STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE BROOKLYN CIVIC ASSOCIATION, INC.,	)	
Petitioner,	)	
vs.	)	CASE NO. 92-5017
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and FLORIDA ROCK INDUSTRIES,	)	
Respondents.	)	

RECOMMENDED ORDER

Pursuant to notice, the above matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Donald R. Alexander, on February 16-19, 1993, in Green Cove Springs, Florida.

APPEARANCES

For Petitioner: Patrice Flinchbaugh Boyes, Esquire
Post Office Box 1424
Gainesville, Florida 32602-1424

Peter B. Belmont, Esquire
511 31st Street North
St. Petersburg, Florida 33704
(February 16 and 17 only)

For Respondent: (Agency) Wayne E. Flowers, Esquire
Jennifer L. Burdick, Esquire
Post Office Box 1429
Palatka, Florida 32178-1429

For Respondent: (Florida Rock) Marcia Penman Parker, Esquire
Emily G. Pierce, Esquire
1301 Gulf Life Drive Suite 1500
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue is whether Florida Rock Industries' application for renewal of its consumptive use permit to pump water at its Goldhead Sand Mine in Clay County, Florida, should be granted.

PRELIMINARY STATEMENT

This proceeding began on September 13, 1991, when respondent/applicant, Florida Rock Industries (FRI), filed an application with respondent, St. Johns

River Water Management District (District), seeking to renew a consumptive use permit authorizing FRI to withdraw water from three ten-inch wells located at the Goldhead Sand Mine in Clay County, Florida. On July 28, 1992, the District gave notice of its intent to grant the application subject to certain conditions. On August 6, 1992, petitioner, Lake Brooklyn Civic Association, Inc., filed a petition under Subsection 403.412(5), Florida Statutes, to contest the agency's preliminary decision. The matter was referred by the District to the Division of Administrative Hearings on August 20, 1992, with a request that a Hearing Officer be assigned to conduct a hearing. By notice of hearing dated September 15, 1992, a final hearing was scheduled on December 1-4, 1992, in Tallahassee, Florida. At the request of petitioner, the matter was rescheduled to February 16-19, 1993, in Green Cove Springs, Florida.

During the course of the hearing, numerous discovery disputes arose necessitating various rulings by the undersigned. The bases for those rulings are set forth in the orders which resolve the motions and need not be discussed here.

At final hearing, petitioner presented the testimony of Dr. Mark T. Stewart, accepted as an expert in hydrogeology and groundwater modeling; Steven R. Boyes, accepted as an expert in hydrogeology, geology and groundwater quality; Alvin A. Price, accepted as an expert in real estate appraisal; Geoffrey B. Watts, accepted as an expert in groundwater chemistry, groundwater monitoring and state water quality standards; and Phillip F. Baumgardner, Jean R. Herron, Edwin Moody, Margie Hazen and John D. Baker, all members of the association. Also, it offered petitioner's exhibits 1, 4, 7, 8, 11, 12, 16, 17, 23, 23A, 23C, 28, 32, 33, 41-43, 52, 53, 56, 61, 64, 65, 71, 75, 76, 78-80, 82, 83, 88-90, 98, 219, 220, 222, 249B and 249D. All exhibits were received in evidence except exhibits 61, 64, 65, 71, 75, 76, 78-80, 82, and 83, on which a ruling as to their admissibility was reserved. The District presented the testimony of Jeffrey C. Elledge, accepted as an expert in water resources engineering, civil engineering and hydrology; Dr. Larry J. Lee, accepted as an expert in hydrology, geology, and hydrogeology; Glenn C. Lowe, Jr., accepted as an expert in ecology; Harold A. Wilkening, III, accepted as an expert in hydrology and water resources engineering; Janis Nepshinsky, accepted as an expert in environmental engineering, water quality and water chemistry; and Tommy C. Walters, accepted as an expert in land surveying. Also, it offered District exhibits 1, 3, 5, 6, 11-18, 20, 21, 29-31, 33-43, 45, and 47-49. All exhibits were received in evidence. FRI presented the testimony of Richard C. Fountain, accepted as an expert in geology and hydrogeology; Robert J. Moresi, accepted as an expert in geology and hydrogeology; George M. Ogden, Jr., accepted as an expert in groundwater modeling; James P. Oliveros, accepted as an expert in geology, hydrogeology and water quality; Robert Peace, its vice-president; and Byron E. Peacock, accepted as an expert in environmental ecology. Also, it offered applicant's exhibits 2, 5-7, 9-13, 15, 16, 18-20, 22-30, 30J-30M, 31-37, 39-43, 46-49, and 50A-50E. All exhibits were received in evidence.

The transcript of hearing (four volumes) was filed on March 31, 1993. Proposed findings of fact and conclusions of law were filed by petitioner on April 19, 1993, and by FRI and the District on April 20, 1993. A ruling on each proposed finding has been made in the Appendix attached to this Recommended Order. Finally, by post-hearing motions, petitioner and FRI have requested attorney's fees and costs or sanctions, and FRI has moved to correct the transcript. These motions are dealt with in the conclusions of law portion of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

A. Background

1. Respondent, Florida Rock Industries (FRI or applicant), a Florida corporation, operates a nine hundred and eighty acre sand mine known as the Goldhead Sand Mine (Goldhead) in Clay County, Florida. The mine is located approximately six miles northeast of Keystone Heights and fifty miles southwest of Jacksonville. FRI has operated the mine since 1958. With the exception of eighty acres of land owned by FRI, the remainder of the land on which the mine is located is owned by Carroll-Phillips Investors and has been leased to FRI since 1973. The mine lies within the jurisdictional boundaries of respondent, St. Johns River Water Management District (District), a special taxing district created by the legislature and charged with the responsibility for administering and enforcing permitting programs for consumptive uses of water. FRI is accordingly subject to the District's regulatory authority.

2. As a necessary component of its operation, FRI withdraws approximately 2.09 million gallons per day (MGD) of groundwater from the Floridan Aquifer which is used in the production of sand. This use of water is made pursuant to a consumptive use permit (no. 2-019-0012U) issued to FRI by the District on December 11, 1984, and which allows it to consume 762.85 million gallons per year of groundwater for hydraulic dredging, cleaning and purification of sand at the Goldhead mine. The permit was issued for seven years. In order to continue groundwater withdrawal and use, FRI has applied to the District for a seven-year renewal of its permit with no request for an increase in allocation. That request, which has been identified as application no. 2-019-0012AUR, is the subject of this proceeding.

3. After conducting a review of the application, making site inspections, and performing various studies and analyses, on July 28, 1992, the District, through its staff, gave notice of its intent to approve the application with certain conditions. Thereafter, on August 6, 1992, petitioner, Lake Brooklyn Civic Association, Inc. (petitioner), a nonprofit corporation made up of property owners in adjacent areas of Clay County, filed a petition under Subsection 403.412(5), Florida Statutes, seeking to contest the proposed action. Petitioner is a citizen of the state and has an interest in activities that may injure or harm the state's water resources. Thus, it has standing to bring this action. As twice amended, the petition generally alleged that the consumptive use would (a) cause an unmitigated adverse impact on adjacent land uses, including a significant reduction in water levels in Lake Brooklyn and Spring, Gator Bone, and White Sands Lake, which lie generally to the south and southwest of the mine site, (b) cause a deterioration in water quality, (c) cause economic or environmental harm, and (d) be for purposes other than operating a sand mine.

4. The broad three-pronged test to be used in determining whether the permit should be issued is whether the proposed consumptive use is a reasonable-beneficial use, whether it will interfere with presently existing legal uses of water, and whether it is consistent with the public interest. In addressing this test, the parties have presented extensive expert testimony involving highly technical subject matter. As might be expected, the experts reached different conclusions as to whether the criteria have been met. In resolving these conflicts, the undersigned has accepted the more credible and persuasive evidence, and this accepted testimony is recited in the findings below.

B. The Mining Site

a. Operations

5. The entire mine site is around 7,000 feet east to west, about one mile north to south in a rectangular shape, and lies within the lake region of northeast Florida. The mine's product is silica sand used for concrete and masonry mortar for construction throughout northeast Florida. As such, it produces an economic benefit to the region. The mine is located on one of the few sites in the northeast Florida area with deposits suitable for construction purposes and is the closest sand mine to the Jacksonville market.

6. In 1958, FRI installed three ten-inch diameter production wells in the center of the mine site. One well is 450 feet deep while the other two are 460 feet deep. The 1984 permit authorizes withdrawals of 762.85 million gallons of water per year, an average rate of 2.09 MGD, and a maximum rate of 3.75 MGD. This rate is consistent with the amount of water used at other mines in north Florida and is based on FRI's projected maximum annual use. The use is industrial commercial for sand mining while the source is the Floridan Aquifer, the lowest acceptable water quality source available capable of producing the requested amount of water. Water use withdrawal from the three wells is monitored by in-line flow meters installed in 1991 as a water control and conservation measure. The pumping rate depends on the number of fixtures and valves open in the system at the time of pumping. However, the actual rate of water production cannot be varied at any of the pumps since the wells are connected to "on or off" pumps. The need for water in the dredge pond and processing plant dictates how long FRI will have a pump in operation.

7. Water from the wells is first discharged into a dredge pond, twenty feet deep, which is an approximately 155-acre excavation lake located in the southwest portion of the mine site. In periods of low water, the water is used to float the dredge, which requires some three feet of water to float, and in conjunction with a bulldozer, to wash sand down from the bank toward the dredge. After the dredge sucks up sand and water from the bottom of the pond, this mixture is slurried to an on-site processing plant where more water is added to sort and wash the sand. The end product (silica sand) is then loaded onto trucks which haul the product to the market. After processing, the moisture content of the sand product is only 5 percent. The tailings (unusable waste product) and wash water are then routed by a slurry pipe to settling areas and eventually recirculated through a system of ditches, canals and water control structures back into the dredge pond. No chemicals are used in the operation. Although FRI's contract with the lessor of the property requires it to maintain the dredge pond elevation at a specified elevation, this requirement cannot be fulfilled during drought conditions.

