

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BEAR WARRIORS UNITED, INC.; THE
SWEETWATER COALITION OF VOLUSIA
COUNTY, INC.; DEREK LAMONTAGNE, AN
INDIVIDUAL; AND BRYON WHITE, AN
INDIVIDUAL,

Petitioners,

vs.

Case No. 23-1512

FLORIDA DEPARTMENT OF
TRANSPORTATION AND ST. JOHNS RIVER
WATER MANAGEMENT DISTRICT,

Amended as to permitting
agency in Recommendation

Respondents.

_____ /

AMENDED RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 23 through 27, 2023, by Zoom Conference, before E. Gary Early, a designated Administrative Law Judge of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioners: Derek LaMontagne, Qualified Representative
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 Port Orange, Florida 32127

For Respondent Department of Transportation:

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For Respondent St. Johns River Water Management District:

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STATEMENT OF THE ISSUE

The issue to be determined is whether Environmental Resource Permit No. 103479-2 (“Permit”) for a new interchange at Pioneer Trail and Interstate Highway 95 (“I-95”) should be issued to the Florida Department of Transportation (“DOT”) by the St. Johns River Water Management District (“District”).

PRELIMINARY STATEMENT

On February 28, 2023, the District issued proposed agency action for the Permit to DOT. The Permit authorizes the construction and operation, including a stormwater management system, of a 74.13-acre project known as Pioneer Trail / I-95 Interchange (“Interchange” or “Project”).

On March 21, 2023, Petitioners timely filed a Request for an Extension of Time for Filing Initial Pleading in which they requested an additional 30 days, until April 20, 2023, within which to file their petition. On March 29, 2023, the District entered an Order Denying Request, and Petitioners were given until April 3, 2023, to file a petition requesting a formal hearing.

On April 3, 2023, Petitioners timely filed a Petition for Administrative Hearing. DOT filed a Motion to Dismiss Petition for Administrative Hearing on the basis that the Petition was insufficient, and that two of the individual Petitioners did not timely file a petition. On April 18, 2023, the Petition was referred to the Division of Administrative Hearings, along with DOT's Motion to Dismiss.

Petitioners obtained the services of counsel, who filed an Unopposed Request for Leave to Amend Petition, which was granted. An Amended Petition was filed, which was followed by Respondents' Joint Motion to Strike the Amended Petition in Part. Petitioners thereafter filed a Stipulated Motion to File Second Amended Petition and Agreed-Upon Order, in which Petitioners represented that Respondents did not intend to file a motion to strike the Second Amended Petition in full or part. The Stipulated Motion was granted, and the Second Amended Petition for Hearing was accepted as filed.

The final hearing was scheduled for August 28 through September 1, 2023. On August 1, 2023, counsel for Petitioners moved to withdraw from representation based on fundamental differences with their clients. The motion was granted, and the final hearing was continued and rescheduled for October 23 through 27, 2023.

On September 15, 2023, Petitioners filed a request that they be allowed to be represented by Derek LaMontagne as their Qualified Representative. Respondents did not object, and an Order accepting Mr. LaMontagne as Petitioners' Qualified Representative was entered on September 20, 2023.

On October 19, 2023, the parties filed their Joint Pre-hearing Stipulation ("JPS"). The JPS contained 12 stipulations of fact, each of which is adopted and incorporated herein. The JPS also identified disputed issues of fact and law remaining for disposition.

The Permit under review was subject to the modified burden of proof established in section 120.569(2)(p), Florida Statutes. The burden of proof provisions are discussed in the Conclusions of Law herein.

The hearing convened on October 23, 2023, as scheduled. At the commencement of the hearing, the undersigned took up a number of motions. Each was discussed on the record, and the bases for the following rulings are contained in the Transcript. The motions, responses where applicable, and the rulings on the motions, were as follows:

1. Respondent, St. Johns River Water Management District's, Motion in Limine to Exclude Irrelevant, Immaterial, and Potentially Confusing Evidence, filed October 12, 2023; and Petitioners' Response in Opposition to Respondent, St. Johns River Water Management District's, Motion in Limine to Exclude Irrelevant, Immaterial, and Potentially Confusing Evidence, filed October 19, 2023 — Granted.

2. Respondent, Florida Department of Transportation's Motion in Limine, filed October 17, 2023 — Granted.

3. Petitioners' Motion for Public Hearing, filed October 17, 2023; and Respondent, St. Johns River Water Management District's, Response in

Opposition to Petitioners' Motion for Public Hearing, filed October 20, 2023
— Denied.

4. Respondent, Florida Department of Transportation's Motion in Limine, filed October 18, 2023 — Granted.

5. Petitioners' Motion for Extension of Time to File Exhibits, filed October 18, 2023 — Granted.

Joint Exhibits 1 through 38, consisting of the entire application for the Permit, along with the District's Technical Staff Report ("TSR"), as amended, were received in evidence by stipulation of the parties. As such, DOT, as the permit applicant, established its prima facie case demonstrating entitlement to the Permit pursuant to section 120.569(2)(p).

In addition to presenting the application and TSR, DOT called Casey Lyon, its Environmental Manager, to provide a brief overview of the Project. Ms. Lyon was accepted as an expert in Biology and Environmental Science; State and Federal Environmental Permitting; and Transportation Project Development (Environmental).

Petitioners called the following witnesses: John Baker; Jeff Brower, Chair of the Volusia County Council; Shawn Collins, who was tendered and accepted as an expert in transportation planning management, traffic studies, and comprehensive plan analysis; Dr. Wendy Anderson, who was tendered and accepted as an expert in biology, habitat ecology, water connectivity, conservation, and nutrient flow; Dr. Hung Jung Cho, who was tendered and accepted as an expert in wetland science, aquatic habitat, habitat restoration, ecology, seagrass and aquatic plants, biology, coastal resilience, stormwater impacts, impacts of flooding, flooding reduction, nutrient pollution, and water resources; Katrina Shadix, Executive Director for Bear Warriors United, Inc., who testified to standing and as to factual matters; Mr. LaMontagne, individually and as the Director of Sweetwater

Coalition of Volusia County, Inc., who testified to standing and as to factual matters; Bryon White, who testified to standing and as to factual matters; and Dr. Peter J. Barile, who was tendered and accepted as an expert in water quality, Volusia County and Atlantic coastal ecosystems, wetlands, linkages of land use and environmental impact to water resources, sources of water pollution, and habitat impacts. Petitioners' Exhibits 1, 2, 18, 20, 22, 44, 50 through 58, 62 through 67, 73, 74, 83, 88, 100, 102, 103, 111, 112, 142, 146, 178, 211 through 213, 217, 218, 223, 245, 273, 274, 278, 286, 296, 298, 307, 370, 474, 491, 494, 536, 1011, 1029 through 1035, 1038, 1041, 1043, 1044, 1046, 1051, 1063, 1068, 1070, 1077, 1102, 1115, 1119 through 1122, 1124 through 1126, 1133 through 1135, and 1137 were received in evidence.¹ In addition, the following exhibits were proffered and, though they accompany the record of this proceeding, have not been reviewed or considered in the preparation of this Recommended Order: Petitioners' Exhibits 29, 30, 33, 42, 43, 77, 78, 91, 92, 99, 105 through 107, 113, 115, 116, 121, 177, 272, 291 through 293, 315, 350, 443, 444, 493, 538, 543, 545, 1008, 1009, 1021, 1023, 1024, 1037, 1039, 1042, 1048 through 1050, 1054, 1058, 1066, 1080, 1082 through 1086, 1093 through 1099, 1103, 1113, 1114, and 1117, and DOT Exhibits 21 through 23.²

The District called Marjorie Cook, P.E., its Supervising Professional Engineer; David Miracle, Program Manager for the Environmental Resource Permit ("ERP") Program; Justin Dahl, who was tendered and accepted as an expert in wildlife ecology and wetland delineation; and Nicole Martin, who was tendered and accepted as an expert in wildlife ecology and wetland

¹ Though they were discussed at the hearing, and appear in Petitioners' list of exhibits filed with the Joint Pre-hearing Stipulation, Petitioners' Exhibits 20, 53, and 296 could not be located in the exhibits filed by Petitioners in the DOAH exhibit portal.

² Though they were proffered by number at the hearing, and appear in Petitioners' list of exhibits filed with the Joint Pre-hearing Stipulation, Petitioners' Proffered Exhibits 42, 1095, and 1114 could not be located in the exhibits filed by Petitioners in the DOAH exhibit portal.

delineation. District Exhibits 1 through 4, 9, 12, 13, 15, and 18 were received in evidence.

DOT recalled Ms. Lyon and, in addition, called Tim Vavre, P.E., who was tendered and accepted as an expert in water resource engineering, drainage, stormwater management systems, and permitting of stormwater management systems; Luis Diaz, who was tendered and accepted as an expert in transportation planning engineering, traffic engineering, and civil engineering; and Michael Drauer, a senior environmental scientist for Stantec, who was tendered and accepted as an expert in environmental science, Federal and state environmental permitting, listed species surveys, soil identification, plant identification, wetland delineation, wildlife habitat surveys and studies, habitat restoration, and wetland and listed species mitigation. DOT Exhibits 1, 3 through 7, 9 through 12, 14, 15, and 18 were received in evidence.

