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,

v.

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

Respondents.
_____/

DOAH No. 23-1512

SJRWMD F.O.R. No. 2023-06

PETITIONERS' EXCEPTIONS TO (AMENDED) RECOMMENDED ORDER

Pursuant to Rule 28-106.217, Florida Administrative Code, and Section 120.57, Florida Statutes, Petitioners file with the Division of Administrative Hearings these Exceptions to the (Amended) Recommended Order entered by the Honorable Administrative Law Judge E. Gary Early ("ALJ") on January 29, 2024. The same abbreviation of terms as Petitioners used in their Proposed Recommended Order will be used here, along with the abbreviation "RO" for the Amended Recommended Order.

Exceptions

Exception No. 1: Exhibits 42, 296, 1095, 1114, 1138-1150, 1201-1203, and all agency official Project files from their website(s) should be included in the record.

Petitioners' Exhibit 296 was accepted into evidence [RO, P.6, footnote], and Petitioners believed it was provided and uploaded appropriately, but if need be, can be reprovided.

Petitioners' Exhibits 42, 1095, and 1114 were proffered and again acknowledged by the ALJ [RO, P.6, footnote], but it is believed to be that their size may have caused an issue with uploading into the e-document portal. They were, however, also emailed to all parties and the Court prior to the end of the Final Hearing, and can be sent again as needed. Petitioners' Exhibits 1138-1150 (which come from the FDOT website, www.cflroads.com/project/436292-1), were also quite large, but were emailed to parties and explicitly requested to be proffered [T:V.5 P.1856], but if the portal was unable to accept them because of size limitations, Petitioners still provided them via email and pointed out they were agency documents found on their own website, and the Court did mention that it would be able to admit such documents "including all documents contained in the District's e-regulatory or e-permit system." [T:V.3 P.877 L.9-10].

Petitioners' Expert Dr. Barile also pointed out that the access to documents through the FDOT and SJRWMD websites was very difficult, confirming Petitioners' complaint of being unduly burdened with providing documents that should have been their responsibility to provide to the Court [T:V.3 P.1057-1058]. This, along with Petitioners' Motion for Extension of Time to File Exhibits, is partially why Petitioners believe that greater leeway needs to be given in accepting any documents which may have been submitted after the originally ordered deadline, or to simply accept documents as links to the websites themselves. This includes documents 1201, 1202, and 1203, which are documents found on the SJRWMD Project website (permitting.sjrwmd.com/ep/#/prmtInfo?curId=&hdr=1&usrId=0&offclId=103479&seqNo=2) and were emailed to all parties prior to the end of the Final Hearing and uploaded into the ALJ document portal, but when Petitioners tried to at least proffer them, they were erroneously prevented [T:V.5 P.1856].

<u>Exception No. 2</u>: **The Finding of Fact in RO Paragraph #22 that "In 2005, the Interchange was added to the Transportation Organization list of projects" incorrectly identifies and gives unnecessary credence to the timeline of the Project, as it was not officially added until 2013.**

Petitioners' Exhibit 146, slide 13, indicates that it was not until August 2013 when the Project was added to the "LRTP" (Long Range Transportation Plan) after being pushed through by a few local officials. Petitioners' witness and Volusia County Chair Jeff Brower confirmed that "it had been declined for some years before it made it to the list. And well, you're looking at 2013 there." [T:V.1 P.186]

<u>Exception No. 3</u>: **The Finding of Fact in RO Paragraph #27 that the Partial Cloverleaf design alternative for the Project had "the highest public support/preference" and "impacts [to wetlands] were minimized to the extent practicable" are incorrect based on evidence and testimony.**

As evidenced by Petitioners' Exhibit 1115 (and Pet. Ex. 42, among others), the comments from the majority of people oppose this Project entirely, and therefore the actual "preferred alternative" is the "**No Build**" scenario. Second, several of Petitioners' experts testified that the impacts were not minimized to the extent practicable with the design of this Project, most notably regarding the unnecessary "road stub-outs." For instance, when asked if dead-end roads (like the stub-outs) help with transportation connectivity, Petitioners' expert Mr. Collins stated the obvious: "*Never*" [T:V.1 P.311 L.19]. **Dead-end roads**, like the two road stub-outs presented in this Project, **do not** and **can not help with evacuation**, regional connectivity, on/off ramping between roads, traffic, or any other public transportation benefit [T:V.1 P.317].

When asked about any unnecessary impact to wetlands, Petitioners' expert Dr. Anderson pointed out: "*it seems odd to me that there's this little roadway {i.e., road stub-out in the northeast quadrant} . . . it seems like that little roadway heading to the north is right about where the canal -- it's just immediately east of where the canal flows underneath Pioneer Trail, and it seems like the roadway would be immediately adjacent to where the Outstanding Florida Waterways designation for the unnamed canal begins. So that little piece is certainly concerning*" [T:V.2 P.390-391, Pet. Ex. 1062]. She confirmed that the road impacts to wetlands are "unnecessary" [T:V.2 P.393]. She also opined on the northwest stub-out road: "*there's a similar interesting little road over on the northwest quadrant that also seems, at least at the moment, unnecessary*" [T:V.2 P.392].

Petitioners' expert Dr. Barile also testified credibly that the Project road stub-outs would create unnecessary wetland impacts, saying: "*I don't believe that that's in the interest of the state of Florida to be adding any additional destruction of wetlands that's beyond the scope of providing an interchange between I-95 and Pioneer Trail*" [T:V.3 P.1049].

It is clear that practicable alternatives to lessening impact, like removing the road stub-outs, adding a nature over/underpass, elevating any of the roads on pilings, buying additional land for Spruce Creek Preserve, choosing a "non-cloverleaf" (*i.e.* Diamond) pattern in the northeast quadrant, or simply improving other connectivity traffic patterns (like extending South Williamson Blvd.) were never seriously considered for this Project, and when a Project is in an Outstanding Florida Waterway ("OFW"), reducing impacts is a must, as the ALJ agreed.

<u>Exception No. 4</u>: Granting of three Motions in Limine against the Petitioners unduly prejudiced Petitioners and their ability to introduce evidence and provide expert testimony.