8. The mining operation is a closed system to the extent there is no point source (surface water) discharge from the system. Even so, a significant amount of water loss occurs during the process, mainly through percolation into the ground. Other water loss occurs through evaporation. The receiving water from the site is primarily the surficial aquifer which recharges the downgradient lakes, including Gator Bone, White Sands, and Spring Lakes. Water may also travel through the surficial aquifer into the sinkholes on site and thence to the Floridan Aquifer. However, not all water is lost to sinkholes in the settling area because they are filled with fine materials. This is confirmed by the fact that water returns to the dredge pond. The mining operation has not

affected this pattern. The lakes in the region are replenished solely by rainfall, either by direct rain on the lakes or through water seeping through sands.

9. FRI plans to mine approximately thirty additional acres at the Goldhead Site during the next seven years. To this end, it has secured a management and storage of surface waters permit from the District which allows construction of this additional acreage. It also has acquired an industrial waste water discharge permit from the Department of Environmental Regulation. It is expected that within the next two to four years, FRI will abandon the current dredge pond and start a new one on the north side of the property to accommodate mining operations, or in the alternative, extend the current pond to the north.

b. Water conservation

10. A water conservation plan has been submitted by FRI. Measures already implemented include (a) using in-line flow meters to monitor amounts of withdrawal, (b) not pumping for more than seventeen hours per day to prevent exceeding the maximum allotment per day, (c) regularly monitoring withdrawals to ensure allocations as not being exceeded, (d) extending the plant discharge further past the sinkholes in the settling area to maximize return water to the dredge pond, (e) raising water levels in the settling area to facilitate flow back to the dredge pond, (f) during periods of drought using bulldozers instead of water spray to break loose sand formations, (g) curtailing production when further production would cause the plant to exceed allocations, (h) replacing water-cooled bearings in plant machinery with bearings that do not require water, and (i) restricting dredge mobility to allow operation in shallower water. No other water conservation measures are economically, environmentally or technologically feasible.

c. Hydrogeologic characteristics at the mine site

11. The mine site, which is located within the Upper Etonia Creek surface water drainage basin, generally slopes from 200 feet NGVD on the north to 120 feet NGVD on the south, and is underlain, in order, by approximately 10 to 50 feet of sand (known as the surficial aquifer), 200 feet of dense, moist clay (known as the Hawthorn Formation), and then a highly transmissive limestone formation (known as the Floridan Aquifer). The surficial aquifer flows from north to south across the site while water falling on the site primarily moves downgradient through the surficial aquifer. There are five sinkholes on the site, all having predated the mining activities, which may provide a conduit for recharge from the surficial aquifer to the Floridan aquifer. Except where the Hawthorn formation, a confining unit to the Floridan aquifer, is breached, recharge through the Hawthorn formation is very slow because of the dense clays of that formation. Aquifer characteristics within the Floridan aquifer beneath the site and immediately adjacent thereto are relatively uniform. As noted earlier, 5 percent of the water leaves the mine site as moisture in the sand product. The remaining 95 percent of water is immediately recharged on site to the surficial aquifer through various impoundments, and after entering the surficial aquifer, that portion of the water which is not recirculated to the dredge pond for reuse in the mining process moves either vertically into the Hawthorn formation, vertically into the Floridan aquifer through a sinkhole, downgradient through the surficial aquifer to one of the lakes south of the mine, or evaporates. It is noted that notwithstanding the mining operations, the flow in the surficial aquifer system still parallels the topography as it existed prior to mining, and the same saturated thickness within the surficial aquifer exists on site as existed before mining occurred.

C. Hydrogeologic Characteristics of the Region

12. The region in which the mine is located is very high in topographic altitude indicating that it is a groundwater recharge area. Like the mine site, the region has three distinct geologic units underlying the surface, including sands and clayey sands (surficial aquifer), thick clays (Hawthorn formation) and limestones and dolomites (Floridan aquifer). The Hawthorn unit serves as a confining unit or semi-confining unit between the surficial aquifer, or water table, in the upper unit and the Floridan aquifer in the lower unit.

13. When solution channels develop within the limestones in the lower unit, the openings can cause the overlying units to collapse, forming sinkholes. Thus, when the Hawthorn formation is breached by the development of a sinkhole, water can move rapidly through the overlying units to the Floridan aquifer. Many of the lakes within the region exist over collapsed features within the limestone units beneath them and are referred to as sinkhole lakes. The rate of recharge from each lake depends on the rate of leakance into the Floridan aquifer. Some lakes leak fast, others not at all. For example, Lake Brooklyn fluctuates about two feet, Lake Johnson about thirteen feet, and Pebble Lake about thirty feet.

14. Lake Brooklyn, which lies several miles to the southwest of the mine, is the fourth lake in a chain of lakes consisting of Blue Pond, Sand Hill Lake, Lake Magnolia, Lake Brooklyn, Keystone Lake, Lake Geneva, Oldfield Pond, and Half Moon Lake. All of these lakes are in a different surface water drainage sub-basin within the larger Upper Etonia Creek Basin than the mine site. The lakes above Lake Brooklyn in the chain are at higher elevations than Lake Brooklyn, and when rainfall is sufficient, water flows from Blue Pond to Sand Hill Lake, to Lake Magnolia, and then to Lake Brooklyn through Alligator Creek. Direct rainfall and surface water inflows from Alligator Creek represent the most significant sources of water to Lake Brooklyn. Other pertinent lakes in the area are Spring, White Sands and Gator Bone Lakes, which lie almost directly along the mine site's southern boundary and are each less than a mile from the mine's dredge pond.

15. During the period records have been maintained for water levels in Lake Brooklyn, it has fluctuated over a range of slightly more than twenty feet. Although average rainfall within the Upper Etonia Creek Basin is approximately fifty-one inches per year, during the period from 1974 through 1990 the basin experienced a continuing period of below normal rainfall resulting in a cumulative deficit of rainfall for this period of minus seventy-eight inches. Since 1988, the lake region has experienced a severe drought. Because the lakes in the region have risen or fallen in correlation with periods of below normal or above normal rainfall, lake levels have fallen dramatically in recent years.

16. Water levels in Lake Brooklyn began declining in 1974 at the same time the period of below normal rainfall began and continued declining until 1991, a year in which the region experienced above normal rainfall. These low water levels were exacerbated by the cessation of surface water inflows from Alligator Creek in late 1988 which continued until late 1992 when such flows resumed. The cessation of surface water flows into Lake Brooklyn during the period from 1988-1992 were a direct consequence of the extended period of below normal rainfall in the region. Finally, very little, if any, of the groundwater flowing in the Floridan aquifer beneath Lake Brooklyn flows toward the mine site.

D. Water Quality Impacts

17. Numerous analyses have been conducted to determine water quality of the site, water quality in nearby homeowners' water systems, and water quality impacts of the proposed consumptive use. They include analyses conducted by the District in 1989 and 1992, including sampling of water quality and an analysis of the background levels for certain parameters, and an assessment of data from HRS testing in March 1989 and May 1992. In addition, FRI conducted water quality sampling on site in eight wells, the dredge pond and a settling pond. Finally, petitioner reviewed water quality samples from off-site private water supply wells taken on March 1, 1989, and on July 22, 1992, by unknown persons. As to this latter sampling, petitioner had no knowledge of the protocol used in obtaining the 1989 samples and offered no evidence of reliability of the 1992 data. Thus, the reliability of its assessment is in doubt.

18. None of the water quality samples taken from the mine site indicate a violation of state water quality standards. However, petitioner posits that a chemical reaction is likely occurring at the deeper levels of the dredge pond, possibly causing undissolved iron in sediments to become dissolved, and then traveling in solution through the clays of the Hawthorn formation into transmissive units and finally to off-site homeowners' wells which may be in those units. This theory was predicated on the results of 1989 HRS sampling which revealed some wells near White Sands Lake experienced elevated levels of iron and manganese, and an assumption that a chemical reaction was occurring because herbicides were used in the dredge pond. However, only one application of a herbicide occurred, and that was in 1990, or one year after iron was detected in the off-site homeowners' wells. Petitioner agreed that the 1990 application of herbicide could not have affected the 1989 sampling. It also agreed that these reactions were less likely to be occurring in a pond with water flowing through it. In this case, water is circulated through the dredge pond by being pumped into it, pumped out of it, and allowed to flow back into the pond.

19. FRI determined that no state water quality standards were exceeded for iron, manganese, zinc, turbidity, total dissolved solids, chloride and nitrate in the surficial aquifer and Hawthorn formations at the site. The wells used for monitoring water quality were installed and sampled using standard quality assurance techniques. Water quality from the surficial aquifer was emphasized because if iron or manganese were present in the water, it would most likely be detected in wells in the surficial aquifer because they are detected in wells immediately downgradient of the source. If the chemical reaction is occurring, water leaving the dredge pond is contaminated, and such water will follow the path of least resistance by going either to the Hawthorn formation or the surficial aquifer. Because of the geologic properties of the Hawthorn, this path is the surficial aquifer. At least 70,000 gallons per day enter the surficial aquifer from the bottom of the dredge pond. Since contaminated water would receive water quality treatment by absorption of the Hawthorn but not in the surficial, water in the surficial aquifer represents the worst case scenario as to the possible presence of contaminated water.

20. The chemical reactions which petitioner believes may be occurring in the deeper portions of the dredge pond require the presence of an acidic environment and reduced oxygen levels in the water. FRI's water quality testing indicates that water in the dredge pond is not acidic, but rather is neutral. Therefore, any reaction which might be occurring could not be on a large enough scale to affect water quality. Moreover, even if the reactions were occurring, it was established that the clays in the Hawthorn formation would absorb iron,

and such absorption would not take place in the surficial aquifer. Therefore, it is found that there would be no adverse impact to groundwater including the surficial aquifer and that water quality standards will be met.

