assigned DOAH Case Nos. 12-1227, 12-1228, and 12-1229 and consolidated (Oculina I).[2] Following an administrative hearing, DEP issued a Consolidated Final Order adopting the ALJ's recommendation to deny the permit because of potential adverse impacts to the refuge and nursery functions of the

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[1] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

[2] *Michael Casale, et al. v. Oculina Bank and Dep't of Envtl. Protection,* Case Nos. 12-1227, etc. (Fla. DOAH, April 19, 2013; Fla. DEP, August 21, 2013.

wetlands, specifically related to tarpon and snook, and potential impacts to the rivulus marmoratus, another species of fish.

In March 2014, Oculina Bank re-applied for an Environmental Resource Permit and Sovereign Submerged Lands Authorization (Permit). The Department gave notice of its intent to issue the Permit on January 7, 2015 (DEP File No. 31-0294393-003-EI). Pelican Island Audubon Society, Garrett Bewkes, Ned Sherwood, Orin R. Smith, Stephanie Smith, and Carolyn L. Stutt filed a petition challenging the permit. After limiting the issues in this new proceeding, the ALJ conducted a final hearing in March 2016. The parties filed proposed recommended orders and the ALJ, subsequently issued the RO on June 1, 2016.

SUMMARY OF THE RECOMMENDED ORDER

In the RO, the ALJ recommended that the Department enter a final order issuing the Permit, with three specific modifications to the project's proposed mitigation. (RO at page 25). The ALJ further recommended that without the modifications, the Permit should be denied. (RO at page 25). The ALJ concluded that modification of the proposed Permit as recommended, results in a proposed project with adequate on-site mitigation to offset all direct impacts and secondary impacts. (RO ¶ 87). The three modifications recommended by the ALJ are:

1. The impoundment berm will not be scraped down to mean sea level, but instead, two new low spots will be created in the impoundment berm at an elevation of approximately 2.0 feet.

2. A new isolated pond will be created to replace the one that will be eliminated by the construction, similar in size to the one that will be eliminated.

3. Internal ditches and other channels will be filled as needed to eliminate predator access to the ponds. (RO at page 25).

Standing

The ALJ found that the Respondents did not contest the standing of Petitioners. The ALJ noted that Carolyn Stutt and Garrett Bewkes had standing in Oculina I and determined that they have standing in this proceeding. The ALJ found that Orin Smith and Stephanie Smith did not present evidence to establish their substantial interests in Oculina I or in this current proceeding, and, therefore, did not make the necessary showing for standing. The ALJ determined that Pelican Island Audubon Society made the showing required under section 403.412([6]), Florida Statutes, and, therefore, has standing. (RO ¶¶ 60, 61, 62).

Res judicata and collateral estoppel

The ALJ concluded that the doctrines of res judicata and collateral estoppel applied in this proceeding to limit the issues. A number of disputed issues were determined in Oculina I and therefore, the Petitioners were barred from re-litigating those issues in this proceeding. (RO ¶¶ 67, 68, 69). The ALJ noted that in Oculina I there was competent evidence to show that the wetlands on the project site are probably used by the mangrove rivulus and by larval tarpon, and Oculina Bank did not rebut that evidence. (RO ¶ 70).

ERP criteria - this proceeding

The ALJ found that in this proceeding, new evidence established the habitat needs of these fish and the site features and hydrologic conditions that affect the quality of the habitat. (RO ¶¶ 41-53, 70). The ALJ found that "Oculina Bank's proposal to

scrape down the impoundment berm would eliminate many crab burrows, which are habitat for the rivulus. (RO ¶ 45). The ALJ found that "[t]he nursery and refuge functions of the wetlands on the project site relate primarily to larval tarpon," and that "[t]he shallow ponds . . . are an important habitat type that can be used by larval tarpon when related hydrologic conditions are compatible." (RO ¶¶ 49 and 50).

The ALJ found that the project site's current hydrologic conditions diminish the value of the nursery and refuge functions provided by the wetlands. Thus, improving the connection to the Indian River Lagoon can enhance the tarpon nursery function if achieved without giving predators access to the interior ponds. (RO ¶ 51 and 52). Therefore, the ALJ concluded that the recommended modifications to the project will mitigate for the loss of habitat for rivulus and tarpon because there will be a net gain in the functional value of the habitat for these fish. (RO ¶¶ 53, 70, 74-76, 79, 81, 84).

Ultimately, the ALJ concluded that if the proposed Permit is modified as recommended, the proposed project is not contrary to the public interest under the public interest criteria in section 373.414(1)(a), Florida Statutes. (RO ¶¶ 77-85).

Sovereignty Submerged Lands Authorization

The ALJ noted that in Oculina I the facts and law supported the determination that Oculina Bank met all applicable criteria to obtain authorization for use of sovereignty submerged lands for the proposed docks. The ALJ found that the facts and law have not changed. (RO ¶ 88).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the

agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." § 120.57(1)(l), Fla. Stat. (2012); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *See, e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); *Nunez v. Nunez,* 29 So. 3d 1191, 1192 (Fla. 5th DCA 2010).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.,* 652 So. 2d 894 (Fla. 2d DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See, e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). If there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So. 2d 622 (Fla. 1st DCA 1986).

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting the decision. *See, e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof'l Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Properties v. Fla. Land and Water Adjudicatory Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law," in order to modify or overturn

what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

An agency's review of the legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte Cty. v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004). An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). The Department is charged with enforcing and interpreting chapter 373 of the Florida Statutes. Thus, chapter 373 of the Florida Statutes is within the Department's regulatory jurisdiction and expertise. *See Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla.*

Power & Light Co. v. Fla. Siting Bd., 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609.

<u>RULINGS ON EXCEPTIONS</u>

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2015); *Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994).

<u>DEP'S EXCEPTION</u>

The DEP takes exception to the second sentence in paragraph 58 of the RO, where the ALJ found:

> 58. The [Uniform Mitigation Assessment Method (UMAM)] analysis performed by DEP did not adequately account for

> the lost tarpon nursery function and the proposed mitigation could further diminish the nursery function. The purchase of mitigation bank credits would not offset the lost nursery function because the mitigation bank was not shown to provide a nursery function.(emphasis added).

The DEP argues that the second sentence of paragraph 58 "should be treated as a conclusion of law, because the ALJ is offering an interpretation of Sections 10.2.8 and 10.3.1.2 of the Applicant's Handbook." *See* DEP's Exception at page 1. The DEP further argues, "[i]mpacts to wetlands may be appropriately offset through the use of mitigation bank credits." *Id.*

Contrary to the DEP's argument, paragraph 58 contains the ALJ's ultimate findings of fact. As a factual finding, the second sentence of paragraph 58 is supported by competent substantial record evidence in the form of expert testimony from the Petitioners' witness, Anthony Miller, an expert in wetlands ecology. Mr. Miller was asked his opinion regarding whether the purchase of credits from the CGW Mitigation Bank provide appropriate mitigation for the impacts to tarpon nursery habitat. Mr. Miller opined that the purpose of the hydrological alterations associated with the CGW bank to increase water depths throughout the site would allow access to juvenile tarpon by predatory fish. (T. Vol. III, pp. 253-257). In addition, Dr. Gilmore, an expert in Ichthyology and marine and estuarine fish ecology, testified that, "[t]hese particular locations for larval tarpon, now that we know more about it, are very limited. And the loss of any one of these I think would be deleterious, it would be a net loss of tarpon habitat." (T. Vol. II, p. 158).

Therefore, the DEP's Exception is denied because the ALJ's factual finding is supported by competent substantial record evidence. *See* § 120.57(1)(l), Fla. Stat. (2015).

CONCLUSION

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996). In this proceeding, the ALJ determined that if the proposed Permit is modified with the three proposals, the permitting criteria are met. (RO ¶¶ 77-85, 87). *See, e.g., Hopwood v. Dep't of Envtl. Reg.,* 402 So. 2d 1296, 1299 (Fla. 1st DCA 1981) ("[T]he permit application, if modified according to the [ALJ's] proposals, would meet applicable state standards . . ."). The ALJ's three proposals are supported by competent substantial record evidence (Gilmore T. Vol. II, p. 162, lines 10-14; Dennis T. Vol. IV, p. 406-407). In fact, in its proposed recommended order, Oculina Bank proposed the three modifications as an "optional revision to the proposed project." *See* Respondent Oculina Bank's Proposed Recommended Order at page 13, ¶ 37, filed on May 2, 2016. In its proposed recommended order the DEP's proposed recommendation also set forth the three modifications as an alternative. See DEP's Proposed Recommended Order at page 22. Finally, the parties did not file any exceptions to the ALJ's conclusions in paragraphs 77-85 and 87 of the RO, nor the recommendation on page 25.

Having considered the applicable law and standards of review in light of the findings and conclusions set forth in the RO, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. Oculina Bank's Permit application in DEP File No. 31-0294393-003-EI, as modified by the ALJ's three proposals, is GRANTED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal under Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 14th day of July, 2016, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

JONATHAN P. STEVERSON
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Deputy CLERK 7/14/16 DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order was sent by electronic mail to the following:

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and by electronic filing to:

Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
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this 14th day of July, 2016.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PELICAN ISLAND AUDUBON SOCIETY,
GARRETT BEWKES, NED SHERWOOD,
ORIN R. SMITH, STEPHANIE SMITH,
AND CAROLYN STUTT,

Petitioners,

vs. Case No. 15-0576

OCULINA BANK CORPORATION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_______________________________/

RECOMMENDED ORDER

The final hearing in this case was held on March 15 and 16, 2016, in Vero Beach, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners: Marcy I. LaHart, Esquire
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For Respondent Oculina Bank Corporation:

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EXHIBIT A

For Respondent Department of Environmental Protection:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Respondent Oculina Bank is entitled to a Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization to construct three single-family homes, an access drive, surface water management system, and three single-family docks in Indian River County.

PRELIMINARY STATEMENT

In February 2012, the Florida Department of Environmental Protection ("DEP") gave notice of its intent to issue to Oculina Bank an Environmental Resource Permit and Sovereign Submerged Lands Authorization. Orin R. Smith, Stephanie Smith, Carolyn Stutt, and Robert Prosser jointly filed a petition challenging the permit. Michael Casale and E. Garrett Bewkes filed separate petitions. These petitions were transferred to DOAH where they were assigned DOAH Case Nos. 12-1227, 12-1228, and 12-1229 and consolidated (referred to hereafter as "Oculina I"). Following an administrative hearing held in November 2012, the Administrative Law Judge recommended denial of the authorization

because potential adverse impacts to the refuge and nursery functions of the wetlands, specifically related to tarpon and snook, and potential impacts to the rivulus marmoratus, another species of fish, were not adequately addressed by Oculina. In August 2013, DEP issued a Consolidated Final Order adopting the Recommended Order with a few exceptions.

In March 2014, Oculina Bank re-applied for an Environmental Resource Permit and Sovereign Submerged Lands Authorization (hereafter referred to as "the Permit"). The Department gave notice of its intent to issue the Permit on January 7, 2015. Pelican Island Audubon Society, Garrett Bewkes, Ned Sherwood, Orin R. Smith, Stephanie Smith, and Carolyn L. Stutt filed a petition challenging the permit.

Oculina Bank filed a motion in limine to limit the issues that could be heard in this new proceeding. The Administrative Law Judge entered an order ruling that the doctrines of res judicata and collateral estoppel were applicable and required that argument and evidence be limited to new facts, changed conditions, or additional submissions by Oculina Bank.

At the final hearing, a number of findings from the earlier proceeding were stipulated to for this new proceeding. Oculina Bank presented the testimony of: George Kulczycki, accepted an expert in estuarine wetlands ecology, through a deposition transcript and video (Oculina Bank Exhibits 55 and 56); and

Dr. W. Michael Dennis, accepted as an expert in biology, wetlands ecology, and wetlands hydrology. Joint Exhibits 1-63 and Oculina Bank Exhibits 1-57 and 59 were admitted into evidence. Official recognition was taken of section 607.0501, Florida Statutes, and a Quitclaim Deed from Oculina Bank dated January 4, 2012.

Petitioners presented the testimony of: David Cox; Grant Gilmore, accepted as an expert in ichthyology and marine and estuarine fish ecology; Scott Taylor, accepted as an expert in the Mangrove Rivulus; and Tony Miller, accepted as an expert in wetlands ecology. Petitioners Exhibits 1-9, 11, 13-15, 23-25, 28-29, 46-47, 53-56, 58, and 64 were admitted into evidence.

DEP presented the testimony of: Dr. Jeffrey Wilcox of the Florida Fish and Wildlife Conservation Commission ("FWC"), accepted as an expert in the Mangrove Rivulus, through his deposition transcript (DEP Exhibit 1); Dr. Kathy Guindon, accepted an expert in fisheries biology and Tarpon; and Monica Sovacool, accepted as an expert in wetlands ecology. DEP Exhibits numbered 1-39 were admitted into evidence.

The four-volume Transcript of the final hearing was filed with DOAH. The parties filed proposed recommended orders, which were considered by the Administrative Law Judge in the preparation of this Recommended Order.

FINDINGS OF FACT

Parties

1. Petitioner Pelican Island Audubon Society has more than 25 members residing in Indian River County, was in existence for more than a year before Oculina Bank filed its application for the Permit, and was formed for the purpose of protecting the environment, fish, and wildlife resources.

2. Petitioners Carolyn Stutt and Garrett Bewkes live approximately one mile north of the proposed project site, on John's Island, which is on the opposite side of the Indian River Lagoon from the proposed project site.

3. Petitioner Carolyn Stutt uses the Lagoon for boating, nature observation, nature photography, and sketching. Petitioner Garrett Bewkes uses the Lagoon for boating and fishing.

4. Petitioners Orin Smith and Stephanie Smith did not testify at the final hearing nor present other evidence to show they have substantial interests that could be affected by the proposed project. Respondents did not stipulate to any facts that would establish the Smiths' substantial interests.

5. Respondent Oculina Bank has an undivided ownership interest in the project site and is the applicant for the Permit that is the subject of this proceeding.

6. DEP is the state agency responsible for regulating construction activities in waters of the State. DEP also has authority to process applications for authorization from the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") to use sovereignty submerged lands for structures and activities that will preempt their use by the general public.

<u>The Project Site</u>

7. The project site is 15.47 acres and located along 45th Street/Gifford Dock Road in Vero Beach. It is on the western shoreline of the Indian River Lagoon.

8. The Lagoon in this area is part of the Indian River-Malabar to Vero Beach Aquatic Preserve. It is an Outstanding Florida Water.

9. The Lagoon is an estuary, but it is almost non-tidal in this area. There is a seasonal rise in sea level that occurs from August to November and it is during this season that waters of the Lagoon flood into adjacent wetlands. The wetlands may be inundated at other times as a result of large storms.

10. The wetlands along the western shore of the Lagoon play a role in regional tarpon and snook fisheries. Wetlands provide essential refuges for early-stage tarpon and snook. When the wetlands are inundated, larval tarpon and snook can move into the wetlands and seek out shallow areas to avoid predation by larger fish.

11. The project site is dominated by salt marsh wetlands. In order to control salt marsh mosquitoes, the site was impounded by the Indian River Mosquito Control District sometime in the 1950s by excavating ditches and building earthen berms or dikes along the boundaries of the site.

12. The mean high water line of the Lagoon in this area is 0.78 feet. The berms were constructed to an elevation of about five feet, but there are now lower elevations in some places. The wetlands on the site are isolated for much of the year because the waters of the Lagoon cannot enter the wetlands unless the waters rise above the lowest berm elevations. This connection only occurs in unusually high water conditions.

13. The impoundment berms have decreased the frequency and duration of the project site's inundation by waters from the Lagoon.

14. There are almost 14 acres of wetlands impounded by the berms.

15. The impounded wetlands are dominated by salt grass. There are also mangroves, mostly white mangroves, along the side slopes of the berms. Most of the upland areas are dominated by Brazilian pepper trees and Australian pine trees, which are non-native, invasive vegetation.

16. Within the wetlands are three ponds.

17. Before the project site was impounded for mosquito control, it had "high marsh" vegetation such as saltwort and glasswort, as well as black and red mangroves. The impoundment resulted in the reduction of these species.

18. There is now reduced nutrient export from the impounded wetlands to the Lagoon.

19. The project site still provides nesting, denning, and foraging habitat for birds and other wildlife. However, the environmental health and productivity of the wetlands on the site have been reduced by the impoundment berms.

20. The adverse effects of impounding wetlands for mosquito control are widely understood by environmental scientists. Therefore, reconnecting impounded wetlands along the Indian River Lagoon has been a local and state governmental objective.

21. North and south of the project site are salt marsh wetlands that have been restored. To the north is a portion of the mitigation area for a development called Grand Harbor. To the south is the CGW Mitigation Bank. Both adjacent wetland areas were restored by reconnecting them to the Lagoon and removing exotic vegetation.

22. The restored wetlands to the north and south now contain a dominance of saltwort and glasswort. They also have more black and red mangroves. These environmental improvements,

as well as an increase in species diversity, are typical for former mosquito control impoundments that have been restored.

23. In the offshore area where the three proposed docks would be constructed, there are scattered seagrasses which are found as close as 25 feet offshore and far as 100 feet offshore. They include Manatee grass, Cuban shoal grass, and Johnson's seagrass.

The Proposed Project

24. The proposed home sites are on separate, recorded lots ranging in size from 4.5 acres to 6.5 acres.

25. The home sites would have 6,000 square feet of "footprint." The houses would be constructed on stilts.

26. There would be a single access driveway to the home sites, ending in a cul-de-sac. The displacement of wetlands that would have been required for the side slopes of the access drive and cul-de-sac was reduced by proposing a vertical retaining wall on the western or interior side of the drive.

27. Each home site has a dry retention pond to store and treat stormwater runoff. The ability of these retention ponds to protect water quality is not disputed by Petitioners.

28. The home sites and access drive would be constructed on the frontal berm that runs parallel to the shoreline. However, these project elements would require a broader and higher base than the existing berm. The total developed area would be about

three acres, 1.85 acres of which is now mangrove swamp and salt marsh and 0.87 acres is ditches. One of the onsite ponds would be eliminated by the construction.

29. The houses would be connected to public water and sewer lines.

30. Oculina Bank would grant a perpetual conservation easement over 11.69 acres of onsite salt marsh wetlands. It would remove Brazilian Pepper trees, a non-native plant, from the site.

31. Petitioners' original objection to the proposed project and their decision to file a petition for hearing appears to have been caused by Oculina Bank's proposal to build docks over 500 feet in length. The dock lengths in the final revision to the project vary in length from 212 to 286 feet. The docks do not extend out more than 20 percent of the width of the waterbody. The docks do not extend into the publicly maintained navigation channel of the Lagoon.

32. Because the docks meet the length limit specified in Florida Administrative Code Chapter 18-21, they are presumed not to create a navigation hazard.

33. To reduce shading of sea grasses, the decking material for the docks would be grated to allow sunlight to pass through the decking.

34. There are no seagrasses at the waterward end of the docks where the terminal platforms would be located and where boats would usually be moored.

35. The dock pilings will be wrapped with an impervious membrane to prevent the treatment chemicals from leaching into the water.

36. In Oculina I, the Administrative Law Judge determined that the condition for vessels moored at the proposed docks should be stated as a maximum permissible draft. The Permit imposes a maximum draft for boats using the docks.

Fish Survey

37. Oculina Bank conducted a fish sampling survey in 2014 to obtain additional information about the presence of tarpon, snook, rivulus, and other fish on the project site. Twenty-three sampling stations were established and sampled from January 16, 2014 to February 16, 2014. The survey was conducted during a period of seasonal high water in order to catalog the highest number of fish that might migrate in and out of the site during high water.

38. Oculina Bank collected five species of fish that are typically found in impounded areas. No tarpon or snook were found.

39. Oculina Bank did not find Florida Gar or Least Killifish during the fish survey, but Dr. Taylor observed these

two species on his site inspection in 2015. He also saw three to five juvenile tarpon.

40. No testimony about snook was presented at the final hearing nor was this fish mentioned in Petitioners' Proposed Recommended Order.

Mangrove Rivulus

41. *Rivulus marmoratus*, or mangrove rivulus, is designated a species of special concern by the FWC. See Fla. Admin. Code R. 68A-27.005(2)(b). Species of special concern are those species for which there are concerns regarding status and threats, but for which insufficient information is available to list the species as endangered or threatened.

42. Some research indicates rivulus are more common than originally believed. Certain populations of rivulus in Florida are healthy and thriving. A team of scientists who participated in a biological status review of the rivulus for the FWC recommended that the rivulus be delisted. The team included Dr. Taylor and Dr. Wilcox.

43. In Oculina I, Dr. Gilmore did not find any rivulus on the project site, but he expressed the opinion that the site had rivulus habitat and they were probably on the site. In his more recent visits to the project site in conjunction with the current proceeding, Dr. Gilmore did not observe any rivulus. Oculina Bank did not find any rivulus during its fish survey.

44. Dr. Taylor sampled for rivulus on the site on five different days in 2015 and found five rivulus in a ditch outside (waterward) of the impoundment berm. Dr. Taylor sampled "extensively" for rivulus in the interior of the project site, but found none there. Still, he believes there are probably some in the interior.

45. The area where the rivulus were found outside the impoundment berm would not be changed by the proposed project. However, Oculina Bank's proposal to scrape down the impoundment berm would eliminate many crab burrows, which are habitat for the rivulus.

46. Dr. Taylor and Dr. Wilcox agreed that rivulus are more likely to be found in areas that are tidally connected.

47. The preponderance of the evidence does not support Petitioners' claim that the proposed project would, on balance, adversely affect the mangrove rivulus. However, the recommended permit modifications should benefit the species.

Tarpon

48. In Oculina I, Dr. Gilmore testified that the project site was "one of the critical habitats maintaining regional tarpon fisheries." However, he only observed one "post larval" tarpon in 2012 and none in 2014. Dr. Gilmore stated that a small mesh seine is the best method to sample for these nursery phase

tarpon, but he never used such a seine to sample for them on the project site, nor did anyone else.

49. Extensive evidence regarding on-site investigations and literature related to tarpon was presented at the final hearing. Sometimes the testimony failed to distinguish between early stage (larval) tarpon and later stage (juvenile) tarpon, whose habitat needs are not the same. The nursery and refuge functions of the wetlands on the project site relate primarily to larval tarpon, not juvenile tarpon.

50. The shallow ponds on the project site are an important habitat type that can be used by larval tarpon when related hydrologic conditions are compatible.

51. The preponderance of the evidence does not support the characterization of the wetlands on the project site as "critical habitat" for tarpon in the region. The current hydrologic conditions diminish the value of the nursery and refuge functions provided by the wetlands. Improving the connection between the wetlands and the Lagoon can enhance the tarpon nursery function if the improved connection is made without giving predators of larval tarpon access to the interior ponds.

52. Dr. Gilmore stated, "you don't have to take down the entire dike, you can create low spots." By low spots, he means areas like the one that currently exists in the southern impoundment berm that is at about elevation 2.0 feet.

53. The preponderance of the evidence shows the proposed project would not adversely affect the nursery function of the wetlands for tarpon if the recommended modifications are made to the Permit to improve the connection to the Lagoon while keeping the interior ponds isolated from the Lagoon for most of the year.

Mitigation

54. DEP conducted a Uniform Mitigation Assessment Methodology ("UMAM") analysis for the proposed project that assumed direct impacts to 2.72 acres of mangrove swamp. It did not account for secondary impacts that could be caused by the proposed project.

55. DEP's UMAM analysis determined there would be a functional loss of 1.269 units. It further determined that these losses would be offset by the creation of 0.88 acres of salt marsh and the enhancement of 10.81 acres of mangrove swamp, resulting in a net functional gain of 2.342 units.

56. DEP concluded that, if functional losses caused by secondary impacts were included, there would be a functional loss of 2.350 units, which still results in a net gain of 3.056 units.

57. Because DEP determined there would be a net gain in functional value, it did not require Oculina Bank to provide additional on-site mitigation or to purchase mitigation credits from an off-site mitigation bank.

58. The UMAM analysis performed by DEP did not adequately account for the lost tarpon nursery function and the proposed mitigation could further diminish the nursery function. The purchase of mitigation bank credits would not offset the lost nursery function because the mitigation bank was not shown to provide a nursery function.

CONCLUSIONS OF LAW

Standing

59. In order to have standing, a petitioner must have a substantial interest that would be affected by proposed agency action. See § 120.52(13)(b), Fla. Stat. Standing requires a petitioner to show he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing, and the injury is of a type or nature which the proceeding is designed to protect. Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

60. Respondents did not contest the standing of Petitioners. Carolyn Stutt and Garrett Bewkes were determined to have standing in Oculina I and they have standing in this proceeding.

61. Petitioners Orin Smith and Stephanie Smith presented no evidence to establish their substantial interests in Oculina I or in this current proceeding, and, therefore, did not make the necessary showing for standing.

62. Petitioner Pelican Island Audubon Society made the showing required under section 403.412(5), Florida Statutes, and, therefore, has standing.

Burden and Standard of Proof

63. The Environmental Resource Permit was issued under chapter 373, Florida Statutes. A petitioner challenging a permit issued under chapter 373 has the burden of ultimate persuasion following the applicant's presentation of its prima facie case. See § 120.569(2)(p), Fla. Stat. Oculina Bank presented a prima facie case of its entitlement to the environmental resource permit. Therefore, the burden of ultimate persuasion was on Petitioners to prove their case in opposition to the permit.

64. The Sovereignty Submerged Lands Authorization was issued under chapter 253, Florida Statutes. It is not subject to section 120.569(2)(p). The applicant for such an authorization has the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

65. The applicable standard of proof is preponderance of the evidence. See § 120.57)1)(j), Fla. Stat.

66. This is a *de novo* proceeding designed to formulate final agency action, not to review action taken preliminarily. J.W.C. at 785. Therefore, modifications to a permit can be made

when they are supported by record evidence and the due process rights of the parties are preserved.

67. The doctrines of *res judicata* and collateral estoppel apply to administrative proceedings. Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So. 2d 35, 40 (Fla. 3d DCA 1972) cert. denied, 267 So. 2d 833 (Fla. 1972).

68. In Thomson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987), the Supreme Court of Florida held that, in a case where a previous permit was denied, *res judicata* will apply "unless the second application is supported by new facts, changed conditions, or additional submissions by the applicant." Changed conditions would present a clear basis for not applying *res judicata*. New facts would also present a clear basis for not applying *res judicata*, if "new facts" means facts that could not have been presented in the original litigation. However, the Court's reference to "additional submissions" is unclear, because the Court does not explain how the allowance for additional submissions would avoid the scenario where a losing party could re-litigate factual disputes in an effort to win with better evidence. Furthermore, the Court's reference to "additional submissions" is *dicta*, because Thomson involved changed conditions; the new permit application was changed to eliminate the impacts to seagrasses which were the reason for the denial of the first application.

69. A number of disputed issues were determined in Oculina I and, therefore, Petitioners are barred by the doctrine of *res judicata* from re-litigating those issues in this new proceeding.

70. In Oculina I, competent evidence was presented to show that the wetlands on the project site are probably used by the mangrove rivulus and by larval tarpon and Oculina Bank did not rebut that evidence. In this proceeding, new evidence was presented about the habitat needs of these fish and the site features and hydrologic conditions that affect the quality of the habitat. The recommended modifications to the project will mitigate for the loss of habitat for rivulus and tarpon because there will be a net gain in the functional value of the habitat for these fish.

Environmental Resource Permit

71. The determination whether Oculina Bank is entitled to the Environmental Resource Permit is governed by chapter 373, Florida Administrative Code Rule 40C-4.301, and the Applicant's Handbook: Management and Storage of Surface Waters of the St. John's River Water Management District ("Applicant's Handbook").

72. Rule 40C-4.301(1) requires, in relevant part, that an applicant provide reasonable assurances that the proposed activity:

> (d) Will not adversely impact the value of functions provided to fish and wildlife and

> listed species by wetlands and other surface waters;
>
> (e) Will not adversely affect the quality of receiving waters such that the water quality standards set forth in Chapters 62-3, 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C., including any antidegradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and Rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;
>
> (f) Will not cause adverse secondary impacts to the water resources;

73. 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 mean absolute guarantees.

74. If the proposed Permit is modified as recommended below, it provides reasonable assurance that the proposed project will not adversely affect the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. If the proposed modifications are not made, reasonable assurance has not been provided.

75. Section 12.2.1 of the Applicant's Handbook requires the DEP to consider whether the applicant has implemented all practicable design modifications to reduce or eliminate the

proposed projects adverse impacts to wetland and surface water functions. If the proposed Permit is modified as recommended below, it will result in net improvements in environmental values to go along with Oculina Bank's design features to reduce adverse impacts, and will satisfy Section 12.2.1. If the proposed modifications are not made, then Oculina Bank did not make all practicable design modifications to reduce adverse impacts.

76. If the proposed Permit is modified as recommended below, the proposed project will not cause secondary impacts to water resources. If the proposed modifications are not made, reasonable assurance has not been provided.

77. Respondents contend that Oculina Bank must provide DEP with reasonable assurance that the project is not contrary to public interest. Petitioners contend the project must be shown to be clearly in the public interest because it affects the Indian River Lagoon, an Outstanding Florida Water. The same public interest criteria, contained in section 373.414(1)(a), are to be balanced in determining whether a project is not contrary to the public interest or is clearly in the public interest:

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

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of the functions being performed by the areas affected by the proposed activity.

78. In Oculina I, it was determined that the project would not adversely affect the public health, safety, or welfare or the property of others. The proposed changes to the project do affect this determination.

79. If the proposed Permit is modified as recommended below, it will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. The project will create a net benefit to fish and wildlife, including endangered or threatened species or their habitats. If the proposed modifications are not made, the project will adversely affect fish and wildlife.

80. In Oculina I, it was determined that the proposed project will not adversely affect navigation or cause harmful erosion or shoaling. The proposed changes to the project do

affect this determination. The proposed project would improve the flow of water by reconnecting the wetlands to the Lagoon.

81. If the proposed Permit is modified as recommended below, the proposed project will not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity. It will result in a net improvement to local fisheries. If the proposed modifications are not made, the project will adversely affect fishing and marine productivity.

82. The project will be of a permanent nature.

83. In Oculina I, it was determined that the proposed project would not adversely affect historical or archaeological resources. The proposed changes to the project do not affect this determination.

84. If the proposed Permit is modified as recommended below, the current condition and relative value of the functions being performed by the areas affected by the proposed activity will be improved by the proposed project. The nursery functions of the site will be improved. Habitat for the rivulus will be improved. The wetlands on the site will be improved by reconnection to the Lagoon. If the proposed modifications are not made, the project will adversely affect the current condition and relative value of the functions being performed.

85. If the proposed Permit is modified as recommended below, the proposed project is not contrary to the public

interest, and is clearly in the public interest. If the proposed modifications are not made, the project is contrary to the public interest.

Mitigation

86. Section 10.3.1.2 provides:

> Mitigation can be conducted on-site, off-site, or through the purchase of credits from a mitigation bank, or through a combination of approaches, as long as it offsets anticipated adverse impacts to wetlands and other surface waters and meets all other criteria for issuance.

87. If the proposed Permit is modified as recommended below, the proposed project includes adequate on-site mitigation to offset all direct impacts and secondary impacts.

Sovereignty Submerged Lands Authorization

88. It was determined in Oculina I that Oculina Bank met all applicable criteria to obtain authorization for use of sovereignty submerged lands for the proposed docks. The facts and law supporting that determination have not changed. Therefore, the determination is the same; Oculina Bank met all applicable criteria for the docks.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusion of Law, it is

RECOMMENDED that the Department of Environmental Protection issue Permit No. 31-0294393-003-EI, with the following modifications:

1. The impoundment berm will not be scraped down to mean sea level, but, instead, two new low spots will be created in the impoundment berm at an elevation of approximately 2.0 feet.

2. A new isolated pond will be created to replace the one that will be eliminated by the construction, similar in size to the one that will be eliminated.

3. Internal ditches and other channels will be filled as needed to eliminate predator access to the ponds.

If these modifications are not made, it is recommended that the Permit be denied.

DONE AND ENTERED this 1st day of June, 2016, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of June, 2016.

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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.

RECEIVED
June 16, 2016
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

PELICAN ISLAND AUDUBON SOCIETY,
GARRETT BEWKES, NED SHERWOOD,
ORIN R. SMITH, STEPHANIE SMITH,
AND CAROLYN STUTT,

Petitioners,

vs.

DOAH CASE NO.: 15-0576
OGC CASE NO.: 15-0044

OCULINA BANK AND
FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondents.
_______________________________________/

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S EXCEPTION TO RECOMMENDED ORDER

Respondent, the State of Florida Department of Environmental Protection (Department), takes exception to the paragraph 58, which concludes "The purchase of mitigation bank credits would not offset the lost nursery function because the mitigation bank was not shown to provide a nursery function." The proposed findings in paragraph 58 should be treated as a conclusion of law, because the ALJ is offering an interpretation of Sections 10.2.8 and 10.3.1.2 of the Applicant's Handbook.

Section 120.57(1)(1), Florida Statutes, authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." See Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001). The Department's interpretations of statutes and rules within its regulatory jurisdiction need not be the only reasonable interpretations, but only "permissible" ones. See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot., 668 So.2d 209, 212 (Fla. 1st DCA 1996). The Department offers the

reasonable and permissible interpretation of Sections 10.2.8 and 10.3.1.2 that impacts may be fully offset by the purchase of credits from mitigation banks under Rule 62-342, Florida Administrative Code.

Section 10.2.8 of the Applicant's Handbook discusses mitigation with the same drainage basin as the impacts:

> If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied.

And mitigation is authorized through the purchase of credits in Section 10.3.1.2:

> Mitigation can be conducted on-site, off-site, or through the purchase of credits from a mitigation bank, or through a combination of approaches, as long as it offsets anticipated adverse impacts to wetlands and other surface waters and meets all other criteria for issuance.

Impacts to wetlands may be appropriately offset through the use of mitigation bank credits. See Joseph McClash, et al. v. Land Trust No. 97-12, et al. Case Nos. 14-4735, 14-5038, 14-5135 (Fla. DOAH June 25, 2015; SWFMD Sept. 9, 2015) attached as Exhibit 1.

Competent substantial evidence was presented at the hearing showing that 4.4 credits were available at the CGW Mitigation Bank. (T. 381). The ALJ concluded these credits would not offset the adverse impacts of the proposed project by accepting the unwarranted premise that a projected biological impact, "lost tarpon nursery function," must be offset with a mitigation credit that is designed specifically to provide nursery habitat for tarpon. There is no statute or rule that creates such a requirement, and there is no reasonable interpretation of a rule or statute that would support it. The ALJ's conclusion of law at paragraph 58 should therefore be rejected

and substituted with the following conclusion of law: "The purchase of mitigation credits at the CGW Mitigation Bank could offset any adverse impacts caused by the proposed project."

In the alternative, the conclusion of law should be rejected for the reason that, in light of the ALJ's ultimate recommendation, the conclusion is unnecessary to determine the merits of the permit application at this stage of the proceedings.

RESPECTFULLY SUBMITTED this 16th day of June 2016.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

*/s/ Glenn W. Rininger III*___________

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was electronically mailed to Marcy LaHart, Attorney for Petitioners, 4804 SW 45th Street Gainesville, FL 32608, at marcy@floridaanimallawyer.com, and Nicholas Giesler, Esq. Giesler & Giesler P.A. 554 SW Halden Ave. Port St. Lucie, FL 34953, at nmg@gieselerlaw.com, on this 16th day of June 2016.

*/s/ Glenn W. Rininger III*__________
GLENN W. RININGER III
Assistant General Counsel

BEFORE THE GOVERNING BOARD OF THE
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

ORDER NO. SWF 15-021

JOSEPH MCCLASH,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors, Case No. 14-4735

vs.

LAND TRUST NO. 97-12 AND
SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.
_______________________________/

MANASOTA-88, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors, Case No. 14-5038

vs.

LAND TRUST NO. 97-12 AND
SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.
_______________________________/

FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,

Intervenors,

Case No. 14-5135

vs.

LAND TRUST NO. 97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondents.