Petitioners' witnesses were restricted from talking about Phosphorous documents which came in prohibitively late after their deposition (which they wanted to talk more about), but felt they could have testified to that if given a chance [T:V.3 P.1061-1062 for Dr. Barile, or T:V.2 P.490-492 for Dr. Anderson, for examples]. Also, their testimony was restricted by a Motion in Limine which prevented them from discussing upcoming changes to state stormwater rules (to which Petitioners objected). Some documents on this were proffered, but Petitioners again want to say that they agree that the current rules are what the ALJ should rule on, but ALSO that in terms of reasonable assurance, which is a criteria for permit issuance, that the fact that state agencies themselves are saying the current rules are not working and they are about to update them is an important factor to consider, if for no other reason than that we can all discuss *where* those deficiencies lie, and see if those are being used for large Projects like this one, regardless of whether the rules actually change or not.

Petitioners' expert Mr. Collins stated that if there are any deficiencies with traffic to the north, "*The need is not satisfied with this project*" [T:V.1 P.278 L.20]. Some of Mr. Collins' testimony was proffered as to "need" because of another granted Motion in Limine; Petitioners renew their position that the ruling was erroneous because "need" is inherently part of the Environmental Resource Permit ("ERP") public interest criteria for OFWs. Without considering it, one cannot truly minimize impacts to greatest extent practicable if one does not know what is the necessity of a project.

Although Petitioners only had time to formulate a single response to the three Motions in Limine as all were filed right before the Final Hearing, Petitioners believe that NONE of them should have been granted. The reasons for this include the lack of timeliness in their filing (some less than a week before our witnesses' testimony), and also because it excluded a full view of the

science and facts (and state *agency* efforts to update Rules) as they exist in Florida today. Furthermore, the "public interest test" criteria for OFW ERP applications mentions several criteria, including safety, health, and future maintenance, which are intricately connected with need and cost. And as a road project that also requires federal permits, those documents and that testimony should not have received a blanket rejection, as if there is no "need" for a Project, or if the federal government is finding fault in it, those themselves are facts which question the state agencies doing their due diligence properly, and a road being built for no purpose benefits no one, clearly. Traffic is also relevant to a road project for obvious reasons, but that falls under a broad scope of "need," but that should not matter. Also, Petitioners feel that Respondents' last-minute Motions in Limine were more broadly an attempt to hide *very relevant* information which could have been found in those documents, as it seems they knew they had made mistakes which they wanted to cover up. Fortunately, some of those glaring errors were still able to be entered into evidence, but Petitioners wish to state that there would have been many more (some can be found in the Proffer, but there is more).

<u>Exception No. 5</u>: The Finding of Fact in RO Paragraph #38 that "the stormwater ponds create mathematically more storage capacity than currently exists on the Project site" is unclear in its assessment of Project site, and erroneously concludes that storage will increase when current site holding capacity numbers were not assessed. Therefore, the conclusion in RO Paragraph #133 about the stormwater system working well is also faulty.

In a riveting presentation regarding the Atlantic Coastal Ridge along the eastern edge of this Project and how it was ignored by permit reviewers, Petitioners' expert witness Dr. J. Cho explained that Spruce Creek and the water within it cannot easily cross it due to its raised

elevation, which gives rise to the shape of the Creek and its tributaries in that area [T:V.2 P.525-529]. This oversight can lead to increased flooding in the low-lying areas:

> "*If you increase impervious surfaces and then remove wetland from that particular {Project} area, if you have a rainfall, the water will accumulate because . . . the flow into . . . the Halifax River is going to be impeded by the ridges -- ridge and the high elevation. So where is it going to flow into? Possibly, into the existing residential area that you can see; right? So it looks like a very small area, but* ***it's very critical*** *because that wetland ~~pulls~~ holds {transcription (accent) correction} water, and it ~~pulls~~ holds the sediment; right? So the roots of the plants will ~~pull~~ hold the sediment, and the water is retained within the wetland, also, in the body of the plants. That's* ***an enormous amount of water*** *that it can naturally prevent . . . this area from flooding. . . you need to look at the elevation. You need to look at the terrain of that area and the location of the project.*" [T:V.2 P.526-527 L.25-18 (emphases added), Pet. Ex. 1046, slides 22-26]. Please **see her PowerPoint slide 26** for emphasis on the visual impact of the funneling of flood water effect.

When asked if she believes that the mitigation proposed would offset potential flooding in and around the Project area, Dr. Cho said "No" [T:V.2 P.529 L.7]. She also stated a fact that one acre of wetland can hold between 330,000 and 1.5 million gallons of water [T:V.2 P.555].

Based on the soil types on site, Dr. Cho persuasively testified that there will be a higher chance of flooding, explaining: "*The soil type, it's so compacted, it doesn't really infiltrate water very easily. So that area per se is going to be very prone to flooding because the water is not going to be infiltrating*" [T:V.2 P.529 L.21-24]. She confirmed that this Project will exacerbate the possible hazards from hurricanes and flooding [T:V.2 P.530, later P.589].

Exception No. 6: **The Finding of Fact in RO Paragraph #39 that the floodplain compensations ponds "will . . . provide compensating treatment to offset the impacts" makes an erroneous conclusion that it "will" happen, when it is simply proposed to happen, and that those proposals neglect the pre-build and unique topography of Project site conditions. Therefore, the conclusion in RO Paragraph #140 about the stormwater system reducing nutrient load adequately is also faulty, in part because Petitioners were unable to talk about it fully due to it being wrongfully disallowed by the ALJ.**

To reduce redundancy, Petitioners wish to incorporate all supporting materials found in Exception No. 4 and 5 above into this response, and explicitly state that another important function of wetlands is not simply that they *hold* water, but that they *release it* in times of drought (which retention ponds cannot) [T:V.2 P.556]. This complimentary function has been completely overlooked in this Permit.

Exception No. 7: **The Finding of Fact in RO Paragraph #49 that the Interconnected Channel and Pond Routing model is "accepted and reliable" is based on no credible evidence and is contrary to expert testimony provided, and simply stating it is "accepted" as a reason itself to "accept" it is circular logic. RO Paragraph #59 is also wrong in its assumption that it is "reasonably expected to be capable of performing and functioning as designed."**

Petitioners' expert Dr. Barile persuasively testified that the stormwater model used for the Project was flawed: "*So part of the issue is what are the assumptions behind the predictive models of performance of a stormwater wet retention pond. . . I gave you an example of one; and that is the amount of rainfall that can be assimilated by a wet detention pond, where you can, actually, do compensatory treatment. And, so, my assertion is that when you have very high*

rainfall events that exceed what a wet detention pond is designed for, then, all of a sudden, you just don't get the performance, in terms of phosphorus removal, that would be predicted" [T:V.3 P.1013-1014, underline added].