A five-volume Transcript of the final hearing was filed on November 29, 2023. The parties were given 20 days within which to file their proposed recommended orders, making December 19, 2023, the filing date. Petitioners filed a request for additional pages beyond the 40 pages allowed by Florida Administrative Code Rule 28-106.215, which was granted. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

The law in effect at the time the District takes final agency action on the application being operative, references to statutes are to Florida Statutes (2023), unless otherwise noted. *Lavernia v. Dep't of Pro. Regul*, 616 So. 2d 53 (Fla. 1st DCA 1993).

FINDINGS OF FACT

The Parties

1. The District is a special taxing district created by section 373.069, Florida Statutes. It has the responsibility to conserve, protect, manage, and control water resources within its geographic boundaries. *See* § 373.016, Fla. Stat. The District is authorized by sections 373.413, 373.414, and 373.416 to administer and enforce ERP program requirements for the management and storage of surface waters, and to apply and implement statewide ERP rules, including Florida Administrative Code Chapter 62-330. § 373.4131(2)(a), Fla. Stat. In implementing responsibilities with regard to ERPs, the District has adopted the ERP Applicant's Handbook ("A.H."), Volumes I and II, to provide standards and guidance to applicants. § 373.4131(1)(a)9., Fla. Stat.

2. DOT is an agency of the State of Florida responsible for coordinating and planning the state's transportation system, including financing and construction of highway facilities and connection points thereto for both the state and federal highway systems. § 334.044, Fla. Stat.

3. Petitioner Bear Warriors United, Inc. ("Bear Warriors") is a Florida not-for-profit corporation established in 2016. Its stated mission is to preserve and protect bears, as well as all of Florida's natural resources and wildlife. In carrying out that mission, Bear Warriors engages in an advocacy and educational efforts. As part of its mission, Bear Warriors provides bear-proof garbage can straps to residents in and around the Project area, to advance both human and animal protection. It has members who recreate in the Spruce Creek ecosystem, and advocates for environmental protection in and around the Spruce Creek watershed. Bear Warriors has sponsored at least one outing in the nearby Doris Leeper Spruce Creek Preserve ("Doris Leeper Preserve") after the Petition was filed, which was attended by roughly 42 members of Bear Warriors. Bear Warriors alleges that the activity authorized by the Permit will adversely affect its members' enjoyment and pursuit of those activities and the success of its mission.

4. Petitioner, The Sweetwater Coalition of Volusia County, Inc. (“Sweetwater”), is a Florida not-for-profit corporation established in 2018. It has a membership of more than 30 neighbors, residents, and organizations whose mission is to preserve and protect the quality of life in the Volusia County area by informing residents of construction projects which significantly impact the natural environment. Members of Sweetwater enjoy hiking, biking, fishing, recreation, canoeing, kayaking, and nature photography in and around Spruce Creek and nearby areas. Sweetwater alleges that the activity authorized by the Permit will adversely affect its members’ enjoyment and pursuit of those activities and the success of its mission. Sweetwater opposes the creation of the Interchange at Pioneer Trail and I-95, as well as land modifications and developments that negatively impact Spruce Creek and its tributaries, canals, and ditches, and Volusia County forests and wetlands. Mr. LaMontagne is a member and officer of Sweetwater, and in that capacity speaks at local government meetings to present Sweetwater’s environmental concerns regarding development proposals in the Spruce Creek area.

5. Petitioner Derek LaMontagne is a Volusia County resident, though he is currently a student and employee at the University of Florida. He is an avid nature photographer of the Spruce Creek area. Mr. LaMontagne hikes, kayaks, and recreates in areas proximate to the Project and Spruce Creek, its tributaries, and their adjacent natural areas. Mr. LaMontagne alleges that the activity authorized by the Permit will adversely affect his enjoyment and pursuit of those activities.

6. Petitioner Bryon White is a Volusia County resident. Mr. White owns property near the Project on which he grows yaupon holly which he uses for tea sold by his businesses. The local property is not his only source for yaupon holly. Mr. White was the resident caretaker for the Doris Leeper Preserve for three and a half years, and he enjoys recreation, hiking, biking, photography, and field study proximate to Spruce Creek, its tributaries, and

their adjacent natural areas. Mr. White alleges that the activity authorized by the Permit will adversely affect his enjoyment and pursuit of those activities.

Proposed Agency Action

7. In February 2022, DOT applied to the District for an ERP for the construction and operation of the Project in Volusia County, Florida.

8. On February 28, 2023, the District gave notice via email to DOT, as well as multiple objectors and interested persons, that it had issued the Permit to authorize the Project. On March 7, 2023, DOT published the required notice of proposed agency action in the Daytona Beach Journal, a daily newspaper published in Volusia County.

9. Petitioners timely filed their Petition for Administrative Hearing.

Background

10. I-95 was constructed in the mid-1960s as a four-lane, limited access highway. The construction of I-95 was completed before the establishment of state water resource criteria. The Pioneer Trail overpass was constructed as part of the 1960s work.

11. Permit No. 103479-1 was issued February 2010 for the realignment of Pioneer Trail, east of I-95.

12. Pioneer Trail is located approximately 3 miles north of the State Road (“SR”) 44/I-95 interchange, and 4.25 miles south of the SR 421/I-95 interchange. There are no existing interchanges between SR 44 and SR 421.

13. The present Project involves an I-95 segment that was expanded to six lanes, and was subject to District Permit No. 118421-2 (issued May 2011). That work was completed in 2016.

14. The Project is approximately three miles south of the main channel of Spruce Creek. An ephemeral watercourse known as the Unnamed Canal runs from a tributary of Spruce Creek through the Project area and further south.

15. The Project is located within the Spruce Creek Hydrologic Basin. The Project meets the applicable special basin criteria for the Spruce Creek Hydrologic Basin contained in A.H. Vol. II, section 13.5.

16. The Spruce Creek Hydrologic Basin is within the Halifax River Watershed.

The Project

17. DOT proposes to construct a new highway interchange to connect with Pioneer Trail at the present Pioneer Trail overpass at I-95 near the cities of Port Orange and New Smyrna Beach in Volusia County, Florida. The Project includes the construction and operation of a Stormwater Management System to serve the 74.13-acre Project.

18. The Project area consists largely of undeveloped parcels surrounding I-95 and Pioneer Trail. A number of existing and permitted residential developments are in the vicinity of the Project, including the Farmton Development of Regional Impact to its south.

19. A diversity of habitat types exist onsite including hydric pine flatwoods, mixed wetland forest, freshwater marshes, and wet prairies. The Project area is bisected by I-95 running north/south; Pioneer Trail running east/west; and South Williamson Boulevard just west of the Project site. On-site wetlands have been severed from other wetlands and watercourses by those roads, by Martin Dairy Road to the east, and are otherwise impacted and fragmented as a result of the nearby residential development and by roadside ditches and existing ponds. Nonetheless, the majority of the on-site wetlands are of moderate quality.

20. The community structure of the onsite wetlands is negatively affected by suppression of fire, which allows for the encroachment of invasive species.

21. Wildlife habitat and movement within the area is fragmented by the existing roadways, which provide significant barriers.

22. In 2005, the Interchange was added to the Transportation Organization list of projects.

23. In 2018, a Project Development and Environment (PD&E) study was commenced to evaluate alternative design configurations and project impacts. The PD&E study was coordinated with the District, the U.S. Fish and Wildlife Service, the Florida Fish and Wildlife Conservation Commission, and Florida's State Historical Preservation Officer. The PD&E study was completed on January 27, 2021.

24. When the design element of the Project was 60 percent complete, stormwater plans were developed. On February 2, 2022, the Permit application was submitted to the District.

25. In March 2022, the District submitted a Request for Additional Information, to which DOT submitted partial responses in April 2022. In January 2023, complete responses were provided. On February 28, 2023, the Permit and notice of proposed agency action was issued.

Project Configuration

26. DOT performed an alternative design analysis that included three build designs for the Pioneer Trail interchange. All three designs had similar wetland and surface water impacts. A "diamond interchange," would result in 45.96 acres of wetland impacts. A full "cloverleaf" interchange would result in 47.29 acres of wetland impacts.

27. The design that is the subject of the ERP, referred to as the Partial Cloverleaf 2 Alternative, is proposed to result in 46.96 acres of wetland impacts. Though having slightly more wetland impact than the diamond interchange, the Partial Cloverleaf has minimal involvement with contaminated areas, incorporated best traffic operations, and has the highest public support/preference. This alternative provided very similar impacts to wetlands and no impacts to listed wildlife. The impacts were minimized to the extent practicable to realize a safe, functional interchange on a six-lane interstate highway.

28. The "partial cloverleaf" design consists of four quadrants.

29. The Northwest Quadrant (Basin A) includes an exit ramp from I-95 South to Pioneer Trail, stormwater ponds, some of which are to be maintained by Volusia County, and an access road into a privately held parcel of property bounded to the west by Williamson Boulevard, for which access to Pioneer Trail is to be severed by the proposed stormwater ponds.

30. The Southwest Quadrant (Basin B) includes an entrance ramp onto I-95 South from Pioneer Trail, and stormwater ponds.

31. The Southeast Quadrant (Basin C) includes stormwater ponds, as well as widening and improvements to Pioneer Trail and Turnbull Bay Road, including construction of a roundabout at the intersection of those roads. Basin C also includes an access road into a privately-held parcel of property adjacent to the Project site, and a floodplain compensation storage area.