21. Although petitioner presented evidence that in 1989 HRS testing of 12 out of 212 homeowners south of the mine site indicated that three homeowners had iron concentrations in excess of state drinking standards and two had manganese concentrations in excess of state drinking water standards, this is insufficient to prove that the mining operation has an adverse impact on water quality. To begin with, some of the wells sampled were thirty to fifty years old even though the life expectancy of a well is fifteen to twenty years. Some were constructed of galvanized steel pipe, and those wells also indicated high turbidity levels. High turbidity levels are caused by a number of unrelated factors and will result in increased iron levels that are not representative of the quality of the groundwater in the formation, but rather of the iron-laden sediments in the formation, or from the casing material. With the exception of one well (the Sutton well), the water from the homeowners' wells did not exceed background water quality for iron and manganese. The elevated iron and manganese concentrations in the Sutton well are caused by a number of factors other than the mine. Then, too, a proper sampling technique may not have been followed during the 1989 sampling event thus rendering the results unreliable. Finally, properly constructed monitoring wells should be used to assess the quality of the groundwaters, and the wells sampled in 1989 and 1992 were not of that type.

E. The Mine's Impact on Water Levels

22. Perhaps the issue of primary concern to members of petitioner's organization is whether the mining operations have contributed to the decline in water levels of nearby lakes, including Lake Brooklyn. This is because of serious declines in the levels of those water bodies over the past years, and a concomitant decrease in the value of homes which surround the lakes. In an effort to resolve this and other water level issues, the parties made numerous studies of the current and anticipated water level impacts from the site. This data collection effort was far more extensive than is normally conducted for a mine of this size. They included aquifer performance tests by FRI and the District, steady state and transient computer modeling of impacts on the Floridan and surficial aquifers by FRI, an analysis of correlations of pumping and water level changes in lakes and aquifers by FRI and petitioner, photolinear and fracture trace analyses of structural conditions by FRI and petitioner, a stratigraphic analysis of a geologic core retrieved from the site by FRI, installation of deep and shallow wells for groundwater monitoring by FRI, groundwater flow mapping by FRI, review of literature by all parties, review and analysis of rainfall data by all parties, analysis of evaporation data by the District and petitioner, and an analysis of geophysical logs from wells by FRI and the District.

a. Aquifer performance tests

23. Aquifer performance tests, which enable hydrologists to reach conclusions regarding the characteristics of the aquifers tested, were conducted in January 1989 by the District and June 1991 by FRI. In a typical pump test, an aquifer production well pumps at a constant rate, while water levels are monitored in observation wells at specified distances from the pumping well. In this case, the tests measured effects of pumping from the mine production wells for periods ranging from 78 hours to 108 hours at approximately twice the average rate of 2.09 MGD. The zone of influence of pumping was measured at wells placed at the property boundaries, at Gold Head State Park, east of the

mine, as well as wells to the south of the mine for the 1989 tests. During the 1989 tests, lake levels for Lake Brooklyn and Gator Bone, White Sands and Spring Lakes were recorded. The effects of pumping were approximately equal for wells spaced approximately equal distances along the east, south and west. Thus, for purposes of analysis, the Floridan aquifer was considered isotropic and homogeneous. This is consistent with assumptions commonly made by geologists in Florida. Computer models were calibrated with actual results of these tests to account for variations caused by this assumption. The District has concluded, and the undersigned so finds, that no changes in the levels of the lakes are attributable to pumping. Further, the aquifer itself will not be harmed by the use of the amount of water requested in the application.

24. The tests indicate the maximum amount of drawdown in the Floridan aquifer from pumping at twice the average rate is 0.1 to 0.6 foot in neighboring wells. Effects of actual pumping will be approximately one-half the test observed amounts on an average pumping day. For example, based on the 1989 test results, drawdowns in the Floridan aquifer at the boundary of the FRI property during an average day of pumpage should not exceed 0.2 to 0.3 feet while drawdowns beneath Spring, White Sands and Gator Bone Lakes to the south of the mine should be less than 0.2 feet. The tests provide actual measurements of the effects of pumping. Indeed, all three lakes were declining before the 1989 test began and continued to decline after the test was ended. However, the rate of decline during the seventy-eight hours of the test was not distinguishable from declines which occurred before or after the test.

b. Computer modeling

25. As a supplement to the aquifer performance tests, FRI performed computer modeling to determine effects of the water withdrawal and use on the Floridan and surficial aquifers. These models are used by hydrologists to predict impacts associated with a particular source of stress, such as pumpage, to an aquifer and, in this case, occurred in three phases. The first was an impact model which determined the drawdown in the Floridan aquifer. The second occurred as a result of questions raised by residents of the sand mine area and included a "steady state" model simulation of impacts of the Floridan and surficial aquifers. The third occurred as a result of questions raised by petitioner and included new data along with both a "transient state" and "steady state" simulation. All three phases of modeling were consistent in finding that the effects of pumping are non-existent or negligible, that is, a predicted drawdown in various locations of the Floridan aquifer of from less than 0.1 to 0.3 feet on an average pumping day, and they corroborated the drawdowns observed during both the 1989 and 1991 aquifer performance tests.

26. Petitioner's witness Dr. Stewart criticized FRI's 1992 "steady state" computer modeling on the grounds FRI had insufficient data to conduct the modeling, the constant head boundaries were set too close to the pumping, a transient model should have been run, and the modelers assumed that the Floridan aquifer is isotropic and homogeneous. However, Dr. Stewart failed to review or consider (a) any technical data or information gathered since September 10, 1992, (b) the 1991 transient model, (c) the December 1992 transient model, (d) the computer disc for the July 1992 steady state model, (e) the December 1992 steady state model, (f) the December 1992 calibration, (g) the basis for setting the constant head boundaries, or (h) the data from the 1989 and 1991 pump tests. All of this data was part of the evidence FRI's experts used in formulating their opinions. Dr. Stewart agreed that he could not form any conclusions on this data and that the Floridan aquifer is rarely completely homogeneous and isotropic, but that he and other modelers regularly make that assumption.

27. The modeling was calibrated to replicate actual subsurface and pumping conditions. Maximum drawdown in the Floridan aquifer under normal pumping conditions is modeled to be 0.1 to 0.2 feet beneath White Sands Lake. This is drawdown with no replacement, although there will be leakance back to the Floridan aquifer through sinkholes on the site and surcharge to Gator Bone, White Sands and Spring Lakes through the surficial aquifer. The impact to the Floridan is minor compared to normal water level fluctuations in that aquifer of 3 to 5 feet per year. In fact, barometric pressure changes can cause water level changes of up to one foot per week.

c. Lake levels

28. Because many of the lakes in the area leak downward, water levels in the lakes could be affected by the changes in levels in the Floridan aquifer. Indeed, for lakes connected to the Floridan aquifer, changes in the level of the potentiometric surface (or pressure) in the Floridan aquifer can have an impact on the level of the lakes. However, a decrease in lake levels will be less than that of the decrease in the Floridan aquifer, depending on the rate of leakance. Consequently, even if Lake Brooklyn and Gator Bone, White Sands or Spring Lakes do leak to the Floridan aquifer, the amount of decline in lake levels attributable to pumping at the mine will be less than the 0.1 to 0.2 foot modeled by FRI. This drawdown effect will not accumulate over time, but rather will remain constant after reaching steady state conditions. Even if levels in Gator Bone, White Sands and Spring Lakes are affected by drawdowns in the Floridan aquifer, that effect will be more than offset by surcharge to the surficial and Floridan aquifers from the dredge pond. The net effect to the lakes would be either positive or immeasurable. This is confirmed by the computer modeling results.

29. Lake stage and precipitation data for Spring, White Sands and Gator Bone Lakes indicates that these lakes, like other lakes in the region, rise and fall in correlation with precipitation patterns. For example, in 1991, a year with above normal rainfall, Spring Lake rose 4.1 feet in elevation, White Sands Lake 2.9 feet in elevation, and Gator Bone Lake rose 3.5 feet in elevation.

30. Similarly, water levels were monitored before, during and after the 1989 aquifer performance test in a portion of Lake Brooklyn known as Brooklyn Bay. Because of low rainfall, Brooklyn Bay was separated from the main body of Lake Brooklyn for at least eighteen to twenty-four months before and during the 1989 aquifer performance test. The lake had been in the midst of a long term decline both before and after the test, and the rate and character of declines during the period of pumping were not distinguishable from the declines occurring before or after the test. It is accordingly found that the impacts on water levels in Lake Brooklyn, if any, as a result of pumping from the Floridan aquifer are immeasurable.