Pet. Ex. 1038, 1041, 1043, 1044, and 1125 show the changes in Rainfall (both locally and beyond) according to scientific studies and agency data. Overall, Dr. Barile's testimony made clear that larger and more frequent rainfall events can be expected, and that old models for stormwater calculations will no longer be sufficient [T:V.3 P.1018-1022]. This includes the extreme event that was Hurricane Ian in 2022, which resulted in Volusia County receiving more than 20" of rain in a single month [Pet. Ex. 1125, T:V.3 P.1039, P.1044]. It was confirmed by Mr. Vavra that the model he is using does not consider existing ponds to be directly connected impervious areas ("DCIA") [T:V.1 P.1214]; but as pointed out by Dr. Cho, that is not a good assumption, as ponds *do* end up flowing into into other waterbodies quite often.

Further discussion by Petitioners' experts of the models' inefficacy and how that is leading to a state-initiated push to change laws and regulations to fix the problem was also wrongly prevented due to a Motion in Limine, and as stated earlier, is an error that should be overturned.

Exception No. 8: **The Finding of Fact in RO Paragraph #62 that the "Project will not contribute to iron, copper, or Enterococci" ignores the fact that roads and vehicles can and do expel almost all metal pollutants, and is based at least partially on Petitioners' experts being wrongfully denied the chance to counter.**

Admitted documents which mention the "calculations" done by Respondents' experts were not provided to Petitioners' before their depositions, and despite Petitioners stating that our experts had opinions on these new documents experts and should be allowed to testify to them,

were prevented by the ALJ from doing so. Petitioners contend that their expert witnesses were unfairly barred from elaborating on documents which came in after their deposition and for which they *could not* be redeposed based on the rules of Pre-Hearing Order (saying Petitioners needed to disclose a new opinion 10 days before the Hearing and be redeposed no less than 7 days before the Hearing, which they could not because they were still formulating them because it takes a reasonable about of time (at least a week) to formulate a new opinion *and share it* with their qualified representative, and that adequate time was not provided by the Respondents, as Petitioners' qualified representative only got (and discussed, under their witness depositions) the documents *less than two weeks* before the Final Hearing. The applies most significantly to Joint Exhibit 8, for which Dr. Anderson, Dr. Cho, and Dr. Barile all had additional analysis. Petitioners do not agree that they made any "mistake" – the "error" came from Respondents, in that they chose to wait until the last minute to share their documents, and may not have at all ahead of time, had Petitioners not insisted they be allowed to depose Respondents' (nine!) witnesses, which in general were not made available until the very last week possible, and Respondents' knew that burden to take all nine depositions was being placed on a single, volunteer qualified representative, who could not reasonably be expected to have a turn-around time on document response during that week to be anything less than a week.

Notably, attempts to talk about calculations were erroneously "excluded," as evidenced when the ALJ said during the testimony of Dr. Cho: "I think we're getting now into the calculations, and that's been previously excluded" [T:V.2 P.605].

Exception No. 9: **The Finding of Fact in RO Paragraph #63 that "maintenance" will be adequate and able to be performed by FDOT lacks basis in the evidence, and indeed Petitioners' experts testified to it being lacking in the Permit.**

When the TSR writes [Joint Ex. 2, P.3] "**Operation and Maintenance:** The applicant FDOT, proposes to operate and maintain the surface water management system, which meets the requirements of Section 12.3.1, A.H. Vol I." – This is **not true** based on documents which show that FDOT plans to transfer some maintenance responsibility to either Volusia County and/or local municipalities [Pet. Ex. 278 and T:V.4 P.1099-1100]. Notably, the top elected official in Volusia County, Chairman Jeff Brower, stated that he believes (and maps he has seen have shown) that part of the Project stormwater infrastructure is expected to be maintained by the County, but that "We have a budget for maintenance and . . . {but} we can't keep up with it now, and we keep adding to it. . . this looks like it goes far beyond mowing grass" [T:V1 P.181].

Dr. Anderson testified that "natural" systems wherein the plants recycle the Phosphorous are preferable to yearly (or more) maintenance by humans on "constructed" systems, like many stormwater ponds [T:V.2 P.400]. Dr. Anderson also educated the Court on negative effects of deforestation, including on water quality, flooding, and temperature [T:V.2 P.452-454], and how Volusia County is facing a lot of clear-cutting of its forests. She testified that she did not see any indication of a planting plan or other natural ecosystem maintenance for the future of this Project [T:V.2 P.472-473], in actuality because it does not exist.

Dr. Cho also stated "I didn't see any kind of detailed documentation or information how these proposed ponds will be maintained nor what will be planted" [T:V.2 P.562 L.22-24], and she went on to say how it it is simply maintained as mowed grass to the ponds' edge, that that is unhealthy and unsustainable for the ecosystem [T:V.2 P.562-565].