_______________________________/

FINAL ORDER

THIS CAUSE was heard by the Governing Board of the Southwest Florida Water Management District ("District") pursuant to Sections 120.569 and 120.57(1), Florida Statutes ("F.S."), for the purpose of issuing a final order in the above-styled proceeding, including consideration of the Recommended Order of Administrative Law Judge ("ALJ") Bram D. E. Canter, the Exceptions to the Recommended Order filed by Respondent, Land Trust No. 97-12 ("Land Trust"), the Exceptions to the Recommended Order filed by the District, and the Joint Response to such exceptions filed by Joseph McClash ("McClash"), Manasota-88, Inc., Florida Institute for Saltwater Heritage ("FISH"), (collectively, "Petitioners"), Sierra Club, Inc., and Suncoast Waterkeeper, Inc. (collectively, "Intervenors").

A. Statement of the Issue

1. The issue is whether reasonable assurance has been provided for the issuance of Environmental Resource Permit ("ERP") No. 43041746.000 (the "Permit") to Respondent Land Trust for its proposed project on Perico Island in Bradenton, Florida.

B. Post-Hearing Procedural History

2. On June 25, 2015, the ALJ issued his Recommended Order in this matter, a copy of which is attached hereto as Exhibit "A."

3. On July 15, 2015, Respondent Land Trust timely filed Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "B."

4. On July 15, 2015, the District timely filed Exceptions to the Recommended Order, a copy of which is attached hereto as Exhibit "C."

5. On July 27, 2015, Petitioners and Intervenors timely filed a Joint Amended Response to Respondents' Exceptions to Recommended Order,[1] a copy of which is attached hereto as Exhibit "D."

6. The record consists of all notices; pleadings; motions; intermediate rulings; evidence admitted and matters officially recognized; the transcript of the proceedings; proposed findings, exceptions and responses; stipulations of the parties; and the Recommended Order.

C. Standard of Review

7. Section 120.57(1)(l), F.S., provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the

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[1] Petitioners and Intervenors filed an initial Joint response on Friday, July 24, 2015, and then filed an amended Joint Response on Saturday, July 25, 2015. The amended Joint Response is considered timely filed as of Monday, July 27, 2015.

> conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of an administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

§ 120.57(1)(l), Fla. Stat. (2012).

8. The District may not reweigh evidence and may reject the ALJ's findings of fact in the Recommended Order only if, after a thorough review of the record, no competent substantial evidence exists to support the finding. Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (citing Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996)); see also Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact).

9. Competent substantial evidence is defined as "evidence that will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (citing Becker v. Merrill, 20 So. 2d 912, 914 (Fla. 1943)). The evidence must be sufficiently relevant and must be such that "a reasonable mind would accept as a conclusion" and "[t]o this extent the 'substantial' evidence should also be 'competent.'" Id. Competent substantial evidence

> does not relate to the quality, character, convincing power, probative value or weight of the evidence but refers to the existence of some evidence (quantity) as to each essential element and as to the legality and admissibility of that evidence. 'Competency of evidence' refers to its admissibility under legal rules of evidence. 'Substantial' requires that there be some (more than a mere iota or scintilla), real, material, pertinent, and relevant evidence (as distinguished from ethereal, metaphysical, speculative, or merely theoretical evidence or hypothetical possibilities) having definite probative value (that is, "tending to prove") as to each essential element ...".

Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 1st DCA 1996) (citing Dunn v. State, 454 So. 2d 641, 649 n. 11 (Fla. 5th DCA 1984)). An ALJ may rely on the testimony of one witness, even if that testimony contradicts testimony of other witnesses. Lantz v. Smith, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

10. If findings of fact are supported by record evidence, the agency is bound by the ALJ's findings of fact. Charlotte County, 18 So. 3d at 1092 (citing Fla. Dep't of Corrs. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987)). The District has no authority to reweigh the evidence, build a new case or make new factual findings. N.W. v. Dep't of Children & Family Svcs., 981 So. 2d 599, 602 (Fla. 3d DCA 2008); Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1st DCA 1996).

11. An agency may reject or modify an ALJ's conclusions of law and application of agency policy; however, when doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Charlotte County, 18 So. 3d at 1092.

D. The Recommended Order and Exceptions

12. The Governing Board has reviewed the Recommended Order.

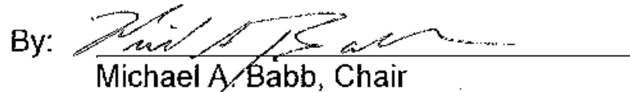
13. The Governing Board has reviewed the Exceptions filed by Land Trust and the District, and the joint response thereto filed by Petitioners and Intervenors, and has considered the underlying arguments presented therein. The Governing Board has ruled on each of the Exceptions for the reasons set forth in the Ruling on Exceptions to the Recommended Order ("Ruling"), which is attached hereto and incorporated herein by reference as Exhibit "E."

14. The Ruling generally finds that the mitigation proposed by the applicant was sufficient and that reduction and elimination of impacts to wetlands and other surface waters was adequately explored and considered.

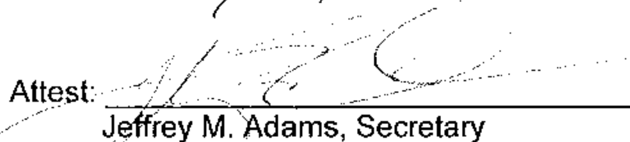
WHEREFORE, the Governing Board hereby issues ERP No. 43041746.000 to Land Trust No. 97-12, a copy of which is attached hereto as Exhibit "F."

DONE AND ORDERED by the Governing Board of the Southwest Florida Water Management District this 25th day of August, 2015, in Tampa, Hillsborough County, Florida.

SOUTWEST FLORIDA WATER
MANAGEMENT DISTRICT

By: 
Michael A. Babb, Chair

Approved as to Legal Form and Content
Amy Wells Brennan, Managing Attorney

Attest: 
Jeffrey M. Adams, Secretary

(Seal)

Filed this 28th day of
August, 2015.

Deputy Agency Clerk

NOTICE OF RIGHTS

In accordance with Section 120.569(1), F.S., a party who is adversely affected by final agency action may seek judicial review of the action in the appropriate District Court of Appeal pursuant to Section 120.68, F.S., by filing a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, within thirty (30) days after the rendering of the final action by the District.

State of Florida
Division of Administrative Hearings

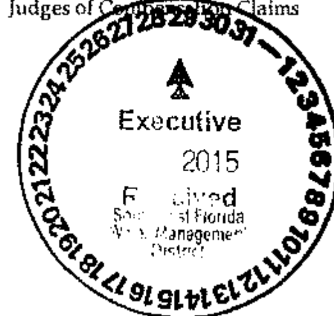
Rick Scott
Governor

Robert S. Cohen
Director and Chief Judge

Claudia Lladó
Clerk of the Division

David M. Maloney
Deputy Chief
Administrative Law Judge

David W. Langham
Deputy Chief Judge
Judges of Compensation Claims



June 25, 2015

Robert Beltram, P.E., Executive Director
Southwest Florida Water Management District
2379 Broad Street
Brooksville, Florida 34604-6899

Re: JOSEPH MCCLASH vs. LAND TRUST NO. 97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT, DOAH Case No. 14-4735, 14-5038, and 14-5135

Dear Mr. Beltram:

The Recommended Order has been transmitted in electronic format to the registered eALJ users and is enclosed for the non-registered parties in the referenced case. Also, enclosed is the five-volume Transcript, together with the Petitioners' Exhibits numbered 1-6, 31-32, 38-39, 41-43, 47, 53, 55, 74, 88, 88A, 91-104, 110, and 112; the Land Trust Exhibits numbered 1-3, 6-8, and 16; and the District's Exhibits 4 and 6-7. Copies of this letter will serve to notify the parties that my Recommended Order and the hearing record have been transmitted this date.

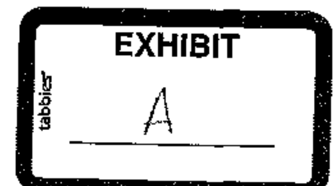
As required by section 120.57(1)(m), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order within 15 days of its rendition. Any exceptions to the Recommended Order filed with the agency shall be forwarded to the Division of Administrative Hearings with the Final Order.

Sincerely,

BRAM D. E. CANTER
Administrative Law Judge

The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060
Administrative Law (850) 488-9675 * Fax Filing (850) 921-6847
Judges of Compensation Claims (850) 487-1911
www.doah.state.fl.us

Exhibit 1



BDEC/rg

Enclosures

cc: Christian Thomas Van Hise, Esquire (eServed)
Martha A. Moore, Esquire (eServed)
Douglas P. Manson, Esquire (eServed)
Joseph McClash (eServed)
Ralf G. Brookes, Esquire (eServed)
Justin Bloom, Esquire (eServed)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH MCCLASH,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors,

vs. Case No. 14-4735

LAND TRUST NO. 97-12 AND
SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.
_______________________________/

MANASOTA-88, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors,

vs. Case No. 14-5038

LAND TRUST NO. 97-12 AND
SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.
_______________________________/

Exhibit 1

FLORIDA INSTITUTE FOR SALTWATER
HERITAGE, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors,

vs. Case No. 14-5135

LAND TRUST NO. 97-12 AND
SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Respondents.
_______________________________/

RECOMMENDED ORDER

The final hearing in these consolidated cases was held on February 17-19, 2015, in Tampa, Florida, before Bram D.E. Canter, Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Joseph McClash:

Joseph McClash, pro se
711 89th Street Northwest
Bradenton, Florida 34209

For Petitioner Manasota-88, Inc.:

Joseph McClash, Qualified Representative
711 89th Street Northwest
Bradenton, Florida 34209

Exhibit 1

For Petitioner Florida Institute for Saltwater Heritage, Inc.:

Joseph McClash, Qualified Representative
711 89th Street Northwest
Bradenton, Florida 34209

For Respondent Land Trust #97-12:

Douglas P. Manson, Esquire
Brian A. Bolves, Esquire
Paria Shirzadi, Esquire
MansonBolves, P.A.
1101 West Swann Avenue
Tampa, Florida 33606

For Respondent Southwest Florida Water Management District:

Christon R. Tanner, Esquire
Martha A. Moore, Esquire
Southwest Florida Water Management District
7601 Highway 301 North
Tampa, Florida 33637

For Intervenor Sierra Club, Inc.:

Ralf G. Brookes, Esquire
1217 East Cape Coral Parkway, Suite 107
Cape Coral, Florida 33904

For Intervenor Suncoast Waterkeeper, Inc.:

Justin Bloom, Esquire
Post Office Box 1028
Sarasota, Florida 34230

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent Land Trust #97-12 ("Land Trust") is entitled to an Environmental Resource Permit ("ERP") for its proposed project on Perico Island in Bradenton, Florida.

PRELIMINARY STATEMENT

On August 21, 2014, Respondent Southwest Florida Water Management District ("District") issued a Notice of Intended Agency Action to issue an ERP to Land Trust to construct a building pad for four single-family homes, an access drive, and surface water management system.

On August 29, 2014, Petitioner Joseph McClash filed a petition for hearing to challenge the proposed ERP. On September 10, 2014, Petitioner Manasota-88, Inc., filed a petition for hearing. On September 18, 2014, Florida Institute for Saltwater Heritage, Inc. ("FISH"), filed a petition for hearing. The District referred the three petitions to DOAH and they were consolidated for final hearing.

On January 26, 2015, Sierra Club, Inc., moved to intervene in the proceeding. On January 27, 2015, Suncoast Waterkeeper, Inc., moved to intervene. The motions were granted.

At the final hearing, Land Trust presented the testimony of Jeb Mulock, P.E., an expert in engineering; and Alec Hoffner, an expert in soil science and wetland ecology. After the hearing, Land Trust was allowed to present the testimony of Anthony Janicki, Ph.D., through a transcript of his deposition. Land Trust Exhibits 1-3, 6-8, and 16 were admitted into evidence.

The District presented the testimony of David Kramer, P.E., an expert in surface water management system engineering;

Al Gagne, an expert in wetland science; and John Emery, an expert in wetland science. District Exhibits 4 and 6-7 were admitted into evidence.

Petitioners presented the testimony of Jacqueline Cook, an expert in wetland science; Sam Johnston, an expert in environmental assessment and wetland science; John Stevely, an expert in mangroves and marine habitat; Joseph McClash; Ed Sherwood; Robert Brown; and Jay Leverone. Petitioners' Exhibits 1-6, 31-32, 38-39, 41-43, 47, 53, 55, 74, 88, 88A, 91-104, 110, and 112 were admitted into evidence.

Members of the public were allowed to make comments at the final hearing. Comments were received from Mary Shepherd, Terry Wonder, Jan VonHahmann, and Sandra Ripberger.

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

FINDINGS OF FACT

The Parties

1. Petitioner Joseph McClash is a resident of Bradenton, Florida, who uses the waters in the vicinity of the project for fishing, crabbing, boating, and wildlife observation.

2. Petitioner Manasota-88, Inc., is an active Florida nonprofit corporation for more than 20 years. Manasota-88 has

Exhibit 1

approximately 530 members, most of whom (approximately 300) reside in Manatee County. The mission and goal of Manasota-88 includes the protection of the natural resources of Manatee County, including Anna Maria Sound and Perico Island.

3. Petitioner FISH is an active Florida nonprofit corporation in existence since 1991. FISH owns real property in unincorporated Cortez in Manatee County and maintains a Manatee County mailing address. FISH has more than 190 members and more than 150 of them own property or reside in Manatee County. The mission and goal of FISH includes protection of the natural resources of Manatee County, including Anna Maria Sound and Perico Island.

4. Intervenor Suncoast Waterkeeper, Inc., is an active Florida nonprofit corporation in existence since 2012. The mission of Suncoast Waterkeeper is "to protect and restore the Suncoast's waterways through enforcement, fieldwork, advocacy, and environmental education for the benefit of the communities that rely upon coastal resources." Suncoast Waterkeeper provided the names and addresses of 25 members residing in Manatee County. A substantial number of the members of Suncoast Waterkeeper use the area and waters near the proposed activity for nature-based activities, including nature observation, fishing, kayaking, wading, and boating along the natural shorelines of Anna Maria Sound and Perico Island.

5. Intervenor Sierra Club, Inc., is a national organization that is a California corporation registered as a foreign nonprofit corporation in Florida. Sierra Club has been permitted to conduct business in Florida since 1982. The mission of Sierra Club includes protection of the natural resources of Manatee County, which include Anna Maria Sound and Perico Island. Sierra Club provided the names and addresses of 26 members who live in Manatee County. A substantial number of the members of Sierra Club use the area and waters near the proposed project for nature-based activities, including observing native flora and fauna, fishing, kayaking, wading, and boating along the natural shorelines of Anna Maria Sound and Perico Island.

6. Respondent Land Trust is the applicant for the challenged ERP and owns the property on which the proposed project would be constructed.

7. Respondent District is an independent special district of the State of Florida created, granted powers, and assigned duties under chapter 373, Florida Statutes, including the regulation of activities in surface waters. The proposed project is within the boundaries of the District.

The Project Site

8. The project site is 3.46 acres of a 40.36-acre parcel owned by Land Trust. The parcel includes uplands, wetlands, and submerged lands, on or seaward of Perico Island, next to Anna

Maria Sound, which is part of Lower Tampa Bay. Anna Maria Sound is an Outstanding Florida Water.

9. The project site is adjacent to a large multi-family residential development called Harbour Isles, which is currently under construction. Access to the Land Trust property is gained through this development.

10. The Land Trust parcel contains approximately seven acres of high quality mangroves along the shoreline of Anna Maria Sound. They are mostly black and red mangroves, with some white mangroves. The mangroves on the project site amount to a total of 1.9 acres.

11. Mangroves have high biological productivity and are important to estuarine food webs. Mangroves provide nesting, roosting, foraging, and nursery functions for many species of wildlife.

12. Mangroves also provide a buffer from storm surge and help to stabilize shorelines.

13. Wildlife species found on the project site include ibises, pelicans, egrets, spoonbills, mangrove cuckoos, bay scallops, fiddler crabs, mangrove tree crabs, horseshoe crabs, marsh rabbits, raccoons, mangrove bees, and a variety of fish.

14. No endangered species have been observed on the project site, but mangroves are used by a number of listed species.

The Proposed Project

15. The proposed project is to construct a retaining wall, place fill behind the wall to create buildable lots for four single-family homes, construct an access driveway, and install a stormwater management facility.

16. The stormwater management facility is a "Stormtech" system, which is an underground system usually used in situations where there is insufficient area to accommodate a stormwater pond.

17. Riprap would be placed on the waterward side of the retaining wall. The retaining wall would be more than 35 feet landward of the mean high water line in most areas.

18. Petitioners contend the proposed retaining wall is a vertical seawall, which is not allowed in an estuary pursuant to section 373.414(5). "Vertical seawall" is defined in section 2.0(a)(111), Volume I, of the Environmental Resource Permit Applicant's Handbook ("Applicants Handbook") as a seawall which is steeper than 75 degrees to the horizontal. It further states, "A seawall with sloping riprap covering the waterward face to the mean high water line shall not be considered a vertical seawall."

19. The retaining wall is vertical, but it would have riprap covering its waterward face and installed at a slope of 70 degrees. The retaining wall is not a vertical seawall under the District's definition.

Stormwater Management

20. Stormwater in excess of the Stormtech system's design capacity would discharge into Anna Maria Sound. Because Anna Maria Sound is an Outstanding Florida Water, District design criteria require that an additional 50 percent of treatment volume be provided.

21. The Stormtech system meets the District's design criteria for managing water quality and water quantity. Projects which meet the District's design criteria are presumed to provide reasonable assurance of compliance with state water quality standards. Petitioners' evidence was not sufficient to rebut this presumption.

22. Petitioners contend the District waiver of water quality certification for the proposed project means that Land Trust was not required to meet water quality standards. However, that was a misunderstanding of the certification process. All state water quality criteria are applicable.

23. Petitioners contend water quality monitoring should be imposed for this project. However, section 4.7 of the Applicant's Handbook, Volume II, provides that if the applicant meets the District's design criteria, water quality monitoring is not required.

24. Petitioners failed to prove the proposed stormwater management system cannot be constructed, operated, or maintained in compliance with applicable criteria.

Wetland Impacts

25. In order to create buildable lots, 1.05 acres of the 1.9 acres of mangroves on the project site would be removed and replaced with fill. A swath of mangroves approximately 40 feet wide would remain waterward of the retaining wall.

26. The proposed direct and secondary impacts to the functions provided by wetlands were evaluated using the Uniform Mitigation Assessment Method ("UMAM") as required by Florida Administrative Code Chapter 62-345. UMAM is used to quantify the loss of functions performed by wetlands considering: current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag, and mitigation risk.

27. The District determined the filling of 1.05 acres of wetlands would result in a functional loss of 0.81 units and the secondary impacts resulting from installation of the retaining wall would result in a loss of 0.09 units for a total functional loss of 0.9 units. Petitioners contend the functional loss would be greater.

28. Petitioners contend the wetland delineation performed by Land Trust and confirmed by the District did not extend as far landward as the hydric soils and, therefore, the total acreage of

affected wetlands would be greater. However, Petitioners did not produce a wetland delineation for the project site, and their evidence was not sufficient to rebut Land Trust's prima facie evidence on this issue.

29. Petitioners' experts believe the secondary impacts caused by the proposed project would be greater than calculated, including fragmentation of the shoreline mangrove system, damage to the roots of mangroves near the retaining wall, and scouring effects caused by wave action associated with the retaining wall. Respondents assert that the analysis by Petitioners' expert Jacqueline Cook relied on federal methodology and that "the science used in her analysis is not contained in the state or district rule criteria."

30. Reliance on science is always appropriate. However, Ms. Cook's use of a federal impact assessment methodology creates doubt about whether her scoring is consistent with UMAM. Despite the unreliability of Ms. Cook's UMAM score, it is found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall.

31. It was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score.

Elimination or Reduction of Impacts

32. Section 10.2.1 of the Applicant's Handbook, Volume I, states that in reviewing a project the District is to consider practicable design modifications to eliminate or reduce impacts to wetland functions. Section 10.2.1.1 explains:

> The term "modification" shall not be construed as including the alternative of not implementing the activity in some form, nor shall it be construed as requiring a project that is significantly different in type or function. A proposed modification that is not technically capable of being completed, is not economically viable, or that adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." Conversely, a modification need not provide the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable, consideration shall also be given to cost of the modification compared to the environmental benefit it achieves.

33. Land Trust originally proposed constructing a surface water retention pond. The Stormtech stormwater management system would cause less wetland impact than a retention pond.

34. Land Trust contends the use of a retaining wall reduces wetland impacts because, otherwise, more mangroves would have to be removed to account for the slope of the waterward side of the fill area. However, this proposition assumes the appropriateness of the size of the fill area.

35. Land Trust also contends wetland impacts are reduced by using the adjacent development to access the proposed project site, rather than creating a new road. However, the evidence did not establish that Land Trust had a practicable and preferred alternative for access.

36. Unlike the Stormtech system, the retaining wall and access driveway were not shown to be project modifications.

37. The proposed project would cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable. Reducing the size of the fill area would not cause the project to be significantly different in type or function.

38. Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions.

<u>Mitigation</u>

39. Land Trust proposes to purchase credits from the Tampa Bay Mitigation Bank, which is 17 miles north of the proposed project site. The Tampa Bay Mitigation Bank is in the Tampa Bay Drainage Basin. The project site is in the South Coastal Drainage Basin.

40. Pursuant to section 10.2.8 of the Applicant's Handbook, Volume I, if an applicant mitigates adverse impacts within the same drainage basin, the agency will consider the regulated

activity to have no unacceptable cumulative impacts upon wetlands and other surface waters. However, if the applicant proposes to mitigate impacts in another drainage basin, factors such as "connectivity of waters, hydrology, habitat range of affected species, and water quality" will be considered to determine whether the impacts are fully offset.

41. The parties disputed whether there was connectivity between the waters near the project site and the waters at the Tampa Bay Mitigation Bank. The more persuasive evidence shows there is connectivity.

42. There was also a dispute about the habitat range of affected species. The evidence establishes that the species found in the mangroves at the project site are also found at the mitigation bank. However, local fish and wildlife, and local biological productivity would be diminished by the proposed project. This diminution affects Petitioners' substantial interests.

43. The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.

44. Cumulative impacts are unacceptable when the proposed activity, considered in conjunction with past, present, and future activities would result in a violation of state water quality standards, or significant adverse impacts to functions of

wetlands or other surface waters. See § 10.2.8.1, Applicant's Handbook, Vol. I.

45. Section 10.2.8(b) provides that, in considering the cumulative impacts associated with a project, the District is to consider other activities which reasonably may be expected to be located within wetlands or other surface waters in the same drainage basin, based upon the local government's comprehensive plan. Land Trust did not make a prima facie showing on this point.

46. Land Trust could propose a similar project on another part of its property on Perico Island. Anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands could apply to enlarge the buildable portion of the property by removing the wetlands and filling behind a retaining wall.

47. When considering future wetland impacts in the basin which are likely to result from similar future activities, the cumulative impacts of the proposed project would result in significant adverse impacts to wetland functions in the area.

Public Interest

48. For projects located in, on, or over wetlands or other surface waters, an applicant must provide reasonable assurance that the project will not be contrary to the public interest, or if such activities significantly degrade or are within an

Outstanding Florida Water, are clearly in the public interest, as determined by balancing the criteria set forth in rule 62-330.302(1)(a), and as set forth in sections 10.2.3 through 10.2.3.7 of the Applicant's Handbook. Rule 62-330.302, which is identical to section 373.414, Florida Statutes, lists the following seven public interest balancing factors to be considered:

> 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 under the provisions of Section 267.061, F.S.; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed regulated activity.

49. The Parties stipulated that the proposed project would not have an adverse impact on public health, navigation, historical resources, archeological resources, or social costs.

50. Land Trust proposes to give $5,000 to the City of Palmetto for an informational kiosk at the City of Palmetto's public boat ramp. A District employee testified that this contribution made the project clearly in the public interest.

51. Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.

CONCLUSIONS OF LAW

Standing

52. Standing to participate in a proceeding under section 120.57(1), Florida Statutes, is afforded to persons whose substantial interests will be affected by the proposed agency action. *See* § 120.52(13)(b), Fla. Stat. (2014)(definition of "party.")

53. For organizational standing under chapter 120, it must be shown that a substantial number of an association's members, but not necessarily a majority, have a substantial interest that would be affected, that the subject matter of the proposed activity is within the general scope of the interests and

activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. Fla. Home Builders Ass'n v. Dep't of Labor and Emp't Servs., 412 So. 2d 351 (Fla. 1982); Fla. League of Cities, Inc. v. Dep't of Envtl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992).

54. Section 403.412(6), Florida Statutes, provides standing to any Florida corporation not for profit which has at least 25 current members residing within the county where the activity is proposed, and which was formed for the purpose of the protection of the environment, fish and wildlife resources, and protection of air and water quality, to initiate an administrative hearing, provided the corporation was formed at least one year prior to the date of the filing of application for the permit that is the subject of the notice of proposed agency action.

55. Section 403.412(5) provides standing to any citizen to intervene in an administrative, licensing, or other proceeding for the protection of the air, water, or other natural resources of the state from pollution, impairment or destruction, upon the filing of a verified pleading.

56. Respondents stipulated to Petitioner McClash's substantial interests in using the waters near the proposed project, but did not stipulate to his alleged injury and contend he failed to prove an injury to his interests. A petitioner can

establish standing by offering evidence to prove that its substantial interests could be affected by the agency's action. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011). Petitioner McClash offered evidence to prove his interests could be adversely affected by the proposed project. He has standing.

57. Respondents stipulated to the standing of Petitioners FISH, Manasota-88, and Suncoast Waterkeeper to intervene in an ongoing proceeding pursuant to section 403.412(5).

58. Sierra Club claims associational standing to intervene under chapter 120. Respondents stipulated that a substantial number of Sierra Club members have substantial interests in the use of the waters near the project site, but assert that Sierra Club failed to demonstrate injury to these interests. Sierra Club offered evidence to prove the interests of its members could be adversely affected by the proposed project. Sierra Club has standing under chapter 120.

59. Sierra Club also claims standing to intervene pursuant to section 403.412(5), but Sierra Club is not a citizen of the state; it is a foreign nonprofit corporation. Legal Envtl. Assistance Found. v. Dep't of Envtl. Protection, 702 So. 2d 1352 (Fla. 1st DCA 1997). Sierra Club does not have standing under section 403.412(5).

Burden and Standard of Proof

60. 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); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

61. Because Petitioners challenge a permit issued by the District under chapter 373, section 120.569(2)(p) is applicable. This statute provides that the permit applicant must present a prima facie case demonstrating entitlement to the permit, but the challenger has the burden of ultimate persuasion.

62. The standard of proof is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

63. Entitlement to an ERP requires reasonable assurance from the applicant that the activities authorized will meet the applicable conditions for issuance as set forth in rules 62-330.301 and 62-330.302 and related provisions of the Applicant's Handbook.

64. Reasonable assurance that a proposed activity is clearly in the public interest does not require a demonstration of need or net public benefit. See 1800 Atlantic Developers v. Dep't of Envtl. Reg., 552 So. 2d 946, 957 (Fla. 1st DCA 1989).

65. Whether assurances are reasonable will depend on the circumstances involved, especially with respect to the potential

harm that could be caused. See Angelo's Aggregate Materials, Ltd. v. Dep't of Envtl. Protection, DOAH Case No. 09-1543 (Recommended Order, June 28, 2013, adopted in its entirety by the Department of Environmental Protection). The potential to harm an Outstanding Florida Water requires greater assurances than for waters without this special designation.

66. Land Trust presented a prima facie case of entitlement to the permit except with regard to the cumulative impacts of the proposed project. Petitioners then presented their case in opposition to the permit and demonstrated that Land Trust was not entitled to the permit for the reasons stated below.

Compliance with Applicable Criteria

67. The Stormtech system meets the District's design criteria for managing water quality and water quantity. Projects which meet the District's design criteria are presumed to provide reasonable assurance of compliance with state water quality standards. Land Trust's proposed project complies with all stormwater management requirements.

68. Section 10.2.1 of the Applicant's Handbook requires an applicant to eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed project by implementing practicable design modifications. Land Trust's proposed project fails to comply with this requirement.

69. Pursuant to rule 62-330.301(d) and 62-330.301(f), an applicant must provide reasonable assurance that the regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Land Trust's proposed project fails to comply with this requirement.

70. Section 373.414(1)(b) provides that if an applicant is unable to otherwise meet the criteria, the District shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity, including the purchase of mitigation credits from a mitigation bank.

71. The proposed mitigation must fully offset the expected impacts. Land Trust did not provide reasonable assurance that the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation credits from the Tampa Bay Mitigation Bank.

72. Section 10.2.8 of the Applicant's Handbook states that cumulative impacts are considered unacceptable when the proposed activity, considered in conjunction with the past, present, and future activities, would result in significant adverse impacts to functions of wetlands or other surface waters within the same drainage basin when considering the basin as a whole. The cumulative impacts that would result from the proposed project

would result in significant adverse impacts to functions of wetlands in the basin.

73. Determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2nd DCA 1997).

74. The District rules state that "protection of wetlands and other surface waters is preferred to destruction and mitigation." The proposed permit does not reflect that preference.

75. Although not acknowledged by the District, this is an unusual project. It resembles the kind of project that was common in the 1960s and 1970s in Florida, before the enactment of environmental regulatory programs, when high-quality wetlands were destroyed by dredging and filling to create land for residential development. In all the reported DOAH cases involving ERPs and mitigation of wetland impacts, the circumstances have involved impaired wetlands and/or the restoration or permanent protection of other wetlands on the project site. No case could be found where an applicant simply paid for authorization to destroy almost an acre of high-quality wetlands and convert it to uplands.

76. The District should determine that the proposed mitigation is insufficient.

77. Land Trust's proposed project is not clearly in the public interest as required by section 373.414(1) and rule 62-330.302(1) because it would cause significant adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law set forth above, it is

RECOMMENDED that the Southwest Florida Water Management District issue a final order that denies the Environmental Resource Permit.

DONE AND ENTERED this 25th day of June, 2015, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2015.

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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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH MCCLASH,
Petitioner,
and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,
Intervenors,
vs. Case No. 14-4735

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
_______________________________/

MANASOTA-88, INC.,
Petitioner,
and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,
Intervenors,
vs. Case No. 14-5038

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
_______________________________/

FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.,
Petitioner,
and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,
Intervenors,
vs. Case No. 14-5135

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
_______________________________/

RESPONDENT LAND TRUST #97-12'S EXCEPTIONS TO RECOMMENDED ORDER

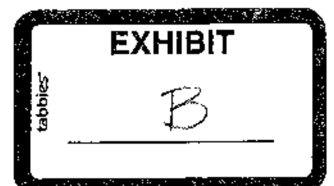

Exhibit 1

INTRODUCTION

Pursuant to Section 120.57(1)(b), Florida Statutes, and Rule 28-106.217, F.A.C., Land Trust #97-12 ("Applicant" or "Land Trust") hereby submits its Exceptions to the Recommended Order entered in this matter on June 25, 2015.

On August 21, 2014, the Southwest Florida Water Management District ("District") issued a Notice of Intended Agency Action to issue an Environmental Resource Permit ("Permit") to Land Trust. Three parties, Joseph McClash, Manasota-88, Inc., and Florida Institute for Saltwater Heritage, Inc. ("FISH"), protested the issuance of the permit and two parties, Suncoast Waterkeeper, Inc. and Sierra Club, Inc., intervened. The final hearing in these consolidated cases was held on February 17-19, 2015, in Tampa, Florida, before Bram D.E. Canter, Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

Citations to the hearing transcript are denoted as (T. at __); citations to Land Trust's Exhibits admitted into evidence at the final hearing in this matter are denoted as (LT Ex. __, p.__); citations to the findings of fact in the Recommended Order are denoted as (FOF No. __); and citations to the conclusions of law in the Recommended Order are denoted as (COL No. __).

SUMMARY OF LAND TRUST'S EXCEPTIONS

In the Recommended Order, the ALJ holds that "Land Trust presented a prima facie case of entitlement to the permit except with regard to the cumulative impacts of the proposed project." (COL No. 66). All of Land Trust's permit application file regarding the project, including the UMAM calculations and scoring, were accepted into evidence as Land Trust's prima facie case. Only its "connectivity" analysis was not accepted as part of the prima facie case file, but was later accepted into evidence. Therefore, the burden is then on Petitioners to

Exhibit 1

present contrary evidence, equivalent in quality to that presented by the applicant. *Dr. Octavio Blanco v. NNP-Bexley, Ltd. and Southwest Florida Water Management District*, 2008 WL 4974178 holds that upon presentation of a prima facie case of credible evidence of reasonable assurances and entitlement to the permit, the burden of presenting evidence can be shifted to Petitioner, as permit challenger, to present evidence of equivalent quality to refute the applicant's evidence of reasonable assurances and entitlement to the permit. Unless the Petitioner, as permit challenger, presents 'contrary evidence of equivalent quality,' the hearing officer would not be authorized to deny the ERP. *Diventura v. The Gables at Stuart*. 2006 WL 716869 (Fla. Div. Admin. Hrgs. 2006) [citing to *Fla. DOT v. J.W.C. Co., Inc.* 396 So.2d 778 (Fla. 1st DCA 1981)]"). In order to overcome that finding, Petitioners must present a preponderance of the evidence for a contrary position to be sustained. *Davis Family Day Care Home v. Department of Children and Family,* 117 So.3d 464 (Fla. 2d DCA 2013).

Despite the above, the ALJ misinterpreted the District rules and statutes, and went on to find that other criteria beyond cumulative impacts, such as the sufficiency of the mitigation and consideration of practicable design modification to reduce impacts criteria, were not satisfied by Land Trust. In addition, no competent, substantial evidence from Petitioners on the sufficiency of the UMAM calculations or scoring were provided in the record.

Furthermore, as explained below, the conclusions reached by the ALJ regarding the sufficiency of the mitigation and practicable design modifications are all either: 1) a misinterpretation of the District's rules on matters which fall squarely within the substantive jurisdiction and discretion of the District; or 2) not supported by competent, substantial evidence.

OVERVIEW OF LAND TRUST'S PROJECT

The project site for the Permit is 3.46 acres of a 40.36-acre parcel owned by Land Trust in the City of Bradenton in Manatee County. (FOF No. 8). The parcel includes submerged lands, uplands, wetlands and includes approximately 7 acres of mangroves along the shoreline of Anna Maria Sound which is part of Lower Tampa Bay. (FOF Nos. 8-10). Land Trust proposes to construct a stormwater management system to support the 3.46-acre, four-lot single family residential subdivision with associated access driveway, to be known as Single Family Homes at Harbor Sound. (LT Ex. 1A; LT Ex. 1, p.5; T. at 72). The project area is located along the western shoreline of Perico Island and is adjacent to a larger multi-family residential development under construction that, when completed, will occupy most of the northern and western portions of Perico Island. (FOF No. 9). Approximately 1.05 acres of the approximately 1.9 acres of mangrove wetlands within the 3.46 acre project area will be filled to create the house lots. (FOF No. 25). Of the 7 acres of mangroves on the Land Trust parcel, 5 acres will remain North and South of the project area, and a swath 40 feet wide of mangroves (approximately 0.85 acres) will remain directly adjacent to and waterward of the project. (FOF 10 & 25). The fill will be placed behind a retaining wall that will be more than 35 feet landward of the mean high water line in most areas. (FOF No. 17). The retaining wall faced with riprap will be used to separate the upland area from the wetlands that will remain onsite. (FOF No. 17).

In addition, the ALJ found that the stormwater treatment system met the Outstanding Florida Water heightened District criteria to provide an additional 50% treatment volume. (FOF Nos. 20, 21, 24; COL No. 67). This added treatment volume will provide a net benefit over current stormwater treatment. (T. at 303, 304, 306, 307 & 311).

Further, utilizing the mandated, exclusive methodology for assessing wetland impacts, set forth in Section 373.414, Florida Statutes, and Rule 62-345, F.A.C., the applicant provided a Uniform Mitigation Assessment Method (UMAM) analysis, "which is used to quantify the loss of functions performed by wetlands considering: current condition, hydrologic connection, uniqueness, location, fish and wildlife utilization, time lag and mitigation risk." (FOF No. 26). The ALJ found the "District determined the filling of 1.05 acres of wetland result in a loss of 0.81 units and the secondary impacts resulting from installation of the retaining wall would result in a loss of 0.09 units for a total of functional loss of 0.9 units. . ." (FOF No. 27). Land Trust proposes to purchase 0.9 mitigation bank credits from Tampa Bay Mitigation Bank to fully offset the adverse impacts upon surface water and wetlands pursuant to Section 373.414(8)(a), Florida Statutes. Tampa Bay Mitigation Bank is outside of the basin where the project is located; however, its service area extends to the project. The ALJ found the requisite hydrologic and ecologic connectivity between Tampa Bay Mitigation Bank and the project area. (FOF Nos. 40-42). With this connectivity, the Tampa Bay Mitigation Bank credits are capable to fully offset the adverse impacts from the project to wetlands and other surface waters and the project is considered to have no unacceptable cumulative impacts. (T. at 882-885); Section 10.2.8, Applicant's Handbook, Volume I.