32. The Northeast Quadrant (Basin D) includes the entrance ramp onto I-95 North from Pioneer Trail, and a semi-circular exit ramp from I-95 North onto Pioneer Trail.

33. The Project includes widening Pioneer Trail from two lanes to four lanes and raising its elevation between Williamson Boulevard to a roundabout to be constructed at the current intersection of Pioneer Trail and Turnbull Road. The widening is required to accommodate traffic flowing to and from I-95. The increase in elevation will prevent flooding of the road surface during flood events. It is not designed to prevent or reduce flooding of on-site property other than the Project's road surface, or to prevent or reduce flooding of off-site property.

34. An "Unnamed Canal" extends through the Project area. The Unnamed Canal has been designated as an Outstanding Florida Water ("OFW") from a point "upstream [from Spruce Creek] to the Southern section line of Section 4, Township 17 South, Range 33 East." Fla. Admin. Code R.

62-302.700(9)(i)33.a. That section line extends through the Project site. The Unnamed Canal does not retain its OFW designation south of that section line. The Unnamed Canal at the Project site to its intersection with Spruce

Creek is an ephemeral stream, which is dry during much of the year. From southwest to northeast, the Unnamed Canal will pass through culverts under the proposed entrance ramp in the southwest quadrant of the Project, then through existing culverted crossings under I-95 into the southeast quadrant of the Project and under Pioneer Trail east of I-95. The Unnamed Canal then extends northward for approximately three miles before ultimately intersecting with a tributary of Spruce Creek.

35. Access from Pioneer Road to privately-owned properties, one adjacent to the northwest quadrant and another adjacent to the northeast quadrant of the Project, will be severed by the Project. DOT proposes to restore access to Pioneer Trail, as required by section 337.27(1), Florida Statutes, by constructing access roads into the properties. The access road at the northwest quadrant will cross stormwater ponds proposed to run parallel to Pioneer Trail. The access road at the northeast quadrant will extend from the proposed roundabout at the Pioneer Road/Turnbull Bay Road intersection, and over a culverted crossing of the Unnamed Canal. The access roads were part of the Project from the 30 percent design stage, and part of the 60 percent design stage plans on which the first stormwater plans were based.

36. The privately-owned parcel of property at the northeast quadrant, about 250 acres in size, is located north of Pioneer Trail, between I-95 and Martin Dairy Road. DOT is taking 24 acres at the southern end of that parcel for the Interchange (Basin D). The 250-acre parcel has been identified as a desirable wildlife corridor extension for the Doris Leeper Preserve, which is located roughly a mile to the northeast from the Project.

37. In order to construct the Interchange, DOT proposes to fill 48.80 wetland acres, with an additional 10.12 acres of wetlands to be subject to secondary impacts. 58.82 acres of these direct and secondary impacts are considered adverse and will require mitigation. An additional 3.11 acres of surface waters will be impacted which include roadside ditches and an

existing artificial pond dug in uplands. The ditch and pond impacts are not considered adverse; therefore, no elimination/reduction analysis, cumulative-impacts analysis, or mitigation is required.

38. Stormwater is to be managed by a wet detention system designed to attenuate and treat stormwater from the Project site, with stormwater ponds and/or floodplain compensation storage areas in each of the four quadrants of the Interchange. The stormwater ponds create mathematically more storage capacity than currently exists on the Project site.

39. There are several areas within the Project for which stormwater treatment in the wet detention system is impractical. To offset the impacts from those areas within the 100-year floodplain of the Spruce Creek Hydrologic Basin, DOT has proposed to include six floodplain compensation ("FPC") ponds to receive stormwater from areas of I-95, largely consisting of existing travel lanes, for which treatment has heretofore not been provided. The FPC ponds will, as the name implies, provide compensating treatment to offset the impacts from those areas for which treatment of stormwater is impractical so that there is no net reduction in flood storage.

Financial, Legal, and Administrative Capability

40. The parties stipulated that DOT has the legal capability of completing the Project in accordance with the conditions of the Permit. DOT further provided reasonable assurance that it has the financial and administrative capability of ensuring that the Project will be undertaken in accordance with the conditions of the Permit.

41. DOT is a state agency. Thus, it is, by rule, an acceptable operation and maintenance entity for ensuring that the Project will be operated and maintained in compliance with the requirements of section 373.416(2) and chapter 62-330.

Sufficient Real Property Interest

42. DOT has the right, conferred by section 337.27 to exercise the power of eminent domain and condemnation. A.H. Vol. I, section 4.2.3(d). Such

authority is sufficient evidence of a sufficient real property interest over the land upon which the Project is to be constructed, provided the Permit contains a provision that work cannot begin until proof of ownership is provided to the District.

43. Condition 27 of the Permit requires DOT to provide proof of sufficient real property interest to the District before construction of the Project can begin. Thus, DOT has, by rule, demonstrated that it has a sufficient property interest in the area encompassed by the Project.

Water Quantity Impacts

44. Water quantity related conditions for issuance of an ERP are established in rules 62-330.301(1)(a) (the project “[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands), 62-330.301(1)(b) (the project “[w]ill not cause adverse flooding to on-site or off-site property), and 62-330.301(1)(c) (the project “[w]ill not cause adverse impacts to existing surface water storage and conveyance capabilities”). Those criteria are further explained in A.H. Vol. II, sections 3.1, 3.2.1, and 3.3.1.

45. The Project meets the discharge rate, design storm, floodplain encroachment, and flood protection criteria set forth in the ERP rules.

46. The Project will not reduce the 10-year floodplain storage, does not propose any dams, will not alter the flow of any stream or water course, and will not lower the groundwater table. Thus, the requirements in A.H. Vol. II, sections 3.3.2, 3.4.1, 3.5.1, and 3.5.2 do not apply. The pre- versus post- mean annual storm criterion in section 3.2.1(a) does not apply because this project modifies an existing system.

47. Soils in the Project area are predominantly Type D soils. Such soils have very low infiltration with a permanent high-water table. The underlying soils create an almost impervious layer which allows wetlands to be perched atop that layer.

48. Stormwater treatment via wet detention systems is proposed for the runoff from the project site. Due to the nature of the underlying soils, water

does not percolate or infiltrate through the bottom of the detention ponds, but is rather held to allow for evaporation or for off-site flow after a period. The ponds are designed for a static pool condition below the control elevation.

49. In calculating pre- and post-development runoff volumes and peak discharge rates for the Project site, DOT utilized the Interconnected Channel and Pond Routing (“ICPR”) model. The ICPR model is an accepted and reliable method for determining stormwater flows and volumes. Site-specific data, including soil types on the Project site, were considered and utilized in designing the system.

50. Since a portion of the Unnamed Canal in Basin D is an OFW, DOT provided 50 percent greater treatment and pond volume in accordance with District criteria for systems discharging to an OFW.

51. A preponderance of the evidence demonstrates that the post-development peak rate of discharge from the Project site will not exceed the pre-development peak rate of discharge for the 25-year, 24-hour storm, which meets the standards of A.H. Vol. II, section 3.2.1.

52. In addition, DOT sized the ponds to be capable of accommodating runoff generated by a 100-year, 24-hour storm event, with one foot of freeboard from the bottom of the maintenance berm surrounding the ponds to the design high water in the ponds. This increase in storage volume provided stormwater management capacity in excess of that required.

53. The Project will not alter any existing conveyance systems, meeting the standards of A.H. Vol. II, section 3.3.1.

54. The Project will not reduce the 10-year floodplain storage within the Project site, meeting the standards of A.H. Vol. II, section 3.3.2.

55. The Project does not include any dams that will be greater than six feet in height, meeting the standards of A.H. Vol. II, section 3.4.1.

56. The Project will not alter the flow of any stream or water course. Where culverts are proposed in the Unnamed Canal, such culverts have been

sized to ensure that no post-construction alteration of flow will occur, meeting the standards of A.H. Vol. II, section 3.5.1.

57. The Project will not lower the groundwater table, meeting the standards of A.H. Vol. II, section 3.5.2.

58. The Project will not cause an adverse impact to any work of the District. There are no works of the District on or near the Project site.

59. The Project has been designed by Florida registered professional engineers and is reasonably expected to be capable of performing and functioning as designed.

60. DOT, an agency of the State of Florida, is a recognized maintenance entity authorized by rule to operate and maintain the surface water management system approved through the Permit. A.H. Vol. I, section 12.3.1(c). The Permit includes conditions (Nos. 16 and 22) which require periodic and documented inspections of the stormwater management system, and routine maintenance, including the removal and disposal of sediment and debris. DOT has a “robust” highway maintenance program that looks at everything, including erosion and vegetation. DOT has the capability to ensure that the maintenance obligations imposed by the terms and conditions of the Permit will be met.

61. From the standpoint of water quantity permitting criteria, the Project meets the discharge rate, design storm, floodplain encroachment, and flood protection criteria set forth in the ERP rules.

Water Quality Impacts

62. Spruce Creek has been designated as impaired for phosphorus, dissolved oxygen (“DO”), iron, copper, and Enterococci. There is an adopted Total Maximum Daily Load (“TMDL”) for waterbody identification (WBID) number 2674A, the location in Spruce Creek that ultimately receives discharges from the Project via the Unnamed Canal, that requires a reduction of total phosphorus, and a reduction of biochemical oxygen demand

(“BOD”) to address the DO impairment. The Project will not contribute to iron, copper, or Enterococci.