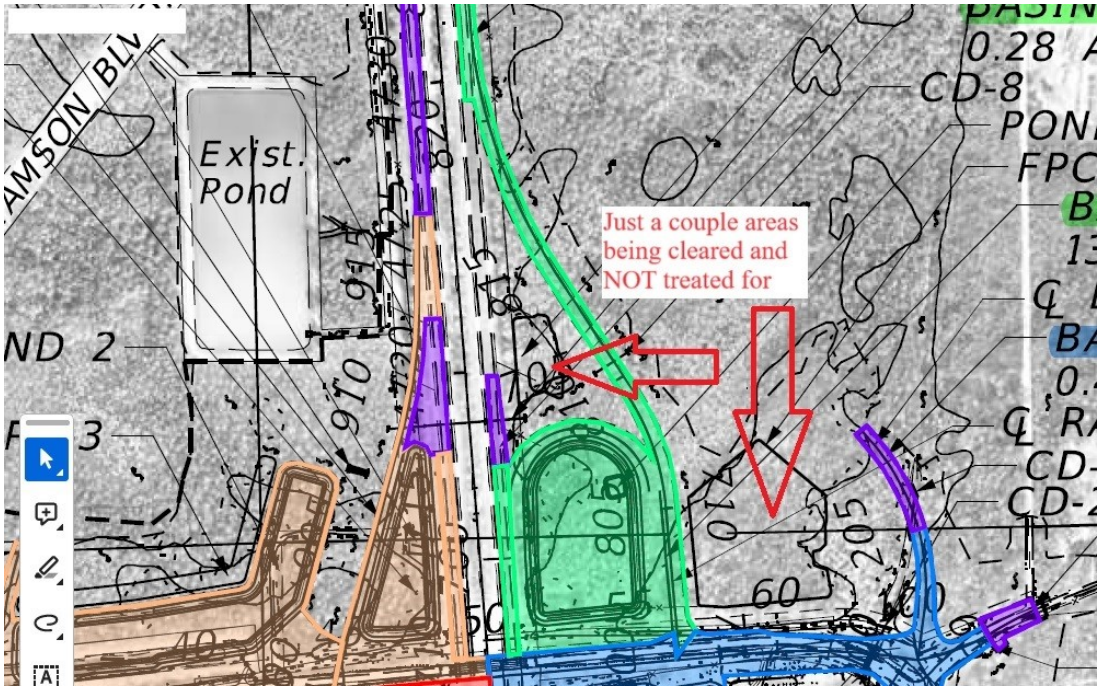
<u>Exception No. 10</u>: **The Finding of Fact in RO Paragraph #65 that the Harper Method model is "reliable" is based on no credible evidence and is contrary to expert testimony provided. RO Paragraph #69 erroneously concludes that the stormwater**

management system "will provide greater removal of phosphorous than currently exists" or that it will result in a "net improvement of water quality" because the model does not take into account existing wetlands benefits. RO Paragraph #70 and #73 also incorrectly justifies the BMP Trains model as valid simply for being "commonly used and accepted" by others when testimony and current water problems in Florida undermine that validity.

The three main problems with Mr. Vavra's calculations are as follows: (a) his model completely ignores and does not treat any of areas *not* colored in his map; (b) the model does not give any positive value or weight to existing wetlands; and (c) the calculations utilize outdated numbers, including too low rainfall yearly averages and nutrient values for Spruce Creek from many years ago. Going through those one by one:

(a) When asked about the areas in between the "color-coded" parts of his map showing the drainage treatment basins on the Project site [Joint Ex. 8 and DOT 18], he indicated that for the "non-colored" areas that will be cleared (in between or adjacent to colored areas), they are "not changing the land use" so he expects them to revert back to their "natural state" after being completely cleared [T:V.4 P.1205-1207, P.1174]. He did confirm that only the colored areas represent the treatment areas, so any of non-colored areas seem to be unaccounted for, saying "*I think I stated before that all these colors represent where they are located on the drainage maps, pre- and post*" [T:V.4 P.1173]. Mr. Miracle was asked about this as well, and confirmed: "*Since it's not colored, it's not included in the calculations*" [T:V.5 P.1679]. As Mr. Vavra admitted to not being a scientist, so it should be pointed out that his assumption is a BAD assumption – destroying wetlands, as will be done for instance in *at least* the two areas indicated above [red arrows and text added to Joint Ex. 8], will release Phosphorous and greatly disturb the ecosystem functions working there. Petitioners' experts confirmed these wetland facts. Besides that, there

is *zero* indication that the FDOT will attempt to recreate wetlands on site (hence, why they are planning to mitigate for them).



(b) As Mr. Vavra admitted in his testimony, none of his calculations included the effects of disturbing and indeed destroying wetlands or forests as part of land clearing, or account for the benefits and ability of wetlands to treat Phosphorous [T:V.4 P.1206-1207 and P.1191].

(c) He did verify that that the residence time for his model is 358 days, meaning the desired Phosphorous treatment levels will not be reached for nearly a year [T:V.4 P.1192-1195]. His model also uses an old rainfall average for the area of 51 inches [Joint Ex. 8], which Volusia County exceeded last year by a good 10 inches, and is expected to stay higher according to Petitioners' experts like Dr. Barile. It seems obvious that the rainfall values used in the modeling must make a difference in the result calculated.

When the ALJ says in Paragraph #73 that the compensating treatment will "offset" the impacts, that does not and should not mean "equally offset."

Furthermore, as previously stated, Petitioners' experts were wrongfully barred from pointing out specific problems with the calculations and models, which is reversible error.

Exception No. 11: **The Finding of Fact in RO Paragraph #74 that Petitioners "did not perform any calculations to demonstrate non-compliance" is patently false; the truth is that Petitioners' were *prevented* (wrongfully) from testifying (thoroughly) to this by the Court.**

As admitted by the ALJ near the end of Dr. Anderson's testimony "All right. I think that . . . will give the reviewing entity enough information to be able to determine if I erred in excluding your testimony on that or not" [T:V.2 P.492]. Petitioners' expert had begun to proffer her testimony on calculations on the previous few pages, but as pointed out, was cut off. Drs. Cho [T:V.2 P.520 and elsewhere] and Barile [T:V.3 P.1061 and elsewhere] were likewise restricted in presenting calculations or additional documents, and this fundamentally and unnecessarily restricted the ability of Petitioners to point out even more flaws in water quality assumptions and calculations made by the Respondents.

Exception No. 12: **The Finding of Fact in RO Paragraph #84 and #85 that UMAM scores calculated herein are correct is wrong because of testimony (and lack of testimony from Respondents) to indicate sufficient analysis was not done nor verified.**

According to the Environmental Report [Joint Ex. 23] submitted with the Application, all of the initial wetland scorings were done by FDOT witness Dinardo, who did not testify to verify these values. Below is an example, from *Id.* P.108, showing his name, and the assessment date from 2019:

PART II – Quantification of Assessment Area (impact or mitigation)
(See Sections 62-345.500 and .600, F.A.C.)

Site/Project Name	Application Number	Assessment Area Name or Number
I-95 Interchange at Pioneer Trail		Wetland 1 & 10
Impact or Mitigation	**Assessment conducted by:**	**Assessment date:**
Direct Impact	M. Dinardo	5/9/2019

Notably, the FDOT did n*ot* call Michael Dinardo, a key witness for their side, and one of the lead creators of many of the wetland documents found in the Permit file, including explicitly seeing his name as the first listed Consultant on the TSR [Joint Ex. 2, P.1], the one who paid the Permit Fee in the Application [Joint Ex. 3, P.36], and his name being the only one listed on the Environmental Resource Permitting Document for wetland assessment [Joint Ex. 23, P.107, P.108, P.109, etc.]. He did undergo a Deposition pre-hearing, in which Petitioners discovered connections and inconsistencies in his work. Petitioners believe such a key creator of these documents not being called speaks for itself, and suggests that the FDOT was trying to hide something they did not want the Court to hear.