31. According to petitioner's witness Boyes, activities at the mine have an influence on water levels in Gator Bone, White Sands and Spring Lakes by "increasing the rate of decline". However, the witness could not quantify the degree of impact but stated the impacts during the 1989 aquifer performance tests were a decline of .03, .03 and less than .03 foot, respectively, for each lake. The witness also opined that, based on District staff guage readings during the 1989 aquifer performance testing, pumping at the mine resulted in a .04 foot decline in lake level for Lake Brooklyn during the 1989 testing period. This decline had a net result of .8 acre decrease in the previously 600 acre plus Lake Brooklyn. By comparison, the drought caused a decline of 162 acres in

1989 and an additional 158 acres in 1990. It is noted that the decline in each lake would be less during average pumping conditions, or about one-half of the .04 foot decline, since average pumping is one-half of the aquifer performance test pump rate. Finally, petitioner's witness Dr. Stewart opined that there is insufficient data to determine whether any impacts to lake levels are occurring. It is found, however, that these drawdowns are less than the .1 to .2 foot modeled by FRI and should have no significant adverse impacts on water levels.

d. Preferential flow theory

32. Petitioner presented evidence of a purported correlation between pumping at the mine and water levels in a Floridan aquifer well located on the southwest side of Lake Brooklyn, 4.3 miles from the mine, and lake levels in Brooklyn Bay, 3 miles from the mine. According to petitioner, this serves as proof of a "preferential flow pattern" in the Floridan from Lake Brooklyn to the mine, and that this preferential flow results in a .04 to .05 foot drawdown in the Floridan aquifer at Lake Brooklyn. However, this correlation is deemed to be incorrect for several reasons. First, if a true correlation existed, recovery from pumping effects would occur after pumping ceased, but the Lake Brooklyn well showed recovery in the Floridan aquifer prior to cessation of pumping, and did not recover when pumping stopped at the end of the 1989 aquifer performance testing. Second, if the premise is correct, impacts from pumping would occur in wells closer to the pumping earlier than in wells farther away, but the Lake Brooklyn well, 4.3 miles from pumping, showed drawdown began before that of the Goldhead well, only 1,000 feet from pumping. Third, levels for the Lake Brooklyn well should have declined during both the 1989 and 1991 aquifer performance tests but the levels rose during the 1991 tests. As to the water level changes in the well during the 1989 test, witness Boyes believed these may reflect declines due to hydrologic conditions rather than the pump test. Fourth, if a true correlation existed, impacts would be experienced following the same hydrographic pattern as pumping, but the Lake Brooklyn well's hydrographics did not correlate to the pumping schedule at all times of the year. It should also be noted that at least two other large scale water users are withdrawing water from wells within 1.25 miles from the Lake Brooklyn well and may affect that well's water levels. Further, the variations in the well may be explained by many other variables, such as barometric pressure changes, diurnal fluctuations in water levels, rainfall, and pumping from closer wells. Finally, Brooklyn Bay is now physically separated from Lake Brooklyn, and it was improper for petitioner to rely on lake level information from Brooklyn Bay to support its theory regarding Lake Brooklyn.

33. To further support its hypothesis that a preferential flow path exists between the mine and Lake Brooklyn, petitioner utilized a "photo linear analysis" or "fracture trace analysis", which is based on an interpretation of surface topographic features to determine the presence of subsurface hydrogeologic features such as solution channels in the limestones of the Floridan aquifer. However, without extensive subsurface testing, which is not present here, such analyses are only interpretative to determine what, if any, subsurface features are present and their hydrogeologic effect. It is noted that subsurface fractures are present less than 50 percent of the time, and if present, the features may be hydrologic barriers as well as preferential flow paths. According to witness Boyes, a photolinear feature (fracture) exists from Lake Brooklyn through Spring Lake and across the mine property to Goldhead State Park. If such a feature did exist, however, the drawdown during the aquifer performance tests and other pumping would be greater adjacent to Spring Lake than adjacent to Lake Brooklyn. This was not observed. Moreover, petitioner's

witness Dr. Stewart thought the photolinear was only inferred and had a lower degree of confidence that it exists.

34. FRI's witness Fountain established that elongated surface features are more likely to demonstrate linear subsurface features. Both witness Boyes and Dr. Stewart agreed with this conclusion. That being the case, the postulated Lake Brooklyn-mine photolinear is not demonstrated, and continuation of the elongated axis of Lake Brooklyn and Brooklyn Bay would bypass the mine site altogether. Because no investigations have been conducted to demonstrate that these postulated photolinear features exist, and the more reliable results of the aquifer performance tests indicate otherwise, the preferential flow path theory is deemed at best to be highly speculative.

35. If the Lake Brooklyn-mine photolinear feature offered a preferential flow path as opined by witness Boyes, the resulting drawdown would be elongated with a zone of influence extending from the mine westward toward Lake Brooklyn. Therefore, areas closer but not on the feature would experience less drawdown than areas farther away which are on the feature, the zone of influence would extend from the mine's wells through Spring Lake toward Lake Brooklyn causing declined water levels along the feature, and areas closer to the pumping wells, such as Spring Lake, would experience a greater decline than areas farther away, such as Lake Brooklyn. However, evidence offered by petitioner shows that the water levels between Lake Brooklyn and the mine are actually higher than in surrounding areas.

36. Finally, even if petitioner's preferential flow path theory were true, there is no evidence that the pumping from the mine is resulting in significant and adverse impacts as required by District rules. Therefore, it is found that the sand mine does not cause significant and adverse impacts on the water levels in the Floridan aquifer or on the water levels of Lake Brooklyn or Gator Bone, White Sands or Spring Lakes. Rather, the lake levels in each of the four lakes in issue here are directly or indirectly a function of rainfall.

e. Intermediate and surficial aquifers

37. Whether an intermediate aquifer is present beneath the mine site is subject to dispute. All parties agree that, on a regional scale, the Hawthorn formation contains some discontinuous water-bearing lenses that in some places produce water in quantities sufficient for household use. The lenses occur in carbonate deposits in the formation, although not all carbonate deposits or all water bearing units will necessarily transmit water. The evidence is less than persuasive that the Hawthorne formation contains carbonate units which are present on the sand mine site as transmissive beds. This finding is based on FRI's review of on-site core boring information and other data from the site. In addition, this finding is corrorborated by District witness Lee, who concluded that water from the site is not discharging into the Hawthorn, but rather into the surficial aquifer. This is because clays comprising the Hawthorn have low permeability, causing water to flow laterally through the surficial aquifer rather than into the Hawthorn.

38. With respect to impacts to the surficial aquifer, FRI presented evidence that during mining operations, the surficial aquifer will be surcharged by up to five feet. When mining operations cease, water levels will return to natural conditions. This evidence was not contradicted.

F. Impacts on Property Values and Recreation

39. Testimony regarding the property values for lake front properties on Lake Brooklyn and Gator Bone, White Sands and Spring Lakes was offered by petitioner's witness Price. He established that values have declined since mid-1989 as a result of a loss of recreational value suffered as water levels have receded. However, witness Price stated that he would not expect a 0.1 foot drop in lake levels to negatively affect property values. Since the declines predicted by petitioner are far less than a 0.1 foot drop, it is apparent that FRI's water use will not result in harm to property values in the area. Similarly, while it is true that declining water levels have impaired recreational uses of Lake Brooklyn and Gator Bone, White Sands and Spring Lakes, FRI's water use cannot be blamed for such impairment.

G. Environmental Impacts

40. The anticipated impacts of the water use on the wetlands and wildlife resources of the area were addressed by FRI witnesses Peacock and Lowe. According to Peacock, who analyzed the wetland vegetation, the dominant species and their adaptions, the wildlife resources and their adaptions, and the general ecology of the area, the water levels in the adjacent lakes have historically fluctuated greatly, and wildlife that use the lakes have adapted to these fluctuations. His opinion that the mine's water use will not have any significant adverse impact on the environment of Lake Brooklyn and Gator Bone, Spring or White Sands Lakes is hereby accepted.

41. Based upon witness Lowe's inspection of the three downgradient lakes, his past knowledge of Lake Brooklyn, the aquifer performance tests, and Dr. Lee's conclusion that the maximum drawdown in the lakes would be 0.1 foot, Lowe opined that the proposed water withdrawal will not cause environmental harm. In addition, such a drawdown will not adversely affect off-site vegetation or cause unmitigated adverse impacts on adjacent wetlands or other types of vegetation. These conclusions were not contradicted and are hereby accepted.

H. Compliance with rule criteria

42. To obtain a consumptive use permit, an applicant must give "reasonable assurance" that the proposed water use is a reasonable beneficial use, will not interfere with any presently existing legal use of water, and is consistent with the public interest. These broad criteria are further explained by criteria enunciated in Rule 40C-2.301(3)-(6), Florida Administrative Code, and sections 9.0 et seq. and 10.0 et seq. of the Applicant's Handbook adopted by reference in Chapter 40C-2, Florida Administrative Code. Findings as to whether these criteria have been satisfied are set forth below.

43. To obtain a renewal of a consumptive use permit, an applicant must first give reasonable assurance that the proposed use of water is a "reasonable beneficial use". For a use to be considered reasonable beneficial, the criteria enumerated in Rule 40C-2.301(4) and (5), Florida Administrative Code, must be satisfied. First, paragraph (4)(a) of the rule and section 10.3(a) of the handbook require that the water use must be in such quantity as is necessary for economic and efficient utilization, and the quantity requested must be within acceptable standards for the designated use. The evidence shows that FRI has used a reasonably low amount of water necessary to continue operations at the mine, it has implemented some water conservation methods and tried or considered others that proved to be inefficient or not economically feasible, and the requested amount of water is within acceptable standards for sand mines

operating within the District. Then, too, some ninety-five percent of the water pumped from the wells is recirculated for reuse in the mining process or is recharged back into the surficial and Floridan aquifers on site. Finally, there is no surface discharge of water outside the mining site. Accordingly, it is found that this criterion has been satisfied.

44. Paragraph (4)(b) of the rule and section 10.3(b) of the handbook require that the proposed use be for a purpose that is both reasonable and consistent with the public interest. The proposed use of the water is to produce sand used in construction materials. This is a reasonable use of water and results in an economic benefit to the region by producing a valuable product. Accordingly, it is found that the use is both reasonable and consistent with the public interest.

45. All parties have stipulated that the Floridan aquifer is capable of producing the requested amounts of water. This satisfies paragraph (4)(c) of the rule and section 10.3(c) of the handbook which impose this requirement.

46. The next criterion, paragraph (4)(d), as amplified by section 10.3(d) of the handbook, requires that "the environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount." The evidence shows that during mine operations, the surficial aquifer is being surcharged by up to five feet. When they cease, the water levels return to natural conditions. The maximum drawdown anticipated in the Floridan aquifer at the property boundary was 0.3 feet and less than or equal to 0.1 feet for most of the area outside the mine site. At most, this equates to a maximum lake level decline of 0.04 feet at Lake Brooklyn, 0.03 feet at Gator Bone and White Sands Lakes, and less than 0.03 feet at Spring Lake. Thus, FRI's usage of water has had, and will have in the future, little, if any, immediate or cumulative impact on the levels of the area lakes. Further, the more persuasive evidence supports a finding that these lowered lake levels or aquifer levels will not result in environmental or economic harm to the area. In addition, the District has proposed to incorporate into the permit a condition that FRI implement a detailed monitoring plan which will detect any overpumping causing lake level changes and a concomitant adverse impact to off-site land uses. Therefore, this criterion has been satisfied.