63. Phosphorous is described as being “sticky,” meaning it tends to adsorb to soil and sediment particles. If a system has rooted plants, they can take phosphorus up as a nutrient, locking it into the system. Whether a natural wetland or a stormwater pond, plants growing therein pull phosphorus off of the sediment particles, and lock it up into the plant tissue. In a constructed system, maintenance with an occasional harvest will pull the phosphorus out of the system. Otherwise, those plants will go through their natural senescence and recycling, allowing phosphorous to accrue over time. Thus, to control phosphorus, one must design a system with maintenance in mind. The evidence indicates that maintenance is a feature of the Permit, and is within the capabilities of DOT to perform.

64. Since Spruce Creek is impaired for the listed parameters, DOT is required, pursuant to rule 62-330.301(2), to implement measures that will result in a net improvement of the water quality in the receiving waters for those parameters.

65. DOT calculated phosphorus loading to Spruce Creek using the Harper Method, which was first developed around 2007, and has since been recognized in the field as a reliable method for making such calculations.³

66. Using the Harper Method, DOT applied a projection for the Project area of 51 inches of annual rainfall. That projection was a reasonable assumption for purposes of the calculations.

67. Calculating the pre-development loading for phosphorus for each basin in the Project area based on its existing land use and calculations of directly connected impervious areas, and comparing that to the calculated post-development loading with the Project in place, it was determined that the wet

³ DOT did not calculate nitrogen loading or removal since Spruce Creek is not impaired for nitrogen.

detention ponds will treat total phosphorus to reduce loading to the receiving waters by 29 percent upon completion. Specifically, post-development loading of total phosphorus (4.411 kg/yr) will be less than the pre-development loading of total phosphorus (6.193 kg/yr) to the receiving waters.⁴ The application of the Harper Method was well-explained at the hearing, and the results were supported by competent, substantial, and persuasive evidence, which is accepted. Evidence to the contrary was generally predicated on the perceived inadequacy of the existing rules to protect water quality, or was otherwise contradicted by more persuasive evidence.⁵

68. Petitioners questioned the accuracy of the 51 inches of rainfall per year assumption, arguing that more recent or more localized measurements would have resulted in higher annual rainfall figures. However, Mr. Vavra credibly testified that if rainfall increases for a period, that increase will result in phosphorous figures at the same ratio for the pre- and post-development calculations. Thus, even though higher levels of rainfall may increase pre-development levels of total phosphorus in the runoff, the system as designed will be capable of providing the same degree of treatment and storage, thereby resulting in a comparable post-development reduction in the pre-development levels of phosphorus.

69. The stormwater management system proposed for the Project will provide greater removal of phosphorus than currently exists, which will

⁴ Mr. Miracle testified that the basin-by-basin analyses for phosphorus showed that Basin D is expected to have a slight increase in phosphorus. However, the Project as a whole will result in a reduction of phosphorous as set forth in this paragraph. An ERP is evaluated on the overall impacts of a permitted project on the environment, and not on its individual but integrated components.

⁵ Petitioners questioned why DOT did not include phosphorus loading calculations [as well as the BOD, iron and copper calculations discussed herein] with the original application, but rather provided those calculations after the permit was issued. However, as will be discussed in the Conclusions of Law, this is a de novo proceeding, designed to formulate agency action, rather than review proposed action taken previously. The loading calculations for each of the parameters discussed herein were supported by competent, substantial, and persuasive evidence, and are accepted as an accurate representation of pre- and post-development conditions.

result in a net improvement of water quality in the receiving waters. Thus, DOT has established that it meets the standards of rule 62-330.301(2).

70. The District used data provided by DOT to calculate levels of BOD, iron, and copper in stormwater from the Project using the BMP Trains model, which is similar to, and relies on, the same inputs and calculations as the Harper Method discussed above. The BMP Trains model is commonly used and accepted in the field of engineering to perform nutrient analysis in stormwater systems. However, the program allows one to manually input values to achieve reliable results for other water quality parameters, including BOD, iron, and copper.

71. The calculations performed by Mr. Miracle showed that the post-development loading of BOD, iron, and copper will be less than the pre-development loading of those impairment parameters, resulting in a net improvement of the water quality in the receiving waters, and providing reasonable assurance that the Project meets the requirements of rule 62-330.301(1)(e), A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.

72. Based on the foregoing, DOT's plans and calculations establish that the Project will result in a "net improvement" to total phosphorus, BOD, iron, and copper, as recommended by the TMDLs and Final Order of Verified Impaired Waters, meeting the standards of A.H. Vol. II, sections 4.0 and 4.1, and A.H. Vol. I, sections 10.2.4.5 and 10.3.1.4.

73. Due to site constraints, a portion of the stormwater from the Project will not be conveyed to a stormwater management system. Compensating treatment is being provided to direct currently untreated stormwater from existing I-95 travel lanes to new stormwater ponds for treatment. That compensating treatment will offset the impacts from the constrained areas.

74. DOT provided reasonable assurance that the Project provides adequate compensating treatment capacity. Petitioners did not run any models or perform any calculations to demonstrate non-compliance with any

District standard, or otherwise present competent substantial evidence that the Project will not provide adequate compensating treatment or will not meet the District's water quality treatment requirements.

75. Petitioners asserted that significant rainfall experienced in Volusia County in 2022 when Hurricane Ian crossed the area, and the growing frequency of significant rainfall events due to climate change may result in adverse flooding impacts from the Interchange to off-site properties. Petitioners did not, however, provide competent, substantial, and persuasive evidence that greater future rainfall events would affect the ability of the stormwater system to attenuate storm events meeting the flood protection standards in A.H. Vol. I, section 3.1. In that regard, Dr. Barile acknowledged that the system was designed to meet existing District stormwater system standards established in the ERP rule and A.H. Volume II. Thus, DOT provided reasonable assurance that the Project will not result in adverse impacts to water quality in the receiving waters.

76. Much of the testimony in opposition to the stormwater system was directed not to whether it would function as designed, but rather to the belief that it is preferable to keep rain in natural areas "rather than just flushing down into the canals." However, as has been stated previously, the issue is not what is preferable or even desirable. The issue is whether the Project, as proposed and designed by DOT, meets the standards for issuance of an ERP permit.

Direct Impacts

77. The Project will result in direct impacts to 48.8 acres of wetlands, which constitutes removal of all wetlands within the Project footprint. Of that, 0.1 acres is an isolated wetland of less than one-half acre in size, for which compliance with the A.H. regulatory standards is not required.

78. The Project will also affect 3.11 acres of surface waters which consist of existing roadside ditches and an artificial pond dug in uplands, for which compliance with the A.H. regulatory standards is not required.

Secondary Impacts

79. Secondary impacts are not direct impacts of the Project, but are those adverse effects to the functions of the surrounding wetlands and habitats that would not occur but for the construction of the Project. DOT established that the Project is expected to result in 10.12 acres of secondary impacts.

Wetland Mitigation

80. DOT proposes to offset direct and secondary impacts to wetlands resulting from the Project by mitigation.

81. A functional Uniform Mitigation Assessment Method (“UMAM”) analysis was performed to determine the mitigation sufficient to offset the loss of wetland/surface water functions from the Project. UMAM is authorized by statute and adopted by rule. The undersigned accepts UMAM as an accurate and representative measure of the impacts of the Project.

82. UMAM scoring is designed to evaluate the functional value of wetlands based on factors that include their landscape and location, water environment, and vegetative community structure. The analysis of those factors results in the assignment of a qualitative score for each of the wetlands to be impacted.

83. In general, the wetlands in the Project area, due to, among other things, fragmentation and isolation of the wetlands, presence of invasive species, and lack of identifiable wildlife species use, were assigned scores consistent with wetlands of moderate quality. Direct impacts are calculated assuming a post-development value of zero. Secondary impacts, which do not involve the complete elimination of wetland values, are scored for the pre- and post-development values. The difference in the pre-development score and the post-development score assigned to each existing wetland - the “delta” - is multiplied by the number of affected wetland acres to establish the functional loss value for direct and secondary impacts.

84. Based on the UMAM scoring of the affected wetlands, DOT calculated the wetland mitigation credits needed to offset the direct and secondary

impacts for wetlands in the Project area. Based on that analysis, DOT will obtain a total of 35.57 UMAM credits as follows: 31.03 forested freshwater UMAM mitigation credits and 1.35 herbaceous freshwater UMAM mitigation credits to be debited from the Farmton North Mitigation Bank, and 3.19 forested freshwater UMAM mitigation credits to be debited from the Lake Swamp Mitigation Bank. The Project and the approved service areas for the two mitigation banks are within Drainage Basin 17 (Halifax River), consistent with to A.H. Vol. I, section 10.2.1.2(b), and A.H. Vol. II, Appendix A.

85. Mr. Brower, testifying for Petitioners, expressed his opinion that mitigation for wetland impacts is a “Ponzi scheme.” Dr. Anderson, Dr. Cho, and Dr. Barile noted that neither of the proposed mitigation areas, though within the regional Halifax River watershed established by rule, were directly in the Spruce Creek sub-basin. Thus, in their collective opinions, the mitigation is not directed to the waterbody most directly affected by the Project. Their concerns are not without merit. However, this case is not a rule challenge, and the validly promulgated mitigation rule must be applied as written. No witness disputed the UMAM scores that formed the basis for the mitigation, or that the mitigation bank service areas included the regional Halifax River watershed of which Spruce Creek is a part.