EXCEPTIONS

I. Exception No. 1: COL No. 75 is incorrect, irrelevant and departs from the essential requirements of law

The ALJ's conclusion in COL No. 75 is incorrect as a matter of law, is not dispositive on the merits of the case, and departs from the essential requirements of law. In COL No. 75, the ALJ states:

75. Although not acknowledged by the District, this is an

> unusual project. It resembles the kind of project that was common in the 1960s and 1970s in Florida, before the enactment of environmental regulatory programs, when high-quality wetlands were destroyed by dredging and filling to create land for residential development. In all the reported DOAH cases involving ERPs and mitigation of wetland impacts, the circumstances have involved impaired wetlands and/or the restoration or permanent protection of other wetlands on the project site. No case could be found where an applicant simply paid for authorization to destroy almost an acre of high-quality wetlands and convert it to uplands.

The absence of a reported DOAH case is not any indication of an absence of a legal justification and authority for purchasing mitigation credits from an authorized mitigation bank to offset wetland losses. Although this conclusion is not correct or dispositive on the merits of this case, it does display the ALJ's personal bias in this proceeding. Unlike projects in the 1960s and 1970s, this project proposes to fully offset adverse impacts through the purchase of credits from a wetland mitigation bank, which is clearly authorized by statute. Section 373.4135(1)(c), Florida Statutes.[1] This is not an "unusual project." The District has issued many permits which provide mitigation for adverse impacts to high quality wetlands solely through the purchase of mitigation bank credits. (See SWFWMD ERP Nos. 43015745.002, 43041751.002, 43001557.052, and 44011222.003).

Furthermore, in a recent DOAH case ALJ Bram Canter approved a permit where the applicant mitigated for adverse impacts to wetlands that would be caused by construction of the road and stormwater management system solely through the purchase of mitigation bank credits. *Tomm Friend, Derek Lamontagne, Turnbull Bay Community, Inc., and Friends of Spruce Creek Preserve, Inc. v. Pioneer Community Development District and St. Johns River Water Management District*, DOAH Case No. 14-3904 (Recommended Order March 12, 2015). In that

[1] It is the further intent of the Legislature that mitigation banks and offsite regional mitigation be considered appropriate and a permittable mitigation option under the conditions specified by the rules of the department and water management districts. Section 373.4135(1)(c), Florida Statutes.

case, the ALJ concluded that the application was consistent with the standards and criteria for issuance of a permit and therefore recommended that the District enter a final order approving the application and issuing the permit. *Id.* Finally, COL No. 75 departs from the essential requirements of law since this issue of other permits before DOAH was not raised before or at the hearing and the parties were not given an opportunity to brief or address this issue. *State Farm Gen. Ins. Co. v. Grant*, 641 So.2d 949, 952 (Fla. Dist. Ct. App. 1994); *See also Department of Environmental Regulation v. Montco Research Products, Inc.*, 489 So.2d 771 (Fla. 5th DCA), *review denied,* 494 So.2d 1152 (Fla.1986) (determination of an issue not raised by pleadings or on which parties have not been given notice or opportunity to be heard is departure from essential requirements of law).

II. Exceptions regarding sufficiency of mitigation

The ALJ holds that the proposed mitigation is insufficient in COL No. 76. However, this conclusion is based on, and encompasses, the ALJ's holdings on the related issues of the sufficiency of the use of mitigation bank credits in general, cumulative impacts, public interest, and secondary impacts. As explained below, these conclusions are all either based on a misinterpretation of the District's rules. In addition, the conclusion regarding the UMAM calculation for secondary impacts is not supported by competent, substantial evidence.

a. Exception No. 2: The conclusions in FOF No. 43 and COL Nos. 69, 71, 74, 75 and 76, on the sufficiency of the use of mitigation bank credits to offset adverse impacts to wetlands and other surface waters, conflict with the District's rules and are not supported by competent, substantial evidence.

Section 120.57(1)(*l*), Florida Statutes, states, "The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction." Furthermore, an agency's interpretation of the statute it is charged with enforcing is entitled to great deference, and a court

will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is "clearly erroneous." *See BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla. 1998); *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988). The Florida Supreme Court has long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous. *State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Department of Business Regulation*, 276 So.2d 823 (Fla. 1973); *Miles v. Florida A & M Univ.*, 813 So.2d 242, 245 (Fla. 1st DCA 2002). The issue of the sufficiency of mitigation proposed by a permit applicant is a policy matter of agency expertise, and consequently, the District has exclusive final authority to determine the sufficiency of any proposed mitigation submitted by the Applicant. *Save Anna Maria, Inc. v. Dept. of Transportation*, 700 So.2d 113, 116 (Fla. 2d DCA 1997); *Collier Development Corp. V. Dept. of Environmental Regulation*, 592 So.2d 1107, 1109 (Fla. 2d DCA 1992); *1800 Atlantic Developers v. Dept. of Environmental Regulation*, 552 So.2d 946, 955 (Fla. 1st DCA 1989), rev. denied, 562 So.2d 345 (1990).

The ALJ even recognizes the District's jurisdiction over sufficiency of mitigation in the Recommended Order by providing the following as COL No. 73: "Determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District. See *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2nd DCA 1997)." (COL No. 73). Thus, the "factual findings" in FOF No. 43 of the ALJ on mitigation are "essentially conclusions of law and are not binding" on the District. *Save Anna Maria, supra*, at 116.

In *1800 Atlantic Developers*, 552 So.2d 946, at 955, the Court found that section 403.918(2)(b), Florida Statutes, requires that the agency, not the hearing officer, consider and

determine what measures to mitigate the adverse effects that may be caused by the project will be legally sufficient under the statute. It is the responsibility of the District, not the ALJ, to establish mitigative measures acceptable to it under the statute, and this task cannot be delegated to the ALJ. *Id.* Section 373.414(18), Florida Statutes, expressly provides:

> The department and each water management district responsible for implementation of the environmental resource permitting program shall develop a uniform mitigation assessment method for wetlands and other surface waters. ... The rule shall provide an <u>exclusive and consistent process</u> for determining the amount of mitigation required to offset impacts to wetlands and other surface waters, and, once effective, shall supersede all rules, ordinances, and variance procedures from ordinances that determine the amount of mitigation needed to offset such impacts. *Once the department adopts the uniform mitigation assessment method by rule, the uniform mitigation assessment method* shall be binding on the department, the water management districts, local governments, and any other governmental agencies and *shall be the sole means to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters and to award and deduct mitigation bank credits.* [Emphasis supplied]

This statute sets forth that UMAM shall be the sole means to determine the amount of mitigation needed to offset adverse impacts to wetlands and other surface waters, and expressly provides for the use of mitigation bank credits to offset those adverse impacts to wetlands and other surface waters. "Shall" is to be considered mandatory when read with the Legislative directive that the UMAM is the "<u>sole means to determine the amount of mitigation.</u>" *Allied Fidelity Insurance Co. v. State,* 415 So.2d 109 (Fla. 3d DCA 1982).

In COL Nos. 69 (last sentence), 71, 74, 75 76 and FOF No. 43, the ALJ incorrectly finds that the Applicant cannot "fully offset" the adverse impacts caused by the proposed project through the purchase of mitigation bank credits from Tampa Bay Mitigation Bank, despite the fact that the applicable statute and District rules expressly provide for and authorize the use of mitigation bank credits to fully offset adverse impacts of a proposed project. See Section

373.4135(1)(c), Florida Statutes ("It is the further intent of the Legislature that mitigation banks and offsite regional mitigation be considered appropriate and a permittable mitigation option under the conditions specified by the rules of the department and water management districts"). Under the District rules and applicable statute, when an ERP requires wetland mitigation to offset adverse impacts to wetlands, the applicant may purchase wetland credits from a mitigation bank and apply them to meet the mitigation requirements. *Florida Wildlife Federation v. CRP/HLV Highlands Ranch, LLC and DEP*, DOAH Case No. 12-3219 (Recommended Order April 11, 2013). The ALJ even recognized this statutory approval and authorization for mitigation by stating "there is mitigation allowed by statute, and there is even a -- I mean, a fairly lengthy statutory provision for it. So, it's a sanctioned idea, and it has to mean there are some local losses, from the critters point of view, a raccoon's point of view, crab's point of view, fish's point of view," and that "mitigation on its face says that those wetlands, if you satisfy mitigation, don't have to be here anymore in this -- in their starting place, now they can be mitigated for in another place." (T. at 569, 570 & 571). Despite the foregoing, the ALJ still held that ". . . the functions performed by mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank" (FOF No. 43), and that "the District should determine that the proposed mitigation is insufficient." (COL No. 76).

In *Florida Wildlife Federation v. CRP/HLV Highlands Ranch, LLC and DEP*, 2013 WL 3131741, the DEP overturned the ALJ's rulings to the extent that they didn't reflect DEP's interpretation of its rules regarding adequate mitigation to fully offset adverse impacts of a proposed project, UMAM and the use of mitigation credits to offset adverse impacts from a proposed project. It was held that DEP's interpretation of the mitigation rules was as reasonable as the ALJ's and was supported by competent substantial evidence. *Id.* For the Land Trust

project, the District determined that, pursuant to Section 373.414, F.S. and Rule 62-345, FAC, the purchase of credits based upon the UMAM analysis from Tampa Bay Mitigation Bank was sufficient to offset the adverse impacts to wetlands and other surface waters. This is a matter over which the District has exclusive final authority and the District's interpretation of the mitigation rule is as reasonable, and indeed more rational, than the ALJ's.

This misapplication of the applicable statute and District rules alone merits overturning the erroneous conclusion. Further, Petitioners presented no competent, substantial evidence on the sufficiency of the proposed mitigation, since Petitioners only UMAM expert, Lee Cook, did not apply the correct UMAM methodology and her impact assessment analysis was found to be "unreliable" by the ALJ: "Reliance on science is always appropriate. *However, (Petitioner's witness) Ms. Cook's use of a federal impact assessment methodology creates doubt about whether her scoring is consistent with UMAM. Despite the unreliability of Ms. Cook's UMAM score...* " (FOF No. 30). An expert opinion based on facts not supported by the record cannot constitute proof of the facts necessary to support the opinion, and is not competent substantial evidence. *D'Avila, Inc. v. Mesa*, 381 So.2d 1172 (Fla. 1st DCA 1980); *R. P. Hewitt & Associates of Florida, Inc. v. McKimie*, 416 So.2d 1230, 1232 (Fla. 1st DCA 1982). UMAM is the sole means for determining the amount of mitigation needed to offset adverse impacts to wetlands and the only UMAM evidence presented by Petitioners in the record was found to be "unreliable" by the ALJ. Therefore, the ALJ's conclusions and findings regarding the sufficiency of Land Trust's proposed mitigation to offset adverse impacts to wetlands are not supported by competent, substantial evidence.

The ALJ's conclusions in FOF No. 43 and COL Nos. 69 (last sentence), 71, 74, 75 and 76, on the sufficiency of the proposed mitigation through use of mitigation bank credits to fully

offset adverse impacts to wetlands and other surface waters, conflict with the District's rules on a matter over which the District has exclusive final authority or are not supported by competent, substantial evidence.

b. Exception No. 3: The conclusions in FOF Nos. 45, 46, 47 and COL Nos. 71 and 72, on the cumulative impacts issue, are based on a misinterpretation of the District's rules.

FOF Nos. 45, 46, 47 and COL Nos. 71 and 72, are based on the ALJ's flawed application of the District's cumulative wetland impacts analysis to the project. Applicant's Handbook, Vol. I, Section 10.2.8 sets forth three separate options for determining whether a project will have unacceptable cumulative impacts on wetlands and other surface waters:

1. **Mitigation within impact basin:** If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied.
2. **Mitigation outside of impact basin but fully offsets based on connectivity:** If an applicant proposes to mitigate adverse impacts through mitigation physically located outside of the basin where the impacts are proposed, an applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted basin based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality. If the mitigation fully offsets the impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g), above, will be satisfied.
3. **Mitigation outside of impact basin and impacts not fully offset:** If it is not demonstrated that the mitigation located outside of the impact basin will fully offset the adverse impacts at the impact basin based on the above factors, then an applicant must provide reasonable assurance that the proposed activity, when considered with the activities listed in 10.2.8 (a) & (b), such as reasonably expected future applications with like impacts, will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters, within the same drainage basin.

If the mitigation is located in the same impact basin (option 1) or the mitigation is located outside of the impact basin but the adverse impacts at the impact basin will be fully offset based on a demonstration of connectivity (option 2), "the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands," and the analysis of future activities required in the third option (option 3) is inapplicable. An applicant is only required to consider reasonably expected future activities with similar impacts under option 3 of the above rule. Option 3 is only applicable where the proposed mitigation is located outside of the impact basin *and* the applicant has not demonstrated that the impact will be fully offset based on the connectivity factors listed in 10.2.8, Applicant's Handbook, Volume I. This is the District's interpretation of its cumulative impacts rule and its mitigation rules. Interpreting its own rules and whether mitigation fully offsets impacts are within the District's discretion. (See John Emery rebuttal testimony T. at 882-885); *See, e.g., Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994); *Florida Wildlife Federation v. CRP/HLV Highlands Ranch, LLC and DEP*, 2013 WL 3131741, at 8) (holding that "an agency has the primary responsibility of interpreting rules within its regulatory jurisdiction and expertise" and overturning the ALJ's rulings to the extent that they didn't reflect DEP's interpretation of its mitigation rule). Petitioners presented no competent substantial evidence that the District's interpretation of its rule is unreasonable or any evidence supporting any other interpretation of the rule. Interpretations of statutes by agencies charged with their enforcement do not have to be the only ones, or even the most desirable interpretations. It is enough if the agency interpretations are permissible ones. *Stuart Yacht Club Marina, Inc., v. Dep't of Natural*

Resources, 625 So.2d 1263, 1267 (Fla. 4th DCA 1993); *Little Munyon Island v. Dep't of Envtl Regulation,* 492 So.2d 735, 737 (Fla. 1st DCA 1986).

In *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So.3d 1079, 1086-87 (Fla. 2d DCA 2009), it was held that DEP had "properly exercised its statutory discretion to determine whether the proposed mitigation is sufficient," and upheld DEP's finding that there would be no adverse impacts post-mitigation because mitigation would fully offset the adverse impacts so no cumulative impacts analysis was needed. Similarly, here the District found that the proposed mitigation would fully offset the adverse impacts to wetlands and other surface waters in the impact basin based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality. This is expressly provided for in Section 10.2.8 of the Applicant's Handbook, Volume I, which states that "an *applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted drainage basin, based on factors such as connectivity* of waters, hydrology, habitat range of affected species, and water quality." The rule goes to on to state that "if the mitigation fully offsets the impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g) will be satisfied." Section 10.2.8, Applicant's Handbook, Volume I.

Under the District's interpretation of its cumulative impacts and mitigation rules and regulations, option 3 of the cumulative impacts test of 10.2.8 of the Applicant's Handbook, Volume I, was inapplicable because it was demonstrated that the proposed mitigation would fully offset adverse impacts in the impact basin based on the finding of connectivity. Therefore, the regulated activity was considered by the District to have no unacceptable cumulative impacts

upon wetlands and other surface waters, and satisfied the condition for issuance in section 10.1.1(g) of Applicant's Handbook, Volume I.

Furthermore, the ALJ even acknowledges in the Recommended Order that Land Trust established connectivity:

> 41. The parties disputed whether there was connectivity between the waters near the project site and the waters at the Tampa Bay Mitigation Bank. *The more persuasive evidence shows there is connectivity.*
>
> 42. There was also a dispute about the habitat range of affected species. The *evidence establishes that the species found in the mangroves at the project site are also found at the mitigation bank.*

(FOF Nos. 41 & 42). However, despite finding that connectivity was established between the project site and the Tampa Bay Mitigation Bank, the ALJ, in FOF Nos. 45, 46, 47 and COL No. 72, incorrectly went on to apply the inapplicable option 3 of the cumulative impacts test of 10.2.8, Applicant's Handbook, Volume I, which requires consideration of other activities which reasonably may be expected to be located within wetlands in the same basin based on the local comprehensive plan. However, option 3 of the rule only applies where mitigation is proposed outside of the impact basin *and* it is not shown that based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality, that the proposed mitigation will fully offset the adverse impacts in the impact basin.

Since Land Trust established, and the ALJ held, that there is connectivity between the project site and the Tampa Bay Mitigation Bank, the District interpreted that under its rules: 1) the mitigation would fully offset the adverse impacts in the impact basin based on the demonstration of connectivity; and 2) because the mitigation fully offsets the impacts, the regulated activity is considered to have no unacceptable cumulative impacts upon wetlands and other surface waters, and the third part of the test regarding similar future activities was

inapplicable. (T. at 451and 882-885). This is the District's interpretation of its cumulative impacts rule and its mitigation rules, and interpreting its own rules and whether mitigation fully offsets impacts are within the District's discretion. *See, e.g., Pub. Employees Relations Comm'n v. Dade Cty. Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994); *Florida Wildlife Federation v. CRP/HLV Highlands Ranch, LLC and DEP*, 2013 WL 3131741 (holding that "an agency has the primary responsibility of interpreting rules within its regulatory jurisdiction and expertise"). Because determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District, the "factual findings" in FOF 45, 46 and 47 of the ALJ on mitigation are "essentially conclusions of law and are not binding" on the District. *See Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2nd DCA 1997).

Additionally, the ALJ states in FOF No. 46 that "Land Trust could propose a similar project on another part of its property on Perico Island. Anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands could apply to enlarge the buildable portion of the property by removing the wetlands and filling behind a retaining wall." This finding is not only irrelevant and based on a misinterpretation of the District's rules regarding cumulative impacts, as explained above, but is also speculative. No evidence was presented to support this finding. It was not stated that Land Trust had proposed any other project on its property or that anyone else had applied "to enlarge the buildable portion of the property by removing the wetlands and filling behind a retaining wall," but rather the ALJ just speculates that this "*could*" happen. This finding should be rejected as it is based on speculation, a misinterpretation of the District's rules, and is not supported by competent, substantial evidence.

Therefore, the conclusions in FOF Nos. 45, 46, 47 and COL Nos. 71 and 72, regarding cumulative impacts, are based on a misinterpretation of the District's rules and should be rejected.

c. Exception No. 4: The conclusions in FOF No. 51 and COL No. 77, regarding the "clearly in the public interest" criterion, are based on a misinterpretation of the District's rules.

The ALJ concludes in FOF No. 51 and COL No. 77 that Land Trust's proposed project is not clearly in the public interest. However, the only reason or basis provided for this conclusion in the Recommended Order is the ALJ's incorrect conclusion that the proposed mitigation would not fully offset the adverse impacts from the project to wetlands and other surface waters, resulting in adverse cumulative impacts:

> 51. Reasonable assurances were not provided that the proposed project is clearly in the public *interest because of the adverse cumulative effects* on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.
>
> 77. Land Trust's proposed project is not clearly in the public interest as required by section 373.414(1) and rule 62-330.302(1) *because it would cause significant cumulative effects* on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound.

However, as explained above in I.b., the ALJ's conclusion that the project would result in adverse cumulative impacts is based on a misinterpretation and misapplication of the District's rule governing cumulative impacts. As explained above, under the District's interpretation of its cumulative impacts rule, the District considers that the project will have no unacceptable cumulative impacts because the proposed mitigation from Tampa Bay Mitigation Bank will fully offset any adverse impacts within the impact basin based on the connectivity of waters, hydrology, habitat range of affected species, and water quality.

Therefore, since the ALJ' s conclusion in FOF No. 51 and COL No. 77, that the proposed project is not in the clearly interest, is based solely on the ALJ's incorrect interpretation and application of the District's cumulative impacts rule, the ALJ's conclusion regarding "clearly in the public interest" should be disregarded. The District should conclude that the proposed mitigation fully offsets the adverse impacts to wetlands and other surface waters and the project has met the cumulative impacts requirement and all applicable criteria, and with the addition of the donation of $5,000 to the City of Palmetto, meets the "clearly in the public interest" criteria.[2]

d. **Exception No. 5: Conclusions in FOF Nos. 29, 30 and 31, regarding consideration of and mitigation for secondary impacts, are based on a misinterpretation of the District's rules and are not supported by competent, substantial evidence.**

Land Trust's experts explained that the purchase of additional mitigation bank credits accounted for the secondary impacts to the root systems of the mangroves from the retaining wall and provided an additional buffer between the permanent impact area and the mangroves that remain. (T. at 233-235). Land Trust's experts (and some of Petitioners' experts) explained that the riprap was added for erosion prevention and also provided an erosion control plan in order to account for and explain how it was mitigating and providing for the prevention of erosion to wetlands. (T. at 107, 153, 233-235, 311, 595 & 678). Despite the forgoing, the ALJ concludes in FOF Nos. 29, 30 and 31 that Land Trust's UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement." The courts have found that determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District. See *Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d

[2] The last sentence of FOF No. 50 erroneously states that "A District employee testified that this contribution made the project clearly in the public interest." However, what the District employee, Mr. Gagne, actually testified was that the informational kiosk donation together with the proposed mitigation is what made the project clearly in the public interest. (T. at 378, 397 and 398) ("I was just going to say, it's the mitigation plus the public interest product that they provided.")

113, 116 (Fla. 2nd DCA 1997)." (COL No. 73). Therefore, since the UMAM methodology is the sole means to determine sufficiency of mitigation, the "factual findings" in FOF Nos. 29, 30 and 31 of the ALJ on the sufficiency of mitigation and the UMAM score are "essentially conclusions of law and are not binding" on the District. *Save Anna Maria, supra,* at 116.

In FOF No. 31, the ALJ inexplicably asserts that no explanation was provided on "how loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score." UMAM methodology is extensively described in Rule 64-345, F.A.C. The UMAM methodology and scoring sheets were part of the Land Trust application and accepted into evidence as part of its *prima facie* case, and, as this ALJ opined, the applicant is "Not require to prove all the facts associated with a proposed project (which can number in the tens of thousands) as part of his *prima facie* case." *Burkett v.* Osceola, DOAH Case No. 05-4308. However, the secondary impact calculation was explained by expert witnesses and the exhibits in evidence.

The UMAM methodology for assessment and scoring – Part II and Rule 62-345.500, F.A.C., provides for scoring three indicators of wetland function: 1) location and landscape support, 2) water environment, and 3) community structure. See Rule 62-345.500(6), F.A.C. Each rule section is lengthy and descriptive of the issues to be considered in the UMAM scoring. Rule 62-345.500(6)(c), F.A.C. Specifically, Section 62-345.500(6)(c)1, F.A.C., provides for the scoring to consider ". . . construction of permanent structures such as seawalls. . ." De minimis or remotely related secondary impacts are not considered in the UMAM scoring. *Pelican Island Audubon Society, Dr. Richard Baker, and Dr. David Cox v. Indian River County and St. Johns River Water Management District,* DOAH Case No. 13-3601 (Recommended Order August 5, 2014, adopted by Final Order issued August 22, 2014) In the UMAM score sheet admitted into

evidence as LT Ex. 1, at pages 161-164, the Location and Landscape Support and Community Structure scores for secondary impacts were lowered to account for impacts to adjacent wetlands and temporary impacts caused by access to construct the retaining wall. This impact required the addition of 0.09 UMAM credits. Additionally, Land Trust's expert, Alec Hoffner explained that "due to the nature of the impact, there was no ability to provide a 25' buffer between the developed area and the wetlands. So, at the very minimum, we'd have to look at that 25' for secondary impacts, but we, in fact, looked at the entire area between the impact -- the permanent impact and the bay, which was greater than 25'." (T. at 201). Thus, it was explained by Land Trust how any secondary impacts from the proposed project were accounted for in its UMAM score.

Furthermore, the ALJ's conclusions and findings in FOF Nos. 29, 30 and 31, are not supported by any competent, substantial evidence. Petitioners presented no expert testimony on the issue of "secondary impacts due to scour and other effects of changed water movement caused by retaining wall." Rather, Petitioners' witnesses Johnston and Stevely attempted to discuss this issue but both admitted they were not experts in wave action, hydrology or UMAM. (T. at 502, 507, 665, 676, 697, & 700). Johnston was only qualified as an expert in environmental assessment and water quality, and Stevely as an expert in mangroves and marine habitats. (T. at 464 & 641). The ALJ held that Stevely was not an expert on tidal flows and sustained the motion to strike his testimony on it (T. at 484-485), and explained to Johnston the complexity of water movement and the fact that one cannot be an expert on water movement simply by observing it on one's boat. (T. at 680-683). Furthermore, as to the UMAM score, Lee Cook was the only expert presented by Petitioners on UMAM methodology and even the ALJ held that her UMAM score was unreliable, stating:

> However, Ms. Cook's use of a federal impact assessment methodology creates doubt about whether her scoring is consistent with UMAM. Despite the unreliability of Ms. Cook's UMAM score, it is found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall.

(FOF No. 30). Additionally, Cook's report submitted into evidence at the final hearing, which discussed secondary impacts due to scour and other effects of changed water movement, did not take into consideration the addition of riprap by the Applicant and admitted during the hearing that the addition of riprap would mitigate the wave action concerns listed in her report:

> Q. And you agreed that the addition of riprap added to the retaining wall will mitigate the wave action that was a concern in your report, correct?
>
> A. Yes.

(T. at 595). Any other UMAM mitigation testimony provided by Petitioners was lay opinion testimony and as such is not considered competent, substantial evidence. Lay witnesses may offer their views in land use cases about matters not requiring expert testimony; lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise, but their speculation about potential traffic problems, light and noise pollution, and general unfavorable impacts of a proposed land use are not considered competent, substantial evidence. *Katherine's Bay, LLC v. Fagan*, 52 So.3d 19 (Fla. 1st DCA 2010). As explained above, Petitioners presented no testimony or evidence from an expert on wave action or water movement, and their only UMAM expert was found to have an "unreliable" UMAM analysis based on incorrect methodology and failed to consider the addition of riprap in her report. Petitioners never presented any evidence quantifying the secondary impacts alleged from scour and changed water movement effects, and Cook's report failed to take into consideration the addition of riprap by the Applicant, which she admitted would mitigate secondary impacts from

scour effect. (T. at 595). Petitioners presented no competent, substantial evidence regarding whether Land Trust adequately mitigated for secondary impacts caused by the retaining wall. Land Trust and the District provided evidence that the secondary impacts of the project were calculated and accounted for in the UMAM calculation requiring a total of 0.9 credit to fully offset adverse impacts to wetlands and other surface waters. (FOF 27; T. at 201, 233-235, 882-885; LT Ex. 1 at p. 161-164).

Therefore, the conclusions in FOF Nos. 29, 30 and 31, regarding consideration of and mitigation for secondary impacts, are based on a misinterpretation of the District's rules, are speculative and are not supported by competent, substantial evidence.

III. Exceptions regarding practicable design modifications.

Exception No. 6: The conclusions in FOF Nos. 34, 35, 36, 37, 38 and COL No. 68 (last sentence), regarding practicable design modifications, are based on a misinterpretation of the District's rules.

The interpretation of the District rules regarding exploring practicable design modifications that eliminate and reduce impacts is a matter over which the District has "substantive jurisdiction" under section 120.57(1)(l), F.S. *Surfrider Foundation, Inc., Snook Foundation Inc., Captain Danny Barow, Tom Warnke and Herbert Terry Gibson v. Town of Palm Beach, Florida, Board of Trustees of the Internal Improvement Trust Fund, and DEP*, DOAH Case No. 08-1511 (Consolidated Final Order July 15, 2009). Section 10.2.1 of the Applicant's Handbook, Volume I, states that in reviewing a project, "*the District is to consider practicable design modifications to eliminate or reduce impacts to wetland functions*," and that "adverse impacts remaining after practicable design modifications have been made may be offset by mitigation." Section 10.2.1.1 of the Applicant's Handbook, Volume I, further provides that "if the proposed activity will result in adverse impacts to wetland functions and other surface

water functions such that it does not meet the requirements of sections 10.2.2 through 10.2.3.7, below, then the Agency in determining whether to grant or deny a permit *shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts.*" The plain language of the rule only requires that the District consider *whether the applicant has implemented practicable design modifications* to reduce or eliminate such adverse impacts, not whether the applicant has implemented *all* practicable design modifications to reduce or eliminate such adverse impacts. Nowhere in the rule is there a requirement that the applicant implement every possible practicable design modification to the proposed project. The rule merely requires that the District consider whether the applicant has implemented practicable design modifications and then allows for mitigation to offset any remaining adverse impacts after the practicable design modifications have been made.

Land Trust explored and implemented practicable design modifications to protect and minimize the impacts to wetlands. The original plans contained a surface water retention pond, but in order to minimize wetland impacts, the Applicant revised the project plans to replace the surface water pond with underground retention system, the Applicant reduced the wetland impacts from the proposed project from 1.4 acres to 1.05 acres, a 0.35 acre reduction in wetland impacts. (FOF No. 33; LT Ex. 1 p. 361; T. at 33-34, 77-78 & 387). Land Trust further minimized impacts to the wetlands by proposing to construct a retaining wall with riprap at the waterward edge, which reduced impacts to the wetlands by decreasing the width of the fill slopes. (FOF No. 34; T. at 76 & 106-107). Land Trust also obtained an agreement with the adjacent developer to allow the Applicant to utilize the adjacent development's roads to access the proposed project site, rather than creating a new road, that further reduced impacts to

wetlands on its property. (FOF No. 35; LT Ex. 1, pp. 147-148; T. at 33). Given the limited size of the project site, further reduction would not be considered practicable. (LT Ex. 1, p. 147-148).

In *Brian Diventura v. The Gables at Stuart and South Florida Water Management District*, 2006 WL 716869 (Recommended Order March 16, 2006) the ALJ held that the Applicant's proposed mitigation measures (similar to those Land Trust proposed) satisfied the District's rules regarding reduction or elimination of impacts, and that while additional measure could be undertaken, those measures would not be practical:

> … *In addition, a retaining wall has been added around much of the development to offset secondary impacts, and additional buffers have been put in place…Conceivably, wetland impacts could be further reduced or eliminated by further decreasing the amount of development. But given the present layout of the proposed site plan, a further reduction would not be considered practicable.* Therefore, The Gables has adequately applied the reduction and elimination criteria as required by the BOR and the District's regulations."

Similarly, Land Trust explored and implemented various design modifications (including a retaining wall and riprap) to reduce adverse impacts to wetlands and explained that given the limited size of the project site, further reduction would not be considered practicable. (LT Ex. 1, p. 147-148; T. at 77 & 377). The District found that Land Trust's project modifications satisfied the reduction and elimination criteria as required by the District's regulations. (LT Ex. 1, p. 147-148; T. at 77 & 377).

The ALJ even discusses and acknowledges the above project modifications in Recommended Order in FOF Nos. 33-36. Despite the foregoing, the ALJ then concludes, contrary to the District, that "Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions," because: 1) "the retaining wall and access driveway were not shown to be project modifications;" and 2) the project would "cause fewer impacts to wetlands if the fill area was reduced in size, which was

not shown to be impracticable." These conclusions misinterpret the District's rules regarding practicable design modifications and impose extra requirements not contained in the plain language of the rule.

The ALJ's conclusion that the modifications to the design proposed by the Applicant were not "modifications," contradicts the findings of the District on a matter over which the regulatory agency has "substantive jurisdiction." Furthermore, it is not adequately explained why the ALJ does not find the retaining wall and access road to be "project modifications." Other DOAH cases have found similar proposals to that of the Applicant to be "project modifications" under the applicable rule. *Brian Diventura v. The Gables at Stuart and South Florida Water Management District*, 2006 WL 716869 (Recommended Order March 16, 2006) ("in addition, a retaining wall has been added around much of the development to offset secondary impacts, and additional buffers have been put in place.."); *Pelican Island Audubon Society, Dr. Richard Baker, and Dr. David Cox v. Indian River County and St. Johns River Water Management District*, DOAH Case No. 13-3601 (Recommended Order, August 5, 2014, adopted by Final Order issued August 22, 2014) ("to meet this requirement, the County has implemented, to the extent practicable, design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters...This was done by incorporating design modifications that eliminated the construction of a stormwater pond in wetlands and adding compensating stormwater treatment; shifting impacts out of critical fisheries and open water habitat within the southern impoundment to upland areas; installing a retaining wall along the trailer parking area to limit the fill slope impacts.").

Furthermore, the ALJ's holding that the project would "cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable," assumes that the

rule requires applicants to implement all or every practicable design modification that would reduce adverse impacts to wetlands. The rule contains no such requirement. Rather, the rule merely requires that the District "consider whether the applicant has implemented practicable design modifications," not whether the applicant has implemented *all* or *every possible* practicable design modification. *See State v. Jett,* 626 So.2d 691, 693 (Fla.1993) ("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language."); *Ervin v. Collins,* 85 So.2d 852, 855 (Fla.1956) (holding that the court is not permitted to revise an unambiguous statute by "engrafting ... our views as to how it should have been written").

In *Michael Casale v. Oculina Bank and Department of Environmental Protection*, DOAH Case Nos. 12-1227, 12-1228, 12-1229 (Consolidated Final Order August 21, 2013), an exception was granted to the ALJ's interpretation of the rule requiring practicable design modifications, where such interpretation imposed an extra requirement not contained in the plain language of the rule:

> "In related conclusion of law paragraph 74, the ALJ explains that his suggested interpretation of Section 12.2.1 is a way to encourage environmental restoration. (RO ¶ 74). There is no record evidence that supports this interpretation. The ALJ opines that the Department and the Board of Trustees "would not achieve the legislative intent reflected in chapters 253 and 373, nor environmental goals reflected in their rules, by applying the requirement to minimize impacts in a manner that discouraged environmental restoration." (RO ¶ 74).Contrary to the ALJ's conclusions in paragraphs 453 and 74, the plain language of the rule does not impose an extra requirement on an applicant conducting an environmental restoration project in conjunction with or as mitigation for proposed impacts to wetlands and surface waters. Id The Department's interpretation of Section 12.2.1 is more reasonable than that of the ALJ. § 120.57(1)(*l*), Fla. Stat. (2012). The ALJ's rule interpretation in paragraphs 45 and 74 is not adopted in this Final Order. Therefore, based on the foregoing, the DEP's exception to paragraph 45 is granted."

The ALJ's conclusion that the project would "cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable" is without any quantitative analysis or record support and misinterprets the rule as imposing a requirement not contained in the plain language of the rule. The District considered the practicable design modifications implemented by Land Trust and concluded that Land Trust satisfied all that is required by the District's regulation governing practicable design modifications for reduction and elimination, which is a matter over which the regulatory agency has "substantive jurisdiction."

Therefore, the conclusions in FOF Nos. 34, 35, 36, 37, 38 and COL No. 68 (last sentence), regarding practicable design modifications, are based on a misinterpretation of the District's rules.

WHEREFORE, Land Trust respectfully requests that the District grant the exceptions regarding FOF Nos. 30, 31, 34, 35, 36, 37, 38, 43, 45, 46, 47, 50 (last sentence), 51, and COL Nos. 51, 68 (last sentence), 69 (last sentence), 71, 72, 74, 75, 76 and 77, and modify the Recommended Order accordingly and issue the ERP that is the subject of this case.