47. Paragraph (4)(e) and section 10.3(e) require the applicant to implement "all available water conservation measures" unless the applicant "demonstrates that implementation is not economically, environmentally or technologically feasible." The rule goes on to provide that satisfaction of this criterion "may be demonstrated by implementation of an approved water conservation plan as required in section 12.0, Applicant's Handbook: Consumptive Uses of Water." Because FRI's water conservation plan insures that water will be used efficiently, as required by section 12.3.4.1. of the handbook, this criterion has been met.

48. The next paragraph provides that "(w)hen reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally or technologi-cally feasible." Since the unrebutted testimony establishes that reclaimed water is not readily available to the mine site, it is found that paragraph (4)(f) has been satisfied.

49. Paragraph (4)(g) of the rule and section 10.3(f) of the handbook generally require that the lowest acceptable quality water source be used.

Since the evidence shows that the Floridan aquifer is the lowest acceptable quality water source, this requirement has been met.

50. Paragraphs (4)(h) and (i) provide that the consumptive use "should not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems" nor "cause or contribute to flood damage." The parties have stipulated that these requirements are not in dispute.

51. The next paragraph provides that the "water quality of the source of the water should not be seriously harmed by the consumptive use." The uncontradicted evidence shows that the source of the water for the proposed use will not be seriously harmed from either saltwater intrusion or discharges to the Floridan aquifer. Paragraph (4)(j) and section 10.3(g) have accordingly been met.

52. Paragraph (4)(k) and section 10.3(k) require that the water quality of the receiving body of water "not be seriously harmed" by the consumptive use. In this case, there is no surface water discharge from the mine site. Thus, the only relevant inquiry here is whether the receiving water (surficial aquifer) will be "seriously harmed" by the consumptive use. To determine compliance with this criterion, the District compared water quality samples from the mine site and surrounding areas with the DER monitoring network to ascertain whether state water quality numerical standards and natural background levels were exceeded. The relevant standards are found in Rule 17-520.420, Florida Administrative Code. Monitoring data from eight wells and from the dredge pond indicate there are no water quality violations resulting from the sand mine operations. Petitioner has contended that water from the dredge pond provides a significant source of water to an intermediate aquifer, which would also be a receiving body of water. However, the evidence shows that any contaminants resulting from the dredge pond flowing into an intermediate aquifer will also be contained in the surficial aquifer. The clays of the Hawthorn formation would absorb and filter out iron and manganese as they traveled to a water transmissive zone. Therefore, the concentrations sampled in the suficial aquifer downgradient from the dredge pond represent the highest concentrations. Since the concentrations in the surficial aquifer do not violate water quality standards, the same finding as to concentrations in the intermediate aquifer can be made. Further, the rule criteria require consideration of the future water use's effect on water quality, and if the intermediate aquifer is in fact a receiving water as contended by petitioner, the reactions which could cause water quality violations are presently occurring. There is no reason to believe they would cease if the mine ceases operation, and the mining operation adds oxygen to the water, which reduces the possibility of the reaction described. Therefore, this criterion has been satisfied.

53. The parties have stipulated that the requirements of paragraph (4)(l) have been fulfilled.

54. Finally, rule 40C-2.301(5)(a) provides that a proposed consumptive use will not meet the criteria for issuance of a permit if such proposed water use will significantly cause saline water encroachment or otherwise cause water flows or levels to fall below certain minimum limits set forth in the rule. The evidence shows that, to the extent these criteria are applicable and in dispute, they have been satisfied.

I. Miscellaneous

55. The contention has been made that insufficient site-specific information was submitted by the applicant to determine the effects of the proposed use of water at the sand mine. In this regard, the evidence shows that FRI consultants installed monitoring wells, performed core borings, and took soil samples at the site. The geology of the site was verified by core boring, review of geologic logs and drilling wells. Slug tests were performed to measure the hydraulic conductivity of the material in which the monitor wells were set, and a step drawdown analysis was performed to measure hydraulic conductivity. A number of monitoring wells to measure water levels data were installed before and after running the 1991 aquifer performance tests, and groundwater modeling in both the transient and steady state modes were run using data that was collected in the field. In addition, water quality samples were collected to evaluate a water budget for the dredge pond, and FRI conducted an assessment of the environmental impacts to the wetland and wildlife resources of the area lakes, including White Sands, Spring and Gator Bone Lakes. Besides this submission and analysis, the District reviewed United States Geological Survey (USGS) topographic maps, potentiometric maps and aerial photographs of the area, water levels of the surrounding lakes, potentiometric surfaces in Floridan and intermediate aquifer wells, geophysical logs for wells, rainfall records, the core generated by FRI consultants, and scientific literature relied upon in making consumptive use permitting assessments. It also monitored the 1991 aquifer performance test and reviewed the resultant model. Before and after submission of the application, the District conducted aquifer performance testing at the site and evaluated the 1991 aquifer performance test conducted by FRI consultants. Finally, the District assessed water quality impacts of the sand mine in 1989 and in the present by site visit, sampling of the Floridan production well and dredge pond, and reviewing sampling data from both monitor wells and homeowner wells. It also reviewed information on water quality data gathered from other sand mines and applied data from the DER background monitoring network. Therefore, the contention that insufficient site-specific information was submitted and considered is rejected.

56. Petitioner has offered into evidence petitioner's exhibits 61, 64, 65, 71, 75, 76, 78-80, 82 and 83. A ruling on the admissibility of the exhibits was reserved. The exhibits, which are based on data collected by the District and the USGS, are hydrographs showing water levels from lakes and monitoring wells during so-called "normal mine operations" on selected dates in 1988, 1989 and 1991. Although FRI was given copies of the exhibits ten days prior to hearing, it was not informed of the source of the data until final hearing. As it turned out, petitioner's witness had reviewed records over an extensive period of time and selected two or three days out of that time period as being representative of "normal" conditions. However, FRI established that, when longer periods of time were reviewed, the correlations alleged to exist by the graphs did not in fact exist and thus they did not represent normal conditions.

J. Attorney's fees and costs

57. FRI has requested an award of attorney's fees and costs on the theories petitioner interposed various papers and brought and participated in this action for "an improper purpose" within the meaning of Subsections 120.57(1)(b)5. and 120.59(6), Florida Statutes. In addition, petitioner has filed a motion for sanctions on the ground four motions filed by FRI were filed for an improper purpose within the meaning of Subsection 120.57(1)(b)5., Florida Statutes.

58. It may be inferred from the totality of the evidence that petitioner did not intend to participate in this proceeding for an improper purpose. Likewise, the same inference may be made with respect to the four motions filed by FRI. Therefore, fees and costs (sanctions) are not warranted for either party.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Subsection 120.57(1), Florida Statutes.

60. As the party seeking a renewal of its consumptive use permit, FRI bears the burden of proving by a preponderance of the evidence that its application should be approved. Florida Department of Transportation v. J. W. C. Company, Inc., 397 So.2d 778, 787 (Fla. 1st DCA 1981). In meeting this burden, FRI is obliged to provide reasonable assurance of compliance with District rules. In so doing, FRI is not required to show that a violation of the District's rules is a scientific impossibility, but only to show that non-occurrence of such violation is reasonably assured by the preponderance of the evidence. The Corporation of the President of the Church of the Latter Day Saints v. St. Johns River Water Management District (SJRWMD, December 13, 1990), aff'd 590 So.2d 427 (Fla. 5th DCA 1991). In other words, the applicant's burden is one of reasonable assur-ance and not absolute guarantees. City of Sunrise v. Indian Trace Community Development District, 14 F.A.L.R. 866, 869 (SFWMD, January 16, 1992).

61. Section 373.223, Florida Statutes, provides that as a condition to obtaining a consumptive use permit, an applicant must establish that the proposed water use:

> (a) Is a reasonable-beneficial use as defined in s. 373.019(4);
> (b) Will not interfere with any presently existing legal users of water; and
> (c) Is consistent with the public interest.

A "reasonable-beneficial use" is defined in Subsection 373.019(4), Florida Statutes, as:

> ...the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

Additional criteria for the issuance of a consumptive use permit are found in Sections (4) and (5) of Rule 40C-2.301, Florida Administrative Code. However, petitioner has stipulated that the criteria in sections (4)(c), (h), (i) and (l) and (5)(a)4., 5., and 6. are either inapplicable or have been met. Therefore, the criteria still at issue are as follows:

> (4) The following criteria must be met in order for a use to be considered reasonable-beneficial:
> (a) The use must be in such quantity as is necessary for economic and efficient

utilization;
(b) The use must be for a purpose that is both reasonable and consistent with the public interest;

* * *

(d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount;
(e) All available water conservation measures must be implemented unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible...
(f) When reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally or technologically feasible.
(g) The lowest acceptable quality water source, including reclaimed water which is addressed in Paragraph 40C-2.031(4)(f) above, must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally, or technologically feasible. If the applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher source may be utilized.

* * *

(j) The water quality of the source of the water should not be seriously harmed by the consumptive use;
(k) The water quality of the receiving body of water should not be seriously harmed by the consumptive use...

* * *

(5)(a) A proposed consumptive use does not meet the criteria for issuance of a permit set forth in Subsection 40C-2.301(2), F.A.C., if such proposed water use will:

* * *

2. Cause the water table or surface water level to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased or otherwise controlled by the applicant; or
3. Cause the water table level or aquifer potentiometric surface to be lowered so that significant and adverse impacts will affect existing legal users;

* * *

The above rules are further explicated in the applicant's handbook. Of concern here is Section 9.4.3, which provides further guidance on the "public interest" requirement as follows:

> The issuance of a permit will be denied as inconsistent with the public interest if the permit would allow withdrawals of water that would cause an unmitigated adverse impact on adjacent land use which existed at the time of permit application. Adverse impacts on land use are exemplified by, but not limited to:
> (a) significant reduction in water levels in an adjacent surface water body,
> (b) significant potential for land collapse or subsidence caused by a reduction in water levels, or
> (c) damage to crops, wetlands or other types of vegetation.