Design Modifications

86. A.H. Vol. I, section 10.2.1.2(b) provides that:

The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

* * *

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

87. Although the Partial Cloverleaf alternative (46.96 acres of wetland impacts) had marginally greater wetland impacts than the Diamond Interchange Alternative (45.96 acres of wetland impacts), Mr. Drauer offered his opinion that the mitigation banks used in this case provide regional ecological value that is of greater value to the environment than the fragmented and somewhat degraded wetlands on the Project site. His opinion was based on the size of the mitigation areas — with the Farmton Mitigation Bank, at roughly 20,000 acres, being the largest in the country — providing functions for a much greater and contiguous geographic region than the individual mitigation parcels, the high quality of the mitigation bank wetlands, and the fact that they are protected in perpetuity. His opinion is accepted. Based thereon, DOT was not required to implement practicable design modifications to reduce or eliminate impacts of the Project.

Cumulative Impacts

88. The Project is considered not to have unacceptable cumulative impacts if mitigation offsets adverse impacts within the same hydrologic basin in which the impacts occur. As set forth herein, the proposed mitigation is adequate to offset adverse wetland impacts within the Halifax River basin, in which the Project is located.

Public Interest Balancing Test

89. Portions of the Project are within or discharge to the ephemeral Unnamed Canal, an OFW that is a tributary of Spruce Creek. Therefore, DOT must provide reasonable assurances that the Project is clearly in the public interest, as described by the balancing test set forth in section 373.414(1)(a), rule 62-330.302(1)(a), and A.H. Vol. I, sections 10.2.3 through 10.2.3.7.

Balancing - Public Health, Safety, or Welfare or the Property of Others

90. A.H. Vol. I, section 10.2.3.1 establishes four criteria to be balanced in order to determine if regulated activities will adversely affect the public health, safety, or welfare or the property of others.

91. A.H. Vol. I, section 10.2.3.1(a) requires an evaluation of hazards or improvements to public health or safety.

92. The final revised TSR, along with testimony at the hearing, identified several factors upon which the District based its determination that the Interchange will not adversely affect the public health, safety, or welfare or the property of others. As set forth in the TSR, those factors are:

A. The Project creates “alternative routes to evacuate coastal populations facing imminent hurricane impacts.” The testimony at hearing indicated that the Interchange is also designed to enhance traffic incident management by improving emergency response times and allowing for a detour point in the event of an accident or blockage. Those traffic safety factors will be discussed herein.

B. “The surface water management system was designed to comply with all criteria necessary to preclude flooding of offsite properties, adverse drainage of surface waters, and degradation of water quality in downstream waters.” Each of those are the minimum elements necessary to obtaining an ERP. As stated by Mr. Drauer, “meet[ing] the water quantity criteria in the Applicant's Handbook, Volume 2, [] would mean that factor would be neutral.” His testimony is accepted. A preponderance of the evidence establishes that the factors in this subparagraph are neutral for purposes of determining whether the Project is “clearly in the public interest.”

C. “The project is not located in an area classified by the Department of Agriculture as approved, conditionally approved, restricted or conditionally restricted for shellfish harvesting.” Merely proposing a project that is far from shellfish harvesting areas, without more, does not make a project clearly in the public interest. This factor is neutral, as was confirmed through the credible testimony of Mr. Drauer and Ms. Martin, which is accepted.

D. “The applicant is proposing to increase the roadway crown of Pioneer Trail to provide improved roadway resiliency and reduce the risk of flooding.” The evidence failed to demonstrate that impacts resulting from the

Project would alleviate flooding or other environmental effects on the property of others. As indicated previously, the reduction in flooding from raising the crown of Pioneer Trail is limited to the surface of the roadway. It does not reduce or affect flooding on the Project site or to off-site properties. This factor is neutral, as was confirmed by the testimony of Mr. Drauer, which is accepted.

E. “Finally, the proposed project will result in a net reduction of total phosphorus to Spruce Creek, which is impaired for phosphorus.” That factor will be discussed herein.

93. As will be discussed in the Conclusions of Law, evidence that the Interchange will establish an alternate route for hurricane and disaster evacuation, and improve emergency response times does not constitute “an improvement to public safety *with respect to environmental conditions*” as set forth in A.H. Vol. I, section 10.2.3.1(a). Post-development discharges from the stormwater system will be improved to the degree required by rule. The reduction in the impairment parameters is a positive factor, though marginally so, since the evidence was not compelling that Spruce Creek, at the point of its impairment designation, would see any measurable effect from the reduction in impairment parameters at the point of the discharge of stormwater to the Unnamed Canal. The evidence that the Project is clearly in the public interest is essentially at equipoise, with the slightest of a tip to the positive solely as a result of DOT’s compliance with the District’s water quality rules.

Balancing - Conservation of Fish and Wildlife

94. The Project will have no effect on any federally-listed species. The area of the Project includes no designated critical habitat, and will affect no threatened or endangered species. As to state-listed species, within 90 days prior to commencement of construction, a gopher tortoise survey will be performed, and any tortoises on the site will be relocated. A scrub jay survey revealed a general lack of scrub jay habitat, and the presence of no scrub jays

on site. The Project area contains no wood stork nesting colonies, and despite the occasional presence of individuals, is not a critical feeding or foraging area for the species.

95. The U.S. Fish & Wildlife Service and Florida Fish & Wildlife Conservation Commission determined that there are no documented road kills of wildlife species with high conservation value within a known area where traversing I-95 or Pioneer Trail creates a potential hazard to motorists and/or wildlife species. There are no public conservation lands or lands under perpetual conservation or agricultural easement on both sides of I-95 or Pioneer Road for a wildlife crossing feature.

96. The evidence that the Project would affect the Doris Leeper Preserve was not persuasive. The privately-owned parcel to the east of the Project's northeast quadrant has been identified as a desirable wildlife corridor extension for the Preserve. A portion of that property is within the Project area. However, a speculative acquisition of property that is not currently in the Preserve, that has no identified willing seller, and for which funding has not been identified, is not sufficient to establish that the Project will adversely affect the conservation of fish and wildlife.

97. There was insufficient evidence to support a finding that the Project will result in adverse impacts to the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, or adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.2. is neutral.

Balancing - Navigation, Flow of Water, or Erosion or Shoaling

98. The Unnamed Canal is ephemeral, its course being dry for most of the year, and flowing north towards Spruce Creek only in response to rainfall. A preponderance of the competent, substantial evidence established that the Project will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling in Spruce Creek or any of its tributaries. Thus, as

characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.3. is neutral.

Balancing - Fishing or Recreational Values or Marine Productivity

99. Given the nature of the Unnamed Canal, there is no effect from the Project on fishing, recreational values, or marine productivity in the vicinity of the Project. With the mitigation proposed and the stormwater treatment and compensatory treatment being provided, DOT established, by a preponderance of the competent, substantial evidence, that the Project would have no measurable adverse impact on fishing, recreational values, or marine productivity in Spruce Creek or its tributaries. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.4. is neutral.

Balancing - Temporary or Permanent Nature

100. The Project is of a permanent nature. Although there will be permanent loss of wetlands, such loss will be offset through mitigation. The proposed mitigation is permanent in nature. Temporary impacts will occur during construction, but DOT is required to obtain a permit from the Department of Environmental Protection (“DEP”) to account for temporary impacts during construction. Temporary impacts will recover at the conclusion of the construction. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.5. is neutral.

Balancing - Historical and Archaeological Resources

101. There was no evidence of significant historical or archaeological resources on or near the Project. Though Petitioners asserted that the historic Old Kings Road might possibly traverse the area, their own exhibit, PEx 142, shows what is believed to be the location of the Old Kings Road being to the east of the Project. It also shows the only other archeological site, the Spruce Creek Mound Complex, being well to the north of the Project. Any suggestion of archeological resources in the area is entirely speculative. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.6. is neutral.

Balancing - Current Condition and Relative Value of Functions

102. The current condition and relative value of functions of the affected wetlands is, at best, moderate. Though the vegetation itself is generally healthy, the value of the wetlands as a whole is compromised by being hydrologically severed due to the combined effects of I-95, Pioneer Trail, Williamson Boulevard, and Martin Dairy Road. The wetlands suffer from the combined effects of fire suppression and invasive species. The periphery of the wetlands is also impacted by trash and litter from I-95.

103. Although several of Petitioners' witnesses testified to the high value of the impacted wetlands, none spent more than a few hours at the Project location, nor had they penetrated into the interior of the wetlands. Dr. Anderson's observations were limited to a 30-minute view from the Pioneer Trail right-of-way. She indicated that the Unnamed Canal is a significant tributary of Spruce Creek, draining a substantial area, which is not in dispute. Dr. Cho was at the Project site for "about an hour, hour and a half," went a hundred yards into the wetlands in the northeast quadrant, and did not traverse or perform transects of the northeast quadrant, or any other portion of the Project area. He acknowledged that one cannot judge the quality of wetlands without going through the site.

104. The survey and assessment of the wetlands, and the assignment of UMAM scores as reflected in J.Ex.28, is supported by a preponderance of the competent, substantial, and persuasive evidence in the record.

105. Though onsite wetlands will be affected, the mitigation provided more than offsets the impacts. Thus, as characterized by the parties, the factor described in A.H. Vol. I, section 10.2.3.7. is neutral.