RESPECTFULLY SUBMITTED this 15th day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify this 15th day of July, 2015, that a true and correct copy of the foregoing has been served by electronic mail upon the following:

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s/ Douglas Manson
Attorney

Exhibit 1

STATE OF FLORIDA
SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT

JOSEPH MCCLASH,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,

Intervenors,

vs. Case No. 14-4735

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondents.
_______________________________/

MANASOTA-88, INC.,

Petitioner,

and

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,

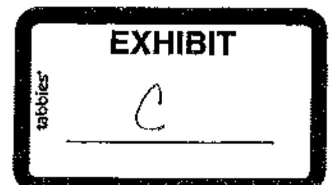
Intervenors,

vs. Case No. 14-5038

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,

Respondents.
_______________________________/

FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.,



Petitioner,

and
SIERRA CLUB, INC., AND SUNCOAST
WATERKEEPER, INC.,

Intervenors,

vs. Case No. 14-5135

LAND TRUST #97-12 AND SOUTHWEST
FLORIDA WATER MANAGEMENT
DISTRICT,

Respondents.
_______________________________/

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, Southwest Florida Water Management District (District), pursuant to Section 120.57(1)(k), Florida Statutes (Fla. Stat.), and rule 28-106.217, Florida Administrative Code (F.A.C.), files the following exceptions to the Administrative Law Judge's (ALJ) Recommended Order (RO) entered in the above styled proceeding on June 25, 2015.

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Findings of Fact

Section 120.57(1)(l), Fla. Stat., prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and state with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. (2014); *Charlotte Cty. v. IMC Phosphates*

Exhibit 1

Co., 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007).

Florida law defines "competent substantive evidence" as such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1975); *Gulf Coast Elec. Co-op v. Johnson*, 727 So.2d 259, 262 (Fla. 1999). Furthermore, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005). Evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in the administrative proceedings. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred."). If there is competent substantial evidence to support an ALJ's finding of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g. Arand Construction Co. v. Dyer*, 592 So.2d 276, 280 (Fla. 1st DCA 1991). However, the ALJ's findings of fact must be "based upon a preponderance of the evidence" and "exclusively on the evidence of record and on matters officially recognized." Section 120.57(1)(j), Fla. Stat.

The ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See, e.g., Peace River/Manasota Regional Water Supply Authority v. IMC*

Phosphates Co., 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So.2d 83, 85 (Fla. 1st DCA 1985). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. *See, e.g., Walker v. Bd. of Prof'l Eng'rs*, 946 So.2d 604 (Fla. 1st DCA 2006).

Conclusions of Law

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an administrative law judge's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health*, 805 So.2d 1008 (Fla. 1st DCA 2001). An agency's review of the legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g. Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009). G.E.L. Corp. v. Dep't of Envtl. Prot., 875 So.2d 1257, 1264 (Fla. 5th DCA 2004).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g. Battaglia Props. v. Fla. Land & Adjudicatory Comm'n.*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994). However, an agency should not label what is essentially an ultimate factual determination as a conclusion of law in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs,* 952 So.2d 1224, 1225 (Fla. 1st DCA 2007).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). Considerable

deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 71 (Fla. 2d DCA 2008); *Falk v. Beard*, 614 So.2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

Pursuant to Chapters 373 and 403, Fla. Stat. and Titles 40D and 62 of the Florida Administrative Code, the Governing Board has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of the Statewide Environmental Resource Permit (SWERP) program. Therefore, the Governing Board has substantive jurisdiction over the ALJ's conclusions of law and interpretations of administrative rules, and is authorized to reject or modify the ALJ's conclusions or interpretations if it determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ. Section 120.57(1)(l), Fla. Stat.; *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So.2d 1224, 1225 (Fla. 1st DCA 2007).

EXCEPTIONS TO FINDINGS OF FACT

Exception to Finding of Fact 30 – The District files the following exception to the last sentence of Finding of Fact 30, which provides as follows:

> Reliance on science is always appropriate. However, Ms. Cook's use of a federal impact assessment mythology creates

Exhibit 1

> doubt about whether her scoring is consistent with UMAM. Despite the unreliability of Ms. Cook's UMAM score, it is found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall.

The District takes exception to the underlined portion of Finding of Fact 30 because there is no competent, substantial evidence to support this finding and it is not a Finding of Fact but rather a mislabeled Conclusion of Law.

First, the ALJ failed to identify any competent, substantial evidence relied upon to conclude that the "UMAM score under-calculated secondary impacts." Included in the same sentence of his finding, the ALJ describes Petitioners' expert witness, Ms. Jacqueline Cook's Uniform Mitigation Assessment Method (UMAM) score as unreliable. [RO ¶ 30] This finding cannot be reconciled with the testimony provided or the evidence admitted at the final hearing. There is no competent, substantial evidence in the record that a reasonable mind would accept as adequate to support finding that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall.

Petitioners had only one expert, Ms. Cook, address UMAM calculations and the issue of appropriate mitigation for secondary impacts. Ms. Cook was accepted as an expert in wetland science. [Transcript (Tr.) 527] At the final hearing, Ms. Cook reaffirmed her opinion provided at an earlier deposition that the mitigation proposed to offset the adverse impacts satisfied District criteria. [Tr. 583-586; *also see* Tr. 576] Ms. Cook testified at the final hearing as follows:

> Q. Okay. Don't you believe that the mitigation as proposed today meets all of the SWFWMD criteria for issuance for the impacts that are proposed in the permit?

A. For – more or less for the mangrove wetlands. It does not take into account the other areas that have additional wetland areas. [Tr. 584-585]

...

Q. The question is, is it sufficient, and you said yes. Now you're saying it's sufficient for the mitigation area proposed, the 1.12 acres?

A. Using the SWFWMD criteria, yes. [Tr. 586]

There is no evidence in the record that Ms. Cook disagreed with the Respondents' UMAM scores as determined using the state's criteria or the amount of mitigation proposed for the anticipated wetland impacts. Rather, Ms. Cook disagreed with the amount of mitigation proposed because she believed that the wetland delineation line was incorrect. [Tr. 584-585] Ms. Cook testified that the wetland delineation should have been placed somewhere landward of its proposed location, which would then require more mitigation to offset adverse impacts because the extent of wetlands impacted would be greater. [Tr. 548, 585] The ALJ found that "Petitioners did not produce a wetland delineation for the project site, and their evidence was not sufficient to rebut Land Trust's prima facie evidence on this issue." [RO ¶ 28, Tr. 547] Thus, the wetland jurisdiction line is not at issue. As a result, Ms. Cook's opinion on the UMAM calculation is not relevant.

Finding of Fact 30 acknowledges that Ms. Cook's analysis is not competent, substantial evidence. The ALJ found that "Ms. Cook's use of a federal impact assessment mythology *creates doubt* about whether her scoring is consistent with UMAM." [RO ¶ 30, Tr. 583-584] (emphasis added). To use the ALJ's own words, Ms. Cook's UMAM score is unreliable. [RO ¶ 30] No reasonable mind would accept Ms. Cook's unreliable UMAM score to support the conclusion that Respondents' UMAM score under-calculated

secondary impacts. Additionally, in regards to any potential impacts resulting from wave action on the retaining wall, Ms. Cook stated that the rip rap added to the retaining wall would mitigate any wave action. [Tr. 595]

The only testimony regarding changes of water movement caused by the retaining wall was provided by Petitioners' witnesses John Stevely and Sam Johnston. Mr. Stevely was tendered as an expert in the subjects of mangroves and marine habitats – not wave action. [Tr. 464] Respondents' objected to Mr. Stevely's testimony regarding wave action. [Tr. 477-478] Nonetheless, Mr. Stevely did not testify on UMAM or mitigation for secondary impacts. Mr. Stevely testified that he was not familiar with UMAM:

> Q. Yes. You're not familiar with UMAM; is that correct, which is the Uniform Mitigation Assessment Methodology?
>
> A. Yeah, I couldn't – I know it's an assessment technique for assigning value to wetlands. [Tr. 507]

Thus, Mr. Stevely's testimony is not competent, substantial evidence that secondary impacts will result from scour or other effects of changed water movement caused by the retaining wall for the purposes of UMAM.

Petitioners' witness Sam Johnston was tendered as an expert in the subjects of environmental assessment and water quality – not wave action. [Tr. 643, 676-677] Mr. Johnson's testimony regarding the vertical seawall and rip rap was in the context of turbidly and water quality. [Tr. 675-678] Respondents' objected to Mr. Johnston's testimony regarding wave action. [Tr. 675-677] Mr. Johnston provided no testimony on UMAM or mitigation for secondary impacts. Therefore, Mr. Johnston's testimony is not competent, substantial evidence that secondary impacts will result from scour or other effects of changed water movement caused by the retaining wall.

When calculating a UMAM score, it is deduced from the rule that it is not sufficient to only state that a certain occurrence will be present. As discussed in Finding of Fact 31 below, if the storm buffering and erosion prevention functions of wetlands were expected to be adversely impacted by a proposed project, the water environment secondary impacts UMAM score would be modified. Per rule 62-345.500(6)(b), F.A.C., the score is affected if it is determined that "the quantity of water in an assessment area, including the timing, frequency, depth and duration of inundation or saturation, flow characteristics, and the quality of that water, *may facilitate or preclude its ability to perform certain functions and may benefit or adversely impact its capacity to support certain wildlife.*" (emphasis added) Therefore, it is not sufficient to only determine that a condition will be present. Rather the condition must be evaluated to determine the effect of these conditions on the functions performed by area and the extent to which these conditions benefit or adversely affect wildlife. Rule 62-345.500(6)(b), F.A.C. Furthermore, "de minimis or remotely related secondary impacts are not considered in the UMAM calculation." *Pelican Island Audubon Society, Dr. Richard Baker, and Dr. David Cox v. Indian River County and St. Johns River Water Management District*, DOAH Case No. 13-3601, pg. 19, (August 22, 2014) (Final Order on file with Clerk, Div. of Administrative Hearing).

Petitioners provided no evidence that "Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall." Therefore, the District takes exception to the last sentence of Finding of Fact 30 because it is not based on substantial, competent evidence.

Secondly, the District asserts that Finding of Fact 30 is actually a mislabeled

conclusion of law. UMAM as provided in Chapter 62-345, F.A.C., is a methodology "that provides a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss." Rule 62-345.100(2), F.A.C. The functional loss determination that is a result of UMAM is not simply the result of weighing evidence but requires the interpretation and application of statutory and rule requirements; thus it is a mislabeled conclusion of law. The ALJ even seemed to acknowledge during the voir dire of expert witnesses that UMAM is not a factual determination when he stated experts could not be tendered in UMAM because it was analogous to "saying he's an expert in regulation, which I don't normally allow." [Tr. 374] Therefore, District recommends that this conclusion be modified to be consistent with the Exception to the Conclusion of Law 30 and 76 set forth below.

Exception to Finding of Fact 31 – The District files the following exception to Finding of Fact 31, which provides as follows:

> It was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score.

The UMAM forms provided in rule 62-345.900, F.A.C., which were completed as part of the permit review process, are included in Land Trust Exhibit 1. As required by rule 62-345.500. F.A.C., the UMAM score is calculated from an analysis using "reasonable scientific judgment characterized by a predominance" of specified indicators that are memorialized on the UMAM forms. [*See*, Land Trust Exhibit 1, pg. 162-164]

UMAM provides that "three categories of indicators of wetland function are to be scored to the extent that they affect the ecological value of the assessment area." Rule

62-345.500(6)(b), F.A.C. Those three categories include location and landscape support, water environment, and community structure. [*Id.*] The water environment score reflects changes to wetland functions, such as storm buffering and erosion prevention, if any, as a result of the proposed project. The determination must be based upon reasonable scientific judgment and characterized by a predominance of twelve factors, including "(d) *soil erosion or deposition patterns...indicative of alterations in flow rates or points of discharge*" and "(l) water depth, *wave energy*, currents and light penetration." Rules 62-345.500(6)(b)1.d. and 62-345.500(6)(b)1.l., F.A.C. (emphasis added).

Part II of Form 62-345.900(2), F.A.C., includes Respondent's determination, based on reasonable scientific judgment, that any loss of storm buffering and erosion prevention functions of the impacted wetlands did not necessitate additional reductions in the secondary impact UMAM score. [*See*, Land Trust Exhibit 1, pg. 163-164] As District expert Albert Gagne testified, the District's determination was based on: (i) the retaining wall being constructed landward of the mean high water line [Tr. 380; Land Trust Exhibit 1, pg. 714-718]; (ii) the addition of rip rap at a 70 degree slope on its waterward side [Tr. 380; Land Trust Exhibit 1, pg. 714-718]; and (iii) approximately 40 feet of mangroves, at a minimum, between the portion of the retaining wall within the wetlands and open water. [Tr. 422-423; Land Trust Exhibit 1, pg. 714-718].

The Recommended Order does not rely on any evidence to refute the Respondents' determination. It cannot because there was no evidence – competent and substantial or otherwise – presented by the Petitioners to rebut Respondent's prima facie evidence on this issue. Therefore, the District takes exception to Finding of Fact 31.

Exception to Finding of Fact 37 and 38 – The District takes exception to findings of fact number 37 and 38. Finding of Fact 37 provides:

> The proposed project would cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable. Reducing the size of the fill area would not cause the project to be significantly different in type or function.

Finding of Fact 38 provides as follows:

> Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions.

The Recommended Order does not rely on any competent, substantial evidence to refute the Respondents' prima facie evidence on elimination and reduction of impacts. Additionally, the District asserts that Findings of Fact 37 and 38 are actually mislabeled conclusions of law. The provisions for the elimination or reduction of impacts are contained in Section 10.2.1 of the Applicant's Handbook, Volume 1 ("AHVI"), and are not solely a factual determination, but rather require an analysis of the "practicability of design modifications for the site that could eliminate or reduce impacts" to wetland functions. Additionally, Section 10.2.1, AHVI, requires a determination as to the "practicability" of a proposed modification by reviewing whether the modification is "economically feasible" or "adversely affects public safety through the endangerment of lives or property." Determining that a modification "would not cause the project to be significantly different in type or function" and that a project "did not demonstrate that it implemented reasonable design modifications" is not simply the result of weighing evidence. The determination necessitates an interpretation and application of statutory and rule requirements; thus it is a mislabeled conclusion of law. Therefore, the District recommends that this finding be

modified to be consistent with the Exceptions to the Conclusions of Law 37, 38, and 68 set forth below.

Exception to Finding of Fact 43 – The District files the following exception to the Finding of Fact 43, which provides as follows:

> The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.

As explained above, there was no complete, substantial evidence presented that a reasonable mind would accept as adequate to conclude the proposed project would result in a loss or reduction of storm buffering and erosion prevention. The Recommended Order does not rely on any evidence to refute the Respondents' determination. It cannot because there was no evidence – competent and substantial or otherwise – presented by the Petitioners to rebut Respondent's prima facie evidence on this issue.

Additionally, the District asserts that this finding is actually a mislabeled conclusion of law. Section 373.4135(1)(d), Fla. Stat., expressly authorizes out-of-basin mitigation. Therefore, since mitigation banks by law may be utilized to offset adverse impacts to wetland functions, it must be assumed that the ALJ believes it is not appropriate in this specific situation to use credits from the Tampa Bay Mitigation Bank to offset impacts from the proposed project, which is a conclusion of law and not a finding of fact.

Therefore, for all the reasons set forth above regarding Finding of Fact 30 and 31 the District recommends that this finding be modified to be consistent with the Exceptions to the Conclusions of Law 43 set forth below.

Exception to Finding of Fact 44 and 45 – The District asserts that Findings of Fact 44 and 45 are a distillation from some provisions of Sections 10.2.8 and 10.2.8.1, AHVI, and misrepresent the rule. Findings of Fact 44 and 45 fail to mention other options available to an applicant to 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.

Pertinent to this proceeding, paragraph 2 of Section 10.2.8, AHVI, provides that an applicant may propose to mitigate adverse impacts through mitigation physically located outside of the drainage basin where the impacts are proposed, if the mitigation fully offsets the adverse impacts within the impacted drainage basin, as measured from the impacted drainage basin, based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality. If the mitigation fully offsets the impacts, as measured from the impacted drainage basin, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition of issuance regarding cumulative impacts will be satisfied.

The District recommends that these findings of fact be modified to include the options available to an applicant, especially the provisions within Section 10.2.8., AHVI, that are pertinent to this proceeding.

Exception to Finding of Fact 46 – The District files the following exception to Finding of Fact 46, which provides as follows:

> Land Trust could propose a similar project on another part of its property on Perico Island. Anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands

> could apply to enlarge the buildable portion of the property by removing wetlands and filling behind a retaining wall.

The District takes exception to this finding because there was no complete, substantial evidence presented to conclude that "anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands could apply to enlarge the buildable portion of the property by removing wetlands and filling behind a retaining wall."

Exception to Finding of Fact 47 – The District files the following exception to the Finding of Fact 47, which provides as follows:

> When considering future wetland impacts in the basin which are likely to result from similar future activities, the cumulative impacts of the proposed project would result in significant adverse impacts to wetland functions in the area.

First, there was no complete, substantial evidence presented that a reasonable mind would accept as adequate to conclude the proposed project would result in "significant adverse impacts to wetland functions in the area." The Recommended Order does not rely on any evidence to refute the Respondents' determination. It cannot because there was no evidence – competent and substantial or otherwise – presented by the Petitioners to rebut Respondent's prima facie evidence on this issue.

Additionally, the District asserts that Finding of Fact 47 is actually a mislabeled conclusion of law. The provisions for determining whether a regulated activity will cause unacceptable cumulative impacts upon wetlands and other surface waters within the same drainage basin as the regulated activated for which a permit is sought are contained in Sections 10.2.8, 10.2.8.1, and 10.2.8.2, AHVI. Determining if a "proposed project would result in significant adverse impacts to wetland functions in the area" is not simply

the result of weighing evidence but requires an interpretation and application of statutory and rule requirements; thus it is a mislabeled conclusion of law.

Therefore, the District recommends that this finding be modified to be consistent with the Exceptions to the Conclusions of Law 47, 71, and 72 set forth below.

Exception to Finding of Fact 50 – The District takes exception to the underlined portion of Finding of Facts 50, which provides as follows:

> Land Trust propose to give $5,000 to the City of Palmetto for an informational kiosk at the City of Palmetto's public boat ramp. A District employee testified that this contribution made the project clearly in the public interest.

The underlined portion of Finding of Fact 51 does not accurately reflect the District employee's testimony. District expert Albert Gagne testified in regards to the requirements of rule 62-330.302, F.A.C., which provides the seven criteria that must be balanced to determine if a project within an Outstanding Florida Water is "clearly in the public interest." Mr. Gagne testified that the proposed mitigation in conjunction with the proposed funds for the informational kiosk for the City of Palmetto led to the District's determination that the proposed project met the requirements of Rule 62-330.302, F.A.C.

> Q. So, the mitigation of the UMAM score, in your opinion, took into consideration all of these seven factors to be clearly in the public interest test?
>
> Mr. Gagne. That's correct.
>
> Q. Including the –
>
> Mr. Gagne. I was just going to say, it's the mitigation plus the public interest product they provided. [Tr. 398; also see Tr. 397 -398]

The District recommends that Finding of Fact 50 be modified to be consistent with the testimony provided at the final hearing.

Exception to Finding of Fact 51 – The District takes exception to Finding of Fact 51, which provides as follows:

> Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.

The District asserts that Finding of Fact 51 is actually a mislabeled conclusion of law. Determining whether reasonable assurances were provided for a regulated activity to be found "clearly in the public interest" requires an interpretation of statutory and rule requirements, and is not a findings of fact.

As such, the District Governing Board may disregard the label and treat it as a conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991). The District recommends that this conclusion be modified to be consistent with the Exceptions to the Conclusions of Law 51 and 77 set forth below.

EXCEPTIONS TO CONCLUSIONS OF LAW

Exception to Conclusions of Law 30 (formerly Finding of Fact 30) and 76 – As provided in Exception to Finding of Fact 30 above, the District takes exception to the last sentence of Finding of Fact 30, because there is no competent, substantial evidence to support this finding and it is not a finding of fact, but rather a mislabeled conclusion of law. As such, the District Governing Board may disregard the label and treat it as a

conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991).

The District takes exception to the underlined portion of Conclusion of Law 30 and all of Conclusion of Law 76. Conclusions of Law 30 and 76 pertain to the sufficiency of mitigation provided to fully offset adverse impacts to the functions of wetlands and other surface waters and will be addressed jointly.

Conclusion of Law 30 provides as follows:

> Reliance on science is always appropriate. However, Ms. Cook's use of a federal impact assessment mythology creates doubt about whether her scoring is consistent with UMAM. Despite the unreliability of Ms. Cook's UMAM score, it is found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall.

Conclusion of Law 76 provides as follows:

> The District should determine that the proposed mitigation is insufficient.

The Recommended Order found the UMAM score under-calculated the secondary impacts, based on Ms. Cook's unreliable UMAM score. The ALJ did not disturb the District's determination that reasonable assurance was provided to support the UMAM score for direct impacts. As discussed above regarding Finding of Fact 30, the record is devoid of competent, substantial evidence to support a finding that the UMAM score for secondary impacts was under-calculated due to scour and other effects of changed water

movement caused by the retaining wall. Furthermore, as the Recommended Order concludes, "Determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District." [RO ¶ 73; *See Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2nd DCA 1997).]

As provided in the Standards of Review of DOAH Recommended Orders discussed above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). The District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the SWERP program, which includes determining the reasonable assurance necessary to demonstrate that a regulated activity will not cause adverse secondary impacts to the water resources. Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 72 (Fla. 2d DCA 2008). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

The District determined that the applicant proposed sufficient mitigation that will fully offset all expected secondary impacts. This conclusion is reasonable and supported by competent, substantial evidence in the record. The ALJ's contrary conclusion is based on the unreliable UMAM score provided by Ms. Cook. The testimony and evidence

provided shows that the Respondent's secondary UMAM calculation is not "clearly erroneous" and the District's conclusion of law is as or more reasonable than that of the ALJ. Therefore, the Exception to Conclusions of Law 30 and 76 should be granted and modified accordingly.

Exceptions to Conclusion of Law 47 (formerly Finding of Fact 47), 71, and 72 – As stated in Exception to Finding of Fact 47, the District asserts that Finding of Fact 47 is actually a mislabeled conclusion of law. As such, the District Governing Board may disregard the label and treat it as a conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991).

The District takes exception to Conclusion of Law 47 and the underlined portions of Conclusions of Law 71 and 72. Conclusions of Law 47, 71, and 72 pertain to unacceptable cumulative impacts and will be addressed jointly.

Conclusion of Law 47, provides as follows:

> When considering future wetland impacts in the basin which are likely to result from similar future activities, the cumulative impacts of the proposed project would result in significant adverse impacts to wetland functions in the area.

The underlined portion of Conclusion of Law 71 provides as follows:

> The proposed mitigation must fully offset the expected impacts. Land Trust did not provide reasonable assurance that the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation bank credits from the Tampa Bay Mitigation Bank.

The underlined portion of Conclusion of Law 72 provides as follows:

> Section 10.2.8 of the Applicant's Handbook states that cumulative impacts are considered unacceptable when the proposed activity, considered in conjunction with the past, present, and future activities, would result in significant adverse impacts to functions of wetlands or other surface waters within the same drainage basin when considering the basin as a whole. The cumulative impacts that would result from the proposed project would result in significant adverse impacts to the functions of wetlands in the basin.

The District takes exception to the ALJ's conclusion of law that the cumulative impacts as a result of the proposed project would result in significant adverse impacts to functions of wetlands in the South Coastal Drainage Basin.

Pursuant to rule 62-330.302(1)(b), F.A.C., a proposed project must not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2, AHVI. Sections 10.2.8 through 10.2.8.2, AHVI, set forth three different methods of addressing cumulative impacts depending on whether the proposed mitigation is within the same basin as the adverse impacts and whether the mitigation "fully offsets" the adverse impacts within the impacted drainage basin. [Tr. 437-438, 455, 882-885]

The first paragraph of section 10.2.8, AHVI, (Paragraph 1) addresses the situation when an applicant proposes to mitigate adverse impacts within the same drainage basin as the impacts. If the applicant proposes to mitigate adverse impacts within the same drainage basin as the impacts, and if the mitigation "fully offsets" the proposed impacts, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition of issuance in section 10.1.1(g), AHVI, requiring a proposed project not have unacceptable

cumulative impacts will be satisfied. [*See* section 10.2.8, AHVI] The applicant in this proceeding proposed mitigation outside of the drainage basin in which the impacts would occur, thus Paragraph 1 is not applicable. [Tr. 437-438]

The second paragraph of section 10.2.8, AHVI, (Paragraph 2) addresses the situation when an applicant proposes to mitigate adverse impacts through mitigation physically located outside of the drainage basin where the impacts are proposed. Paragraph 2 provides that an applicant may demonstrate that mitigation "fully offsets" the adverse impacts within the impacted drainage basin, as measured from the impacted drainage basin, based on factors such as: (i) connectivity of water, (ii) hydrology, (iii) habitat range of affected species, and (iv) water quality. [RO ¶ 40; Section 10.2.8, AHVI]

In this case, the applicant provided an analysis as described in Paragraph 2 that demonstrated that the proposed mitigation, physically located outside of the drainage basin where the impacts are proposed, fully offsets the adverse impacts within the impacted drainage basin, based on the amount of mitigation provided and the four factors. [Land Trust Exhibit 16; Tr. 438, 412-413, 438-439, 440-441, 882-885] The ALJ addressed two of the four factors in the Recommend Order. First, the ALJ found that the more persuasive evidence shows there is connectivity between waters near the project and the waters at the Tampa Bay Mitigation Bank. [RO ¶ 41] Second, the ALJ found that the "evidence establishes that the species found in the mangroves at the project site are also found at the mitigation bank." [RO ¶ 42] The ALJ made no contrary findings with respect to the applicant's analysis of hydrology or water quality. Yet, the ALJ concluded that reasonable assurance was not provided that the adverse impacts caused by the proposed project would be "fully offset" by purchasing mitigation bank credits from the Tampa Bay

Mitigation Bank. [RO ¶ 71] This conclusion is not based on any facts or evidence that purports to demonstrate that the mitigation will not fully offset adverse impacts. If it is found that the mitigation provided by the applicant *fully offsets* the adverse impacts within the impacted drainage basin, then the project will have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g), AHVI, regarding unacceptable cumulative impacts will be satisfied. Thus, no additional cumulative impact analysis, as discussed below, would be necessary.

The third paragraph of 10.2.8, AHVI, (Paragraph 3) addresses the situation when adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface waters are *not fully offset* within the same drainage basin as the impacts. In other words, if reasonable assurance cannot be shown that the proposed mitigation fully offsets the adverse impacts within the drainage basin, as measured from the impacted drainage basin, based on the four factors provided in Paragraph 2, then the applicant must provide a Paragraph 3 analysis. A Paragraph 3 analysis is not required if the mitigation fully offsets the adverse impacts, regardless of whether the mitigation is within the same drainage basin.

A Paragraph 3 analysis is to determine "whether the proposed system, considered in conjunction with past, present, and future activities would be the proverbial 'straw that breaks the camel's back'" regarding water quality or wetland and other surface water functions in the basin. [Section 10.2.8.1, AHVI] The evaluation described in Paragraph 3 includes a subsection (a) and (b), and is expanded upon in section 10.2.8.1, AHVI. The Paragraph 3 analysis necessitates a consideration of past, present, and future activities

regulated under Part IV, Chapter 373, Fla. Stat., within the same drainage as the impacts. [RO ¶ 44; Sections 10.2.8 and 10.2.8.1, AHVI]

There is nothing in the Recommend Order, to substantiate the conclusion that the proposed mitigation does not fully offset the adverse impacts. The ALJ concluded that the "cumulative impacts that would result from the proposed project would result in *significant* adverse impacts to functions of wetlands in the basin." [RO ¶ 72] (emphasis added). It is wholly unclear how the ALJ came to that conclusion of law, in light of the fact that a Paragraph 3 analysis was not performed considering past, present, and future activities within the basin and the ERP conditions of issuance require that the proposed project not cause *unacceptable* cumulative impacts. [*See* 62-330.302(1)(b), F.A.C.] (emphasis added). As a result, the District takes exception to this conclusion.

As provided in the Standards of Review of DOAH Recommended Orders above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). The District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the SWERP program, which includes determining whether a proposed project will cause unacceptable cumulative impacts upon wetlands and other surface waters. Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 72 (Fla. 2d DCA 2008). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be

the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

The District determined that the applicant provided reasonable assurance that the proposed mitigation fully offsets the adverse impacts within the impacted drainage basin, as measured from the impacted drainage basin, based on proposed mitigation and factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality. [Tr. 412-413, 438-439, 882-885] If the mitigation fully offsets the impacts, as measured from the impacted drainage basin, then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance regarding unacceptable cumulative impacts, section 10.1.1(g), AHVI, will be satisfied. [Section 10.2.8, AHVI]

The District's conclusion is more reasonable than the ALJ's contrary conclusion based on the evidence in the record. Additionally, great deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). The District's interpretation of sections 10.2.8 and 10.2.8.1, AHVI, is not "clearly erroneous" and the District's conclusion of law is as or more reasonable than that of the ALJ. Therefore, the exception should be granted and Conclusions of Law 47, 71, and 72 should be modified accordingly.

<u>Exception to Conclusion of Law 51 (formerly Finding of Fact 51), and 77</u> – As stated in Exception to Finding of Fact 51, the District asserts that Finding of Fact 51 is

actually a mislabeled conclusion of law. As such, the District Governing Board may disregard the label and treat it as a conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991).

The District takes exception to Conclusions of Law 51 and 77, which both pertain to the clearly in the public interest test and will be addressed jointly.

Conclusion of Law 51 provides as follows:

> Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.

Conclusion of Law 77 provides as follows:

> Land Trust's proposed project is not clearly in the public interest as required by section 373.414(1) and rule 62-330.302(1) because it would cause significant adverse cumulative effects on the conservation of fish and wildlife, fishing and recreation values, and marine productivity of Anna Maria Sound.

For projects located within an Outstanding Florida Water, an applicant must provide reasonable assurance that the project is clearly in the public interest, as determined by balancing the seven criteria set forth in section 62-330.302(1)(a), F.A.C., as set forth in sections 10.2.3 through 10.2.3.7, AHVI. This is known as the public interest test, and is determined by balancing seven criteria, which need not be weighted equally. *See Lott v. City of Deltona and SJRWMD*, DOAH Case Nos. 05-3662 and 05-

3664, pg. 14, (May 9, 2006) (Final Order on file with Clerk, Div. of Administrative Hearing).

The ALJ concluded that the proposed project is not clearly in the public interest in regards to rules 62-330.302(1)(a)2. and 62-330.302(1)(a)4., F.A.C., that pertain to adverse effects to the conservation of fish and wildlife, including endangered or threatened species, or their habitats, and effects the fishing or recreational values or marine productivity in the vicinity of the activity. The applicant proposed mitigation from the purchase of credits from the Tampa Bay Mitigation Bank to fully offset adverse impacts, as well as proposed providing $5,000 to the City of Palmetto for an information kiosk at the City of Palmetto's public boat ramp. [RO ¶ 50; Tr. 397-398] As stated in Finding of Fact 50, it was the proposed mitigation in conjunction with the public interest project for the City of Palmetto that led to a determination that the proposed project met the clearly in the public test provided in rule 62-330.302, F.A.C. [Tr. 397 -398] The ALJ provided in the Recommended Order that "reasonable assurance that a proposed activity is clearly in the public interest does not require a demonstration of need or net public benefit." [RO ¶ 64; *See 1800 Atlantic Developers v. Dep't of Envtl. Reg.*, 552 So.2d 946, 957 (Fla. 1st DCA 1989)]

The ALJ does not articulate what is meant by "cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound," but it can only be inferred that the ALJ believed insufficient mitigation was proposed to address these "cumulative effects" on fish and wildlife, and recreation values.

As stated in above in Conclusions of Law 30 and 76, the Recommended Order only mentions an under-calculation in the UMAM score in regards to the secondary impacts, thus it is assumed the ALJ agreed with the District's determination that reasonable assurance was provided to support the UMAM scores for direct impacts. As discussed in Finding of Fact 30, the record is devoid of competent, substantial evidence to support a finding that the UMAM score for secondary impacts was under-calculated due to scour and other effects of changed water movement caused by the retaining wall. Disregarding the fact that the record is devoid of competent, substantial evidence, as the Recommended Order provides, "determinations as to the sufficiency of mitigation for adverse wetland impacts are within the jurisdiction of the District. [RO ¶ 73; *See Save Anna Maria, Inc. v. Dep't of Transp.*, 700 So.2d 113, 116 (Fla. 2nd DCA 1997).]

As provided in the Standards of Review of DOAH Recommended Orders above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). The District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the SWERP program, which includes determining the reasonable assurance necessary to demonstrate that a regulated activity will not cause adverse secondary impacts to the water resources and also determinations as to whether a proposed project is clearly in the public interest. Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 72

(Fla. 2d DCA 2008). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

The District determined that the applicant proposed sufficient mitigation that will fully offset all expected secondary impacts. Therefore, in conjunction with the proposed public interest project the District had reasonable assurance to find the proposed project to be clearly in the public interest. This conclusion is as or more reasonable than the ALJ's contrary conclusion based on the evidence in the record. Additionally, great deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). The testimony and evidence provided shows that the District's determination that the proposed project is clearly in the public interest is not "clearly erroneous" and the District's conclusion of law is as or more reasonable than that of the ALJ. Therefore, the Exception to Conclusions of Law 51 and 77 should be granted and modified accordingly.

Exception to Conclusions of Law 37, 38, (formerly Findings of Fact 37 and 38), and 68 – As provided in Exception to Finding of Fact 37 and 38, the District asserts the findings are mislabeled conclusions of law. As such, the District Governing Board may disregard the label and treat it as a conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this

conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991).

Conclusion of Law 37 provides as follows:

> The proposed project would cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable. Reducing the size of the fill area would not cause the project to be significantly different in type or function.

Conclusion of Law 38 provides as follows:

> Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions.

Additionally, the District takes exception to the underlined portion of Conclusion of Law 68, which provides as follows:

> Section 10.2.1 of the Applicant's Handbook requires an applicant to eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed project by implementing practicable design modifications. Land Trust's proposed project fails to comply with this requirement.

Conclusions of Law 37, 38, and 68 pertain to the sufficiency of the elimination or reduction of impacts efforts provided by the applicant and will be addressed jointly.

Section 10.2.1, AHVI, provides that the District is to consider practicable design modifications to eliminate or reduce impacts to wetland functions. Section 12.2.1.1, AHVI, further provides:

> The term "modification" shall not include the alternative of not implementing the activity in some form, nor shall it be constructed as requiring a project that is significantly different in type or function. A proposed modification that is not technically capable of being completed, is not economically

> viable, or that adversely affects public safety through the endangerment of lives or property is not considered "practicable." A proposed modification need not remove all economic value of the property in order to be considered not "practicable." Conversely, a modification need not provide the highest and best use of the property to be "practicable." In determining whether a proposed modification is practicable, consideration shall also be given to the cost of the modification compared to the environmental benefit it achieves.

The ALJ acknowledges that the applicant's proposal to use a Stormtech stormwater management system instead of a retention pond would cause less wetland impacts. [RO ¶ 33] Additional elimination and reduction efforts provided include the use of a retaining wall to reduce wetland impacts associated with slope on the waterward side of the fill area and using the adjacent development to access the proposed project site, rather than creating a new road. [RO ¶¶ 34, 35] The ALJ appears to disregard the retaining wall and access driveway as elimination and reduction efforts because they were not included in project modifications. [RO ¶ 36] Nothing in rule or statute necessitates that elimination and reduction efforts be submitted as project modifications.

As provided in the Standards of Review of DOAH Recommended Orders above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69 (Fla. 2d DCA 2008). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be

the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

As the competent, substantial evidence shows the District reviewed the elimination and reduction efforts provided by the applicant and determined those proposed provided reasonable assurance that the applicant eliminated and reduced adverse impacts to the functions of wetlands or other surface waters caused by the proposed project by implementing practicable design modifications. Therefore, the exceptions should be granted and Conclusions of Law 37, 38, and 68 should be modified accordingly.

Exception to Conclusion of Law 69 – The District takes exception to the underlined portion of Conclusion of Law 69, which provides as follows:

> Pursuant to rule 62-330.301(d) and 62-330.301(f), an applicant must provide reasonable assurance that the regulated activity will not adversely impact the value of function provided to fish and wildlife and listed species by wetlands and other surface waters. Land Trust's proposed project fails to comply with this requirement.

Conclusion of Law 69 addresses two of the conditions for issuance required for approval of an individual permit; specifically adverse impacts to the functions provided to fish and wildlife and listed species by wetlands and other surface waters, and adverse secondary impacts to the water resources. As previously discussed, the applicant proposed the purchase of mitigation credits from the Tampa Bay Mitigation Bank to fully offset adverse impacts to the functions of wetlands and other surface waters resulting from the regulated activities, including impacts that would adversely impact the value of function provided to fish and wildlife and listed species by wetlands and other surface waters.