Finally, Section 9.4.4 of the applicant's handbook contains a presumption that an interference with an existing legal use occurs when:

> the withdrawal capability of any individual withdrawal facility of a presently existing legal user experiences a 10 percent or greater reduction in withdrawal capability or when the existing user experiences economic, health or other type of hardship as a result of the new use.

62. By a preponderance of the evidence, FRI has given reasonable assurance that the above criteria will be met. There-fore, it is concluded that the proposed water use is a reasonable-beneficial use, will not interfere with any presently existing legal users of water, and is consistent with the public interest. Stated differently, the proposed water use is in "such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest". Subsection 373.010(4), F. S. Further, the proposed use will not interfere with an existing legal use as defined by Section 9.4.4 of the applicant's handbook in that no homeowner's well in the vicinity of the mine suffered a 10 percent or greater reduction in withdrawal capacity, and no other type of hardship to homeowners' wells was shown. West Coast Regional Water Supply Authority v. Southwest Florida Water Management District, (SWFWMD, September 30, 1989). Finally, the proposed use is beneficial to the overall collective well being of the people and water resources of the area, will not "cause an unmitigated adverse impact on adjacent land use which existed at the time of permit application" and is therefore deemed to be consistent with the public interest.

63. In reaching these conclusions, the undersigned has given consideration to petitioner's contention that insufficient site-specific information exists to determine "the fate of the approximately 2 million gallons (of water) discharged daily by FRI and to calculate the significance of lake level reductions." The record shows, however, that a voluminous amount of information was submitted by FRI, and extensive data was collected and analyzed by the District. This data, testing and analysis are summarized in finding of fact 55 and dispel the contention that FRI's showing here, like that of the applicant in Booker Creek

Preservation, Inc. v. Mobil Chemical Co., 481 So.2d 10 (Fla. 1st DCA 1986), was insufficient to provide reasonable assurances that all criteria would be met. In its proposed order, petitioner has also argued that, pursuant to section 6.5.2 of the applicant's handbook, additional permit conditions should be established to shorten the life of the permit from seven to five years and to reduce the water pumping during times of drought conditions. However, this contention overlooks the fact that the District already has ample authority under Sections 373.175 and 373.246, Florida Statutes, to declare water shortages and adopt emergency orders when deemed to be appropriate. Moreover, the District has adopted Chapter 40C-21, Florida Administrative Code, which outlines the specific water use restrictions applicable to the various types of users during water shortage phases. Further, every water consumptive use permit, including that of FRI, contains a provision that in times of water shortages, the District may require the permittee to adhere to water shortage restrictions that are inconsistent with the terms and conditions of the permit. Rule 40C-2.381(2)(a)2., F.A.C. Petitioner also has contended that after FRI abandons the existing dredge pond within the next few years and moves to a new pond north of its present site, it will need less water than the requested allocation. It speculates that the existing allocation has been requested so that FRI can divert the excess water to the old pond to fulfill the requirement of its contract with the private landowner to maintain the artifical lake at specified levels. Assuming arguendo that such an assertion is correct, any diversion of water for lake augmentation or aesthetic purposes would be a violation of the permit and justify enforcement action by the District. Finally, contentions by petitioner that FRI's use of water from the surficial aquifer requires a separate permit and that state water policy (Chapter 17-40, F.A.C.) contains additional permitting criteria that must be satisfied are rejected as being without merit.

64. Also at issue are a motion for attorney's fees and costs filed by FRI and a motion for sanctions filed by petitioner. In its motion for attorney's fees and costs, FRI has sought relief under several statutory theories, including Subsection 403.412(2)(f), Florida Statutes. This part of its request is denied because that section only applies to suits to maintain an action for injunctive relief in circuit court, and not to an administrative action such as this. See, e. g., Greene v. State, Department of Natural Resources, 414 So.2d 251, 253 (Fla. 1st DCA 1982); Lake Hickory Nut Homeowners' Association, 14 F.A.L.R. 3385, 3401 (DER, July 23, 1992). On the theory that petitioner initiated this proceeding for "an improper purpose", FRI also seeks attorney's fees and costs under Subsection 120.57(1)(b)5., Florida Statutes. Under this statute, if a pleading, motion or other paper is interposed "to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation", it is deemed to have been filed for an improper purpose. As grounds for relief, FRI alleges that petitioner (a) was required to twice amend its initial petition before stating a good cause of action, (b) was "uncooperative" during discovery, (c) initially submitted a list of over 250 exhibits it intended to offer at hearing but actually introduced less than 50, (d) was late and disorganized at the meeting held to exchange exhibits, (e) failed to offer evidence to support many of the rule criteria at issue, and (f) used this proceeding solely as a vehicle to obtain information from FRI and the District on the issues raised in its petition. The general rule regarding the award of fees and costs under the cited statute is "if a reasonably clear legal justification can be shown for the filing of the paper in question, improper purpose cannot be found and sanctions are inappropriate." Mercedes Lighting and Electrical Supply, Inc. v. State, Dept. of General Services, 560 So.2d 272, 278 (Fla. 1st DCA 1990). At the same time, "one of the proper purposes for a section 120.57 proceeding is to allow persons affected by intended decisions of

state agencies to change the agency's mind." Id. at 278. Moreover, the failure of a party to carry its burden of proof during the final hearing does not equate to participation for an improper purpose. Department of Health and Rehabilitative Services v. S. G., 613 So.2d 1380, 1385 (Fla. 1st DCA 1993). Finally, in Mercedes, the court concluded that "a frivolous purpose . . . should be one which is of little significance or importance in the context of the goal of administrative proceedings." Id. at 278. Initially, it is noted that even if true, a party's being "uncooperative" during discovery and late and disorganized at a meeting of counsel would not fall within the purview of subsection 120.57(1)(b)5. since that subsection is aimed at deterring the filing of "pleadings, motions or other papers" for an improper purpose. As to the remaining grounds, the totality of the evidence supports a conclusion that petitioner had "a reasonably clear justification" for initiating this proceeding and its purpose was not "of little significance or importance in the context of the goal of administrative proceedings." Unlike the factual scenario present in Burke v. Harbor Estates Associates, Inc. and Dept. of Environmental Regulation, 591 So.2d 1034 (Fla. 1st DCA 1991), petitioner submitted evidence in support of its petition, offered expert testimony on many issues, demonstrated knowledge of the applicable law and purpose of the proceeding, and provided spirited opposition to the application. Therefore, the motion for fees and costs under this theory is denied. FRI has also requested fees and costs under Subsection 120.59(6), Florida Statutes. That subsection allows fees and costs to be awarded to the prevailing party if the nonprevailing party participated in this cause for "an improper purpose". The definition of an improper purpose is the same as that found in subsection 120.57(1)(b)5. In this case, petitioner is a nonprevailing party within the meaning of the statute. Applying the same rationale as was used in denying the claim for fees and costs under subsection 120.57(1)(b)5., the undersigned concludes that this request should likewise be denied.

65. Petitioner has also filed a motion for sanctions against FRI under subsection 120.57(1)(b)5. on the theory that four motions filed in this case were interposed for an improper purpose. They are a motion to dismiss filed on August 17, 1992, a motion to compel compliance with Rule 60Q-2.023, Florida Administrative Code, filed on February 26, 1993, and FRI's pending motion for attorney's fees and costs and motion to correct transcript. As to the first two motions, Mercedes instructs us that "the orderly conduct of proceedings would appear to dictate the striking of a pleading or, at the very least, an order for withdrawal or amendment . . . at the earliest stage at which a violation of the statute can be determined." Id. at 279. Although the request for sanctions as to the first two motions appears to be untimely under this principle, nonetheless the undersigned concludes that they were not interposed for an improper purpose. Likewise, FRI's two pending motions are not deemed to have been filed for the purpose of harassing petitioner, causing unnecessary delay or for a frivolous reason, or needlessly increasing the cost of litigation. This being so, the motion for sanctions is denied.

66. Finally, there remains pending FRI's motion to correct transcript and an objection by FRI to petitioner's exhibits 61, 64, 65, 71, 75, 76, 78-80, 82 and 83, on which a ruling was previously reserved. As to the pending motion to correct transcript, the same is hereby granted. As to the evidentiary objection, FRI contends that petitioner did not comply with Section 90.956, Florida Statutes, and thus the exhibits are inadmissible. The cited section provides that before a summary of evidence is admissible, the party offering it must give timely written notice to the adverse party so that opposing counsel has sufficient time to investigate and inspect the records and to determine whether the summary is accurate. While it is true that petitioner furnished a

copy of the exhibits to opposing counsel ten days prior to hearing, the summaries did not indicate the source of the underlying information, and thus FRI had no opportunity, except during final hearing since a continued hearing was not a viable option, to investigate and verify the accuracy of the graphs. Since the spirit and intent of section 90.956 were violated, the objection is hereby sustained. Parenthetically, it is noted that even if the exhibits were admitted, they have been shown to be unrepresentative of normal conditions and thus have limited probative value.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a final order be entered by the District granting application number 2-019-0012AUR as proposed by the District in its notice of intent to approve the application issued on August 6, 1992.

DONE AND RECOMMENDED this 4th day of June, 1993, in Tallahassee, Florida.

DONALD R. ALEXANDER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 1993.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 92-5017

Petitioner:

1-3.	Partially accepted in finding of fact 1.
4.	Partially accepted in finding of fact 2.
5-6.	Partially accepted in finding of fact 6.
7.	Rejected as being unnecessary.
8.	Partially accepted in finding of fact 9.
9.	Partially accepted in finding of fact 8.
10-12.	Partially accepted in finding of fact 7.
13.	Partially accepted in findings of fact 6 and 7.
14.	Partially accepted in finding of fact 7.
15-16.	Partially accepted in finding of fact 6.
17-18.	Partially accepted in finding of fact 7.
19.	Partially accepted in finding of fact 6.
20.	Partially accepted in finding of fact 7.
21.	Rejected as being unnecessary.
22.	Partially accepted in finding of fact 11.
23-24.	Partially accepted in finding of fact 7.
25.	Partially accepted in findings of fact 7 and 8.
26.	Partially accepted in finding of fact 7.
27-28.	Partially accepted in finding of fact 14.