Public Interest Balancing Test - Conclusion

106. Taking into account the TSR and the competent, substantial evidence adduced at the hearing, the bases for the conclusion that the Project is clearly in the public interest boil down to two factors. The first, related to traffic safety, is that it is intended to provide an alternate route for hurricane and

disaster evacuation via I-95, and enhances traffic incident response times, with the Interchange being roughly in between a 7.5 mile stretch between SR 44 and SR 421. The second is that stormwater that currently drains to the Unnamed Canal will benefit from enhanced water quality treatment and an incremental reduction in levels of phosphorus, BOD, iron, and copper for which Spruce Creek is impaired, a reduction required by rule since the Unnamed Canal is an OFW, though not itself subject to an impairment designation.

107. The public interest balancing test is just that, a balance. There is no strict formula for determining when a project is clearly in the public interest, and when it is not. Respondents assert that, mathematically, there are more positive outcomes (one factor - barely) than negative outcomes (no factors), with six of the seven criteria being neutral. A further discussion of the balancing test is contained in the Conclusions of Law.

CONCLUSIONS OF LAW

Jurisdiction

108. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

Standing

109. Section 120.52(13) defines a “party,” in pertinent part, as a person “whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.” Section 120.569(1) provides, in pertinent part, that “[t]he provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency.”

110. Standing under chapter 120 is guided by the two-pronged test established in the seminal case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). In that case, the court held that:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding, he must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Id. at 482.

111. *Agrico* was not intended as a barrier to the participation in proceedings under chapter 120 by persons who are affected by the potential and foreseeable results of agency action. Rather, “[t]he intent of *Agrico* was to preclude parties from intervening in a proceeding where those parties’ substantial interests are totally unrelated to the issues that are to be resolved in the administrative proceedings.” *Mid-Chattahoochee River Users v. Fla. Dep’t of Env’t Prot.*, 948 So. 2d 794, 797 (Fla. 1st DCA 2006)(citing *Gregory v. Indian River Cnty.*, 610 So. 2d 547, 554 (Fla. 1st DCA 1992)).

112. The standing requirement established by *Agrico* has been refined, and now stands for the proposition that standing to initiate an administrative proceeding is not dependent on proving that the proposed agency action would violate applicable law. Instead, standing requires proof that the petitioner has a substantial interest and that the interest reasonably could be affected by the proposed agency action. Whether the effect would constitute a violation of applicable law is a separate question.

Standing is “a forward-looking concept” and “cannot ‘disappear’ based on the ultimate outcome of the proceeding.” ... When standing is challenged during an administrative hearing, the petitioner must offer proof of the elements of standing, and it is sufficient that the petitioner demonstrate by such proof that his substantial interests “*could* reasonably be affected by ... [the] proposed activities.”

Palm Beach Cnty. Env't. Coal. v. Fla. Dep't of Env't. Prot., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (citing *Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009); and *Hamilton Cnty. Bd. of Cnty. Comm'rs v. State, Dep't of Env't. Regul.*, 587 So. 2d 1378 (Fla. 1st DCA 1991)); *see also St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist.*, 54 So. 3d 1051, 1055 (Fla. 5th DCA 2011) (“Ultimately, the ALJ’s conclusion adopted by the Governing Board that there was no proof of harm or that the harm would be offset went to the merits of the challenge, not to standing.”).

113. The individual Petitioners alleged standing based on the detrimental effect of the Project on their use and enjoyment of Spruce Creek, the nearby Doris Leeper Preserve, and areas that they frequent. The Project would effectively eliminate an area identified as an “Essential Parcel” for expansion of the Preserve.

114. The evidence adduced at hearing indicated that the Interchange will have little or no effect on Spruce Creek or the Doris Leeper Preserve. Nonetheless, the allegations that Petitioners use the potentially affected areas at a frequency and for purposes that are different from that of the general public, and that the Project would adversely affect their quality of life as they have come to enjoy it, are sufficient, despite the ultimate failure of proof at the hearing.

115. Petitioners meet the second prong of the *Agrico* test, that is, this proceeding is designed to protect them from potential adverse impacts on water quantity, water quality, and alleged adverse effects to the public interest caused by the Project, impacts that are the subject of chapter 373 and the rules adopted thereunder.

116. The question for determination as to the first prong of the *Agrico* test is whether Petitioners have alleged injuries in fact of sufficient immediacy as a result of the Project to entitle them to a section 120.57 hearing.

117. In *Reily Enterprises, LLC v. Florida Department of Environmental Protection*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008), the Court found that a challenger to a permit, alleged to adversely affect a nearby water body, met the *Agrico* test for standing. The facts upon which the court found standing were that the petitioner in that case:

[C]an see the Indian River from his house across the Reily property. He and his family have “spent time down at the causeway,” and they have “enjoyed the river immensely with all of its amenities” over the years. He is concerned that the project will affect his “quality of life” and “have effects on the environment and aquatic preserve [that he and his family] have learned to appreciate.”

118. Petitioners’ interests are comparable to the type of general “quality of life” issues found sufficient to confer standing in *Reily*.

119. The individual Petitioners alleged and offered proof of an “injury in fact which is of sufficient immediacy to entitle [them] to a section 120.57 hearing.”

120. Petitioners Bear Warriors and Sweetwater have alleged standing as associations acting on behalf of the interests of their members. The facts adduced at the hearing are sufficient to demonstrate their associational standing under *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) and its progeny, including *St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District*, 54 So. 3d at 1154-1155.

121. As a result of the facts supporting standing as described in the testimony of Mr. LaMontagne and Mr. White, and the representatives of Bear Warriors and Sweetwater, there is sufficient evidence to demonstrate that, if the adverse impacts of the Project on Spruce Creek and its tributaries, and on the Doris Leeper Preserve had been proven, those impacts would have adversely affected Petitioners.

Nature of the Proceeding

122. This is a de novo proceeding, intended to formulate final agency action and not to review action taken earlier and preliminarily. *Young v. Dep't of Cmty. Aff.*, 625 So. 2d 831, 833 (Fla. 1993); *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Dep't of Env't. Regul.*, 587 So. 2d at 1387; *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

Burden and Standard of Proof

123. Section 120.569(2)(p) provides that:

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

124. DOT made its prima facie case of entitlement to the Permit by entering into evidence the complete application files and supporting documentation, the Permit, and the TSR. In addition, DOT presented the testimony of Casey Lyon, its Environmental Manager. With DOT having made its prima facie case, the burden of ultimate persuasion is on Petitioners to prove their case in opposition to the Permit by a preponderance of the

competent and substantial evidence, and thereby prove that DOT failed to provide reasonable assurance that the standards for issuance of the ERP were met.

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

Reasonable Assurance Standard

126. Issuance of the proposed ERP is dependent upon there being reasonable assurance that the activities authorized will meet applicable standards.

127. Reasonable assurance means “a substantial likelihood that the project will be successfully implemented.” *Metropolitan Dade Co. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. 3d DCA 1992). Reasonable assurance does not require absolute guarantees that the applicable conditions for issuance of a permit have been satisfied. Furthermore, speculation or subjective beliefs are not sufficient to carry the burden of presenting contrary evidence or proving a lack of reasonable assurance necessary to demonstrate that a permit should not be issued. *FINR II, Inc. v. CF Indus., Inc.*, Case No. 11-6495 (Fla. DOAH Apr. 30, 2012; Fla. DEP June 8, 2012).

ERP Permitting

128. Section 373.413(1) provides, in pertinent part, that:

[T]he governing board [of the District] and the [DEP] may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

129. Section 373.4131, which establishes the creation and implementation of statewide ERP rules, provides, in pertinent part, that:

(1) The [DEP] shall initiate rulemaking to adopt, in coordination with the water management districts, statewide environmental resource permitting rules governing the construction, alteration, operation, maintenance, repair, abandonment, and removal of any stormwater management system, dam, impoundment, reservoir, appurtenant work, works, or any combination thereof, under this part.

* * *

(2)(a) Upon adoption of the rules, the water management districts shall implement the rules without the need for further rulemaking pursuant to s. 120.54. The rules adopted by [DEP] pursuant to this section shall also be considered the rules of the water management districts. The districts and local governments shall have substantive jurisdiction to implement and interpret rules adopted by [DEP] under this part, consistent with any guidance from [DEP], in any license or final order pursuant to s. 120.60 or s. 120.57(1)(l).

130. Pursuant to its rulemaking authority, DEP adopted rules 62-330.301 and 62-330.302, which establish standards applicable to this proceeding.

131. The A.H. has been jointly adopted for use by DEP and the state's five water management districts. Fla. Admin. Code R. 62-330.010(4). DEP and the water management districts "developed [the] Applicant's Handbook to help persons understand the rules, procedures, standards, and criteria that apply to the environmental resource permit (ERP) program under Part IV of Chapter 373 of the Florida Statutes (F.S.)." A.H. § 1.0.

Water Quantity

132. A.H. Vol II, section 3.2.1, provides, in pertinent part, that "[t]he post-development peak rate of discharge must not exceed the pre-development peak rate of discharge for the 25-year frequency, 24-hour duration storm."

133. A preponderance of the competent, substantial evidence demonstrates that the stormwater management system for the Project will meet that standard.

134. DOT designed the ponds to accommodate stormwater volumes from a 100-year/24-hour storm. By so doing, DOT provided added assurance that the ponds would not overtop during storm events.