As provided in the Standards of Review of DOAH Recommended Orders above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). The District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the SWERP program, which includes determining the sufficiency of mitigation in order to have "reasonable assurance that the regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 72 (Fla. 2d DCA 2008). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

The District determined that the applicant provided reasonable assurance that the proposed mitigation will fully offset all adverse impacts. Therefore, since adequate mitigation was provided the District had reasonable assurance to find the proposed project will not adversely impact the value of function provided to fish and wildlife and listed species by wetlands and other surface waters or cause adverse secondary impacts to water resources.

The District's conclusion is more reasonable than the ALJ's contrary conclusion based on the evidence in the record. Additionally, great deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). The testimony and evidence provided shows that the District's determination that the proposed project meets the conditions of issuance provide in rules 62-330.301(d) and 62-330.301(f), F.A.C., and the District's conclusion of law is as or more reasonable than that of the ALJ. Therefore, the Exception to Conclusion of Law 69 should be granted and modified accordingly.

Exception to Conclusion of Law 43 (formerly Finding of Fact 43) – As stated in Exception to Finding of Fact 43 above, the District asserts that Finding of Fact 43 is actually a mislabeled conclusion of law. As such, the District Governing Board may disregard the label and treat it as a conclusion of law. *Battaglish Properties, LTD., v. Florida Land and Water Adjudicatory Commission, et al.*, 629 So.2d 161, 168 (Fla. 1st DCA 1993). As a conclusion of law, the District's Governing Board is free to reject this conclusion or to substitute its own legal conclusion for those of the ALJ, so long as competent substantial evidence supports the substituted legal conclusions. *Harloff v. City of Sarasota*, 575 So.2d 1324, 1325 (Fla. 2d DCA 1991).

Conclusion of Law 43, provides as follows:

> The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.

As provided in Finding of Fact 31, there is no competent, substantial evidence to support that there will be a loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island based upon: (i) the retaining wall being constructed landward of the mean high water line [Tr. 380; Land Trust Exhibit 1, pg. 714-718]; (ii) the addition of rip rap at a 70 degree slope on its waterward side [Tr. 380; Land Trust Exhibit 1, pg. 714-718]; and (iii) approximately 40 feet of mangroves, at a minimum, between the portion of the retaining wall within the wetlands and open water. [Tr. 422-423; Land Trust Exhibit 1, pg. 714-718]. It is unclear what competent, substantial evidence the ALJ relied upon to conclude that there would be a "loss or reduction of storm buffering and erosion prevention functions."

As provided in the Standards of Review of DOAH Recommended Orders above, an agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction. *See Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So.2d 987, 989 (Fla. 1985). The District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the SWERP program, which includes determining whether the loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island can be mitigated for at the Tampa Bay Mitigation Bank.

Additionally, considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See Collier Cty. Bd. of Cty. Commr's v. Fish and Wildlife Conservation Comm'n*, 993 So.2d 69, 72 (Fla. 2d DCA 2008). Agency interpretations of statutes and rules within their regulatory jurisdiction

do not have to be the only reasonable interpretation. It is enough if such agency interpretations are permissible ones. *See Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

The District's conclusion is more reasonable than the ALJ's contrary conclusion based on the evidence in the record. Additionally, great deference should be accorded to an agency's interpretation of statutes and rules within its regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *Dept. of Environmental Regulation v. Goldring*, 477 So.2d 532, 534 (Fla. 1985). The testimony and evidence provided shows that the District's determination that the proposed mitigation fully offset adverse impacts and the District's conclusion of law is as or more reasonable than that of the ALJ. Therefore, the Exception to Conclusion of Law 69 should be granted and modified accordingly.

RECOMMENDATION

WHEREFORE, the District hereby requests that the Governing Board accept the exceptions provided herewith and issue a Final Order consistent with these exceptions and grant the ERP as proposed by the District.

Respectfully submitted this 15th day of July, 2015.

s/Christon Tanner
Christon Tanner
Staff Attorney
Florida Bar No. 85492
Southwest Florida Water
Management District
7601 Highway 301 North
Tampa, Florida 33637-6759

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July 2015, the original of these Exceptions to the Recommended Order has been filed with the Agency Clerk of the Southwest Florida Water Management District, and a true copy of the foregoing has been sent by electronic mail to the following:

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s/Christon Tanner
Christon Tanner

Exhibit 1

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH MCCLASH,
Petitioner,
vs.
LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
______________________/

Case No: 14-4735

MANASOTA-88, INC.,
Petitioner,
vs.
LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
______________________/

Case No: 14-5038

FLORIDA INSTITUTE FOR SALTWATER HERITAGE, INC.,
Petitioner,
vs.
LAND TRUST NO. 97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.
______________________/

Case No. 14-5135

SIERRA CLUB, INC., AND SUNCOAST WATERKEEPER, INC.,
Intervenors,
vs.

LAND TRUST #97-12 AND SOUTHWEST FLORIDA WATER MANAGEMENTDISTRICT,
Respondents.
______________________/

Case No. 14-5135

PETITIONERS' AND INTERVENORS' JOINT RESPONSE

TO

RESPONDENTS' EXCEPTIONS TO RECOMMENDED ORDER

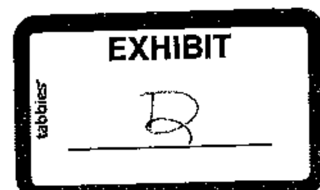

Exhibit 1

Executive Summary

The Administrative Law Judge (ALJ)'s Recommended Order should be upheld. To ensure fundamental fairness and a level playing field, an independent Division of Administrative Hearings (DOAH) assigns an Administrative Law Judge who is independent from SWFWMD to conduct a hearing whenever the proceeding involves a disputed issue of material fact. It is the function of the ALJ to rule on issues of disputed facts. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.

The ALJ's Finding of Fact 51, found that:

"***Reasonable assurances were <u>not</u> provided that the proposed project is clearly in the public interest*** because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water." (emphasis added).

It is important for the Governing Board to know that the subject application is:

- located in Outstanding Florida Waters of Anna Maria Sound on Perico Island near the important historic fishing village of Cortez
- includes permanent destruction of mangrove wetland fringe on Perico Island for a proposed non-water dependent use for residential fill for 4 homes that includes
  - filling of mangrove wetlands for larger backyards rather than minimizing impacts through practicable alternatives, and
- fails to reduce or eliminate adverse impact and
- then fails to include any on-site mitigation where opportunities for onsite mitigation area clearly available, including wetlands and a smaller island adjacent to Perico Island that are owned and located within the applicant's larger 40 acre parcel.

<u>Exhibit 1</u>

The ALJ after listening to all the testimony and evidence, entered Finding of Fact 42 further found that

"... local fish and wildlife, and local biological productivity *would be diminished by the proposed project*."

The proposed project will be of a permanent nature and will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity.[1] Mullet fisherman from Cortez fish in this vicinity.(860:15-25). Stone Crab traps are adjacent to the project site.(860:15-25). It is not economical or as safe to fish in the mitigation area that is replacing this habitat. (861:7-19).

The proposed project will adversely affect *recreational* values to people kayaking and observing the natural environment in the Anna Maria Sound OFW in Manatee County that cannot be replaced by mitigation 17 miles away.(512:14-23)(860:1-10).

The ALJ held in Finding of Fact paragraph "12. Mangroves ... provide a buffer from storm surge and help to stabilize shorelines. Mangroves also provide a buffer from storm surge and help to stabilize shorelines," and in paragraph "43. *The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.*"

The Petitioners support Administrative Law Judge's Recommended Order.

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[1] John Stevely former Marine Extension Sea Grant Agent for the area Testimony "Q. In your expert opinion, based on your work with Sea Grant and the voluminous papers and talks and conferences you've been to, would this proposed project have an impact on fisheries? A. Yes. Q. What is that impact and is it adverse? A. It's adverse in that it would decrease productivity in the number or amount or pounds of fish or shell fish."

SWFWMD Exhibit 1 (excerpt) location:

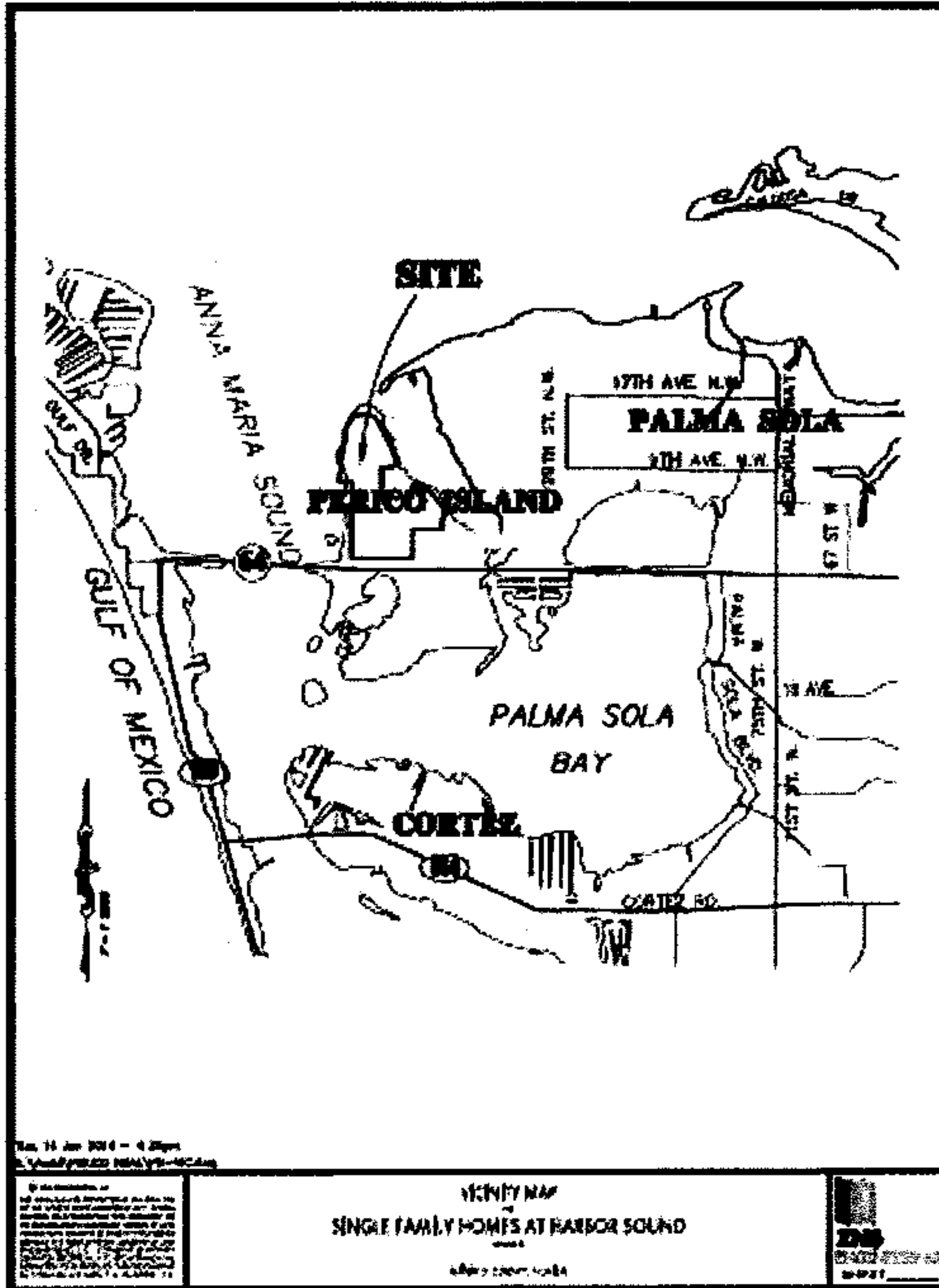
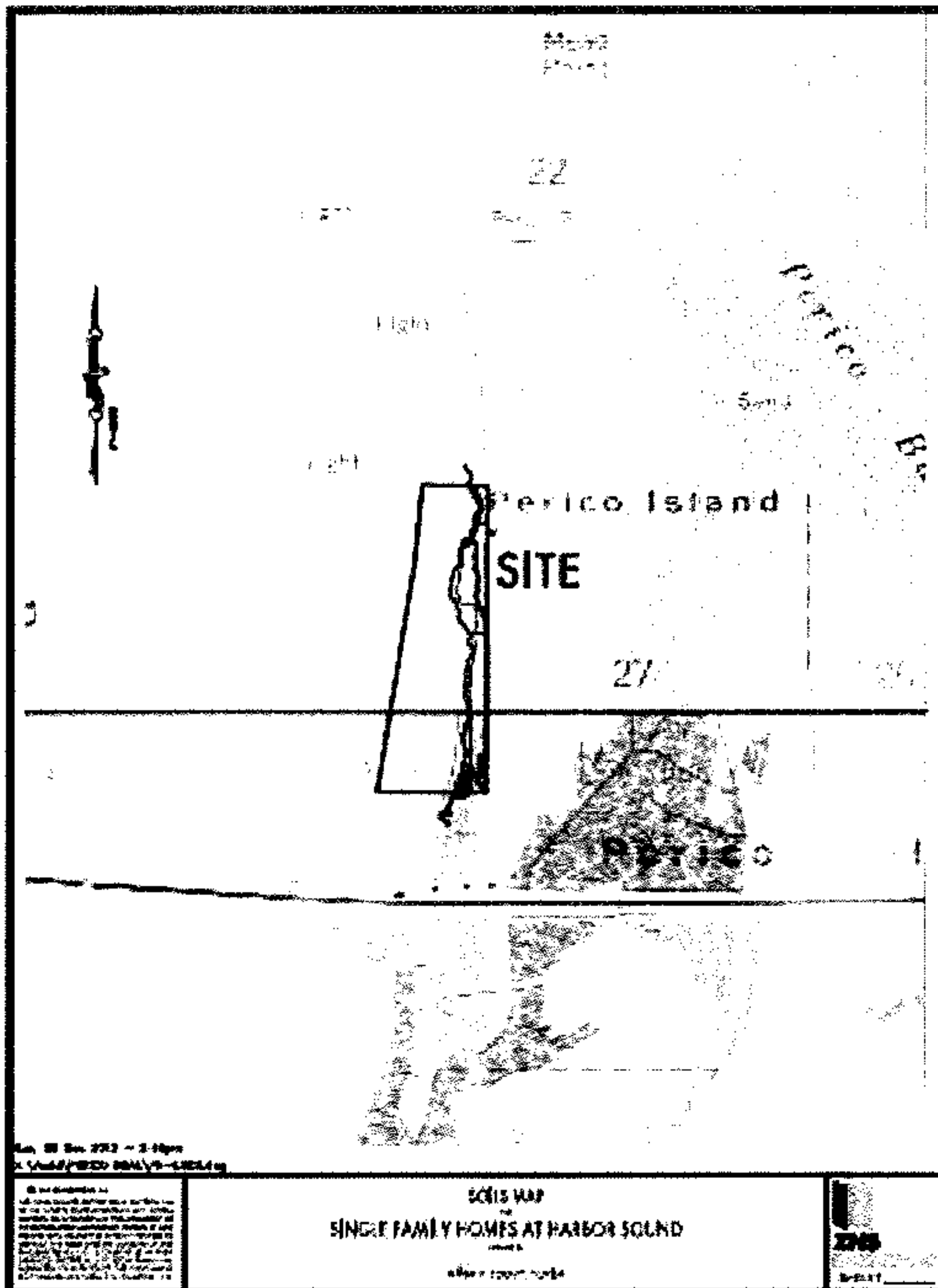
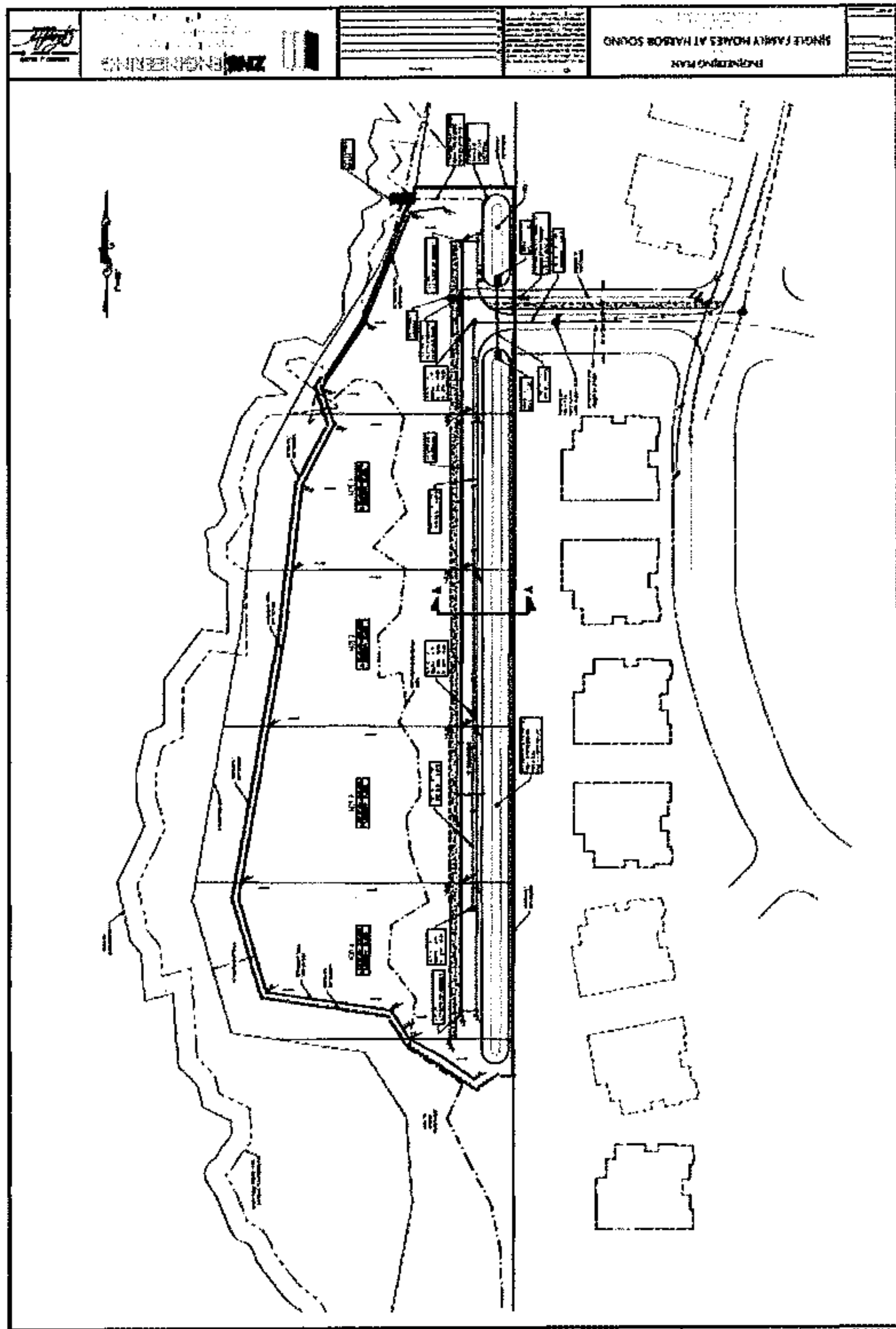


Exhibit 1



SWFWMD Exhibit 1 (excerpt) location

Exhibit 1



SWFWMD Exhibit 1 (excerpt) site plan

Responses to Exceptions

It is the function of the DOAH ALJ to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred, *i.e. no evidence at all.* The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

No reduction or elimination of impacts prior to utilization of OFFSITE mitigation bank

Recommended Order Paragraph No. 75 (Trust Exception No. 1) explained the recommendation for denial as follows:

> "75. Although not acknowledged by the District, this is an unusual project. It resembles the kind of project that was common in the 1960s and 1970s in Florida, before the enactment of environmental regulatory programs, when high-quality wetlands were destroyed by dredging and filling to create land for residential development. In all the reported DOAH cases involving ERPs and mitigation of wetland impacts, the circumstances have involved impaired wetlands and/or the restoration or permanent protection of other wetlands on the project site. No case could be found where an applicant simply paid for authorization to destroy almost an acre of high-quality wetlands and convert it to uplands."

It is well within the discretion of a Judge to cite case law and precedent as well as legislative and regulatory history to support a finding. Such is the case with his conclusion that he could find no case where an applicant simply paid for authorization to destroy almost an acre of high-quality wetlands and convert it to uplands. This permit request is for four (4) residential lots. The case the Trust references, Tomm Friend v Pioneer Community Development District, (also recently decided on March 12, 2015 by the same Administative Law Judge Bram Canter), is distinguishable because that permit was *not* for residential development but for the impacts of a

Exhibit 1

linear road crossing and the impacts were to wetlands that were *not* in Outstanding Florida Waters subject the lesser "*not contrary to* public interest" test.

The subject application is for a residential housing development that could minimize impacts through practicable alternatives, such as simply reducing the size of backyards and is located in Outstanding Florida Waters subject to the heightened standard of "*clearly in* the public interest." The Administrative Law Judge stated clearly that the subject activity was an unusual project because " It resembles the kind of project that was common in the 1960s and 1970s in Florida, before the enactment of environmental regulatory programs, when *high-quality wetlands* were destroyed by dredging and filling to create land *for residentia*l development."

Further, collecting money for a mitigation bank located outside of Anna Maria Sound does not adequately mitigation impacts in the subject important fringe mangroves near the historic fishing village of Cortez especially when mitigation opportunities exist on the applicant's large 40 acre site, which includes other wetlands and an island that is not part of this development proposal but instead held by the applicant for speculative "future development" areas.

The record supports paragraph 75, including:

> **Page 590**
> before you reviewed the permit and before you were
> even on the site; is that correct?
> A. Yes.
> Q. And you said you your outrage was caused
> by the fact that this was precedent setting. Why
> would --
> MR. BROOKES: Objection. This is beyond
> the scope of direct.
> MR. MANSON: This is going to the witness'
> credibility, Your Honor.
> THE COURT: Go ahead.

THE WITNESS: That I thought it was
precedent setting?
BY MR. MANSON:
Q. Yes. What outraged you about this
development being precedent setting before you were
hired?
A. Well, I feel like if you let this
developer buy -- or develop environmentally
sensitive land then what is going to stop the next
land owner who owns environmentally sensitive lands
to apply for a permit, and he's going to say, well,
if he did it why can't I.
Q. And you think that's a binding precedent?
A . I do. I think that's a great scenario,

Page 602-603
Q . Could you explain further what you meant
in your answer to Doug Manson's question about
precedent? ...

A. It would seem to me that if you gave one
landowner permission to fill in his wetlands for
non-water dependent housing and the next guy, next
lot over comes in and wants to fill in wetlands for
non-water dependent housing, and if the rules are
the same for everybody, so if it meets one guy's
rules why wouldn't it meet the other guy's rules.

The proposed project in OFW Anna Maria Sound is not "clearly in the public interest."

Adverse Impacts:

Recommended Order, Para. 43, 69, 71, 74, 75, 76 (Trust Exception No. 2) found that with regard to this project located on Perico Island, in Anna Maria Sound

Finding of Fact "43. *The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.*"

The ALJ's Finding of Fact 43 is supported by competent, substantial evidence, evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached' and is based in part upon:

Undisputed Finding of Fact 12, which states:

"*12. Mangroves also provide a buffer from storm surge and help to stabilize shorelines. Mangroves also provide a buffer from storm surge and help to stabilize shorelines.*"

This is an undisputed fact, and in this day and age, a reasonable person would determine that removing mangroves would create a loss or reduction of storm buffering and erosion prevention functions performed by the mangroves that would be permanently removed. Further, evidence from expert testimony relies upon reasonable scientific data for this finding.

The Trust is confusing the Finding 43 to be a determination of *sufficiency* of mitigation, rather than first reducing or eliminating adverse impacts prior to mitigation of the reduced, unavoidable adverse impacts. In accordance with AH I -10.3 Mitigation – "Mitigation will be approved *only after* the applicant has complied with the requirements of sections 10.2.1 through 10.2.1.3, regarding practicable modifications to reduce or eliminate adverse impacts." If the applicant has not first *reduced or eliminated* adverse impacts, mitigation *will* not be approved.

The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island is an adverse impact to Perico Island is not mitigated in Cockroach Bay Mitigation Bank many miles away in Tampa Bay as noted in Finding of Fact 43 found that with regard to this project on Perico Island "The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank."

Finding of Fact 42 further found that

"... local fish and wildlife, and local biological productivity would be diminished by the proposed project. This diminution affects Petitioners' substantial interests."

This is further supported by the Finding of Fact 51:

"Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

It is important to recognize that FINDING OF FACT 43 is not related to a UMAM score because the Trust confuses the ALJ's finding as a determination of the "sufficiency of mitigation" but is instead related to whether the Applicant provided reasonable assurances under the "clearly in the public interest" test applicable in the Outstanding Florida Waters of Anna Maria Sound. This is clearly not what the ALJ did acknowledged and stated in conclusion of law 73 " Determinations as to the *sufficiency* of mitigation for adverse wetland impacts are within the jurisdiction of the District. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So. 2d 113, 116 (Fla. 2nd DCA 1997). Sufficiency of mitigation as specific to facts for a UMAM score are instead contained in findings of fact 25-31.

The evidence and expert testimony at hearing supports the Finding of Fact 43.

Expert Testimony of PWS Lee Cook, Page 552

I described the biological and economic impacts --
or benefits to mangroves that we all enjoy: Flood
protection, fish and
Page 553
Q . And what other functions do mangroves
Page 554

Exhibit 1

perform?
A. Storm buffers, wind breaks, the roots wildlife habitat, recreational
Q. So, these mangroves and this coastal
wetland, are they performing a local function in
this specific area?
A. Yes.

Page 576
Q. Your opinion as an expert is that the
adverse impacts in this vicinity by removing the one
acre directly of the mangroves and the secondary
impacts are not going to be mitigated?
A. No.

Page 572 lines 10-20

I think that the difference on this
particular project is, it's out of basin. The
Tampa Bay Mitigation Bank is 17 miles away out
of basin. So, you're asking for -- therefore
you have to ask for cumulative impact analysis
to show that the bank way over here is going to
exceed the functions and values lost way down
here. And what our point is, is that the
cumulative impact analysis provided is not
sufficient to comfortably address that and say
there will not.

Petitioners's Exhibit #55 Lee Cook's Environmental Assessment Report[2] at Page 5:

> "**Mangroves serve as storm buffers by functioning as wind breaks and through prop root baffling of wave action.** Mangrove roots stabilize shorelines and fine substrates, reducing turbidity, and enhancing water clarity. Mangroves improve water quality and clarity by filtering upland runoff and trapping waterborne sediments and debris."

and at Page 44 states:

> "Functions. Mangrove wetlands located within western Florida form a vital component of the estuarine and marine environment, providing a major organic detrital base to the aquatic food chains, significant habitat for arboreal, intertidal and subtidal organisms, nesting sites, cover and foraging grounds for birds, and habitat for reptiles and mammals. Mangroves provide protected nursery area for fishes, crustaceans, and shellfish. They are one of the most biologically productive ecosystems in the world. Mangroves also serve as

[2] admitted into evidence (Transcript p. 535)

storm buffers by functioning as wind breaks and through prop root baffling of wave action. Mangrove roots stabilize shorelines and fine substrates, reducing turbidity, and enhancing water clarity. Mangroves improve water quality and clarity by filtering upland runoff and trapping waterborne sediments and debris. The shallow waters surrounding the project area contain SAV that maintains water quality and stabilizes and supports the marine benthic community which in turn provides food and habitat for other marine organisms which support the local economy that depends heavily on tourism and commercial and recreational fisheries."

and at Page 49 states

"Changes in the association of the wetland with a watercourse or other waterbody.- wetland buffer between the open waters of Anna Maria Sound and development will be reduced. ...

Tidal flow patterns likely affected by retaining wall....

Changes in the ability of the wetland to receive floodflow from surrounding uplands or wetlands. ..

[W]etland will no longer receive floodflow from surrounding uplands or wetlands...

Loss of shade...

Loss of wetlands will reduce detrital input a food chain foundation for the estuarine food web...

...wall disrupting natural tidal/wave attentuation"

Long time former marine extension agent John Stevely's expert testimony, at Page 464-465

> Q. And what's your opinion about the impacts
> to the marine habitats and the mangroves?
> A. Well, and after the site visit it's clear
> that there is impacts to the wetlands that have been
> cited. But, in my considered judgment I take a look
> at this and there will result -- the result will be
> fragmentation and loss of mangroves along that part
> of the shoreline.
> The building of the wall -- I guess we're at
> a different definition of retaining and seawall, that
> will alter that shoreline -- well, for two primary
> reasons it will change the dynamics and the physics of
> the wave energy along that shoreline.
> Also, the construction of the wall will
> interrupt the connectivity between the lower wetland
> areas and the higher resulting in damage to the root

structure and, again, fragmenting this mangrove
shoreline.
It's very clear, I think you've talked about
it a little bit, the area where there are no mangroves,
where there actually is already a beach area, and in
that area the black mangroves adjoining that area, both
to the north and to the south, are eroding. There is
some undercutting of the pneumatophores, there is a
loss of the red mangrove fringe in that area. And what
that does is opens that up as a point of attack during
any kind of -- well, a storm event certainly, but also
spring tides and king tides.

Page 471
Q. Okay. Are you familiar with the
approximate location of the mitigation banks?
A . Approximate location, yes.

Page 477
Q. What is your opinion as far as storm
buffering in mangroves?

A. Well, they're absolutely critical. And
that's where the wall is, it's coming down and it's
going to be periodically -- tidal waters are going
to reach it right now regardless, just on good
spring tides, which happen quite frequently during
the year. And when you add storm surge on to
that -- there is a large fetch in that area, there
is a lot of open water.

Page 478

Q. The question was just basically the value
of those mangroves to be removed and the value they
have as far as during a storm, buffering the
shoreline and preventing other damage.

A. They do provide storm protection.

Q . So the removal of the mangroves, in your
opinion, will provide less storm protection?

A. Yes.

Q. Would the -- I believe this is allowed --

would a mitigation outside of this area provide any benefit to the storm protection if those mangroves were removed?

A. No.

Expert Testimony Samuel Johnston, Jr.
Page 665-666

Q. Do the mangroves on this site provide that water quality function in this location?
A. Yes.

Q. Do the provisional mangroves in another location provide that same water quality function in this location?
A. Well, you've forever removed and eliminated the mangroves in ***this*** location. So, that function is automatically brought down to zero .

Page 667

Q. Does this impacted acre of coastal mangrove wetland have a tidal connection to Anna Maria Sound?
A. Yes.

Q. Are these impacted coastal mangrove wetlands, this one acre, a productive part of Anna Maria Sound estuary system?
A. Yes.

Q. Will this one acre of coastal mangrove wetlands that are being filled, is that a permanent loss?
A. Yes.

The ALJ's CONCLUSION OF LAW 69 is clearly supported by and logically arises from the ALJ's FINDING OF FACT 51:

> Finding of Fact "51.Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

Conclusion of Law "69. Pursuant to rule 62-330.301(d) and 62-330.301(f), an applicant must provide reasonable assurance that the regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. Land Trust's proposed project fails to comply with this requirement."

As found and concluded by the ALJ, the Tampa Bay Mitigation Bank does not fully offset the expected impacts at Perico Island in Manatee County's Anna Maria Sound:

CONCLUSION OF LAW 71 is supported by FINDING OF FACT 43:

"43. The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank."

"71. The proposed mitigation must fully offset the expected impacts. Land Trust did not provide reasonable assurance that the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation credits from the Tampa Bay Mitigation Bank."

"Elimination or reduction of impacts is preferred and required prior to mitigation."

CONCLUSION OF LAW 74 is supported by FINDING OF FACT 32 and AHI 10.2.1.

As noted in paragraph 32 of the Recommended Order the "Elimination or Reduction of Impacts" is required under Section 10.2.1 of the Applicant's Handbook, Volume I:

"10.2.1 Elimination or Reduction of Impacts Protection of wetlands and other surface waters ***is preferred to destruction and mitigation*** due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features."

"74. The District rules state that "protection of wetlands and other surface waters is preferred to destruction and mitigation." The proposed permit does not reflect that preference."

Sufficiency of Mitigation FINDING OF FACT 25-31, CONCLUSION OF LAW 76.

CONCLUSION OF LAW 76 is clearly supported by FINDING OF FACT 25-31 as follows:

CONCLUSION OF LAW 76 states:

"76. The District should determine that the proposed mitigation is insufficient."

FINDING OF FACT:

> "30. Reliance on science is always appropriate. … it is found that Respondents' **UMAM score under-calculated secondary impacts** due to scour and other effects of changed water movement that would be caused by the retaining wall.

The conclusion of law 76 is further supported by findings of fact 25-31 (Wetland Impacts), including the failure to provide reasonable assurances that the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score.

> *"31. It was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score.*"

The ALJ's findings of facts must be used to make the determination, and the ALJ found in findings of facts 30-31 that the UMAM score is not accurate.

Therefore, the Governing Board cannot make a determination inconsistent with the facts in changing conclusions of law. Reasonable assurance must be provided that mitigation will offset the impacts, which cannot be done based on a UMAM score that is not accurate.

Reasonable assurances that a UMAM score is based on competent, substantial evidence must be provided. In this case, the ALJ determined the UMAM score to be under-calculated and therefore inaccurate.

Cumulative Impacts

FINDING OF FACT Nos. 45, 46, 47 and CONCLUSION OF LAW Nos. 71 and 72

FINDING OF FACT as stated

> "45. Section 10.2.8(b) provides that, in considering the cumulative impacts associated with a project, the District is to consider other activities which *reasonably may be expected* to be located *within wetlands or other surface waters in the same drainage basin, based upon the local government's comprehensive plan.* Land Trust did not make a prima facie showing on this point.
>
> 46. Land Trust could propose a similar project on another part of its property on Perico Island. Anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands could apply *to*

enlarge the buildable portion of the property by removing the wetlands and filling behind a retaining wall.

47. When *considering future wetland impacts* in the basin which are *likely to result from similar future activities*, the cumulative impacts of the proposed project would result in *significant adverse impacts to wetland functions in the area*."

The competent, substantial evidence is supports all of these findings. The ALJ determined in Finding of Fact 51 that Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water, and determined in Finding of Fact 38 that the Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions. Further, The UMAM score to not be accurate in Finding of Fact 30 and 31.

The ALJ did not misinterpret the District rules, since the rules require according to the AHI

"10.2.8 Cumulative Impacts Pursuant to section 10.1.1(g), above, 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."

which further states

"If an applicant proposes to mitigate adverse impacts *through mitigation physically located outside of the drainage basin where the impacts are proposed, an applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted drainage basin (as measured from the impacted drainage basin), based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality.* If the mitigation fully offsets the impacts (as measured from the impacted drainage basin), then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the condition for issuance in section 10.1.1(g), above, will be satisfied"

The ALJ determined the mitigation did not fully **offsets the adverse impacts within the impacted drainage basin for several valid reasons:**

a. The UMAM score to not be accurate in FINDING OF FACT 30 and 31
b. As determined in Finding of Fact 51 "Reasonable assurances were not provided that the proposed project is clearly in the public interest *because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water*" and
c. Determined in Finding of Fact 38 that the Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions

Section 10.2.8 further states the requirement for evaluating cumulative impacts:

> "When adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface waters, as referenced in the paragraphs above, are not fully offset within the same drainage basin as the impacts, then an applicant must provide reasonable assurance that the proposed activity, when considered with the following activities, will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters, **within the same drainage basin**"

The ALJ's determinations adverse impacts to water quality or adverse impacts to the functions of wetlands and other surface waters, as referenced in the paragraphs above, are not fully offset within the same drainage basin as the impacts is a Finding of Fact based on competent, substantial evidence.

It would defy logic and reason that an inaccurate UMAM score can be used to support the Trust's argument in the exception. Furthermore there are additional requirements to provide reasonable assurances for a project to be *clearly in the public interest* by evaluating adverse effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.Section 10.2.8 is very clear that the intent and purpose of cumulative impacts analysis includes the following:

> "The cumulative impact evaluation is conducted using an assumption that reasonably expected future applications with like impacts will be sought, thus necessitating equitable distribution of acceptable impacts among future applications."