29. Partially accepted in finding of fact 29.
30. Partially accepted in finding of fact 11.
31-33. Partially accepted in findings of fact 14-16.
34-35. Partially accepted in finding of fact 15.
36-42. Partially accepted in findings of fact 14-16.
43. Partially accepted in finding of fact 16.
44. Partially accepted in finding of fact 31.
45. Rejected as being irrelevant.
46. Partially accepted in finding of fact 28.
47. Partially accepted in finding of fact 33.
48. Partially accepted in finding of fact 32.
49. Partially accepted in finding of fact 23.
50. Partially accepted in finding of fact 12.
51. Partially accepted in finding of fact 14.
52-53. Partially accepted in finding of fact 11.
54. Partially accepted in finding of fact 37.
55. Partially accepted in finding of fact 11.
56. Rejected as being contrary to the more persuasive evidence. See finding 23.
57-58. Partially accepted in finding of fact 11.
59-61. Partially accepted in finding of fact 12.
62. Partially accepted in finding of fact 13.
63. Partially accepted in finding of fact 11.
64-71. Partially accepted in findings of fact 32-36.
72. Partially accepted in finding of fact 11.
73-74. Partially accepted in finding of fact 6.
75. Partially accepted in finding of fact 8.
76-77. Partially accepted in findings of fact 8 and 11.
78. Rejected as being contrary to the more persuasive evidence. See finding of fact 11.
79. Partially accepted in finding of fact 8.
80. Partially accepted in finding of fact 37.
81. Partially accepted in finding of fact 11.
82. Partially accepted in finding of fact 22.
83-120. Partially accepted in findings of fact 23 and 24.
121-139. Partially accepted in findings of fact 25-27.
140-144. Rejected since even if true, the impacts are not significant.
145. Partially accepted in finding of fact 18.
146-158. Partially accepted in findings of fact 18-20.
159-171. Partially accepted in finding of fact 39.
172-177. Partially accepted in findings of fact 40 and 41.

Respondent (District):

1. Partially accepted in finding of fact 3.
2-4. Partially accepted in finding of fact 1.
5-6. Partially accepted in finding of fact 2.
7. Partially accepted in finding of fact 3.
8. Partially accepted in finding of fact 2.
9. Partially accepted in findings of fact 1, 3 and 5.
10. Partially accepted in finding of fact 7.
11. Partially accepted in finding of fact 5.
12. Partially accepted in finding of fact 1.
13. Partially accepted in finding of fact 9.
14. Partially accepted in finding of fact 5.
15. Partially accepted in finding of fact 2.

16. Partially accepted in finding of fact 6.
17-18. Partially accepted in finding of fact 7.
19-22. Partially accepted in finding of fact 11.
23. Partially accepted in finding of fact 37.
24-40. Partially accepted in findings of fact 12-16.
41-51. Partially accepted in findings of fact 11.
52-59. Partially accepted in findings of fact 23 and 24.
60-64. Partially accepted in finding of fact 25.
65. Partially accepted in finding of fact 45.
66. Partially accepted in finding of fact 23.
67-69. Partially accepted in finding of fact 11.
70. Rejected as being unnecessary.
71. Partially accepted in finding of fact 7.
72-73. Partially accepted in finding of fact 11.
74-77. Partially accepted in finding of fact 28.
78. Partially accepted in finding of fact 23.
79. Partially accepted in finding of fact 24.
80-81. Partially accepted in findings of fact 23 and 24.
82-83. Partially accepted in finding of fact 29.
84. Partially accepted in finding of fact 11.
85. Partially accepted in finding of fact 28.
86-90. Partially accepted in finding of fact 30.
91. Partially accepted in finding of fact 32.
92-94. Partially accepted in finding of fact 33.
95. Partially accepted in finding of fact 34.
96. Partially accepted in finding of fact 36.
97-100. Partially accepted in finding of fact 17.
101. Partially accepted in finding of fact 19.
102-103. Partially accepted in finding of fact 21.
104-121. Partially accepted in findings of fact 19 and 20.
122-130. Partially accepted in finding of fact 21.
131-133. Partially accepted in finding of fact 20.
134-138. Partially accepted in findings of fact 40 and 41.
139. Partially accepted in finding of fact 33.
140-141. Partially accepted in finding of fact 10.
142. Partially accepted in finding of fact 48.
143. Partially accepted in finding of fact 49.

Respondent (FRI):

1. Partially accepted in findings of fact 1 and 2.
2. Partially accepted in findings of fact 3 and 4.
3. Partially accepted in finding of fact 5.
4. Partially accepted in findings of fact 2 and 6.
5. Partially accepted in finding of fact 11.
6. Partially accepted in findings of fact 6 and 7.
7-8. Partially accepted in finding of fact 10.
9. Partially accepted in finding of fact 8.
10. Partially accepted in finding of fact 9.
11. Partially accepted in finding of fact 13.
12. Partially accepted in finding of fact 15.
13. Rejected as being unnecessary.
14. Partially accepted in finding of fact 22.
15. Partially accepted in finding of fact 23.
16. Partially accepted in finding of fact 24.
17. Partially accepted in finding of fact 25.
18. Partially accepted in finding of fact 26.

19. Partially accepted in finding of fact 27.
20. Partially accepted in finding of fact 28.
21. Partially accepted in finding of fact 31.
22-24. Partially accepted in finding of fact 32.
25. Partially accepted in finding of fact 33.
26. Partially accepted in finding of fact 34.
27. Rejected as being unnecessary.
28. Partially accepted in finding of fact 35.
29-30. Partially accepted in finding of fact 36.
31-35. Partially accepted in finding of fact 37.
36. Partially accepted in finding of fact 38.
37. Partially accepted in finding of fact 17.
38. Partially accepted in finding of fact 18.
39. Partially accepted in finding of fact 19.
40-41. Partially accepted in finding of fact 20.
42-45. Partially accepted in finding of fact 21.
46. Partially accepted in finding of fact 40.
47. Partially accepted in finding of fact 41.
48. Partially accepted in findings of fact 40 and 41.
49. Partially accepted in finding of fact 39.
50-51. Partially accepted in finding of fact 42.
52. Partially accepted in finding of fact 43.
53. Partially accepted in finding of fact 44.
54. Partially accepted in finding of fact 45.
55. Partially accepted in finding of fact 46.
56. Partially accepted in finding of fact 47.
57-58. Partially accepted in finding of fact 49.
59. Partially accepted in finding of fact 51.
60. Partially accepted in finding of fact 52.
61. Partially accepted in finding of fact 54.

Note - Where a proposed finding has been partially accepted, the remainder has been rejected as being unnecessary, irrelevant, cumulative, not supported by the more credible, persuasive evidence, or a conclusion of law.

COPIES FURNISHED:

Henry Dean, Executive Director
St. Johns River Water Management
District
Post Office Box 1429
Palatka, Florida 32178-1429

Patrice Flinchbaugh Boyes, Esquire
Post Office Box 1424
Gainesville, Florida 32602-1424

Peter B. Belmont, Esquire
511 31st Street North
St. Petersburg, Florida 33704

Wayne E. Flowers, Esquire
Jennifer L. Burdick, Esquire
Post Office Box 1429
Palatka, Florida 32178-1429

Marcia Penman Parker, Esquire
Emily G. Pierce, Esquire
1301 Gulf Life Drive
Suite 1500
Jacksonville, Florida 32207

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

==========

SJRWMD AGENCY FINAL ORDER

==========

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

LAKE BROOKLYN CIVIC ASSOCIATION, INC.,	)	
Petitioner,	)	
v.	)	DOAH CASE NO. 92-5017 SJRWMD FILE OF RECORD NO. 92-1247
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and FLORIDA ROCK INDUSTRIES,	)	
Respondents.	)	

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated hearing officer, the Honorable Donald R. Alexander, held a formal administrative hearing in the above-styled case on February 16 through February 19, 1993, in Green Cove Springs, Florida.

APPEARANCES

For Lake Brooklyn Civic Association, Inc.:
PATRICE FLINCHBAUGH BOYES, ESQUIRE
Post Office Box 1424
Gainesville, Florida 32601

PETER B. BELMONT, ESQUIRE
511 31st Avenue North
St. Petersburg, Florida 33704

For Respondent Florida Rock Industries, Inc.:
MARCIA PENMAN PARKER, ESQUIRE
EMILY G. PIERCE, ESQUIRE
1301 Gulf Life Drive, Suite 1500
Jacksonville, Florida 32207

For Respondent St. Johns River Water Management District:
WAYNE E. FLOWERS, ESQUIRE
JENNIFER L. BURDICK, ESQUIRE
Highway 100 West
Post Office Box 1429
Palatka, Florida 32178-1429

On June 7, 1993, Mr. Alexander submitted to the St. Johns River Water Management District ("District"), and all other parties to this proceeding, a Recommended Order, a copy of which is attached hereto as Exhibit "A". Lake Brooklyn Civic Association ("LBCA") timely filed Exceptions to the Recommended Order as well as a Motion for Remand, Motion for Official Recognition and Motion to Supplement the Record. Respondent Florida Rock Industries ("FRI"), and Respondent District filed responses to the Exceptions and Motions filed by LBCA. This matter then came before the Governing Board on July 13, 1993, for final agency action.