135. Since the Project contains no Class A soils, and thus no impacts to Class A soils, there are no applicable special basin plans requiring the provision of recharge volume equivalence.

136. Based on the Findings of Fact herein, the Project meets the water quantity standards established in rules 62-330.301(1)(a) (the project “[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands), 62-330.301(1)(b) (the project “[w]ill not cause adverse flooding to on-site or off-site property), and 62-330.301(1)(c) (the project “[w]ill not cause adverse impacts to existing surface water storage and conveyance capabilities”), and the corresponding provisions of A.H. Vol. II, sections 3.1, 3.2.1, and 3.3.1.

137. The Project will not reduce the 10-year floodplain storage, does not propose any dams, will not alter the flow of any stream or water course, and will not lower the groundwater table. Thus, the requirements in A.H. Vol. II, sections 3.3.2, 3.4.1, 3.5.1, and 3.5.2 do not apply.

Water Quality

138. A preponderance of the competent, substantial evidence demonstrates that the Project will reduce the post-development loading to the receiving waters of parameters for which Spruce Creek is impaired, including phosphorus and BOD, as well as iron and copper, to levels less than those in the pre-development condition. Thus, DOT provided reasonable assurances to satisfy applicable water quality criteria and compliance with rule 62-330.301. Petitioners did not offer a quantum of evidence sufficient to counter that

demonstration, and therefore did not meet their burden of proof as to that issue.

139. The steps taken by DOT will result in a net improvement of water quality in the receiving waters for those impairment parameters. Thus, DOT has established that it meets the standards of rule 62-330.301(2).

140. Petitioners failed to prove, by a preponderance of persuasive competent and substantial evidence, that the stormwater management system for the Project would be ineffective to reduce post-development loading of impairment parameters to levels less than those in the pre-development condition.

Fish, Wildlife, and Listed Species

141. Rule 62-330.301(1)(d) provides, in pertinent part, that:

(1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

* * *

(d) Will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

142. A.H. Vol. I, section 10.1.1(a) provides, in pertinent part, that:

Applicants must provide reasonable assurance that:

(a) 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 [paragraph 62-330.301(1)(d), F.A.C.].

143. A.H. Vol. I, section 10.2.2, entitled Fish, Wildlife, Listed Species and their Habitats, provides, in pertinent part, that:

Pursuant to section 10.1.1(a), above, an 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, and the bald eagle (*Haliaeetus leucocephalus*), which is protected under the Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668d (April 30, 2004); a copy of the Act is in Appendix F; and

(b) The habitat of fish, wildlife, and listed species.

144. Based on the Findings of Fact set forth herein, and as supported by a preponderance of the persuasive evidence adduced at the hearing, DOT demonstrated that the Project, evaluated in its entirety with mitigation, will not impact the values of wetland and other surface water functions so as to cause adverse impacts to the abundance, diversity, or habitat of fish, wildlife, and listed species.

Mitigation

145. It is well established that:

Addressing transportation projects with unavoidable impact to wetland areas, the Florida Legislature expressed its intent that “mitigation to offset the adverse effects of these transportation projects be funded by [FDOT] and be carried out by the use of mitigation banks and any other mitigation options that satisfy state and federal requirements in a manner that promotes efficiency, timeliness in project delivery, and cost-effectiveness.”

Bluefield Ranch Mitigation Bank Trust v. S. Fla. Water Mgmt. Dist., 263 So. 3d 125, 129 (Fla. 4th DCA 2018).

146. Section 373.4136(6) provides, in pertinent part, that:

The department or water management district shall establish a mitigation service area for each mitigation bank permit. ... Except as provided herein, mitigation credits may be withdrawn and used only to offset adverse impacts in the mitigation service area. The boundaries of the mitigation service area shall depend upon the geographic area where the mitigation bank could reasonably be expected to offset adverse impacts. ...

* * *

(c) Once a mitigation bank service area has been established by the department or a water management district for a mitigation bank, such service area shall be accepted by all water management districts, local governments, and the department.

147. A.H. Vol. I, section 10.3.1.3 provides, in pertinent part, that:

Mitigation through participation in a mitigation bank shall be in accordance with Section 373.4136, F.S., and Chapter 62-342, F.A.C. (Mitigation Banks).

148. The Project is within the Halifax River Drainage Basin, which is the service area for the Farmton North Mitigation Bank and the Lake Swamp Mitigation Bank. Petitioners argue that the mitigation areas are disconnected from, and do not directly provide adverse impact offsets to, Spruce Creek, which is also in the Halifax River Drainage Basin. However, such direct offsets to a sub-basin of the regional basin served by a mitigation bank service area are not required. As indicated, this case is not a rule challenge, and compliance with the rules of the District is based upon the District's existing standards. Spruce Creek is within the Farmton North Mitigation Bank and Lake Swamp Mitigation Bank service areas, and they are, therefore, suitable mitigation for the Project.

149. DOT demonstrated by a preponderance of competent and substantial and persuasive evidence that the mitigation proposed for the ERP will offset the adverse impacts of the Project. Based on the Findings of Fact set forth herein, Petitioners failed to prove by a preponderance of competent and substantial evidence that the mitigation proposed for the Project is not adequate.

Secondary Impacts

150. Rule 62-330.301(1)(f) provides, in pertinent part, that:

(1) To obtain an individual or conceptual approval permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, or abandonment of the projects regulated under this chapter:

* * *

(f) Will not cause adverse secondary impacts to the water resources.

151. “Secondary impacts are impacts caused not by the construction of the project itself, but by ‘other relevant activities very closely linked or causally related to the construction of the project.’” *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1143 (Fla. 2d DCA 2001)(citing *Fla. Power Corp. v. Dep’t of Env’t. Regul.*, 605 So. 2d 149, 152 (Fla. 1st DCA 1992); and *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 777 (Fla. 1st DCA 1991)).

152. A.H. Vol. I, section 10.2.7 establishes the criteria for consideration of secondary impacts and provides, in pertinent part, that:

(a) An applicant shall provide reasonable assurance that the secondary impacts from construction, alteration, and intended or reasonably expected uses of a proposed activity will not cause or contribute to violations of water quality standards or adverse impacts to the functions of wetlands or other surface waters

(b) An applicant shall provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of a proposed activity will not adversely impact the ecological value of uplands for bald eagles, and aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species

There was no competent, substantial evidence to establish that any species on the Wetland Dependent Species List referenced in A.H. Vol. I, section 10.2.7(b) utilize the Project area.

153. A.H. Vol. I, section 10.2.7 also provides that:

A proposed activity shall be reviewed under this criterion by evaluating the impacts to: wetland and surface water functions identified in section 10.2.2, above, water quality, upland habitat for bald eagles and aquatic or wetland dependent listed species, and historical and archaeological resources. ... If such secondary impacts cannot be prevented, the applicant may propose mitigation measures as provided for in sections 10.3 through 10.3.8, below.

154. DOT established, by a preponderance of the competent substantial evidence, that 10.12 acres of the Project site will be subject to secondary impacts requiring mitigation. The functional loss resulting from the secondary impacts was calculated by application of the UMAM rule.

155. Mitigation credits of 32.38 functional units were purchased from the Farmton North mitigation bank, and 3.19 functional units from the Lake Swamp mitigation bank. The mitigation banks provide regional ecological value for impacts occurring within the Halifax River Basin. The mitigation provided offsets the combined functional loss from the direct and secondary impacts. Evidence to the contrary was not persuasive.

156. Based on the Findings of Fact set forth herein, Petitioners failed to prove by a preponderance of competent and substantial evidence that the activities authorized by the ERP will cause adverse secondary impacts to the water resources.

Cumulative Impacts

157. Section 373.414(8)(a) provides, in pertinent part, that:

The governing board ..., in deciding whether to grant or deny a permit for an activity regulated under this part, shall consider the cumulative impacts upon surface water and wetlands.

158. Rule 62-330.302(1)(b) provides that:

(1) In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

* * *

(b) Will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in sections 10.2.8 through 10.2.8.2 of Volume I.

159. A.H. Vol. I, section 10.2.8 provides, in pertinent part, that:

[A]n 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.

* * *

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. (emphasis added).

160. As set forth herein, impacts from the Project will be fully offset by the use of mitigation credits at the Farmton North Mitigation Bank and the Lake Swamp Mitigation Bank, both of which are within the same drainage basin as Spruce Creek and the Project.

161. Based on the Findings of Fact set forth herein, as supported by a preponderance of the persuasive evidence adduced at the hearing, and applying the standards set forth in A.H. Vol. I, section 10.2.7, DOT demonstrated that the Project, evaluated in its entirety with mitigation, will not result in unacceptable cumulative impacts upon wetlands and other surface waters.

Elimination or Reduction of Impacts

162. A.H. Vol. I, section 10.2.1 provides, in pertinent part, that:

The following factors are considered in determining whether an application will be approved by the Agency: the degree of impact to wetland and other surface water functions caused by a proposed activity; whether the impact to these functions can be mitigated; and the practicability of design modifications for the site that could eliminate or reduce impacts to these functions, including alignment alternatives for a proposed linear system.

163. A.H. Vol. I, section 10.2.1.1 provides, in pertinent part, that:

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 ... adversely affects public safety through the endangerment of lives or property is not considered “practicable.”