Reasonably expected activities allowed under local comprehensive plan land use designations (for example future residential uses) should be part of this evaluation:

> "activities regulated under Part IV of Chapter 373, F.S., which may reasonably be expected to be located within wetlands or other surface waters, in the same drainage basin, based upon the comprehensive plans, adopted pursuant to Chapter 163, F.S., of the local governments having jurisdiction over the activities, or applicable land use restrictions and regulations."

The applicant did not provide sufficient prima facia evidence included in its Exhibit 16 titled Cumulative Analysis Report. The rule clearly requires and states that:

> "10.2.8.1 **Cumulative impacts are considered unacceptable** when the proposed activity, considered in conjunction with the past, present, and future activities as described in section 10.2.8, above, would then result in a violation of state water quality standards as set forth in section 10.1.1(c) above, or **significant adverse impacts to functions of wetlands or other surface waters identified in section 10.2.2,** above, within the same drainage basin when considering the basin as a whole. This analysis asks the question whether the proposed system, considered in conjunction with past, present, and future activities would be the proverbial "straw that breaks the camel's back regarding the above referenced water quality or wetland and other surface water functions in the basin."

The ALJ determines through competent, substantial evidence as stated herein that mitigation was not sufficient since there will be adverse impacts to functions of wetlands or other surface waters that cannot or were not mitigated.

Cumulative Impacts FINDING OF FACT 45, 46, 47 CONCLUSION OF LAW 71 and 72 is supported by evidence, including but not limited to:

Page 560

In your expert opinion, is that cumulative
impact study sufficient, not with regard to the conclusion of lawors
or how it looks, but the substance of it?
A. In my opinion there is very little facts
and science and data to back up the statements made.
in the cumulative impact analysis.

Q. In your opinion would that be
insufficient?
A. Yes.

Q. On the screen above you is Applicant's
Handbook 10.2.8, and we're looking at the second
paragraph with regard to cumulative impact analysis
where mitigation is located outside the drainage
district. Does the cumulative impact study that was
submitted, in your opinion, meet the requirements
that are stated in that Applicant's Handbook?
A. No.
Q. And why not?
A. Because it says that the applicant may
demonstrate that such mitigation fully offsets the
adverse impacts within the impacted drainage basin.
And based on this -- yeah, based on those factors.
There is no -- there is no data other than the
birds, and only some of the birds, that those
statements are true -- that it meets it.

Does the mitigation as proposed in the Tampa
Bay Mitigation Bank fully offset the adverse impacts of
this project?
A. It is my opinion it does not.
Q. And what is the basis for your opinion?
A. Impacts to local fish and wildlife habitat
will not be offset 17 miles away at the Tampa Bay

Page 664

Q. I'm looking at the report that was handed
out prior to the deposition -- I believe attached to
it. On page 6 it says: "The permanent destruction
of productive mangrove wetlands on Perico Island and
impacts to the adjacent OFW receiving waters *cannot
be replaced through the purchase of mitigation
credits of the Tampa Bay Mitigation Bank miles away
in a separate drainage basin* and with impaired
receiving waters. Those activities will
consequently result in an adverse impact in the
vicinity of Perico Island".
Was that the opinion you gave in your report?
A. Yes, it must.
Q. Do you still agree with that opinion?
A. Yes.

Page 603

It would seem to me that if you gave one

> landowner permission to fill in his wetlands for
> non-water dependent housing and the next guy, next
> lot over comes in and wants to fill in wetlands for
> non-water dependent housing, and if the rules are
> the same for everybody, so if it meets one guy's
> rules why wouldn't it meet the other guy's rules.

See also, Petitioners Exhibit 38 contains a list of similar parcels that should be evaluated in a cumulative impact analysis. Transcript 844-847.

Similar residential uses of waterfront property with mangroves and or wetlands in private ownership should be evaluated to meet the requirements contained in 10.2.8. When considered in conjunction with the past, present, and future activities as described in section 10.2.8 the proposed activity of filling mangrove fringe wetlands for residential backyards would result in **significant adverse impacts to functions of wetlands** within the same drainage basin when considering the basin as a whole. Cumulative impacts should be considered separately from mitigation particularly when mitigation is not in the same drainage basin and inadequate to offset the adverse impacts within the drainage basin in which the proposed activity is located.

"Clearly in the public interest" test applicable to Anna Maria Sound OFW

FINDING OF FACT No. 51 and CONCLUSION OF LAW No. 77 finding and concluding that the proposed project is ***not*** "clearly in the public interest" criterion, are based on competent, substantial evidence, the statute, and the District's rules.

> Finding of Fact "51. Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

Finding of Fact 51 is supported by competent evidence, evidence sufficiently relevant and material to the ultimate fact determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.' The Evidence below supports the Finding of Fact 51.

There will be unmitigated secondary impacts by the loss of shade provided by the mangroves will increase water temperatures, which will increase algae and phytoplankton densities which could adversely affect water chemistry and quality, which could affect the sea grass beds, which are located right adjacent to this property that is primary food habitat for the endangered West Indian Manatee. There would be additional input of toxicants and nutrients and debris into the bay from people building right on to the mangroves. (555:23-25, 556:2-14).

There will be unmitigated secondary impacts by the reduced detrital export, which is all the materials that are flushed daily by the tides in the mangroves, and that would potentially effect the forage for the small-toothed sawfish, which is a listed species that is known to occur in the area. (557:1-6).

There will be unmitigated secondary impacts by a loss of overall wetlands in the area, which would reduce canopy cover and habitat for existing mangrove-dependent species such as the black whiskered vireo. (557:7-11).

There will be unmitigated secondary impacts by wildlife having to be concentrated. There would be increased mortality. The wildlife corridor would be significantly narrowed. And nesting, food sources, breeding area would all be reduced for local wildlife (557:12-20).

The loss of a pollen source in the vicinity for bees from black mangroves cannot be mitigated by a mitigation bank 17 miles away. Bees cannot travel this distance.(Exhibit 43)(488:14-22)(236:4-12)

When there is, and while there may be, conflicting testimony, the Governing Board may not re-weigh the evidence or the credibility of the expert testimony.

The stated exception by the Land Trust is the ALJ's "conclusion that the proposed mitigation would not fully offset the adverse impacts from the project to wetlands and other surface waters, resulting in adverse cumulative impacts" ignores the rest of the ALJ's Recommended Order and is incorrect statement because this WAS NOT THE ONLY basis for the ALJ's findings and conclusions that the proposed project in an OFW was not CLEARLY IN THE PUBLIC INTEREST was based on other factors that are relevant to the public interest test.

A more careful reading of FINDING OF FACT 51 is a finding of fact clearly stating " adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

This fact is based on:

a. adverse **effects on the conservation of fish and wildlife,**
b. adverse **effects fishing and recreational values,**
c. adverse **effects marine productivity of Anna Maria Sound, an Outstanding Florida Water.**

Finding of Fact 51 follows the logical sequence of facts for Public Interest which states 7 criteria that must be met if a project is located in an Outstanding Florida Water. The FINDING OF FACTs dealing with Sufficiency of Mitigation and whether the proposed project meets the "Clearly in the Public Interest Test" are not the same thing. FINDING OF FACT 48 which proceeds FINDING OF FACT 51 is relevant to Rule 62- 330.302(1)(a), which implements Florida Statute section 373.414 as further set forth in sections 10.2.3 through 10.2.3.7 of the Applicant's Handbook. Rule 62-330.302. The rule cited in the Respondents exception is for mitigation under section 10.2.8. The FINDINGS OF FACT 39 -47 under the ALJ's heading

"Mitigation" is separate and apart from the conclusions of law that the proposed project does not meet the "Clearly in the Public Interest Test" applicable to the Outstanding Florida Waters of Anna Maria Sound.

As stated in FINDING OF FACT 50, the Trust proposed $5,000 for a Manatee Information Kiosk that is not located within the Anna Maria Sound OFW, and not located within the same drainage basin and unrelated to the impacts of a non-water dependent residential fill for housing backyards (not docks):

> **Page 240-241**
> Q. And you believe a kiosk at the boat ramp
> in Palmetto, which is in the -- in a different basin
> than the -- it's not in the South Coastal Drainage
> basin, correct?
> A. Palmetto is not in the same drainage basin
> as the impact area.

This is not sufficient to support a finding that the proposed project is clearly in the public interest and does not make it so.

FINDING OF FACT 51 determined that reasonable assurance was not provided and that finding is supported by competent evidence. The ALJ's finding of fact 51 can be shown to be clearly supported by competent substantial evidence under findings 49 and 50 as follows (*italicized* references to related findings of fact 49 and 50 as correlated to the 7 prong public interest test):

FINDING OF FACT 48 is clearly labeled and included under the Public Interest test in the ALJ RO analysis and is supported by findings of fact based on competent substantial evidence (as embedded* below each part of the test in the following annotation provided by Petitioners):

"**<u>Public Interest</u>**

48. For projects located in, on, or over wetlands or other surface waters, an applicant must provide reasonable assurance that the project will not be contrary to the public interest, or if such activities significantly degrade or are within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the criteria set forth in rule 62- 330.302(1)(a), and as set forth in sections 10.2.3 through 10.2.3.7 of the Applicant's Handbook. Rule 62-330.302, which is identical to section 373.414, Florida Statutes, lists the following seven public interest balancing factors to be considered:

1. Whether the activities will adversely affect the **public health**, safety, or welfare or the property of others;

> **See, FINDING OF FACT 49. (The Parties stipulated that the proposed project would not have an adverse impact on* ***public health****, navigation, historical resources, archeological resources, or social costs.)*

2. Whether the activities will adversely affect the **conservation of fish and wildlife,** including endangered or threatened species, or their habitats;

> **See, FINDING OF FACT 51. (Reasonable assurances were not provided that the proposed* ***project is clearly in the public interest because of the adverse cumulative effects*** *on the* ***conservation of fish and wildlife****, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.)*

3. Whether the activities will adversely affect **navigation** or the flow of water or cause harmful erosion or shoaling;

> **See, FINDING OF FACT 49. (The Parties stipulated that the proposed project would not have an adverse impact on public health,* ***navigation****, historical resources, archeological resources, or social costs.)*

4. Whether the activities will adversely affect the **fishing or recreational values or marine productivity in the vicinity of the activity**;

> **See, FINDING OF FACT 51. (Reasonable assurances were not provided that the proposed* ***project is clearly in the public interest because of the adverse cumulative effects*** *on the conservation of fish and wildlife,* ***fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.)***

5. Whether the activities will be of a temporary or permanent nature;

<u>Exhibit 1</u>

6. Whether the activities will adversely affect or will enhance **significant historical and archaeological** resources under the provisions of Section 267.061, F.S.;

> **See, FINDING OF FACT 49. (The Parties stipulated that the proposed project would not have an adverse impact on public health, navigation,* ***historical resources, archeological resources****, or social costs.)*

7. The current condition and relative value of functions being performed by areas affected by the proposed regulated activity."

Competent substantial evidence exists that the proposed project will result in Adverse impacts to Fish, Wildlife, Listed Species and their Habitats.

The Applicant's Handbook AH I 10.2.2 states - Applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions so as to cause adverse impacts to:

(a) The abundance and diversity of fish, wildlife, listed species

(b) The habitat of fish, wildlife, and listed species **and consider comments** [4]and recommendations received from the FWC, the U.S. Fish and Wildlife Service

However, the District did not consider comments from the U.S. Fish and Wildlife Service. (394:25,394:1-3).

The impacts to wetlands will cause adverse impacts to the habitat of fish and wildlife and listed species and the abundance of fish and wildlife, and the proposed mitigation will not offset those adverse impacts (562:19-25).[5]

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[4]Alan Gagne- (394:25,394:1-3) Q . So just to confirm, you didn't take those comments into consideration from US Fish and Wildlife? A. Correct.

[5] Lee Cook - Does the mitigation as proposed in the Tampa Bay Mitigation Bank fully offset the adverse impacts of this project? A. It is my opinion it does not. And what is the basis for your opinion? A. Impacts to local fish and wildlife habitat will not be offset 17 miles away(562:19-25)

The proposed project will have adverse direct and secondary effects on water quality, water chemistry, wildlife and wildlife habitat in the local vicinity and greater Anna Maria Sound. (Exhibit P- 55 Page 6).

<u>The value of functions of the subject wetlands were assessed as high quality at this site.</u>

The mangroves have been assessed as follows:

(a) **Condition** –a wetland or other surface water that is in a high quality state

(b) **Hydrologic connection** that provide benefits to off-site water resources through detrital export, base flow maintenance, water quality enhancement and the provision of nursery habitat;

(c) **Uniqueness** – it is a relative rarity and part of the last remaining coastal wetlands and its floral and faunal components.

(d) Location –land with high ecological values,

(e) **Fish and wildlife utilization** the wetland and other surface water is used for resting, feeding, breeding, nesting or denning by fish and wildlife, particularly those that are listed species. **(AH I 10.2.2.3)(546:4-9) (Exhibit 55 Page 5-6).**

The proposed project will adversely affect a very popular fishing area, by changing the habitat and the productivity and the quality of fishing will decline. Affecting recreational fishing and commercial fishing. [7]**(495:5-11).**

As noted in Petitioners Exhibit 55 (Page 5-6), the proposed project will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats by reducing forage for the West Indian manatee (*Trichechus manatus*),a federally

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[7] John Stevely - This is a very popular fishing area, change the habitat and the productivity and the quality of fishing will decline. Q. And does this affect recreational fishing and commercial fishing? A. Yes.

listed Endangered species, reducing detrital export, a food chain foundation of the local estuarine food web. This could potentially affect forage for the smalltooth sawfish (*Pristis pectinate*), a federally listed Endangered species, Impacts will cause direct mortality of fiddler crabs (*Ucasp.*), mangrove tree crab (*Aratus pisonii*) and other fishes, crustaceans, and shellfish observed in the proposed impact area. (Exhibit P-55 Page 5-6).

The proposed project will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity. As such, the proposed project is projected to have local unmitigated impacts (Exhibit P-55:pages 5-6).

Further, Guidelines from AH-I **10.2.3.4 Fisheries, Recreation, Marine Productivity state:**

> "In reviewing and balancing the criterion regarding fishing or recreational values and marine productivity in section 10.2.3(d), above, the Agency will evaluate whether the regulated activity in, on, or over wetlands or other surface waters will cause:
>
> (a) Adverse effects to sport or commercial fisheries or marine productivity. Examples of activities that may adversely affect fisheries or marine productivity are the elimination or degradation of fish nursery habitat, change in ambient water temperature, change in normal salinity regime, reduction in detrital export, change in nutrient levels, or other adverse effects on populations of native aquatic organisms."

The proposed project will be of a permanent nature and will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity[8]

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[8] John Stevely Sea Grant Agent Testimony Q. In your expert opinion, based on your work with Sea Grant and the voluminous papers and talks and conferences you've been to, would this proposed project have an impact on fisheries? A. Yes. Q. What is that impact and is it adverse?

Mullet fisherman from Cortez fish in this vicinity.(860:15-25).

Stone Crab traps are adjacent to the project site.(860:15-25).

The regulated activity will adversely affect recreational values to people kayaking and observing the natural environment that cannot be replaced by mitigation 17 miles away.(512:14-23)(860:1-10).

It is not economical or as safe to fish in the mitigation area that is replacing this habitat. (861:7-19).

The bethnic community is not the same in Lower Tampa Bay where the project of impact is and the mitigation bank in middle Tampa Bay(737:12-18).[9]

Tampa Bay has different salinities than Anna Maria Sound (741:2-7)

Scallops are planted, seeded, transplanted, raised in hatcheries. (743:22-25,744:1-13).

The mitigation bank will not fully offset impacts to the impacted drainage basin (663:1-10)10 Mitigation of mangroves will not offset the water quality function of the impacted mangroves(665:2-8)11 .

The Testimony of John Stevely who was a Sea Grant Agent for 35 years provides competent substantial evidence for

*FINDING OF FACT 51. To support "Reasonable assurances were not provided that the proposed **project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity***

A. It's adverse in that it would decrease productivity in the number or amount or pounds of fish or shell fish.

[9] Jay Leverone – "the benthic -- structure of the benthic communities in terms of the abundance and diversity of animals living in the sediments in the areas in upper Tampa Bay and middle Tampa Bay, the composition is statistically different than the composition of the benthics in lower Tampa Bay."

[10] San Johnston – "I believe I stated in my expert opinion that that would not be offset in a separate drainage basin miles away in another -- in another county."

[11] San Johnston – Well, you've forever removed and eliminated the mangroves in this location. So, that function is automatically brought down to zero ."(666:11-13)

of Anna Maria Sound, an Outstanding Florida Water." No reasonable person could dispute this evidence.

Page 480

8 Just for clarity on the
9 record, we're not asking Mr. Stevely's opinion
10 about the actual mitigation bank, but just the
11 location of the mitigation area that's in the
12 location.
13 THE COURT: I'll allow it.

Page 494
2 A. Okay. Well, number one, we have the
3 physical destruction of the mangroves filling in
4 behind the wall. And then it's my considered
5 opinion that you're going to lose more mangrove
6 fringe seaward of that shoreline and you're going to
7 break the connection between what was behind the
8 wall and what is in front of the wall. Taken
9 together, that will be a loss of fishery's
10 productivity and functioning of that shoreline as a
11 mangrove wetland habitat.

Page 495
1 A. Some of the blue crab, fiddler crab,
2 probably pass crabs I don't have the scientific
3 name off the top of my head. But, yes, many --
4 several different types of mud and swimming crab.
5 Q. And will those in turn affect fisheries
6 and why? Would a loss of crabs affect fishery
7 productivity and why?
8 A. Yes. Loss of mass to the system means
9 less food for the other creatures.
4 Q. Do you have an expert as to whether that
15 loss of marine productivity will affect recreational
16 values in the immediate area of the project?
17 A. This is a very popular fishing area,
18 change the habitat and the productivity and the
19 quality of fishing will decline.
20 Q. And does this affect recreational fishing
21 and commercial fishing?
22 A. Yes.

Page 496
16 Q. And do mangroves remove nutrients from
17 that surface water as it flows through?

18 A. Well, they do. And then some of the
19 microflora growing on the roots also uptake
20 nutrients.
21 Q. And does that microflora growing on the
22 roots also feed crabs and in turn fish and in turn
23 fishermen?
24 A. Yes. It goes **all** the way.
25 Q . You call that a food chain?

Page 497

|

1 A. We used to call it food chain, now we like
2 to call it food web.
3 Q. Okay. And because commercial -- do
4 commercial fishermen and recreational fishermen
5 depend on that marine productivity in the area?
6 A. Absolutely.
7 Q. And would this project's impacts be
8 adverse then to the public welfare of commercial and
9 recreational fishermen and other recreational users
10 in the immediate area?

Page 498 lines 6- 25

MR. MANSON: My issue isn't mangroves;
he's already testified to that. **The reduction
of mangroves reduces the fishery's value**; I get
that, he's put that on the record, that's his
opinion.
But I thought the question was asking for
how that would impact the commercial fisheries.
**And I don't have any background where he has
information or understanding of the commercial
fishery and how it would be impacted by a
one-acre reduction in mangrove habitat.**
THE COURT: Do you know what the Sea Grant
Program is?
MR. MANSON: Excuse me?
THE COURT: Have you ever heard of the Sea
Grant Program?
MR. MANSON: Yes, I have, Your Honor.
THE COURT: **He said he's been 35 years
with the Sea Grant Program. So, that's all
about supporting fisheries, as I understand it,
right?**
THE WITNESS: We do a lot of work with
fisheries over all the years, yes.

THE COURT: **So I'll allow a question about fisheries.**

Page 499
2 Q. In your expert opinion, based on your work
3 with Sea Grant and the voluminous papers and talks
4 and conferences you've been to, would this proposed
5 project have an impact on fisheries?
6 A. Yes.
7 Q. What is that impact and is it adverse?
8 A. It's adverse in that it would decrease
9 productivity in the number or amount or pounds of
10 fish or shell fish.
11 Q. And would that be a measurable impact if
12 the project were to be put in one acre of wetlands?
13 A . Would it be
14 Q. Let me back up. How many acres -- excuse
15 me, let me back up again. Have we lost mangrove
16 fringe in the south coastal drainage basin in
17 Sarasota Bay and Tampa Bay?
18 A. Absolutely.
19 Q. And do you have -- can you explain to the
20 Court in either percentages or acres how many
21 mangroves -- how much mangrove fringe we've lost in
22 the area?
23 A. Well, there is -- there are numbers as
24 high as 40 and 50 percent. But, I mean, it is very
25 specific to the particular bays and systems. So,

Expert Lee Cook Professional Wetland Scientist (PWS) also provided competent evidence:

Page 500
1 you can have a bay where we've lost 80 percent, you
2 can have another area that there is not nearly that
3 much loss. So, it's highly variable. But, the
4 numbers vary significantly, and some of the numbers
5 in the past thrown out have been as high as 40 or
6 50 percent.
7 Q. Is it important to preserve a percentage
8 of mangroves in each bay and each sound?
9 A. Yes.
10 Q. Why is that?
11 A. Well, it goes to this connectivity
12 there are so many different reasons, because if you
13 loose that habitat in the area you're losing the

14 productivity and you're also losing the
15 attractiveness of the habitat to the fish. So, I
16 would see where would it would not be a good idea to
17 eliminate mangroves in several sub bays and say,
18 well, we've got mangroves over there so everything
19 is fine. Is that answering the question?
20 Q. Is it important to have a mangrove fringe
21 around traditional fishing areas like Cortez,
22 Florida?
23 A. Yes.
24 Q. Why is that?
25 A . Because of the productivity.

Page 501
1 Q. And can those mangrove fringes in the area
2 of Cortez be replaced by mangrove fringes further up
3 Tampa Bay and still preserve that marine
4 productivity for fishing in the vicinity?
5 A. The further away it goes the less you lose
6 the connectivity and the production to the local
7 area.
8 Q. Do the permits say how many acres of
9 mangroves were being removed, approximately?
10 A. In this permit I believe it was right
11 around one.
12 Q. And does that include what type of
13 mangroves?
14 A. Blacks and reds that I saw, probably some
15 whites back in there.
16 Q. Okay. And in your expert opinion, and
17 based on your work with Sea Grant, is it important
18 to keep this one acre of impacted mangroves in tact
19 on the site?
20 A. Yes.
21 Q. Can you explain why? And that will be my
22 last question.
23 A. Okay. Well again, we go back to we've
24 lost an acre of that type of habitat. And again, my
25 opinion is that we've opened it up for a much

Page 502
1 greater impact because of the fragmentation and loss
2 of basically what will eventually be that entire
3 shoreline in front of the seawall.

Page 504
1 A. Yep .

Exhibit 1

2 Q. Okay. So, is it your testimony that the
3 black mangroves that already exist out in the water
4 that we can see -- and you saw black mangroves when
5 you went out there, right?
6 A. Hm-mm.
7 Q. That they'll somehow be eradicated by the
8 retaining wall being built that far back with a
9 slope of 70 percent riprap in front of them?
10 A. Yes.

Page 582

12 Q. In your opinion, Ms. Cook, does the
13 project adversely affect the fishing and
14 recreational values?
15 A. Yes.
16 Q. And the values that will be affected are
17 local in the vicinity of the project area of impact?
18 A. Yes.

Page 667

7 Q. Does this impacted acre of coastal
8 mangrove wetland have a tidal connection to Anna
9 Maria Sound?
10 A. Yes.
11 Q. Are these impacted coastal mangrove
12 wetlands, this one acre, a productive part of Anna
13 Maria Sound estuary system?
14 A. Yes.
15 Q. Will this one acre of coastal mangrove
16 wetlands that are being filled, is that a permanent
17 loss?
18 A. Yes.

In summary there is competent, substantial evidence that supports FINDING OF FACT 51 which states the facts about the failure of the applicant to provide reasonable assurances supported by the evidence of the record which needs to be determined in order for the project to be clearly in the public interest.

FINDING OF FACT 51 states -"Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects

on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

and the conclusion of law 77 provides that the requirement of section 373.414(1) and rule 62-330.302(1) based on the facts of FINDING OF FACT 51 have not been met and properly concluded based on competent, substantial evidence .

CONCLUSION OF LAW 77 states – " Land Trust's proposed project is not clearly in the public interest as required by section 373.414(1) and rule 62-330.302(1) because it would cause significant adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound."

Wetland Impacts

FINDING OF FACT Nos. 29, 30 and 31, are based on the District's rules and supported by competent, substantial evidence. The Trust argument in the exceptions focus on reweighing evidence, attacking the credibility of the witnesses, and indicating they were Lay Testimony. The Governing Board cannot reweigh evidence, or the credibility of witnesses and evidence presented. The following **Competent, substantial evidence** demonstrates the evidence relied upon that was not objected by the respondents as expert testimony:

John Stevely Page 464 Q. And what's your opinion about the impacts
23 to the marine habitats and the mangroves?
24 A. Well, and after the site visit it's clear
25 that there is impacts to the wetlands that have been

Page 465

1 cited. But, in my considered judgment I take a look

2 at this and there will result -- the result will be
3 fragmentation and loss of mangroves along that part
4 of the shoreline.
5 The building of the wall -- I guess we're at
6 a different definition of retaining and seawall, that
7 will alter that shoreline -- well, for two primary
8 reasons it will change the dynamics and the physics of

9 the wave energy along that shoreline.
10 Also, the construction of the wall will
11 interrupt the connectivity between the lower wetland
12 areas and the higher resulting in damage to the root
13 structure and, again, fragmenting this mangrove
14 shoreline.
15 It's very clear, I think you've talked about
16 it a little bit, the area where there are no mangroves,
17 where there actually is already a beach area, and in
18 that area the black mangroves adjoining that area, both
19 to the north and to the south, are eroding. There is
20 some undercutting of the pneumatophores, there is a
21 loss of the red mangrove fringe in that area. And what
22 that does is opens that up as a point of attack during
23 any kind of -- well, a storm event certainly, but also
24 spring tides and king tides.

Page 471 23 Q. Okay. Are you familiar with the
24 approximate location of the mitigation banks?
25 A . Approximate location, yes.

Page 477

9 Q. What is your opinion as far as storm
10 buffering in mangroves?
11 A. Well, they're absolutely critical. And
12 that's where the wall is, it's coming down and it's
13 going to be periodically -- tidal waters are going
14 to reach it right now regardless, just on good
15 spring tides, which happen quite frequently during
16 the year. And when you add storm surge on to
17 that -- there is a large fetch in that area, there
18 is a lot of open water.

Page 478

8 Q. The question was just basically the value
9 of those mangroves to be removed and the value they
10 have as far as during a storm, buffering the
11 shoreline and preventing other damage.
12 A. They do provide storm protection.
13 Q . So the removal of the mangroves, in your
14 opinion, will provide less storm protection?
15 A. Yes.

16 Q. Would the -- I believe this is allowed --
17 would a mitigation outside of this area provide any
18 benefit to the storm protection if those mangroves
19 were removed?
20 A. No.

Samuel Johnston, Jr. Testimony

Page 665
1 A. Yes .
2 Q. Do the mangroves on this site provide that
3 water quality function in this location?
4 A. Yes.
5 Q. Do the provisional mangroves in another
6 location provide that same water quality function in
7 this location?

Page 666
11 A. Well, you've forever removed and
12 eliminated the mangroves in this location. So, that
13 function is automatically brought down to zero .

Page 667

7 Q. Does this impacted acre of coastal
8 mangrove wetland have a tidal connection to Anna
9 Maria Sound?
10 A. Yes.
11 Q. Are these impacted coastal mangrove
12 wetlands, this one acre, a productive part of Anna
13 Maria Sound estuary system?
14 A. Yes.
15 Q. Will this one acre of coastal mangrove
16 wetlands that are being filled, is that a permanent
17 loss?
18 A. Yes.

The building of the wall will alter the shoreline for two primary reasons - it will change the dynamics and the physics of the wave energy along that shoreline.(465:5-9).

The construction of the wall have future impacts to wetlands and will interrupt the connectivity between the lower wetland areas and resulting in damage to the root structure and, again, fragmenting this mangrove shoreline.(465:10-14).

This competent, substantial evidence supports the ALJs Findings of Fact that:

"31. **It was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score.**"

The record did not support the UMAM score provided by the applicant. Instead, a Finding of Fact was made that "found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall," and "It was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score."

The conclusions in FINDING OF FACT Nos. 34, 35, 36, 37, 38 and CONCLUSION OF LAW No. 68 (last sentence), regarding practicable design modifications, are based on the District's rules and supported by record testimony. FINDING OF FACT 34 as stated in RO notes that the applicant failed to reduce or eliminate the size of the fill area which could have been reduced by reducing the size of the backyards:

> "34. Land Trust contends the use of a retaining wall reduces wetland impacts because, otherwise, more mangroves would have to be removed to account for the slope of the waterward side of the fill area. **However, this proposition assumes the appropriateness of the size of the fill area.**"

This finding is supported by evidence, including but not limited to:

the applicant's own project description:

> **Transcript Page 107**
> ...from the slopes and so forth, we use a retaining
> wall. Again, it's a very expensive item. So, it's
> not always used. It's expensive to do but it's used
> when you want to maximize the footprint of what you
> can put on the residential lot without having that
> secondary further impact to the wetlands. So, for
> us, that's the purpose of the retaining wall. It's
> to retain the soils behind it. Nothing more.

Similarly,

Jeb Mullock for the Trust:

Page 106

11 A For us, the purpose of the retaining wall

12 is -- its primary purpose is basically, when we know
13 that we are filling a certain area, that needs to
14 drain a certain direction. And then we also have
15 limits of not making additional impacts. That's when
16 a retaining wall can be utilized by us.
17 So, in this case, the retaining wall was
18 put in place so that -- a typical development like
19 a residential development or a lot, if you will, will
20 finish the backside of the lot with a slope going
21 down, whether it's a three-to-one slope or a
22 four-to-one slope. But, generally, that means that
23 you are going to have a lot of secondary impacts from
24 the slope going off further into the wetlands.
25 So, in order to limit those further impacts

Page 34
This is -- what you see there is the
wetland acreage. It shows how much would have
been preempted by a pond. Instead, we went to
a more expensive type -- a vault system that
puts the drainage through the StormTech system
under the roadway which is going to be in
front of each one of the four lots.

Page 72
3 A Well, as I said, the main thing that I deal
4 with on the civil portions is the utilities, the
5 stormwater drainage and paving.
6 So, in this case, there is a gravity sewer
7 system and a pressurized water system. And then this
8 -- in this area is where we designed a StormTech
9 system, which-- obviously, we'll elaborate on.

Page 107
1 from the slopes and so forth, we use a retaining
2 wall. Again, it's a very expensive item. So, it's
3 not always used. It's expensive to do but it's used
4 when you want to maximize the footprint of what you
5 can put on the residential lot without having that
6 secondary further impact to the wetlands. So, for
7 us, that's the purpose of the retaining wall. It's
8 to retain the soils behind it. Nothing more.

Exhibit 1

this testimony also supports Findings of Fact 36:

"36. Unlike the Stormtech system, **the retaining wall and access driveway were not shown to be project modifications.**"

As to finding of Fact

"37. The proposed project would cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable. Reducing the size of the fill area would not cause the project to be significantly different in type or function."

This finding is supported by evidence, including but not limited to:

Page 418
17 Q. My question is different too. Why is this
18 retaining slopped retaining wall so far into the
19 mangroves? Did you ever explore the District moving
20 that retaining wall back to the proposed house
21 footprint general locations?
22 A. We asked them for minimization and
23 avoidance, they gave us documentation that did not
24 include moving that wall. But, we accepted what
25 they gave us and we agreed with it.

Al Gagne
Page 391
18 BY MR. MCCLASH:
19 Q. The guide and policy is -- prefers the
20 protection of the wetlands, right, Mr. Gagne?
21 A. Correct.
22 Q. Wetlands could be protected if only one
23 building structure was located outside of the areas
24 of the high quality mangroves?
25 A. Yes .

The proposed project has not minimized impacts to the wetlands including the high quality productive mangroves, and the tidal waters. (391:22-25). **The proposed project could have minimized impacts with smaller yards and or using stilts versus fill or replanting the**

backyard with native vegetation after filling of the mangrove wetlands. The District did not request changes to minimize impacts (416:3-24, Trust Exhibit 1-HHH sheet -6)

Page 416

3 Q. So, if those are the proposed house pads
4 why are they taking out wetlands here to this extent
5 in front of lots four and three and two when they're
6 getting by with much less backyard, if you will, on
7 Lot 1. Why do they need such big backyards on four,
8 three and two?
9 A. I don't know why they need that.
10 Q. Did you ever ask them to bring this
11 retaining wall back closer of the houses to save
12 some of the mature mangroves that are in this
13 wetlands? The hatch line is the fill, correct?
14 A. Right. Yeah. Yes, it is. Yeah, that is
15 the fill.
16 Q. Okay. Why do they need such a big
17 backyard?
18 A. I don't know why they need that. They
19 proposed it.
20 Q. Is it possible to construct homes on
21 stilts rather than on dirt fill?
22 A. It is possible, yes.
23 Q. Did you ask for that?
24 A. No.
25 Q. Did you ask for these backyards to be
1 replanted with native vegetation?
2 A. No.

Finding of Fact "38. Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions."

is supported at:

Page 666
4 BY MR. BROOKES:
5 Q. Okay. Maybe don't get so technical. Give
6 me the common sense answer to my question with
7 regard to why replacing mangroves in another
8 geographic location will not perform the same water
9 quality function, removing turbidity and silt in
10 this location.
11 A. Well, you've forever removed and

12 eliminated the mangroves in this location. So, that
13 function is automatically brought down to zero .

It is the intent of the District that the criteria in sections 10.2 through 10.3.8, of the APPLICANT'S HANDBOOK VOLUME I(AH I), be implemented in a manner that achieves a programmatic goal, and a project permitting goal, of no net loss in wetland or other surface water functions. See (385:12-16)12

Page 385
12 Q. Okay. And do you also agree that the
13 intent of the State rules as well as the District
14 rules are to avoid impacts or minimize impacts to
15 wetlands?
16 A. That is one of the tests, yes.

Modifications to the site plan could be made to eliminate adverse impacts to the high quality mangroves/wetlands.(578:11-18)13 Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features (10.2.1).14 There is no requirement for the District to approve a 4 lot subdivision.(388:20-25,389:1-4). Wetlands could be protected if only one building structure was located outside of the areas of the high quality mangroves.(391:22-25)15

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[12] Alan Gagne- Q. Okay. And do you also agree that the intent of the State rules as well as the District rules are to avoid impacts or minimize impacts to wetlands? A. That is one of the tests, yes.

[13] Q. In your opinion, has the applicant exhausted all alternatives to avoid the impacts to the wetlands? MR. MANSON: I'm going to object. That was not an opinion she has given, having gone through the summary now, at the deposition. THE COURT: They've obviously not exhausted all alternatives.

[14] AH I 10.2: Protection of the wetlands and other surface water is preferred to destruction and mitigation due to temporal loss of ecological value and certainly the ability or recreate certain functions associated with these features.

[15] Alan Gagne- Q. Wetlands could be protected if only one building structure was located outside of the areas of the high quality mangroves? A. Yes.

68. Section 10.2.1 of the Applicant's Handbook requires an applicant to *eliminate or reduce adverse impacts* to the functions of wetlands or other surface waters caused by a proposed project by *implementing practicable design modifications*. **Land Trust's proposed project fails to comply with this requirement.**

The applicant proposed activity could have been modified to reduce impacts. The proposed project could have minimized impacts with smaller yards and or using stilts versus fill or replanting the backyard with native vegetation after filling of the mangrove wetlands. The District did not request changes to minimize impacts (416:3-24, Trust Exhibit 1-HHH sheet -6)

Finding of Fact 30

The Land Trust exception 5 to FINDING OF FACT 30 confuses questions by the Trust attorney as evidence by page 584 later the record of evidence becomes clear that on page **Page 585:**

" Q. Now go to page 98. And it says: "Now the
question being asked is whether or not this
mitigation credit from Tampa Bay Mitigation Bank met
the regulatory requirements to be able to get
issuance proposed by the District for the impacts
that were identified on site". Your answer: "Yes.
Technically I would say yes, it does meet the
regulatory criteria."
A. For the mangrove impact area, yes.
Q. That's not specified in the question, is
it?
A. No.
Q. The question is, is it sufficient, and you
said yes. Now you're saying it's sufficient for the
mitigation area proposed, the 1.12 acres?
A . Using the SWFWMD criteria, yes."

age 595 also indicates close agreement with direct impacts
7 Q. And you agreed you were very close to
8 the UMAM impact analysis for the primary site of
9 impact, correct?
10 A. Yes.
11 Q. The 1. 12 acres?
12 A. Yes.