Additionally, Mr. Justin Dahl admitted that he "might not have" visited "Wetland Z (or N)," located almost a mile north of the Interchange, and could recall where it was even located [T:V.5 P.1765]. He also could not explain why there was no distinction being made to the bifurcated "Wetland 6" areas on the map, meaning the UMAM score of the one *touching* I-95 was the same as the ones (to the east, where the road stub-out is) *not* touching any road [T:V.5 P.1692]. A simple review of the wetland evaluation sheet [Joint Ex. 28] shows isolated wetlands were not being mitigated for, and that the northeastern road stub-out, in conjuction with the impacts around Pioneer Trail, create three sides of a "donut" around (off-site) wetlands which are *not* being mitigated for [Pet. Ex. 56]. Those wetlands are similarly expected to suffer from that kind of isolation.

<u>Exception No. 13</u>: The Finding of Fact in RO Paragraph #87 that mitigation in Farmton Mitigation Bank is "high quality" and "protected in perpetuity" cannot be concluded to be true because the exact location of mitigation is not known, and Farmton and other so-called "protected areas" have been sold off or redesignated for development in recent years.

As witness Shadix testified to, "as far as it [Farmton] being forever, that's a no because there was a release of a conservation easement in the Farmton Mitigation Bank by St. Johns River Management District" [T:V.2 P.674]. At one point, the Bank was over 50,000 acres, but today is closer to 20,000 acres, with most of the rest being no slated for development. Also, it cannot be assumed that every single acre of property at Farmton North is "high quality," so at some point it is reasonable to assume that some of the mitigation credits being sold will not actually protect land of equal value to what is being lost.

<u>Exception No. 14</u>: The Finding of Fact in RO Paragraph #88 that "the proposed mitigation is adequate" because it lies within the Halifax River basin is flawed, because it ignores the intent of the rule, the hydrology of the area, and the evidence and testimonies provided.

PART II – Quantification of Assessment Area (impact or mitigation)
(See Sections 62-345.500 and .600, F.A.C.)

Site/Project Name	Application Number	Assessment Area Name or Number
I-95 Interchange at Pioneer Trail		Wetland 1 & 10
Impact or Mitigation	**Assessment conducted by:**	**Assessment date:**
Direct Impact	M. Dinardo	5/9/2019

Petitioners acknowledge and thank the ALJ for considering their arguments that the mitigation is not in the same watershed (as mentioned in RO Paragraph #85) and therefore is not providing benefits to Spruce Creek, but disagree that this can only be addressed in a different forum.

The Farmton Mitigation Bank has (at least) two parts, and the "Farmton North" part is only partially contained in the Basin 17, the Halifax super-basin [SJRWMD Ex. 9]. Farmton is also a "DRI" or "Development of Regional Impact," using parts of the Farmton property (which a few years ago were removed from the once-larger 50,000+ acre wetland mitigation bank) to develop thousands of acres into residential and commercial units. Ironically, this Project states as one of its *explicit* purposes that it will *increase* the likelihood that the pristine habitat contiguous with what is left of the mitigation bank gets developed as stated in its Permit Application: "*Additionally, the proposed interchange is anticipated to support existing and approved economic developments, including three DRI's; Farmton, Restoration, and Pavilion at Port Orange*" [Joint Ex. 3, P.34, underline added].

The other proposed mitigation area, Lake Swamp Mitigation Bank, is located entirely in Flagler County, outside of Volusia County, whereas the project is located in the southern side of Volusia, roughly 20+ miles away, being separated by several major cities including Daytona Beach [SJRWMD Ex. 9]. It is not hydrologically connected to Spruce Creek [T:V.2 P.519-521, P.418, and P.463].

Dr. Anderson credibly testified that the mitigation banks involved in this Project would not effectively offset its impacts, saying "*the Lake Swamp Mitigation Bank might have equivalent functions, but they aren't functions that are going to provide any benefit to Spruce Creek because this mitigation bank is nowhere near the basin for Spruce Creek. So it might be doing some, you know, nutrient mitigation for some -- you know, for Tomoka or some other river that's -- that's flowing into the northern part of the Halifax, but it's not -- it's not providing any benefit to Spruce Creek. The Farmton North Mitigation Bank, you know, a portion of that may be part of the headwaters of one of the tributaries of Spruce Creek, but it's -- you know, it's*

upstream, upgradient from the project site. So even though, again, it might be providing some benefits to the Spruce Creek Basin or to Spruce Creek itself, it's not doing anything to mitigate, you know, the impacts of the project because the project is downstream from it" [T:V.2 P.414-415, underline added].

Dr. Anderson persuasively testified that Lake Swamp is too far away (with several urban centers between it and Spruce Creek) and Farmton North too far upriver to mitigate any harmful impacts caused by this Project in this part of Spruce Creek. She elaborated that "*Lake Swamp Mitigation Bank is, physically, disconnected. . . . it's not in the Spruce Creek Basin. . . biologically and physically, it is disconnected from the Spruce Creek Basin*" [T:V.2 P.418, and also P.463].

Importantly, regarding her opinion on the ineffectiveness of the proposed mitigation banks, Dr. Cho assessed: "*the Halifax River Basin here, . . . I still have a question that -- that the FDEP used the same entire watershed using eight-digit hydrologic unit code -- right? -- HUC, that includes from Daytona Beach to St. Augustine. So that is the Halifax River Basin for mitigation purpose. But when it is discussing about the impact of the project, <u>they were using a different scale of watershed</u>, which is a subwatershed. So Spruce Creek watershed, which is a sub-basin, or subwatershed, and that is HUC 12. It should be HUC 12 because that is a tributary to Halifax River. . . But as a mitigation, when you talk about the impact of the project per se, it doesn't even acknowledge that it has a direct impact on Spruce Creek; but when you talk about the mitigation impact, you're using in a different watershed, that is, Halifax River watershed, using HUC 8 versus you're using HUC 12 when you talk about mitigation. So my opinion is . . . <u>don't you have to use the same level of watershed when you talk about impact that this project would cause versus the mitigating impact?</u>*" [T:V.2 P.519-521, underline added; ; later P.583-

584]. Dr. Cho's view should be weighed strongly as she is possibly *the* leading scientific expert on the Halifax River watershed, authoring or editing several books and publications on it [Pet. Ex. 1070].