164. The design alternative selected for the Project, i.e., the Partial Cloverleaf 2 Alternative, has one more acre of wetland impact (46.96 acres) than the least impacting alternative, the “diamond interchange” (45.96 acres). A.H. Vol. I, section 10.2.1.2 provides, in pertinent part, that:

The Agency will not require the applicant to implement practicable design modifications to reduce or eliminate impacts when:

* * *

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

165. DOT has proposed mitigation to offset the impacts of the Project that provides regional ecological value and greater long-term ecological value than the areas to be adversely affected. Therefore, DOT was under no requirement to implement practicable design modifications to reduce or eliminate impacts from the Project.

Public Interest Test

166. Section 373.414(1) provides, in pertinent part, that:

As part of an applicant’s demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board ... shall require the applicant to provide ... reasonable assurance that such activity ... within an Outstanding Florida Water ... will be clearly in the public interest.

(a) In determining whether an activity ... is clearly in the public interest, the governing board ... shall consider and balance the following criteria:

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

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

167. Rule 62-330.302(1) provides, in pertinent part, that:

In addition to the conditions in Rule 62-330.301, F.A.C., to obtain an individual or conceptual approval permit under this chapter, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, repair, removal, and abandonment of a project:

(a) ... within an Outstanding Florida Water, are clearly in the public interest, as determined by balancing the following criteria as set forth in sections 10.2.3 through 10.2.3.7 of Volume I. . . .

168. The seven public interest criteria listed in section 373.414(1)(a) are repeated almost verbatim in rule 62-330.302(1) and A.H. Vol. I, sections 10.2.3.1 through 10.2.3.7.

169. The public interest test was largely determined by the District to have been met by the benefit to public health, safety, or welfare from the

traffic safety factors of increased hurricane evacuation and incident response capabilities along the stretch of I-95 between SR 44 and SR 421 pursuant to A.H. Vol. I, section 10.2.3.1.

170. A.H. Vol. I, section 10.2.3.1, provides, in pertinent part, that:

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

(a) *An environmental hazard to public health or safety or improvement to public health or safety with respect to environmental issues.* Each applicant must identify potential *environmental* public health or safety issues resulting from their project. (emphasis added)

171. The public interest test is limited to interests that are environmental in nature. In drawing that conclusion, the undersigned relies not only on the plain meaning of the A.H., but also on the well-researched and well-reasoned Order authored by ALJ Bram D.E. Canter in *Martin County and St. Lucie County vs. All Aboard Florida - Operations, LLC; Florida East Coast Railway, LLC and South Florida Water Management District*, Case Nos. 16-5718 and 17-2566 (Fla. DOAH Sept. 29, 2017; Fla. SFWMD Nov. 16, 2017). In *All Aboard Florida*, Judge Canter determined that non-environmental factors may not be considered in a determination related to the public interest test. There is little to improve upon in Judge Canter's Recommended Order, which was adopted "in its entirety" by the South Florida Water Management District, and the following is therefore restated and adopted herein:

155. The public interest test was created in 1985 and first codified in section 403.918. When the ERP Program was adopted in 1993, the public interest test was transferred to section 373.414(1). The "whereas" clauses in the law as it appeared in

chapter 93-213, Laws of Florida, have environmental themes.

156. In section 373.414(1), the Legislature added a preamble stating that the test is to be “part of an applicant’s demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district.” § 373.414(1), Fla. Stat. (1993). The overall objectives of a district relate to water resources, their management and protection for flood control, water supply, and maintaining environmental quality. *See* § 373.016(3), Fla. Stat. (2017).

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

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

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

(a) An environmental hazard to public health or safety or improvement to public health or safety with respect to

environmental issues. Each applicant must identify potential environmental public health or safety issues resulting from their project.

* * *

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

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

161. Although the case of *Avatar Development Corporation v. State*, 723 So. 2d 199, 207 (Fla. 1998), involved a challenge to DEP’s authority to enforce permit conditions, the opinion of the Supreme Court is important for this discussion. In *Avatar*, the appellant argued that DEP’s authority to enforce permit conditions pursuant to section 403.161 was an unconstitutional delegation of legislative authority because DEP was not adequately guided by statute. In holding that the Legislature had provided sufficient guidance for the exercise of DEP’s authority, the Court pointed to the “specific policies” in section 403.021. Those policies relate exclusively to environmental matters. The Court noted that the public interest test in section 373.414 allows DEP to consider public health, safety, and welfare, but explained that DEP’s authority is limited to “specific legislative intent” and gave examples of this intent in provisions of chapter 403 that articulate specific environmental objectives.

162. In *Avatar*, the Supreme Court determined that, despite the expansive connotation that may be

associated with “public health, safety, and welfare,” these words must be given a limited meaning in section 373.414 in order for the Legislature’s delegation of authority to be constitutional. The delegation is constitutional because DEP’s authority (and the authority of the water management districts) is limited to environmental matters for which there is legislative guidance in the statutes. There are no “specific policies” and there is no “specific legislative intent” in chapters 373 or 403 to guide DEP or the water management districts in making regulatory decisions based on non-environmental factors associated with public health, safety, and welfare.

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

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

R.O. at 49, ¶ 116. The District adopted the Recommended Order in toto, and the Fourth District Court affirmed per curiam, without

opinion. *Fla. Wildlife Fed. v. So. Fla. Water Mgmt. Dist.*, 902 So. 2d 812 (Fla. 4th DCA 2005).^[6]

Based on the Recommended and Final Orders entered in *All Aboard Florida*, and the cases cited therein, it is concluded that hurricane evacuation and traffic incident management are non-environmental factors that are not appropriate factors for determining whether the Project is “clearly in the public interest.”

172. As set forth in the Findings of Fact, the only remaining element of the Project having any benefit to the environment is the reduction of the impairment parameters for which Spruce Creek is designated as impaired. All other factors are neutral, or are not environmental factors.

173. Discharges to the Unnamed Canal (which is not designated as impaired) will flow downstream to the point at which Spruce Creek is designated as impaired. The “positive” factor of a post-development reduction of the concentration of the Spruce Creek impairment parameters to the Unnamed Canal is one required by the District’s water quality rules. There was no competent, substantial evidence to demonstrate to what extent, or whether, the waters of Spruce Creek would experience any measurable reduction in concentrations of the impairment parameters, only that the post-development concentration of those parameters from the stormwater management system to the receiving waters of the Unnamed Canal would be reduced.

⁶ The undersigned recognizes the conclusion in *Goldberg v. South Florida Water Management District*, Case No. 16-1018 (Fla. DOAH Nov. 8, 2016; Fla. SFWMD Jan. 10, 2017), that non-environmental safety measures could be considered in the public interest balancing test. Judge Canter’s well-reasoned and subsequently issued analysis calls that into question. However, even without the traffic safety measures discussed in *Goldberg*, the applicant for that ERP exceeded the bare minimum standards required by rule in order to meet the public interest test, including providing water quality enhancement projects such as the installation of baffle boxes, reestablishment of oxbows in the North Fork of the St. Lucie River, and dredging of unsuitable sediments in a tributary; providing greater mitigation to provide habitat and improve water quality than was required; and providing enhanced public recreational access to the river. There are no similar “extra” environmental enhancement measures not already required by rule provided by DOT in this case.

174. How the public interest scale is to be balanced is not defined. It is not a mathematical formula. To the extent it includes a qualitative element, the sole remaining “environmental” element provided to meet the “public interest” test is not compelling. The reduction in the impairment parameters were those required by the District’s water quality standards.⁷ In complying with rule 62-330.301(2), DOT has done the bare minimum to qualify for the Permit. That element of simple regulatory compliance is not sufficient to establish that the Project is “clearly in the public interest.”⁸

Ultimate Conclusion

175. But for the public interest test, DOT established that the Project meets all relevant ERP criteria. If this case did not involve an OFW, and if the standard for issuance was whether the Project is not contrary to the public interest, the undersigned would have no hesitation in recommending issuance of the Permit. However, this case *does* involve an OFW, and the standard is whether the Project is clearly in the public interest. Based on the Findings of Fact as to each element of the public interest test set forth herein, and applying the public interest standards in section 373.414(1)(a), rule 62-330.302(1), and A.H. Vol. I, sections 10.2.3.1 through 10.2.3.7., it is concluded that reasonable assurances have not been provided that the activities to be authorized by the Permit are clearly in the public interest.⁹ Thus, application for Environmental Resource Permit No. 103479-2 should be denied.

⁷ As suggested by Mr. Drauer, simple compliance with regulatory requirements warrants consideration as a neutral factor in a “public interest” determination.

⁸ It stands to reason that if simple regulatory compliance is, *ipso facto*, sufficient to establish that a proposed ERP is “clearly in the public interest,” the public interest test is superfluous, having no real effect on whether a permit is to be issued or denied. Caselaw suggests that is not the intent of the public interest test over the years of its application by DEP, the water management districts, and the courts.

⁹ A good portion of the evidence regarding the “neutral” nature of elements deemed positive in the TSR was elicited during Petitioner’s examination of witnesses. Thus, the result reached herein is a measure of Petitioners meeting their burden of ultimate persuasion to establish their case in opposition to the Permit through the presentation of competent and substantial evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that the St. Johns River Water Management District enter a final order denying the application in Environmental Resource Permit No. 103479-2 for a new interchange at Pioneer Trail and Interstate Highway 95.

DONE AND ENTERED this 29th day of January, 2024, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
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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.