Petitioners' expert Ms. Cooks calculations contained in submitted evidence P-55 rebut the exception

- The mitigation proposed by the applicant of .9 credits does not offset the total UMAM score of the Functional Loss resulting from the proposed ***mangrove i***mpacts of 2.83 units, consisting of permanent wetland impacts resulting in 0.87 units of Functional Loss and secondary wetland impacts resulting in 1.96 units of Functional Loss.(Exhibit 55-page 6)
- The UMAM score for secondary impacts was determined by Lee Cook to be 1.96 based on the latest science, which is higher than the .09 impacts calculated by the applicant. (Exhibit 55-page 4)
- Table 2 in Exhibit also contain evidence by Ms. Cook of Quest Ecology rebutting the calculations of EcoConsultants Inc. as follows:

Table 2.
Comparison of Secondary Impact UMAM SCORES
by the Applicant and Quest Ecology Inc.

Consulting Firm	ASSESSMENT AREA NAME	Secondary Impact Area (acres)	SCORE						WITHOUT IMPACT	WITH IMPACT	MITIGATION DELTA	FUNCTIONAL LOSS
			LOCATION AND LANDSCAPE		WATER ENVIRONMENT		COMMUNITY STRUCTURE					
			W/O IMPACT	WITH IMPACT	W/O IMPACT	WITH IMPACT	W/O IMPACT	WITH IMPACT				
EcoConsultants, Inc Applicant	Mangrove Swamp	0.85	7	5	8	8	8	7	0.77	0.67	0.1	0.09
Quest Ecology, Inc.	Mangrove Swamp	7.54	7	5	9	6	9	6	0.83	0.57	0.26	1.96

Exhibit 1

District stated: "There is no evidence in the record that Ms. Cook disagreed with the Respondents' UMAM scores as determined using the state's criteria or the amount of mitigation proposed for the anticipated wetland impacts." Yet, this ignores

- Table 2 in Petitioners' Exhibit 55 contain evidence of calculations and scores that disagreed with the Trust.
- Additional documentation contained in the record Petitioners Exhibit 55 details the justification based on Ms. Cooks Scientific judgment for UMAM calculations.

  Attachment B - Wetland Determination Data Forms Atlantic and Gulf Coastal Plan Region

  Attachment C - Parts 1 and 2 UMAM Data Sheets

  Attachment D -Scope of Effects Worksheet

District stated "Rather, Ms. Cook disagreed with the amount of mitigation proposed because she believed that the wetland delineation line was incorrect." That is incorrect and confuses the two issues: 1) delineation with 2) UMAM scores.. This is also supported by the exhibit P-55 in sections cited above

Page 567
Q. Did your UMAM score take into
consideration the additional wetlands that you found
on the site in what you call the D test?
A. No .
Q. If you had to take that into consideration
would the UMAM scores reflect different numbers?
A. Yes.
Q. And it would have numbers that would
increase the amount of mitigation needed for this
site?
A. Yes.

Most importantly, the ALJ was without evidence to support the applicants expert's UMAM score as correct and therefore, the ALJ found the applicant's UMAM score was "inaccurate."

The District argues that the FINDING OF FACT 30 is a conclusion of law. This is incorrect. There is competent, substantial evidence supporting FINDING OF FACT 30 as a determination of a score's accuracy was a disputed fact. The fact is the UMAM scoring as presented by the applicant was not supported and inaccurate is a fact. This is not a conclusion of law but a finding of fact.

Design Modifications to Reduce or Eliminate Adverse Impacts.

FINDINGS OF FACT 37 and 38 are findings of fact, not conclusions of law as asserted by the District, and support CONCLUSION OF LAW No. 68.

> FINDING OF FACT "37. The proposed project would cause fewer impacts to wetlands if the fill area was reduced in size, which was not shown to be impracticable. Reducing the size of the fill area would not cause the project to be significantly different in type or function.
>
> FINDING OF FACT 38. Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions."

Support the ALJ's subsequent

> CONCLUSION OF LAW "68. Section 10.2.1 of the Applicant's Handbook requires an applicant to *eliminate or reduce adverse impacts* to the functions of wetlands or other surface waters caused by a proposed project by *implementing practicable design modifications*. **Land Trust's proposed project fails to comply with this requirement."**

As set forth above, the applicant proposed activity could have been modified to reduce impacts. The proposed project could have minimized impacts with smaller yards and or using stilts versus fill or replanting the backyard with native vegetation after filling of the mangrove wetlands. The District did not request changes to minimize impacts (416:3-24, Trust Exhibit 1-HHH sheet -6). The District argues that the findings are a determination that necessitates an interpretation and application of statutory and rule requirements; thus it is a mislabeled conclusion of law. However, the Finding is the result of disputed facts determined by competent, substantial evidence. Further, it is the intent of the District that the criteria in sections 10.2 through 10.3.8,

of the APPLICANT'S HANDBOOK VOLUME I(AH I), be implemented in a manner that achieves a programmatic goal, and a project permitting goal, of no net loss in wetland or other surface water functions.(Page 385:12-16)16

> Page 385
> **12** Q. Okay. And do you also agree that the
> **13** intent of the State rules as well as the District
> **14** rules are to avoid impacts or minimize impacts to
> **15** wetlands?
> **16** A. That is one of the tests, yes.

For example, the record provides the following evidence, including but not limited to:

1. **Modifications to the site plan could have been made to eliminate adverse impacts to the high quality mangroves/wetlands.**(578:11-18)17

2. Protection of wetlands and other surface waters is preferred to destruction and mitigation due to the temporal loss of ecological value and uncertainty regarding the ability to recreate certain functions associated with these features (10.2.1).18

3. There is no requirement for the District to approve a 4 lot subdivision.(388:20-25,389:1-4)

4. Wetlands could be protected if only one building structure was located outside of the areas of the high quality mangroves.(391:22-25)19.

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[16] Alan Gagne- Q. Okay. And do you also agree that the intent of the State rules as well as the District rules are to avoid impacts or minimize impacts to wetlands? A. That is one of the tests, yes.

[17] Q. In your opinion, has the applicant exhausted all alternatives to avoid the impacts to the wetlands? MR. MANSON: I'm going to object. That was not an opinion she has given, having gone through the summary now, at the deposition. THE COURT: They've obviously not exhausted all alternatives.

[18] AH I 10.2: Protection of the wetlands and other surface water is preferred to destruction and mitigation due to temporal loss of ecological value and certainly the ability or recreate certain functions associated with these features.

Lack of Storm buffering at Perico Island

SWFMD Exception to Finding Fact 43 incorrectly asserts that this finding is actually a mislabeled conclusion of law:

43. The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank.

This is clearly a Finding of Fact not law. Further, this finding of fact is based on competent, substantial evidence that the loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island is not sufficiently offset at the Tampa Bay Mitigation Bank located in another drainage basin. The ALJ's Finding of Fact 43 is supported by competent, substantial evidence, evidence sufficiently relevant and material to the ultimate determination 'that a reasonable mind would accept it as adequate to support the conclusion reached.' Substantial evidence is evidence that provides a factual basis from which a fact at issue may also reasonably be inferred from FINDING OF FACT 12 which states:

"12. Mangroves also provide a buffer from storm surge and help to stabilize shorelines."

This undisputed fact is one a reasonable person would use to determine that removing mangroves would create a loss or reduction of storm buffering and erosion prevention functions performed by the mangroves removed that cannot be mitigated 17 miles away.

Storm buffering is provided at Cockroach Bay in a different county in a different drainage basin 17 miles away it does not buffer Perico Island or anywhere else in Manatee County.

---

[19] Alan Gagne- Q. Wetlands could be protected if only one building structure was located outside of the areas of the high quality mangroves? A. Yes.

Exhibit 1

As set forth above there is record evidence from testimony of several experts along with reasonable scientific data that mangroves provide a buffer from storm surge and help to stabilize shorelines, and that the loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank. It is not.

Further do not forget that elimination or reduction of adverse impacts must come before mitigation is allowed as appropriate. In accordance with

AH I -10.3 Mitigation "Mitigation ***will be approved only after*** the applicant has complied with the requirements of sections 10.2.1 through 10.2.1.3, regarding ***practicable modifications to reduce or eliminate adverse impacts***."

The ALJ correctly found as fact that the loss or reduction of storm buffering and erosion prevention functions performed by the mangroves *specific to Perico Island* is an adverse impact that cannot be mitigated 17 miles away because the area to be buffered from storms and erosion is not in the same area.

Further, the storm buffering on Perico Island is lost, without first reducing or eliminating storm buffering impact.

Cumulative Impacts of Similar Projects

SWFMD Exception to Finding Facts 44, 45, 46, 47 contains findings of fact by the ALJ that cannot be changed by the Governing Board:

> "44. Cumulative impacts are unacceptable when the proposed activity, considered in conjunction with past, present, and future activities would result in a violation of state water quality standards, or significant adverse impacts to functions of wetlands or other surface waters. See § 10.2.8.1, Applicant's Handbook, Vol. I.
>
> 45. Section 10.2.8(b) provides that, in considering the cumulative impacts associated with a project, the District is to consider other activities which reasonably may be expected to be located within wetlands or other surface waters in the same drainage basin, based upon

Exhibit 1

> the local government's comprehensive plan. **Land Trust did not make a prima facie showing on this point.**
>
> 46. **Land Trust could propose a similar project on another part of its property on Perico Island.** Anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands **could apply to enlarge the buildable portion of the property by removing the wetlands and filling behind a retaining wall.**
>
> 47. When considering future wetland impacts in the basin which are likely to result from similar future activities, **the cumulative impacts of the proposed project would result in significant adverse impacts to wetland functions in the area.**"

The District argues "The District takes exception to this finding because there was no complete, substantial evidence presented to conclude that "anyone owning property in the area which is designated for residential use under the City of Bradenton's comprehensive plan and bounded by wetlands could apply to enlarge the buildable portion of the property by removing wetlands and filling behind a retaining wall."

As set forth in detail above, applicant's own application shows additional property similar that it did not preclude from development (for which there is no evidence of a conservation easement on the remaining lands owner by the Trust that would prevent future similar development applications) much less other properties in the subject drainage basin on Anna Maria Sound.

This permit would set a precedent for other pending and future permits filling wetlands for residential housing and backyards with similar adverse impacts included therefore requiring cumulative impacts to be evaluated especially within the same drainage basin.

If all the mangroves in Anna Maria Sound were mitigated in Cockroach Bay there would be no mangroves to provide habitat or stormwater buffering at Anna Maria Sound in Manatee County.

Clearly in the Public Interest Test requirements - SWFMD Exception to Finding 50 and 51

These paragraphs contain findings of fact by the ALJ that cannot be changed by the Governing Board with regard to the *Clearly in the Public Interest Test* requirements applicable to the Outstanding Florida Waters of Anna Maria Sound:

> "50. Land Trust proposes to give **$5,000 to the City of Palmetto for an informational kiosk at the City of Palmetto's public boat ramp.** A **District employee testified that this contribution made the project clearly in the public interest.**
>
> 51. Reasonable assurances were not provided that the proposed project is clearly in the public interest because of **the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water.**"

The District incorrectly argues "The District asserts that Finding of Fact 51 is actually a mislabeled conclusion of law. Determining whether reasonable assurances were provided for a regulated activity to be found "clearly in the public interest" requires an interpretation of statutory and rule requirements, and is not a findings of fact."

Finding of fact 51 is a disputed fact and the finding is based on competent, substantial evidence that "Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water."

Finding of fact 51 is a determination of disputed facts, determined by competent, substantial evidence and not a determination that necessitates an interpretation and application of statutory and rule requirements; it is not a mislabeled conclusion of law as argued by the District.

CONCLUSION

First and foremost, and before mitigation is utilized, practicable alternatives and project modifications should be fully utilized to reduce or eliminate adverse impacts resulting from the loss of these important mangrove wetlands in an Aquatic Preserve Outstanding Florida Waterbody of Anna Maria Sound. Under the AHI, only after practicable alternatives have been fully exhausted, will mitigation be used.

When mitigation is used after impacts are reduced, care must be taken to evaluate and fully offset all the adverse affects caused by the permanent loss of mangrove wetlands in Anna Maria Sound's South Coastal Drainage Basin.

Purchase of mitigation bank credits in Tampa's Cockroach Bay in a different Tampa Bay Drainage Basin located 17 miles away does not offset fully the adverse impacts from the permanent loss of mangrove wetlands that are lost in Anna Maria Sound's South Drainage Basin.

Mangroves not only provide important storm buffering and erosion control as determined by the ALJ, the "Land Trust's proposed project is not clearly in the public interest as required by section 373.414(1) and rule 62-330.302(1) because it would cause significant adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound." Recommended Order, para. 77.

That is important to the Aquatic Preserve and Outstanding Florida Waterbody of Anna Maria Sound and merits denial of the permit for the proposed activity.

WHEREFORE, Petitioners request a final order consistent with the recommended order ENTERED on the 25th day of June, 2015, in Tallahassee, Leon County, Florida by BRAM D. E. CANTER Administrative Law Judge.

CERTIFICATE OF SERVICE

I certify that the foregoing was filed and served by email service upon the following on July 25, 2015:

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EXHIBIT E
RULING ON EXCEPTIONS TO RECOMMENDED ORDER

A. Ruling on Land Trust No. 97-12's Exceptions

1. **First Exception.** The First Exception is accepted. Conclusion of Law ("COL") No. 75 is rejected in total. The District's rejection of COL No. 75 is more reasonable because COL No. 75 is a statement of opinion with no basis in statute, rule, or record evidence to support such a conclusion.

The purchase of credits from a mitigation bank to fully offset impacts to wetlands or other surface waters is clearly authorized by statute. Subsection 373.414(1)(b), F.S., allows an applicant to propose onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks. § 373.414(1)(b), Fla. Stat. (2014). Section 373.4135, F.S., directs water management districts to participate in and encourage the use of offsite mitigation and mitigation banking, providing in pertinent part:

> [t]he Legislature finds that the adverse impacts of activities regulated under [part IV of Chapter 373] may be offset by the creation, maintenance, and use of mitigation banks and offsite regional mitigation. Mitigation banks and offsite regional mitigation can enhance the certainty of mitigation and provide ecological value due to the improved likelihood of environmental success associated with their proper construction, maintenance, and management. Therefore, the department and the water management district are directed to participate in and encourage the establishment of private and public mitigation banks and offsite regional mitigation.

§ 373.4135(1), Fla. Stat. (2014). Subsection 373.4135(3), F.S., further directs that "...mitigation banks and offsite regional mitigation be considered appropriate and a permittable mitigation option under the conditions specified by the rules of the department and water management districts." § 373.4135(1)(c), Fla. Stat. (2014).

Finally, subsection 373.4135(1)(e), F.S., provides that "[t]he department or water management district may allow the use of a mitigation bank or offsite regional mitigation alone or in combination with other forms of mitigation to offset adverse impacts of activities regulated under this part." § 373.4135(1)(e), Fla. Stat. (2014). The use of mitigation bank credits are clearly accepted as an appropriate form of mitigation to offset wetland impacts. See, Rule 62-330.010 and 62-330.301, Fla. Admin. Code (2014) and Environmental Resource Permit Applicant's Handbook Volume 1, Section 10.3.1.2 ("Applicant's Handbook").

Therefore, COL No. 75 is modified as follows:

> This is not an unusual project. The District routinely reviews applications and issues environmental resource permits for projects involving the purchase of mitigation bank credits to offset impacts to wetlands of varying quality.

2. Second Exception.

a. With regard to Finding of Fact ("FOF") No. 43, the Exception is accepted and FOF No. 43 is rejected. FOF provides, "[t]he loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island cannot be mitigated for at the Tampa Bay Mitigation Bank." However, the District has the exclusive final authority to determine the sufficiency of proposed mitigation. Save Anna Maria, Inc. v. Dep't. of Transp., 700 So. 2d 113, 116 (Fla. 2d DCA 1997) (citing 1800 Atlantic Developers v. Dep't of Envt'l Reg., 552 So. 2d. 946 (Fla. 1st DCA 1989)). Furthermore, "[a] hearing officer's 'findings' related to the sufficiency of mitigation are essentially conclusions of law and are not binding" upon the District. Save Anna Maria, 700 So. 2d at 116. Therefore, the District can apply the standard of review pertaining to conclusions of law to FOF No. 43.

The District determines that it is as or more reasonable to determine that the adverse impacts of Land Trust's proposed project can be mitigated for at the Tampa Bay Mitigation Bank. First, the purchase of credits from mitigation banks is an acceptable form of mitigation. See, §§ 373.414 and 373.4135, Fla. Stat. (2014); see also, Rule 62-330.010, Fla. Admin. Code (2014) and Environmental Resource Permit Applicant's Handbook, Section 10.3.1.2. Second, there is ample evidence in the record to support the District's finding that appropriate mitigation can be provided via the purchase of credits from the Tampa Bay Mitigation Bank. [T. 201-207, 216, 229-32; 433-39; 454-56]; Land Trust Exhibits 2 and 16.

Therefore, FOF No. 43 is modified as follows:

> The loss or reduction of storm buffering and erosion prevention functions performed by the mangroves at Perico Island can be mitigated for at the Tampa Bay Mitigation Bank.

b. With regard to COL No. 69, the Exception is accepted in part and rejected in part. The first sentence of COL No. 69 reads, "[p]ursuant to rule 62-033.301(d) and 62-330.301(f), an applicant must provide reasonable assurance that the regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." Although this somewhat condenses the conditions for issuance outlined in subparagraphs (d) and (f), it appropriately summarizes those particular requirements.

The second sentence of COL No. 69 reads, "Land Trust's proposed project fails to comply with this requirement." Land Trust argues that

> [i]n COL Nos. 69 (last sentence)....the ALJ incorrectly finds that the Applicant cannot 'fully offset' the adverse impacts caused by the proposed project through the purchase of mitigation bank credits from the Tampa Bay Mitigation Bank, despite the fact that applicable statute and District

rules expressly provide for and authorize the use of mitigation bank credits to fully offset adverse impacts of a proposed project."

As previously stated in Section A.1. herein, the applicable statutes and District rules allow the use of mitigation bank credits to offset adverse impacts of a proposed project. See, §§ 373.414 and 373.4135(1)(c), Fla. Stat. (2014); see also, Rules 62-330.010 and 62-330.301, Fla. Admin. Code (2014) and Applicant's Handbook, Section 10.3.1.2.

The District has the exclusive final authority to determine the sufficiency of proposed mitigation, and an ALJ's findings relating to the sufficiency of the mitigation are conclusions of law, not binding upon the District. Save Anna Maria, 700 So. 2d at 116. The District's conclusion that the mitigation provided is sufficient is as or more reasonable than the ALJ's conclusion.

Therefore, the second sentence of COL No. 69 is modified as, "Land Trust's proposed project complies with this requirement."

c. With regard to COL No. 71, the Exception is accepted in part and rejected in part. The first sentence, which reads "[t]he proposed mitigation must fully offset the expected impacts," is generally accurate in this proceeding (See, Rules 62-330.010(4) and 62-330.301, Fla. Admin Code (2014); see also Applicant's Handbook, Section 10); however, it is more reasonable to cite the language in Rule 62-330.302(1)(b), F.S., which provides that an applicant must provide reasonable assurance that the proposed activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters.

The second sentence of COL No. 71 reads, "Land Trust did not provide reasonable assurance that the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation credits from the Tampa Bay Mitigation Bank."

For the reasons explained in Paragraphs A.1.a. and A.2.a. and b., it is more reasonable to conclude that the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation credits from the Tampa Bay Mitigation Bank.

Accordingly, the second sentence of COL No. 71 is modified as follows:

> Land Trust provided reasonable assurance that the proposed project will not cause unacceptable cumulative impacts upon wetlands and other surface waters, as the adverse impacts caused by the proposed project would be fully offset by purchasing mitigation credits from the Tampa Bay Mitigation Bank.

d. With regard to COL No. 74, the Exception is rejected in part and accepted in part. COL No. 74 reads, "[t]he District rules state that 'protection of wetlands and other surface waters is preferred to destruction and mitigation.' The proposed permit does not reflect that preference." Although a portion of the rule language is not included in the first sentence of COL No. 74, this statement is generally accurate. See, Applicant's Handbook, Section 10.2.1. However, Section 10.2.1 of the Applicant's Handbook does not require a permit to reflect a "preference" but rather sets out the process by which practicable design modifications to reduce or eliminate adverse impacts are to be considered and explored.

Specifically, Section 10.2.1 of the Applicant's Handbook states in pertinent part, "[d]esign modifications to reduce or eliminate adverse impacts must be explored in accordance with Section 10.2.1.1, below. Adverse impacts remaining after practicable design modifications have been made may be offset by mitigation as described in sections 10.3 through 10.3.8, below." Id. Section 10.2.1.1 of the Applicant's Handbook

further states, "Except as provided in 10.2.1.2,[1] below, if the proposed activity will result in adverse impacts to wetland functions and other surface water functions such that it does not meet the requirements of sections 10.2.2 through 10.2.3.7, below, then the Agency in determining whether to grant or deny a permit shall consider whether the applicant has implemented practicable design modifications to reduce or eliminate such adverse impacts." Id. at Section 10.2.1.1. Whether a design modification is "practicable" is determined by a consideration of whether it is economically viable; technically feasible; whether it affects public safety; or whether the cost of the modification is outweighed by any achieved economic benefit; whether the modification is technically capable of being completed. Id. A proposed modification need not remove all economic value of the property in order to be considered "not practicable" nor does a proposed modification need to provide the highest and best use to be considered "practicable." Id.

Land Trust's argument relative to COL No. 74 concerns whether sufficient mitigation has been provided; however, COL No. 74 does not address the mitigation proposed by the applicant – it addresses whether the Applicant fully addressed the requirement to eliminate or reduce impacts to wetlands and other surface waters, a requirement which must be undertaken prior to evaluating the sufficiency of the mitigation proposed to offset any remaining impacts. See, Environmental Resource

[1] Section 10.2.1.2 states that practicable design modifications are not required to reduce or eliminate impacts when a) the ecological value of the functions provided by the adversely affected area is low and the proposed mitigation provides greater long-term ecological value than the area 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 adversely affected area. Neither applies to this application.

Permit Applicant's Handbook, Sections 10.2.1, 10.2.1.1, and 10.2.1.2. Nevertheless, it is more reasonable to substitute a more accurate restatement of Section 10.2.1 of the Applicant's Handbook. Therefore, COL No. 74 is modified as follows:

> In accordance with the provisions of Section 10.2.1 of the Applicant's Handbook, Volume 1, protection of wetlands and other surface waters is preferred to destruction and mitigation. Design modifications to reduce or eliminate adverse impacts must be explored and considered. Mitigation is required to offset the adverse impacts remaining after practicable design modifications have been made.

e. With regard to COL No. 75, the Exception is accepted, for the reasons articulated in Section A.1. herein. COL No. 75 is rejected in total.

f. With regard to COL No. 76, which states, "The District should determine that the proposed mitigation is insufficient," the Exception is accepted. COL No. 76 is rejected in total. As explained in Sections A.1 and A.2.a. and b., herein, the District's determination that the proposed mitigation is sufficient and is more reasonable. The District has the exclusive final authority to determine the sufficiency of proposed mitigation. Finding relative to the sufficiency of mitigation are essentially conclusions of law and therefore the ALJ's findings are not binding upon the District. Save Anna Maria, 700 So. 2d at 116.

For these reasons, COL No. 76 is modified to state, "The District determines that the proposed mitigation is sufficient."

3. Third Exception.

a. With regard to FOF No. 45, the Exception is accepted. The first sentence of FOF No. 45 states, "Section 10.2.8(b) provides that, in considering the cumulative impacts associated with a project, the District is to consider other activities which reasonably may be expected to be located within wetlands or other surface waters in

the same drainage basin, based upon the local government's comprehensive plan." This is not an entirely accurate statement, as Section 10.2.8(b) of the Applicant's Handbook only applies if impacts are not fully offset, whether in basin or out of basin. See, Applicant's Handbook, Section 10.2.8, First and Second Paragraphs. When proposing out-of-basin mitigation, as was proposed in the Application, it further provides that "[i]f an applicant proposes to mitigate adverse impacts through mitigation physically located outside of the drainage basin where the impacts are proposed, an applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted drainage basin ... based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality." Id. "If the mitigation fully offsets the impacts...then the Agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters" and, consequently, the referenced environmental conditions for issuance are met. Applicant's Handbook, Section 10.2.8 (emphasis added). FOF No. 45 should be modified to correctly restate this section of the Applicant's Handbook.

The second sentence of FOF No. 45 reads, "Land Trust did not make a prima facie case showing on this point." It is more reasonable to reject this statement. First, the previous sentence to which it refers is a misstatement of the applicable standard. Furthermore, and as previously argued in Paragraphs A.1. and A.2.a. through f. herein, because the District has the exclusive final authority to determine the sufficiency of proposed mitigation, the District determines that the adverse impacts of Land Trust's proposed project have no unacceptable adverse impacts upon wetlands and other surface waters.

For these reasons, FOF No. 45 is hereby modified to read,

> Section 10.2.8 provides that if an applicant proposes to mitigate adverse impacts through mitigation physically located outside of the drainage basin where the impacts are proposed, an applicant may demonstrate that such mitigation fully offsets the adverse impacts within the impacted drainage basin based on factors such as connectivity of waters, hydrology, habitat range of affected species, and water quality. If the mitigation fully offsets the impacts, the reviewing agency will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters, and consequently, the environmental condition for issuance listed in Rule 62-330(1)(f), F.A.C., will be satisfied. Because Land Trust's mitigation fully offsets the adverse impacts within the impacted drainage basin, the proposed activity has no unacceptable cumulative impacts upon wetlands and other surface waters.

b. With regard to FOF No. 46, the Exception is accepted. FOF No. 46 is rejected in total as no competent substantial evidence exists in the record to support it.

c. With regard to FOF No. 47, the Exception is accepted. FOF No. 47 is rejected in total. For the reasons stated in Sections A.1., A.2.a., b., c., e., f., and A.3.a., the District has exclusive authority to determine that Land Trust's mitigation fully offsets the adverse impacts within the impacted drainage basin and, therefore, the proposed activity has no unacceptable cumulative impacts upon wetlands and other surface waters.

d. With regard to COL No. 71, the Exception is accepted in part and rejected in part for the reasons provided in Paragraph A.2.c., herein. COL No. 71 is modified in accordance with Paragraph 2.b., herein.

e. With regard to COL No. 72, the Exception is accepted. COL No. 72 misapplies and overlooks several important portions of Section 10.2.8 of the Applicant's Handbook that address how cumulative impacts are evaluated. It is more reasonable

for the District to read and apply Section 10.2.8 as a whole. Therefore, and for the reasons explained in Sections A.1., A.2.a. through f., and A.3.a through c., and in accordance with modified FOF No. 45, COL No. 72 is modified as follows:

> Pursuant to Rule 62-330(1)(b), an applicant must provide reasonable assurance that the activity will not cause unacceptable cumulative impacts upon wetlands and other surface waters. Because Land Trust's mitigation fully offsets the adverse impacts within the impacted drainage basin, it has satisfied this requirement.

4. Fourth Exception.

a. With regard to FOF No. 51, the Exception is accepted. FOF No. 51 states, "Reasonable assurances were not provided that the proposed project is clearly in the public interest because of the adverse cumulative effects on the conservation of fish and wildlife, fishing and recreational values, and marine productivity of Anna Maria Sound, an Outstanding Florida Water." Land Trust correctly argues that this is based upon the conclusion that the proposed mitigation would not fully offset the project's adverse impacts to wetlands and other surface waters, resulting in cumulative impacts. For the reasons stated in Sections A.1., A.2.a. through f., and A.3.a., c., and e., the District has the exclusive authority to determine the sufficiency of the proposed mitigation and treat any finding relative thereto as a conclusion of law not binding on the District. As such, the District finds that the project will not cause unacceptable cumulative impacts. For these reasons, it is more reasonable to conclude that the project is in the public interest. Therefore, FOF No. 51 is modified as follows:

> Because Land Trust's proposed mitigation fully offsets the adverse impacts resulting from the project, reasonable assurance has been provided that the project is clearly in the public interest.

b. With regard to COL No. 77, the Exception is accepted. For the reasons articulated in Sections A.1., A.2.a. through f., A.3.a., c., and e., and A.4.a. herein, COL No. 77 is modified as follows:

> Land Trust's proposed project is clearly in the public interest as required by subsection 373.414(1) and Rule 62-330.302(1), Florida Statutes.

5. Fifth Exception.

a. With regard to FOF No. 29, the Exception is rejected. The first sentence of FOF No. 29 summarizes the testimony of Petitioner's witness, Jaqueline Cook ("Cook"), relating to the evaluation of secondary impacts. The second sentence of FOF No. 29 summarizes Respondents' arguments counter to that testimony. Competent substantial evidence exists in the record to support this finding. [T. 107, 153, 201, 233-35, 311, 595, 678].

b. With regard to FOF No. 30, the Exception is accepted in part and rejected in part. Unlike FOF No. 29, FOF No. 30 draws a conclusion relative to Cook's testimony. The first sentence reads, "Reliance on science is always appropriate." No competent substantial evidence exists in the record to support this finding. The second sentence reads, "However, Ms. Cook's use of a federal impact assessment methodology creates doubt about whether her scoring is consistent with UMAM." Competent substantial evidence does exist in the record to support this finding. [T. 583-86, 604].

The third sentence of FOF No. 30 goes on to say, "Despite the unreliability of Ms. Cook's UMAM score, it is found that Respondents' UMAM score under-calculated secondary impacts due to scour and other effects of changed water movement that would be caused by the retaining wall." First, no competent substantial evidence exists

in the record to support this contradictory finding. Second, pursuant to subsection 373.414(18), F.S., UMAM is the sole methodology used to determine the sufficiency of proposed mitigation. Furthermore, as stated in Paragraphs A.1., A.2.a. through f., A.3.a., c., and e., and A.4.a. herein, the District has the exclusive authority to determine the appropriateness of proposed mitigation and thus may treat a finding relative thereto as a conclusion of law that is not binding on the District. The District correctly and more reasonably determined that Land Trust's UMAM score sheet was reasonable, and that the proposed mitigation was appropriate. See, Land Trust's Exhibit 1, pp. 161-164. Additionally, there is ample record evidence to support how secondary impacts were accounted for in the UMAM score (Land Trust's Exhibit 1, pp. 161-164, [T. 201, 233-35, 882-85]) and that Petitioners' witnesses were not experts in wave action, hydrology or UMAM. [T. 502, 507, 665, 676, 697, 700]. Finally, Cook admitted that the addition of riprap would mitigate wave action concerns in her report. [T. 595]. Therefore, FOF No. 30 is modified as follows:

> Ms. Cook's use of a federal impact assessment methodology creates doubt about whether her scoring is consistent with UMAM. Land Trust's UMAM score appropriately accounted for secondary impacts.

c. With regard to Finding of Fact No. 31, the Exception is accepted in accordance with the ruling in Sections A.5.b. and B.2., herein.

6. Sixth Exception.

a. With regard to FOF No. 34, the Exception is accepted. The first sentence of FOF No. 34 provides that "Land Trust contends the use of a retaining wall reduces wetland impacts because, otherwise, more mangroves would have to be removed to account for the slope of the waterward side of the fill area." Competent substantial

evidence exists in the record to support this finding. [T. 76, 106-107]. The second sentence of FOF No. 34 states, "However, this proposition assumes the appropriateness of the size of the fill area." This is a statement of opinion, and no competent substantial evidence exists in the record support this statement. As such, FOF No. 34 is modified as follows:

> Land Trust contends the use of a retaining wall reduces wetland impacts because, otherwise, more mangroves would have to be removed to account for the slope of the waterward side of the fill area.

b. With regard to FOF No. 35, the Exception is accepted. FOF No. 35 provides, "Land Trust also contends wetland impacts are reduced by using the adjacent development to access the proposed project site, rather than creating a new road. However, the evidence did not establish that Land Trust had a practicable and preferred alternative for access." There is no competent substantial evidence to support the second sentence; indeed, competent substantial evidence indeed exists in the record to show that Land Trust's proposed access road was a practicable alternative developed prior to submittal of its application to reduce wetland impacts by utilizing existing roads in uplands. [T. 58], Land Trust Exhibit 1. Therefore, FOF No. 35 is modified as follows:

> Land Trust also contends that wetland impacts are reduced by using the adjacent development to access the proposed project site, rather than creating a new road.

c. With regard to FOF No. 36, the Exception is rejected. Competent substantial evidence exists in the record to support the finding. [T. 58; 416-18], Land Trust Exhibit 1.

d. With regard to FOF No. 37, the Exception is accepted in part. While there is competent substantial evidence in the record concerning the size of the fill area [T.

416-418], no competent substantial evidence exists in the record to support the statement that "reducing the size of the fill area would not cause the project to be significantly different in type or function." As such, FOF No. 37 is modified as follows:

Reduction of the size of the fill area was not shown to be impracticable.

e. With regard to FOF No. 38, the Exception is accepted. FOF No. 38 states, "Land Trust did not demonstrate that it implemented reasonable design modifications to eliminate or reduce impacts to wetland functions." This is a mislabeled conclusion of law. An agency is not bound by labels affixed by the ALJ to findings of fact and conclusions of law; "if a conclusion is improperly labeled as a finding of fact, the label is disregarded and the item is treated as though it were properly labeled." Battaglish Properties, Ltd. v. Florida Land & Water Adjudicatory Comm'n., 629 So. 2d 161, 168 (Fla. 1st DCA 1993) (citing Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987). First, FOF No. 38 misconstrues the provisions in Section 10.2.1 of the Applicant's Handbook. Furthermore, competent, substantial evidence exists in the record to support that Land Trust implemented practicable design modifications to eliminate or reduce impacts to wetlands or other surface waters [T. 76, 106-107], Land Trust Exhibit 1. It therefore more reasonable to substitute a more accurate description of those provisions.

Accordingly, FOF No. 38 is modified as follows:

Section 10.2.1 of the Applicant's Handbook requires that an applicant must explore practicable design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. Land Trust explored and implemented practicable design modifications to reduce or eliminate adverse impacts to wetlands or other surface waters.

f. With regard to COL No. 68, the Exception is accepted in part and rejected in part. COL No. 68 states:

> Section 10.2.1 of the Applicant's Handbook requires an applicant to eliminate or reduce adverse impacts to the functions of wetlands or other surface waters caused by a proposed project by implementing practicable design modifications. Land Trust's proposed project fails to comply with this requirement.

The first sentence of COL No. 68 misconstrues Section 10.2.1 of the Applicant's Handbook that requires an applicant to explore design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. Applicant's Handbook, Section 10.2.1. Furthermore, Section 10.2.1.1 requires the District to consider whether the applicant has explored practicable design modifications. It is more reasonable to substitute a more accurate description of the provisions in Applicant's Handbook Sections 10.2.1. and 10.2.1.1, respectively.

Furthermore, based upon the rulings on the Exceptions to Findings of Fact Nos. 32 through 38, it is more reasonable to conclude that Land Trust explored and implemented practicable design modifications to reduce or eliminate adverse impacts to wetlands or other surface waters, and the District considered that Land Trust had done so. [T. 416-418], Land Trust Exhibit 1.

Accordingly, COL No. 68 is modified as follows:

> Section 10.2.1 of the Applicant's Handbook requires that an applicant must explore practicable design modifications to reduce or eliminate adverse impacts to wetlands and other surface waters. Section 10.2.1.1 of the Applicant's Handbook requires an agency to consider whether the applicant has implemented practicable design modifications to reduce or eliminate such impacts. Both Land Trust and the District complied with these requirements.

B. Ruling on the District's Exceptions.

1. **Exception to FOF/COL No. 30**. This Exception is accepted in part and rejected in part for the reasons stated and is modified as stated in Section A.5.b., herein.