Indeed, the ERP Applicant Handbook rules *do* say that the impact must be in the same watershed as the mitigation, but that is not happening here. Regarding Mitigation Service Areas, the rule says "Can reasonably be expected to offset specific types of wetland impacts within a specific geographic area. . ." [Florida Statutes 373.4136(a)(5)] But in this case, NONE of the Spruce Creek impacts are being offset by the Lake Swamp Mitigation Bank, so the Project mitigation is failing to follow the statute. As put elegantly by Dr. Cho's expert opinion, the mitigation is too far away to offset the Project's impacts: "*you can have mitigation in the broader Halifax River Basin, but then you don't acknowledge even the impact within the Spruce Creek. And, for me, that doesn't make too much of sense*" [T:V.2 P.522]. She also confirmed that the off-site mitigation is inadequate to offset the water quality impact to Spruce Creek.

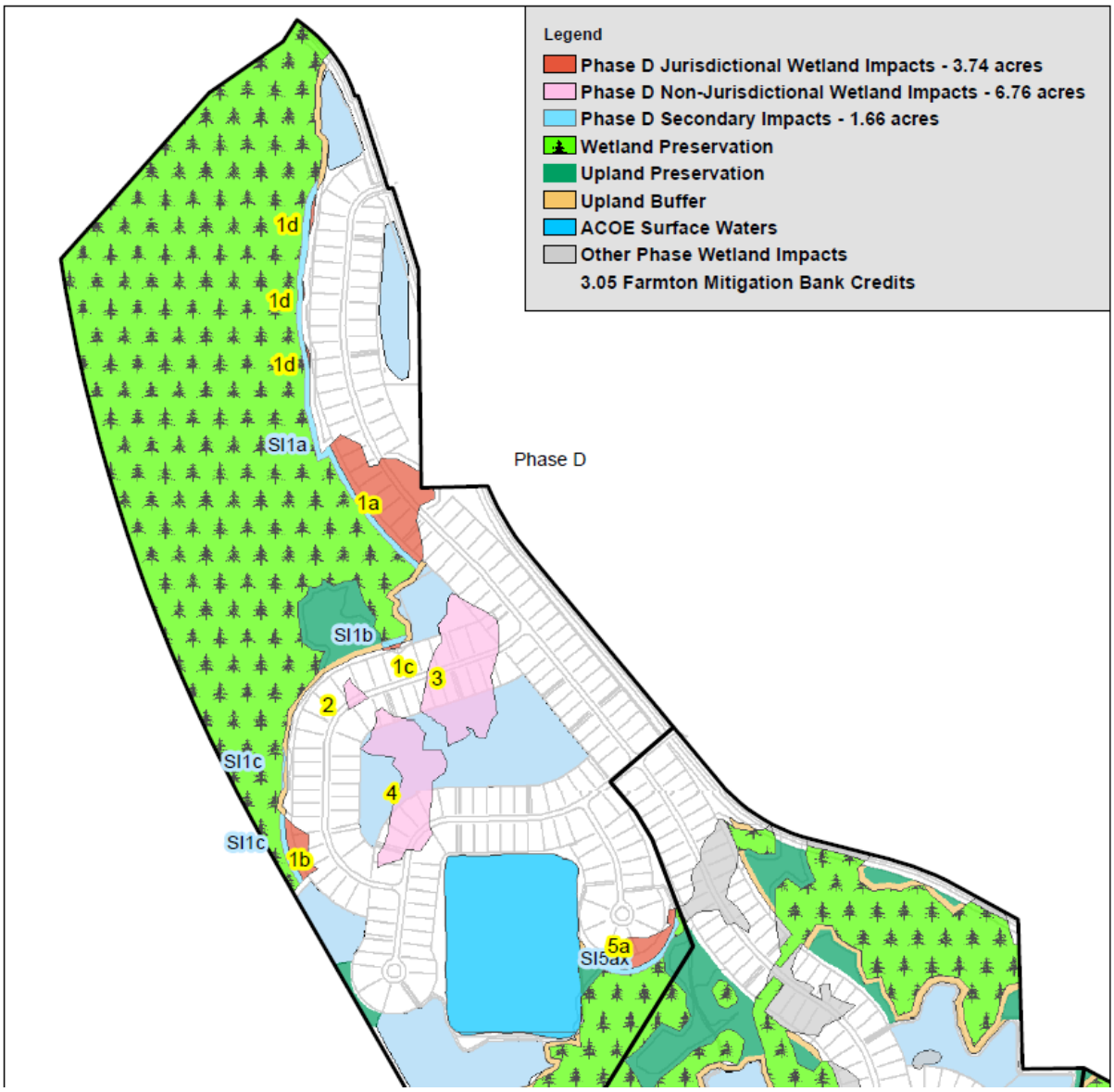
Petitioners wish to point out a few selections from the SJRWMD Basin Management Plan Report, Pet. Ex. 1088, which Petitioners believe is in evidence based on the ALJ saying "1088 through 1092" [T:V.3 P.964] were admitted, although the RO accidentally omits it for some reason on RO Page 6. Firstly, it explicitly shows that Halifax is not really a "basin" by itself, but instead a planning unit, made up of 33 basins: "*The **Halifax River** planning unit includes portions of Flagler and Volusia counties along the northeast Florida coast and encompasses an area of nearly 208,000 acres, within 33 basins. Major drainage into the estuary comes from Bulow Creek, the Tomoka River, and Spruce Creek, and their natural tributaries*." [P.4, underline added] It also shows that in the Halifax River Planning Unit: "*Important habitat areas include the Spruce Creek and Tomoka River/Bulow Creek corridors, including the estuarine marshes*

around Ponce Inlet; . . . Both the Tomoka River and Spruce Creek basins are listed as OFWs and fall under more stringent SJRWMD surface water and environmental resource permitting rules. The rules were promulgated in 1998" [P.33]. It also states the SJRWMD goal to: "*To preserve natural and functional components of the ecosystem*" [P.41] which this Project does NOT do for Spruce Creek. Finally, that document says: "*SJRWMD supports ongoing acquisition programs in the purchase of identified lands and, where appropriate, adds these identified areas to the Florida Forever Work Plan*" [P.60] – something that is clearly are NOT being done for this Project, by not supporting acquisition of the essential parcel for the Spruce Creek Preserve on the northeast of the Project site.