2. **Exception to FOF No. 31**. This Exception is accepted. FOF No. 31 provides, "[i]t was not explained how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score." The forms adopted in Rule 62-345.900, Florida Administrative Code, ("UMAM Forms") were submitted as part of Land Trust's Application. See, Land Trust Exhibit 1, [T. 162-164]. The UMAM score is calculated on the UMAM Forms by completing an analysis using "reasonable scientific judgment characterized by a predominance" of specified indicators that are memorialized thereupon. Id. UMAM provides that "three categories of indicators of wetland function are to be scored to the extent that they affect the ecological value of the assessment area." Rule 62-345.500(6)(b), Fla. Admin. Code (2014). One such category, water environment, evaluates changes to wetland functions, such as storm buffering and erosion prevention, if any, as a result of the proposed project. Id. The water environment score must be determined based upon reasonable scientific judgment and characterized by a predominance of 12 factors, including soil erosion or deposition patterns...indicative of alterations in flow rates or points of discharge as well as water depth, wave energy, currents, and light penetration. Rules 62-345.500(6)(b)1.d. and 62-345.500(6)(b)1.l., Fla. Admin. Code (2014).

Part II of Land Trust's UMAM Forms includes its determination, based upon reasonable scientific judgment, that any loss of storm buffering and erosion prevention functions of the impacted wetlands did not necessitate additional reductions in the

secondary impact UMAM score for water environment. See, Land Trust Exhibit 1, [T. 162-64]. Additionally, District expert Albert Gagne's testimony stated that the score was based on a) the retaining wall being constructed landward of the mean high water line [Land Trust Exhibit 1; T. 162-64, 380]; b) the addition of riprap at a 70-degree slope on its waterward side [Land Trust Exhibit 1; T. 162-64, 380]; and c) a minimum of approximately 40 feet of mangroves between the retaining wall and open water [Land Trust Exhibit 1; T. 162-64; 422-23].

Competent substantial evidence exists in the record to support a finding that evidence exists in the record to explain how the loss of storm buffering and erosion prevention functions of wetlands are accounted for in the UMAM score. Therefore, Finding of Fact No. 31 is rejected.

3. **Exception to FOF No. 37.** The Exception to FOF No. 37 is accepted in accordance with the ruling in A.6.d., herein.

4. **Exception to FOF No. 38.** The Exception to FOF No. 38 is accepted in accordance with the ruling in A.6.e., herein.

5. **Exception to FOF No. 43.** The Exception to FOF No. 43 is accepted in accordance with the ruling in A.2.a., herein.

6. **Exception to FOF No. 44.** The Exception to FOF No. 44 is rejected. Competent substantial evidence exists in the record to support this finding. [T. 23].

7. **Exception to FOF No. 45.** The Exception to FOF No. 45 is rejected. However, FOF No. 45 is modified in accordance with the ruling in A.3.a., herein.

8. **Exception to FOF No. 46.** The Exception to FOF No. 46 is accepted. As also provided in Section A.3.b., herein, FOF No. 46 is rejected in total as no competent substantial evidence exists in the record to support it.

9. **Exception to FOF No. 47.** The Exception to FOF No. 47 is accepted. FOF No. 47 is rejected in total for the reasons stated in Paragraphs A.3.a. and c., herein.

10. **Exception to FOF No. 50.** The Exception to FOF No. 50 is rejected. Competent substantial evidence exists in the record to support this finding. [T. 397-98].

11. **Exception to FOF No. 51.** The Exception to FOF No. 51 is accepted and modified in accordance with the ruling in Section A.4.a., herein.

12. **Exception to COL No. 76.** The Exception to COL No. 76 is accepted. COL No. 76 is rejected in total, in accordance with the ruling in Section A.2.f., herein.

13. **Exception to COL No. 71.** The Exception to COL No. 71 is rejected in part and accepted in part, in accordance with the ruling in Section A.2.c., herein.

14. **Exception to COL No. 72.** The Exception to COL No. 72 is rejected in part and accepted in part, in accordance with the ruling in Section A.3.e., herein.

15. **Exception to FOF No. 51.** The Exception to FOF No. 51 is accepted and FOF No. 51 is modified in accordance with the ruling in A.4.a., herein.

16. **Exception to COL No. 77.** The Exception to COL No. 77 is accepted and COL No. 77 is modified in accordance with the ruling in A.4.b., herein.

17. **Exception to COL No. 68.** The Exception to COL No. 77 is accepted in part and rejected in part, and COL No. 68 is modified in accordance with the ruling in Section A.6.f., herein.

18. **Exception to COL No. 69.** The Exception to COL No. 69 is accepted in part and rejected in part, and COL No. 69 is modified in accordance with the ruling in Section A.2.b., herein.

Southwest Florida
Water Management District

2379 Broad Street, Brooksville, Florida 34604-6899
(352) 796-7211 or 1-800-423-1476 (FL only)
SUNCOM 628-4150 TDD only 1-800-231-6103 (FL only)
On the Internet at: WaterMatters.org

An Equal Opportunity Employer

Bartow Service Office
170 Century Boulevard
Bartow, Florida 33830-7700
(863) 534-1448 or
1-800-492-7862 (FL only)

Sarasota Service Office
6750 Fruitville Road
Sarasota, Florida 34240-9711
(941) 377-3722 or
1-800-320-3503 (FL only)

Tampa Service Office
7601 Highway 301 North
Tampa, Florida 33637-6759
(813) 985-7481 or
1-800-836-0797 (FL only)

August 25, 2015

Land Trust # 97-12
Attn: Christian Van Hise, Trustee
P.O. Box 49948
Sarasota, FL 34230

Subject: **Notice of Intended Agency Action**
ERP Individual Construction

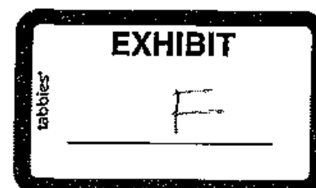
Project Name:	Single Family Homes at Harbor Sound
App ID/Permit No:	690912 / 43041746.000
County:	MANATEE
Sec/Twp/Rge:	S27/T34S/R16E

Dear Permittee(s):

Your Environmental Resource Permit has been approved contingent upon no objection to the District's action being received by the District within the time frames described in the enclosed Notice of Rights.

If approved construction plans are part of the permit, construction must be in accordance with these plans. These drawings are available for viewing or downloading through the District's Application and Permit Search Tools located at www.WaterMatters.org/permits.

The District's action in this matter only becomes closed to future legal challenges from members of the public if such persons have been properly notified of the District's action and no person objects to the District's action within the prescribed period of time following the notification. The District does not publish notices of intended agency action. If you wish to limit the time within which a person who does not receive actual written notice from the District may request an administrative hearing regarding this action, you are strongly encouraged to publish, at your own expense, a notice of intended agency action in the legal advertisement section of a newspaper of general circulation in the county or counties where the activity will occur. Publishing notice of intended agency action will close the window for filing a petition for hearing. Legal requirements and instructions for publishing notice of intended agency action, as well as a noticing form that can be used is available from the District's website at www.WaterMatters.org/permits/noticing. If you publish notice of intended agency action, a copy of the affidavit of publishing provided by the newspaper should be sent to the District's Tampa Service Office, for retention in the File of Record for this agency action.



If you have questions, please contact Pakorn Sutitarnnontr, at the Tampa Service Office, extension 2071. For assistance with environmental concerns, please contact Cory Catts, extension 6104.

Sincerely,

Michelle K. Hopkins, P.E.
Bureau Chief
Environmental Resource Permit Bureau
Regulation Division

Enclosures: Approved Permit w/Conditions Attached
Statement of Completion
Notice of Authorization to Commence Construction
Notice of Rights

cc: E Co Consultants, Inc.
U. S. Army Corps of Engineers
Tim Najjar, PSM
Leonard Najjar, P.E., ZNS Engineering, L.C.

SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT
ENVIRONMENTAL RESOURCE
INDIVIDUAL CONSTRUCTION
PERMIT NO. 43041746.000

EXPIRATION DATE: **August 25, 2020** **PERMIT ISSUE DATE:** **August 25, 2015**

This permit is issued under the provisions of Chapter 373, Florida Statutes, (F.S.), and the Rules contained in Chapter 62-330, Florida Administrative Code, (F.A.C.). The permit authorizes the Permittee to proceed with the construction of a surface water management system in accordance with the information outlined herein and shown by the application, approved drawings, plans, specifications, and other documents, attached hereto and kept on file at the Southwest Florida Water Management District (District). Unless otherwise stated by permit specific condition, permit issuance constitutes certification of compliance with state water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. 1341. All construction, operation and maintenance of the surface water management system authorized by this permit shall occur in compliance with Florida Statutes and Administrative Code and the conditions of this permit.

PROJECT NAME: Single Family Homes at Harbor Sound

GRANTED TO: Land Trust # 97-12
Attn: Christian Van Hise, Trustee
P.O. Box 49948
Sarasota, FL 34230

OTHER PERMITTEES: N/A

ABSTRACT: This permit authorizes the construction of a stormwater management system to serve a 3.46-acre single family residential project, including four single family lots with associated fill for the lots, a retaining wall with riprap covering its waterward face, access driveway and facilities. The project discharges into Anna Maria Sound which is an Outstanding Florida Water (OFW) and is verified as impaired for nutrients (historic chlorophyll-a and chlorophyll-a) and mercury (in fish tissue); therefore, water quality certification is waived as a condition of this permit. Stormwater runoff within the project site will be collected through catch basins and directed to the underground exfiltration chamber system to provide the required water quality treatment, prior to off-site discharge. The applicant's engineer of record has demonstrated through design calculations that the District's presumptive design criteria for the project discharging into OFW governs for the required water quality treatment volume. Attenuation is not required as the proposed project drains to a tidal water body. Information regarding the wetlands is stated below and on the permitted construction drawings for the project.

OP. & MAIN. ENTITY: Harbor Sound Neighborhood Association, Inc.

OTHER OP. & MAIN. ENTITY: N/A

COUNTY: MANATEE

SEC/TWP/RGE: S27/T34S/R16E

TOTAL ACRES OWNED OR UNDER CONTROL: 40.36

PROJECT SIZE: 3.46 Acres

LAND USE: Residential

DATE APPLICATION FILED: February 05, 2014

AMENDED DATE: N/A

Exhibit 1

I. Water Quantity/Quality

POND No.	Area Acres @ Top of Bank	Treatment Type
Underground Chamber *	0.17	EXFILTRATION
	Total: **0.17**	

Water Quantity/Quality Comments:

The project discharges to Anna Maria Sound (WBID 1968A), a water body that is verified as impaired for nutrients (historic chlorophyll-a and chlorophyll-a) and mercury (in fish tissue); therefore, water quality certification is waived as a condition of this permit. Stormwater runoff within the project site will be collected through catch basins and directed to the underground exfiltration chamber system, designed to provide the required treatment volume, prior to discharge into Anna Maria Sound. The stormwater management system will provide treatment volume based on the District's presumptive water quality criteria with an additional 50 percent treatment volume to meet the District's design criteria for discharges to an Outstanding Florida Water (OFW). The applicant's engineer of record has demonstrated through design calculations that the treatment volume provided by the proposed system will have greater treatment efficiencies for nutrient removal than the design requirements to meet the net improvement requirement. As the project discharges to Anna Maria Sound, a tidal water body, peak discharge attenuation is not required. No adverse off-site / on-site water quantity or water quality impacts are expected.

* The area of the underground chamber shown in the above table represents the total footprint area of the underground chamber system (644.40 ft. L X 11.49 ft. W).
A mixing zone is required.
A variance is not required.

II. 100-Year Floodplain

Encroachment (Acre-Feet of fill)	Compensation (Acre-Feet of excavation)	Compensation Type	Encroachment Result* (feet)
0.00	0.00	No Encroachment	N/A

Floodplain Comments:
According to the Flood Insurance Rate Map (FIRM), published by the Federal Emergency Management Agency (FEMA), the project site is located in a tidal floodplain with a 100-year flood elevation of 11.00 ft NAVD 1988 (12.00 ft NGVD 1929). No compensation is required.

*Depth of change in flood stage (level) over existing receiving water stage resulting from floodplain encroachment caused by a project that claims Minimal Impact type of compensation.

III. Environmental Considerations

Wetland/Other Surface Water Information

Wetland/Other Surface Water Name	Total Acres	Not Impacted Acres	Permanent Impacts		Temporary Impacts	
			Acres	Functional Loss*	Acres	Functional Loss*
Mangrove Wetland	1.90	0.00	1.90	0.90	0.00	0.00
Total:	**1.90**	**0.00**	**1.90**	**0.90**	**0.00**	**0.00**

*** For impacts that do not require mitigation, their functional loss is not included.**

Wetland/Other Surface Water Comments:
There are 1.90 acres of wetlands (FLUCCS 612) located within the project area for this ERP. Permanent filling impacts to 1.05 acres of wetlands (FLUCCS 612) will occur for construction of a single family subdivision. Wetland impacts are proposed to a mangrove shoreline on Anna Maria Sound, an area designated as an Outstanding Florida Waters in the Sarasota Bay Estuarine System. As an Outstanding Florida Water public interest criteria must be met as part of this permit. Permanent filling impacts to 1.05 acres of qualifying wetlands were evaluated using the Uniform Mitigation Assessment Method (UMAM) as required pursuant to Chapter 62-345, F.A.C. The results of the UMAM analysis indicate a functional loss of 0.81 units due to the permanent impacts proposed. Secondary wetland impacts to 0.85 acre of qualifying wetlands were evaluated using the UMAM as required pursuant to Chapter 62-345, F.A.C. The results of the Secondary UMAM analysis indicate a functional loss of 0.09 units due to the secondary impacts associated with the project, which were reduced by the addition of riprap covering the waterward face of the retaining wall. The results of the UMAM analysis identify a total functional loss of 0.90 units due to the project's proposed permanent and secondary wetland impacts. Temporary impacts to 0.07 acre of wetlands will occur for construction of a single family subdivision. Re-vegetation of the temporarily impacted wetland areas is to occur via natural recruitment. This temporary impact was accounted for in the UMAM calculation for secondary wetland impact area. There are no other surface water features located within the project area.

Mitigation Information

Name	Creation		Enhancement		Preservation		Restoration		Enhancement +Preservation		Other	
	Acres	Functional Gain	Acres	Functional Gain	Acres	Functional Gain	Acres	Functional Gain	Acres	Functional Gain	Acres	Functional Gain
Tampa Bay Mitigation Bank	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.90
Total:	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.00**	**0.90**

Mitigation Comments:
Wetland mitigation for permanent filling impacts and secondary impacts will be provided by the purchase of 0.90 forested credits from the Tampa Bay Mitigation Bank, ERP No. 43020546.038. The results of the UMAM analysis indicate a relative functional gain of 0.90 units. The UMAM analysis determined that the mitigation provided by the permit adequately offsets the project's proposed impacts to functional wetland habitat.

Specific Conditions

1. If the ownership of the project area covered by the subject permit is divided, with someone other than the Permittee becoming the owner of part of the project area, this permit may be terminated, unless the terms of the permit are modified by the District or the permit is transferred pursuant to Rule 40D-1.6105, F.A.C. In such situations, each land owner shall obtain a permit (which may be a modification of this permit) for the land owned by that person. This condition shall not apply to the division and sale of lots or units in residential subdivisions or condominiums.

2. The Permittee shall retain the design professional registered or licensed in Florida, to conduct on-site observations of construction and assist with the as-built certification requirements of this project. The Permittee shall inform the District in writing of the name, address and phone number of the design professional so employed. This information shall be submitted prior to construction.

3. The following boundaries, as shown on the approved construction drawings, shall be clearly delineated on the site prior to initial clearing or grading activities:

   wetland and surface water areas

   limits of approved wetland impacts

   The delineation shall endure throughout the construction period and be readily discernible to construction and District personnel.

4. All wetland and surface water boundaries shown on the approved construction drawings shall be binding upon the Permittee and the District for the term of this permit. If this permit is extended, the wetland and surface water boundaries shall only remain binding for the term of such extension provided that physical conditions on the property, as solely determined by District staff, do not change so as to alter the boundaries of the delineated wetlands or other surface waters during the permit term, unless such change has been authorized by a permit issued under Part IV, Chapter 373, F.S.

5. The following language shall be included as part of the deed restrictions for each lot:

   "No owner of property within the subdivision may construct or maintain any building, residence, or structure, or undertake or perform any activity in the wetlands, wetland mitigation area(s), buffer area(s), upland conservation area(s) and drainage easement(s) described in the approved permit and recorded plat of the subdivision, unless prior approval is received from the Southwest Florida Water Management District."

6. Rights-of-way and easement locations necessary to construct, operate and maintain all facilities, which constitute the permitted stormwater management system, and the locations and limits of all wetlands, wetland buffers, upland buffers for water quality treatment, 100-year floodplain areas and floodplain compensation areas, shall be shown on the final plat recorded in the County Public Records. Documentation of this plat recording shall be submitted to the District with the As-Built Certification and Request for Conversion to Operational Phase Form, and prior to beneficial occupancy or use of the site.

7. Copies of the following documents in final form, as appropriate for the project, shall be submitted to the Regulation Division:

   a. homeowners, property owners, master association or condominium association articles of

incorporation, and

b. declaration of protective covenants, deed restrictions or declaration of condominium

The Permittee shall submit these documents with the submittal of the Request for Transfer of Environmental Resource Permit to the Perpetual Operation Entity form.

8. The following language shall be included as part of the deed restrictions for each lot:

"Each property owner within the subdivision at the time of construction of a building, residence, or structure shall comply with the construction plans for the stormwater management system approved and on file with the Southwest Florida Water Management District."

9. For underground exfiltration systems, the bottom area shall become dry within 72 hours after a rainfall event. If the bottom area is regularly wet, this situation shall be deemed to be a violation of this permit.

10. Certification of compliance with state water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. 1341 is waived.

11. If limestone bedrock is encountered during construction of the stormwater water management system, the District must be notified and construction in the affected area shall cease.

12. The Permittee shall notify the District of any sinkhole development in the stormwater management system within 48 hours of discovery and must submit a detailed sinkhole evaluation and repair plan for approval by the District within 30 days of discovery.

13. The Permitted Plan Set for this project includes: the set received by the District on July 14, 2014.

14. The operation and maintenance entity shall provide for the inspection of the permitted project after conversion of the permit to the operation and maintenance phase. For systems utilizing effluent filtration or exfiltration or systems utilizing effluent filtration or exfiltration and retention or wet detention, the inspections shall be performed 24 months after operation is authorized and every 24 months thereafter.

    The operation and maintenance entity must maintain a record of each inspection, including the date of inspection, the name and contact information of the inspector, whether the system was functioning as designed and permitted, and make such record available upon request of the District.

    Within 30 days of any failure of a stormwater management system or deviation from the permit, an inspection report shall be submitted using Form 62-330.311(1), "Operation and Maintenance Inspection Certification" describing the remedial actions taken to resolve the failure or deviation.

15. District staff must be notified in advance of any proposed construction dewatering. If the dewatering activity is likely to result in offsite discharge or sediment transport into wetlands or surface waters, a written dewatering plan must either have been submitted and approved with the permit application or submitted to the District as a permit prior to the dewatering event as a permit modification. A water use permit may be required prior to any use exceeding the thresholds in Chapter 40D-2, F.A.C.

16. Off-site discharges during construction and development shall be made only through the facilities authorized by this permit. Water discharged from the project shall be through structures having a

mechanism suitable for regulating upstream stages. Stages may be subject to operating schedules satisfactory to the District.

17. The permittee shall complete construction of all aspects of the stormwater management system, including wetland compensation (grading, mulching, planting), water quality treatment features, and discharge control facilities prior to beneficial occupancy or use of the development being served by this system.

18. The following shall be properly abandoned and/or removed in accordance with the applicable regulations:

    a. Any existing wells in the path of construction shall be properly plugged and abandoned by a licensed well contractor.
    b. Any existing septic tanks on site shall be abandoned at the beginning of construction.
    c. Any existing fuel storage tanks and fuel pumps shall be removed at the beginning of construction

19. All stormwater management systems shall be operated to conserve water in order to maintain environmental quality and resource protection; to increase the efficiency of transport, application and use; to decrease waste; to minimize unnatural runoff from the property and to minimize dewatering of offsite property.

20. This permit is valid only for the specific processes, operations and designs indicated on the approved drawings or exhibits submitted in support of the permit application. Any substantial deviation from the approved drawings, exhibits, specifications or permit conditions, including construction within the total land area but outside the approved project area(s), may constitute grounds for revocation or enforcement action by the District, unless a modification has been applied for and approved. Examples of substantial deviations include excavation of ponds, ditches or sump areas deeper than shown on the approved plans.

21. The mixing zone is granted exclusively for the duration of the construction, not to exceed 30 days per mixing zone as shown on the permitted construction drawings and in accordance with Rule 62-4.244, F.A.C.

22. Monitoring for turbidity as measured in Nephelometric Turbidity Units (NTUs) shall be conducted for the duration of construction activities. Sampling will commence 24 hours before initiation of construction activities and will be conducted according to the approved water quality monitoring plan as identified in the permitted construction drawings.

23. The Permittee shall not begin construction within the project area until the District has been provided a copy of a permit modification authorizing the withdrawal of 0.90 forested credits from the Tampa Bay Mitigation Bank or the permit has been modified to provide an equivalent level of mitigation to be completed by the Permittee. Failure to submit this modification prior to the commencement of construction shall be a violation of this permit.

24. Within 90 days of the permitted wetland impacts, the Permittee shall submit to the District a written statement and certification that demonstrates $5000.00 has been contributed to the City of Palmetto for information kiosk at the City of Palmetto boat ramp. This to ensure the project is clearly in the public interest in accordance with Subsection 10.2.3, A.H.V.I and Rule 62-330.302(1)(a), F.A.C. Failure to submit this information shall be a violation of this permit.

GENERAL CONDITIONS

1. The general conditions attached hereto as Exhibit "A" are hereby incorporated into this permit by reference and the Permittee shall comply with them.

Michelle K. Hopkins, P.E.

Authorized Signature

EXHIBIT A

GENERAL CONDITIONS:

1 The following general conditions are binding on all individual permits issued under this chapter, except where the conditions are not applicable to the authorized activity, or where the conditions must be modified to accommodate, project-specific conditions.

a. All activities shall be implemented following the plans, specifications and performance criteria approved by this permit. Any deviations must be authorized in a permit modification in accordance with Rule 62-330.315, F.A.C., or the permit may be revoked and the permittee may be subject to enforcement action.

b. A complete copy of this permit shall be kept at the work site of the permitted activity during the construction phase, and shall be available for review at the work site upon request by the Agency staff. The permittee shall require the contractor to review the complete permit prior to beginning construction.

c. Activities shall be conducted in a manner that does not cause or contribute to violations of state water quality standards. Performance-based erosion and sediment control best management practices shall be installed immediately prior to, and be maintained during and after construction as needed, to prevent adverse impacts to the water resources and adjacent lands. Such practices shall be in accordance with the *State of Florida Erosion and Sediment Control Designer and Reviewer Manual (Florida Department of Environmental Protection and Florida Department of Transportation June 2007)*, and the *Florida Stormwater Erosion and Sedimentation Control Inspector's Manual (Florida Department of Environmental Protection, Nonpoint Source Management Section, Tallahassee, Florida, July 2008)*, which are both incorporated by reference in subparagraph 62-330.050(8)(b)5, F.A.C., unless a projectspecific erosion and sediment control plan is approved or other water quality control measures are required as part of the permit.

d. At least 48 hours prior to beginning the authorized activities, the permittee shall submit to the Agency a fully executed Form 62-330.350(1), "Construction Commencement Notice,"[effective date], incorporated by reference herein (<http://www.flrules.org/Gateway/reference.asp?No=Ref-02505>), indicating the expected start and completion dates. A copy of this form may be obtained from the Agency, as described in subsection 62-330.010(5), F.A.C. If available, an Agency website that fulfills this notification requirement may be used in lieu of the form.

e. Unless the permit is transferred under Rule 62-330.340, F.A.C., or transferred to an operating entity under Rule 62-330.310, F.A.C., the permittee is liable to comply with the plans, terms and conditions of the permit for the life of the project or activity.

f. Within 30 days after completing construction of the entire project, or any independent portion of the project, the permittee shall provide the following to the Agency, as applicable:

1. For an individual, private single-family residential dwelling unit, duplex, triplex, or quadruplex - "Construction Completion and Inspection Certification for Activities Associated with a Private Single-Family Dwelling Unit" [Form 62-330.310(3)]; or

2. For all other activities - "As-Built Certification and Request for Conversion to Operational Phase" [Form 62-330.310(1)].

3. If available, an Agency website that fulfills this certification requirement may be used in lieu of the form.

g. If the final operation and maintenance entity is a third party:

1. Prior to sales of any lot or unit served by the activity and within one year of permit issuance, or within 30 days of as- built certification, whichever comes first, the permittee shall submit, as applicable, a copy of the operation and maintenance documents (see sections 12.3 thru 12.3.3 of Volume I) as filed with the Department of State, Division of Corporations and a copy of any easement, plat, or deed restriction

needed to operate or maintain the project, as recorded with the Clerk of the Court in the County in which the activity is located.

2. Within 30 days of submittal of the as- built certification, the permittee shall submit "Request for Transfer of Environmental Resource Permit to the Perpetual Operation Entity" [Form 62-330.310(2)] to transfer the permit to the operation and maintenance entity, along with the documentation requested in the form. If available, an Agency website that fulfills this transfer requirement may be used in lieu of the form.

h. The permittee shall notify the Agency in writing of changes required by any other regulatory agency that require changes to the permitted activity, and any required modification of this permit must be obtained prior to implementing the changes.

i. This permit does not:

1. Convey to the permittee any property rights or privileges, or any other rights or privileges other than those specified herein or in Chapter 62-330, F.A.C.;

2. Convey to the permittee or create in the permittee any interest in real property;

3. Relieve the permittee from the need to obtain and comply with any other required federal, state, and local authorization, law, rule, or ordinance; or

4. Authorize any entrance upon or work on property that is not owned, held in easement, or controlled by the permittee.

j. Prior to conducting any activities on state-owned submerged lands or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund, the permittee must receive all necessary approvals and authorizations under Chapters 253 and 258, F.S. Written authorization that requires formal execution by the Board of Trustees of the Internal Improvement Trust Fund shall not be considered received until it has been fully executed.

k. The permittee shall hold and save the Agency harmless from any and all damages, claims, or liabilities that may arise by reason of the construction, alteration, operation, maintenance, removal, abandonment or use of any project authorized by the permit.

l. The permittee shall notify the Agency in writing:

1. Immediately if any previously submitted information is discovered to be inaccurate; and

2. Within 30 days of any conveyance or division of ownership or control of the property or the system, other than conveyance via a long-term lease, and the new owner shall request transfer of the permit in accordance with Rule 62-330.340, F.A.C. This does not apply to the sale of lots or units in residential or commercial subdivisions or condominiums where the stormwater management system has been completed and converted to the operation phase.

m. Upon reasonable notice to the permittee, Agency staff with proper identification shall have permission to enter, inspect, sample and test the project or activities to ensure conformity with the plans and specifications authorized in the permit.

n. If any prehistoric or historic artifacts, such as pottery or ceramics, stone tools or metal implements, dugout canoes, or any other physical remains that could be associated with Native American cultures, or early colonial or American settlement are encountered at any time within the project site area, work involving subsurface disturbance in the immediate vicinity of such discoveries shall cease. The permittee or other designee shall contact the Florida Department of State, Division of Historical Resources, Compliance and Review Section, at (850) 245-6333 or (800) 847-7278, as well as the appropriate permitting agency office. Such subsurface work shall not resume without verbal or written authorization from the Division of Historical Resources. If unmarked human remains are encountered, all work shall stop immediately and notification

shall be provided in accordance with Section 872.05, F.S. (2012).

o. Any delineation of the extent of a wetland or other surface water submitted as part of the permit application, including plans or other supporting documentation, shall not be considered binding unless a specific condition of this permit or a formal determination under Rule 62-330.201, F.A.C., provides otherwise.

p. The permittee shall provide routine maintenance of all components of the stormwater management system to remove trapped sediments and debris. Removed materials shall be disposed of in a landfill or other uplands in a manner that does not require a permit under Chapter 62-330, F.A.C., or cause violations of state water quality standards.

q. This permit is issued based on the applicant's submitted information that reasonably demonstrates that adverse water resource-related impacts will not be caused by the completed permit activity. If any adverse impacts result, the Agency will require the permittee to eliminate the cause, obtain any necessary permit modification, and take any necessary corrective actions to resolve the adverse impacts.

r. A Recorded Notice of Environmental Resource Permit may be recorded in the county public records in accordance with Rule 62-330.090(7), F.A.C. Such notice is not an encumbrance upon the property.

2. In addition to those general conditions in subsection (1) above, the Agency shall impose any additional project-specific special conditions necessary to assure the permitted activities will not be harmful to the water resources, as set forth in Rules 62-330.301 and 62-330.302, F.A.C., Volumes I and II, as applicable, and the rules incorporated by reference in this chapter.

JUDICIAL REVIEW

1. Pursuant to Sections 120.60(3) and 120.68, F.S., a party who is adversely affected by District action may seek judicial review of the District's action. Judicial review shall be sought in the Fifth District Court of Appeal or in the appellate district where a party resides or as otherwise provided by law.

2. All proceedings shall be instituted by filing an original notice of appeal with the District Agency Clerk within 30 days after the rendition of the order being appealed, and a copy of the notice of appeal, accompanied by any filing fees prescribed by law, with the clerk of the court, in accordance with Rules 9.110 and 9.190 of the Florida Rules of Appellate Procedure (Fla. R. App. P.). Pursuant to Fla. R. App. P. 9.020(h), an order is rendered when a signed written order is filed with the clerk of the lower tribunal.

Exhibit 1

RECEIVED
June 27, 2016
Dept. of Environmental Protection
Office of General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PELICAN ISLAND AUDUBON SOCIETY, GARRETT BEWKES, NED SHERWOOD, ORIN R. SMITH, STEPHANIE SMITH, AND CAROLYN STUTT,

Petitioners,

vs.

DOAH CASE NO.: 15-0576

OCULINA BANK CORPORATION AND FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

______________________________/

PETITIONERS' RESPONSE TO FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioners PELICAN ISLAND AUDUBON SOCIETY, GARRETT BEWKES, NED SHERWOOD, ORIN R. SMITH, STEPHANIE SMITH, AND CAROLYN STUTT, pursuant to Rule 28-106.217(2), Florida Administrative Code, by and through their undersigned attorney, submit the following Response to Florida Department of Environmental Protection's Exceptions to the Recommended Order ("RO") filed by Administrative Law Judge ("ALJ") Bram D.E. Canter in DOAH Case No. 15-576, and state:

In its haste to facilitate destruction of 2.72 acres of functional mangrove wetlands and salt marsh, surface waters for construction of three single family houses, Respondent Department of Environmental Protection filed one exception ALJ Canter's recommended order, paragraph 58, which states: "The purchase of mitigation bank credits would not offset the lost nursery function because the mitigation bank was not shown to provide a nursery function." According to FDEP, the proposed finding in paragraph 58 is not really a factual finding, "but

should be treated as a conclusion of law, because the ALJ is offering an interpretation of Sections 10.2.8 and 10.3.1.2 of the Applicant's Handbook."

The FDEP's counsel attached to its exceptions 187 pages of exhibits, consisting of a recommended order, exceptions thereto and a final order stemming from a third party challenge to an environmental resource permit issued by the Southwest Florida Water Management District. The attached final order is one in which FDEP's sister regulatory agency took the rather nervy action of modifying Judge Canter's recommended order finding the permit should be denied, and granting the permit anyway. The order has zero precedential value, and, other than the unremarkable proposition that "impacts to wetlands may be appropriately offset through the use of mitigation bank credits," FDEP's counsel fails to provide any analysis as to how any portion of the final order and/or the other 180 pages of exhibits compel the conclusion that the factual conclusion that Respondents failed to show CGW mitigation bank provides fish nursery functions is in reality a legal conclusion. Undersigned counsel declines to wade through the attached final order and other documents in attempt to glean what portion of them if any supposedly should persuade FDEP's Secretary to conclude that apples are in fact oranges.

The law is crystal clear that FDEP is not free to reject a finding of fact unless it first determines from a review of the entire record, and states with particularity in the order, that the finding of fact was not based upon competent substantial evidence. See Section 120.57(1)(l), Fla. Stat., accord *Charlotte County v. IMC Phosphates Co*., 18 So. 3d 1089 (Fla. 2nd DCA 2009). Furthermore, the agency may not avoid the unequivocal mandate of Section 120.57 by simply mischaracterizing a finding of fact as a conclusion of law as urged by FDEP's counsel. See *Goin v. Commission on Ethics*, 658 So. 2d 1131 (Fla. 1st DCA 1995). ("An agency cannot circumvent the requirements of the statute by characterizing findings of fact as legal conclusions." citing, *Department of Labor & Employ. Sec. v. Little*, 588 So. 2d 281, 282 (Fla.

1st DCA 1991). "Erroneously labeling what is essentially a factual determination a 'conclusion of law,' whether by the hearing officer or the agency does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact may not be avoided by categorizing a contrary finding as a 'conclusion of law.'" citing *Kinney v. Department of State, Div. of Licensing*, 501 So. 2d 129, 132 (Fla. 5th DCA 1987).)

During the final hearing in this matter, Anthony Miller, an expert in wetlands ecology, was asked his opinion regarding whether the purchase of credits from the CGW Mitigation Bank provide appropriate mitigation for the impacts to tarpon nursery habitat. After the ALJ overruled the Applicant's objections that the questions sought a legal conclusion or were beyond Mr. Miller's expertise, Mr. Miller opined that the purpose of the hydrological alterations associated with the CGW bank was to increase water depths throughout the site, and water of the resultant depth allows access by fish that would be predatory to juvenile tarpon. [T:253-257] Furthermore, Dr. Gilmore, an expert in Ichthyology and marine and estuarine fish ecology, was asked if, in his opinion, "purchase of credits from the mitigation bank compensate for adverse impacts to fish nursery habitat on the Oculina site?" His testimony was "These particular locations for larval tarpon, now that we know more about it, are very limited. And the loss of any one of these I think would be deleterious, it would be a net loss of tarpon habitat." [T:158]

FDEP asserts that the ALJ's amply supported factual finding that the CGW mitigation bank does not provide fish nursery habitat is really the ALJ's "interpretation of Sections 10.2.8 and 10.3.1.2 of the Applicant's Handbook." FDEP offers no explanation as to how it reached this conclusion. Notwithstanding FDEP's attempt to mischaracterize a finding of fact regarding the type of functions provided by the applicant's proffered mitigation as a "conclusion of law," the record contains competent, substantial evidence supporting the finding contained in paragraph 58.

FDEP asserts that the applicant is not obligated to offset the nursery functions that will be lost by the destruction of 2.72 acres, overlooking the basic purpose of mitigation, which is to offset a regulated activities adverse impacts to wetland and surface water functions in order to achieve the "programmatic goal" of no net loss in wetland or other surface water functions. See Section 10.1 of the Applicant's Handbook. (Hereinafter AH)

Section 10.1.1(a) AH and Rule 62-330.301(1(d) require a permit applicant to provide assurance that a regulated activity "will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." To receive Agency approval, an activity cannot cause a net adverse impact on wetland functions and other surface water functions that is not offset by mitigation. See Section 10.2.1 AH.   If a wetland is providing nursery habitat function, the mitigation must offset the adverse impact to the function being provided, which is typically "accomplished through creation, restoration, enhancement, or preservation of ecological communities similar to those being impacted." See section 10.3.1.1, AH, While "[m]itigation involving other ecological communities is acceptable if impacts are offset and the applicant demonstrates that greater improvement in ecological value will result," section 10.3.1.1, AH, there was no such showing in this case. In order to construct single family houses, Oculina will fill shallow wetlands which, because of their location and intermittent connection to the Indian River Lagoon, provide juvenile fish refuge from larger fish. The adverse impacts to those shallow wetlands cannot be mitigated by purchasing credits in a deep water habitat, a different ecological community that does not provide the same function. See also 373.414(1)(b), Fla. Stat. ("The mitigation must offset the adverse effects caused by the regulated activity.")

WHEREFORE, Respondent Florida Department of Environmental Protection's Exception to Finding of Fact 58 should be denied.

s/ *Marcy I. LaHart*
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Attorney for Petitioners
Florida Bar No. 0967009
Phone:352-224-5699
Fax: 888-400-1464

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by electronic mail to counsel of record on this 27th day of June, 2016.
s/ *Marcy I. LaHart*
Marcy I LaHart, Esquire