<u>Exception No. 15</u>: The Finding of Fact in RO Paragraph #95 that there are no "public conservation lands" or lands under "easement" is incorrect, as shown by evidence provided.

Two subdivisions, Coastal Woods on the southeast and Shell Pointe Colony on the southwest of the proposed Interchange site both either have or are expected to have through design plans conservation areas on either side of I-95, making the finding in RO Paragraph #19 inaccurate. Dr. Anderson confirmed that there is a preserved area (or several) included in the subdivision south of Pioneer Trail from which the "unnamed canal" originates [T:V.2 P.389, Pet. Ex. 88], saying that the waterway path was "*connected to the conservation areas of the Coastal Woods development*" and later on specifically referenced conservation areas in the Shell Pointe Colony subdivision in the southwest quadrant of the Project [T:V.2 P.445]. For reference, Coastal Woods clearly has a conservation area on the land contiguous with the Project site, shown at the northern portion of the map below [Pet. Ex. 88, P.23, Project to the northwest, touching the "green" wetland preservation area]; Shell Pointe Colony was given its permit by the

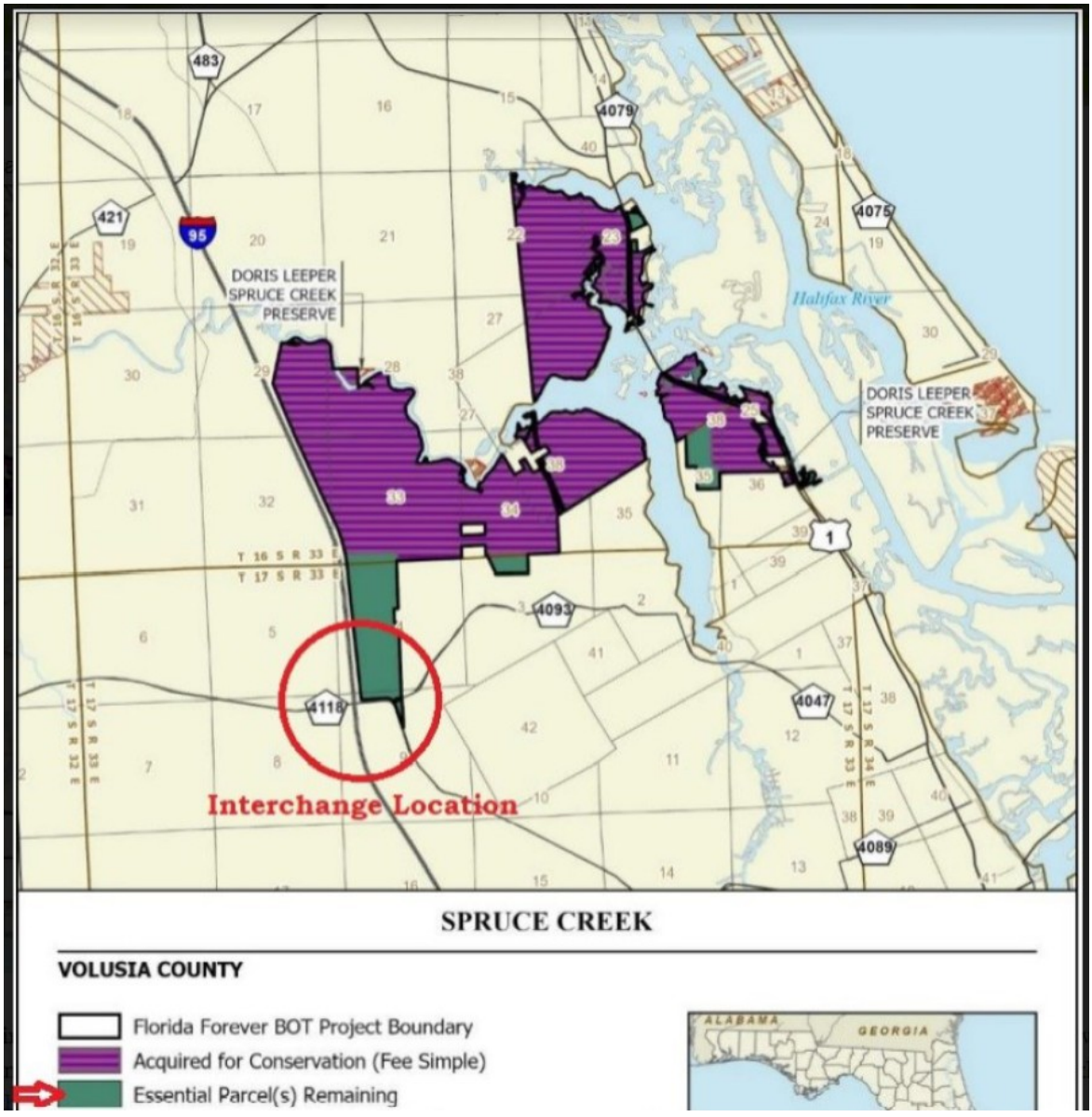
SJRWMD just last year, while the case herein was being litigated, and its maps were proffered into evidence as well, and included in Petitioner Exhibits 1048, 1049, and 1050 (and thus erroneously excluded by the ALJ, as they were relevant to the accuracy of this Finding).



<u>Exception No. 16</u>: The Finding of Fact in RO Paragraph #96 that the Project will not affect the Doris Leeper Spruce Creek Preserve failed to consider that the *State*, through its designation of this land as "essential" for the Preserve, has already by that designation defined the parcel as important for conservation, and thus the public interest in preserving

it should not be undermined by the State itself through other agencies "promoting" its development, as the FDOT has indicated.

The Project proposes to destroy land that is identified by the state of Florida for acquisition into the Spruce Creek Preserve. That is shown clearly in the FDEP's map of the Florida Forever Five-Year Plan regarding Spruce Creek where the largest remaining chunk, over 200 acres on the southwest side of the Preserve, touches where the Project is being contemplated to be built, and calls it an "Essential Parcel(s) Remaining" [Pet. Ex. 307, see title at top]. For clarity, Petitioners have also provided it below, with an arrow and added red circle around the Interchange location, found in Pet. Ex. 18, slide 4. It was referenced in PO Paragraph #113.



<u>Exception No. 17</u>: **The Finding of Fact in RO Paragraph #99 that there is no effect on recreational values ignores testimony and evidence to the contrary.**

Several witnesses, including Petitioners LaMontagne and White, commented on how they use the Preserve for recreational purposes, and it is clear that introducing more development into its essential future parcels prevents that future recreation. When asked if he thinks there will be an effect on recreational value, expert John Baker stated "It's possible. John Tucker, who we quoted in our OFW petition, pointed out in 1985 that some development near Turnbull Bay had caused a lot of turbidity and sediment that disrupted the oysters and had diminished the population of that Spruce Creek Kings Crown big snail by four/fifths. . . . I think that the more you isolate a wildlife preserve, the less diversity you end up with." [T:V.1 P.156]

<u>Exception No. 18</u>: **The Finding of Fact in RO Paragraph #102 stating that the "relative value of functions of the affected wetlands that there is no effect on recreational values is, at best, moderate" ignores testimony and evidence that they are of higher value.**

Petitioners' expert witness Dr. Cho credibly testified that there is a really diverse plant community around the "unnamed canal" [T:V.2 P.509-510]. She explained that even the most "lowly" plants/fungi, like lichens and mosses, play a vital ecosystem role, similar to the microbiome community of human intestines. Keystone species play a significant role in preventing ecosystem collapse as well [T:V.2 P.511-512], and diversity allows for the total system to be more resilient and not easily destroyed. But, according to Dr. Cho, the value of the ecosystem, and particular wetlands, serve multiple functions which interact with each other, and these cannot simply be offset in a "one-to-one" manner in terms of function [T:V.2 P.512]. She rephrased this later as follows: "*{retention ponds} are not going to be one-to-one in terms of*

acreage to the functions of the ecosystems that are provided by natural habitats and wetlands" [T:V.2 P.538].

Dr. Cho credibly assessed the ecosystem at the Project site as "***very high quality*** *in terms of based on my experience because I do wetland surveys all the time within this area, both in disturbed and urban area and, also, pristine environment*" [T:V.2 P.516, emphasis added].

Exception No. 19: **The Finding of Fact in RO Paragraph #100 that the permanency of the Project's affects to wetlands will be offset fails to quantify the unequal weight of loss to so-called benefit, and ignores the significant affect of temporary factors which could potentially ruin Spruce Creek to devastating effect before "recovery" takes place.**

Several expert witnesses commented on this. Dr. Anderson persuasively testified that the permanency of the Project is "*not neutral*" [T:V.2 P.470-471] and that "*We're definitely changing the ecosystems . . . so there's a good possibility that it {this factor} would be negative.*"

Dr. Cho confirmed that construction activities *themselves* also release Phosphorous, and the Permit Application did not consider any of those at all. She explicitly said: "*what I want you to see is how this construction actually releases a lot of nutrients, particularly phosphate, phosphorus*" [T:V.2 P.542 L.2-4]. She explained, starting with a poignant fact: "*Phosphorus is the primary ingredient of our body. So any living organisms, if they are disturbed, they will release -- if you die, you release phosphorus and nitrogen in common.· Right?· So you disturb this soil, and phosphorus will be released; and they become available in water for plants, finally, they can utilize, which is a good thing because phosphorus is limited in most of times;* ***but*** *the problem is the* ***amount*** *of phosphorus that can be increasing in natural water. So what I'm saying is that phosphorus loading increases with erosion and construction and any kind of disturbance of the sediments. Plus, the wetland plants, they are holding this enormous amount of phosphorus,*

and they have to be releasing into the water and soil" [T:V.2 P.542-543, emphasis added]. So if wetlands are destroyed on site (as they are proposed for this Project), they will release their Phosphorous, and that is not being accounted for, and if the amount is too much, it could cause irreparable harm from which Spruce Creek could not recover (such as through local extirpation events like fish kills). She explicitly asserted that this release will harm waterways [T:V.2 P.543].

Exception No. 20: **The Finding of Fact in RO Paragraph #101 that there are no historical or archaeological resources on or near the Project" is incorrect, at least insofar as Spruce Creek Preserve is "near" the Project, and does contain archaeological sites.**

The historic "Old King's Road" is present on or near the Project site, and at minimum runs through neighboring Spruce Creek Preserve and several Project-adjacent parcels [Pet. Ex. 142]. On the map, Petition witness John Baker identified: "*The Old Kings Road, which I believe was begun in the 1760's or 1770's to connect the – I believe to connect the Turnbull Plantation with St. Augustine to the north*" [T:V.1 P.115]. He also confirmed the exact footprint of that historical road might be wider than the map shows, noting that "the archaeological area could be larger" [T:V.1 P.161, L.23]. Native American shell middens are also identified in Pet. Ex. 142.

Conclusion

The St. Johns River Water Management District should: (a) make an explicit ruling on each of the above – stated exceptions, per §120.57 (1)(k), Fla. Stat.; (b) grant these exceptions; and (c) enter a Final Order denying Individual Environmental Resource Permit No. 103479-2 for the construction of the I-95/Pioneer Trail Interchange (and its additional construction components, namely the two road stub-outs and roundabout), as it is not clearly in the Public

Interest as proposed, and also fails to meet other ERP rules criteria, especially those protecting OFWs like Spruce Creek and its tributaries. Petitioners' also request that all agencies help in establishing a name for the "Unnamed Canal" – which to locals is called either Black Creek, Hawks Cypress Creek, or the Left Trail Tributary of Spruce Creek.

RESPECTFULLY SUBMITTED this 13th day of February, 2024.

/s/ DEREK LAMONTAGNE
Derek LaMontagne
lamontagne@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was provided to the Clerk of the St. Johns River Water Management District (Clerk@sjrwmd.com); Kathleen Patricia Toolan (Kathleen.Toolan@dot.state.fl.us); Carson Zimmer (Carson.Zimmer@dot.state.fl.us); Thomas Mayton (TMayton@sjrwmd.com); Jessica Pierce Quiggle (JQuiggle@sjrwmd.com); Wayne Flowers (wflowers@llw-law.com); Robert Diffenderfer (rdiffenderfer@llw-law.com); and Frederick L. Aschauer (faschauer@llw-law.com) on this 13th day of February, 2024, via email.

/s/ DEREK LAMONTAGNE
Derek LaMontagne
lamontagne@gmail.com