STATEMENT OF THE ISSUES

The issue in this proceeding is whether the District should approve FRI's consumptive use permit application, no. 2-019-0012AUR, pursuant to Chapter 40C-2, Florida Administrative Code

The FRI is seeking permission to withdraw an annual average daily rate of 2.09 million gallons per day (mgd) of water and 762.85 million gallons per year of ground water for hydraulic dredging, cleaning and purification of sand at the Goldhead Sand Mine. Subject to certain limiting conditions to be set forth in the FRI's consumptive use permit, the water is proposed to be produced from three Floridan aquifer wells. District proposed to grant the permit application which was challenged by LBCA, resulting in the formal administrative proceeding. LBCA challenged the issuance of the permit to FRI on the basis of the FRI's alleged failure to comply with the applicable requirements of Chapter 3V3, Florida Statutes (E.S.), and Chapter 40C-2, Florida Administrative Code (F.A.C.), and other applicable law.

A. RULINGS ON EXCEPTIONS TO FINDINGS OF FACT

LBCA Exception Number 1

The LBCA takes exception to the hearing officer's Finding of Fact 2 that a necessary component of FRI's operation is its withdrawal of approximately 2.09 mgd of ground water for the production of sand. The 2.09 mgd is the average daily usage rate to who the parties stipulated prior to the hearing. The maximum daily usage rate is 3.75 mgd. However, FRI cannot exceed 762.5 million gallons for the year which is an average of 2.09 mgd. (Prehearing Stip. pp. 1,9). In the LBCA Proposed Recommended Order paragraph 25, the LBCA states that the operation "necessitates FRI's pumping allocation of an average daily 2.09 million gallons of water from the Floridan aquifer." Additionally, LBCA acknowledges in its Exception No. 2 that it is "known that approximately 2 mgd are pumped into the system." If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). This exception is rejected because the finding is supported by competent substantial evidence. (T. 41-42, 104, 913-914).

LBCA Exception Number 2

The LBCA takes exception to the hearing officer's Findings of Fact 8 and 28 that the receiving water from the mine site is primarily the surficial aquifer which recharges the downgradient lakes and that the surficial aquifer recharge will result in a positive or immeasurable effect on the lakes. The exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. It is improper for this Board to retry the case after the hearing has concluded by altering findings supported by evidence and reweighing evidence. Tampa Wholesale Liquors, Inc. v. Div. of Alcoholic Beverages and Tobacco, 376 So.2d 1195 (Fla. 2d DCA 1979). The decision to believe one expert over another is left to the hearing officer, and the decision cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club v. Orlando Utility Comm., 436 So.2d 383, 389 (Fla. 5th DCA 1983) This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. Heifetz v. Dept. of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985); Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990). If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Section 120.57(1)(b)10., Fla. Stat.; Berry v. Dept. of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). This exception is rejected because the findings are supported by competent substantial evidence. (T. 105, 120-129, 146, 170, 187-190, 208-209, 235, 248, 256-257, 972-973, 1085-1093, 1139).

LBCA Exception Number 3

The LBCA takes exception to the hearing officer's Finding of Fact 11 that the aquifer characteristics in the Floridan aquifer beneath and around the mine site are relatively uniform. The exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 180, 926-927).

LBCA Exception Number 4

The LBCA takes exception to a mischaracterization of the hearing officer's Finding of Fact 13 regarding lake leakance by stating that the hearing officer found that some of the lakes at issue do not have leakance to the Floridan aquifer. In fact, it is contextually clear that the Hearing Officer was referring to "many of the lakes within the region." This exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 77-80).

LBCA Exception Number 5

The LBCA takes exception to the hearing officer's Finding of Fact 16 that very little, if any, of the groundwater flowing into the Floridan aquifer beneath Lake Brooklyn flows toward the mine site. In making its argument, LBCA inaccurately attributes testimony to FRI witness Fountain when the referenced testimony was testimony of LBCA witness Boyes. This exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 1145-1146).

LBCA Exception Number 6

The LBCA takes exception to the hearing officer's Findings of Fact 22 and 55 that the data collection effort of FRI and the District was far more extensive than is normally conducted for a mine of this size and that sufficient site-specific information was developed to be able to determine the effects of the proposed use of water at the mine operation. This exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. The findings are supported by competent substantial evidence and therefore the exception is rejected. (T. 103, 201, 238, 918-919; FR Ex. 5).

LBCA asserts that FRI did not evaluate the "worstcase" scenario in order to establish permit entitlemet LBCA provides no legal citations to support its exception. LBCA's assertion lacks legal as well as factual support. LBCA has criticized FRI's aquifer performance test and modeling effort without presenting the elusive "worstcase scenario" which presumably would show impacts greater than those modeled by FRI. LBCA seeks to impose a burden of proof which is insupportable in law. It is not FRI's burden to show a violation of the criteria in Chapter 40C-2, Fla. Admin. Code, is a scientific impossibility, only to show that the non-occurrence of such violation is reasonably assured by the preponderance of the evidence in the proceeding. The Corporation of the President v. SJRWMD and City of Cocoa, Case Nos. 89-828, 89-751 (SJRWMD Dec. 13, 1990), aff'd, 590 So.2d 427 (Fla. 5th DCA 1991). An agency cannot assume the worst-case scenario unless that condition is reasonably foreseeable. Florida Audubon Society, supra..; Rudloe and Gulf Stream Specimen Co. v. Dickerson Bayshore, Inc., 10 F.A.L.R. 3426 (Florida Department of Environmental Regulation, June 8, 1988). As delineated in FRI's response to this exception, FRI and the Distract presented evidence of numerous investigations regarding this application, including testing and analyses of the impact of withdrawals at greater than the average and maximum daily pumping rates. (See Record citations on pp 17-20 of FRI's Response to Exceptions; T. 115-116, 126, 176-177, 918-920). LBCA failed to present any citation to the record where it presented testimony evincing that another scenario which would result in greater impacts than those predicted by the applicant were reasonably like to occur. LBCA's speculation that another undefined scenario of pumping would show greater

impacts was rejected by the hearing officer. The applicant has provided reasonable assurances with regard to the effects of the proposed withdrawal.

LBCA Exception Number 7

The LBCA takes exception to the hearing officer's purported inference in Finding of Fact 23 that the aquifer performance test (2T) measured impacts significantly greater than could be expected to occur under "worst case" conditions as a result of the mining operation. The finding actually states "the (aquifer performance) test measured effects of pumping from the mine production wells for periods ranging from 78 hours to 108 hours at approximately twice the average rate of 2.09 mgd." As discussed in the ruling on exception no. 6, LBCA's assertion of a "worstcase scenario" has factual support in the instant case. The applicant is required to provide reasonable assurance that the proposed use is reasonable, beneficial, will not impact existing legal uses and is consistent with the public interest. The applicant is not required to evaluate LBCA's unspecified worst case scenario or prove the use will not cause any impacts. Florida Audubon Society, supra..; Rudloe, supra.. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 113-115, 141, 920).

LBCA Exception Number 8

The LBCA takes exception to the hearing officer's Finding of Fact 23 that no changes in the lake levels are attributable to the pumping at the mine. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. In Finding of Fact No. 24, the hearing officer found that the effects of pumping were not distinguishable from the declines which occurred before and after the ADT test. Therefore, his conclusions are not inconsistent as alleged by the LBCA. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 120-130, 146, 759, 928-933, 942, 944- 948, 1015-1016, 1122-1123, 1168; Dist. Ex. 5).

LBCA Exception Number 9

The LBCA takes exception to the hearing officer's Finding of Fact 24 that the actual effects of the pumping will be approximately one half of the observed amounts of the 2T test on an average pumping day. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 113-117, 923-996; Dist. Ex. 5). LBCA's claim that this finding is irrelevant since only a "worstcase" scenario is pertinent is likewise rejected. Initially, it is noted that LBCA cites no legal support for its arguments. Furthermore, there is no requirement in the District's rules governing consumptive use which mandates consideration of only "worstcase" scenarios. Furthermore, an agency cannot assume worst case scenarios unless they are reasonably foreseeable, which determination is a case by case factual issue. See Florida Audubon Society, supra., Rudloe, supra..

LBCA Exception Number 10

The LBCA takes exception to the hearing officer's Finding of Fact 26 that Dr. Stewart testified that the Floridan aquifer is rarely completely homogenous and isotropic but that he and other modelers regularly make that assumption. This Board cannot judge credibility of witnesses or otherwise interpret the evidence to reach a desired result. Heifetz, supra.; Freeze, supra.. This

exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding supported by competent substantial evidence and therefore the exception is rejected. (T. 738).

LBCA Exception Number 11

The LBCA takes exception to the hearing officer's Finding of Fact 27 that the maximum drawdown in the Floridan aquifer under normal pumping conditions is modeled to be 0.1 to 0.2 feet beneath White Sands Lake. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 129, 182). For the same reasons stated in the ruling on exceptions no. 9 and 7, the LBCA's claim regarding irrelevancy is rejected.

LBCA Exception Number 12

The LBCA takes exception to the hearing officer's Finding of Fact 28 that a decrease in lake levels will be less than that of the decrease in the Floridan aquifer, depending on the rate of leakance and that the drawdown effect will not accumulate over time, but rather will remain constant after reaching steady state conditions. The LBCA is simply rearguing their case. This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. Heifetz, supra.; Freeze, supra.. This exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 118-120, 129, 237, 706-708, 758). LBCA's irrelevancy argument is rejected for the reasons stated in the ruling on exceptions no. 9 and 7.

LBCA Exception Number 13

The LBCA takes exception to the hearing officer's Findings of Fact 42 through 54 as being conclusion of law rather than findings of fact. The LBCA does not cite to the record or make legal argument to support the exception as required by Rule 40C-1 .564, F.A.C. Without said citation or argument, the exception is rejected. Corporation of the President, supra.. The hearing officer's recitation of the individual criteria of Rules 40C-2.301 (2), (4) and (5), F.A.C., serve as introduction to and reference for the specific findings with regard to each criterion to provide clarity in the order. To the extent that expert witnesses presented testimony on the criteria and how the applicant satisfied the criteria through proof, the elements are findings or fact. These additional reasons also serve as ground for rejection of the exception.

LBCA Exception Number 14

The LBCA takes exception to the hearing officer's Finding of Fact 56 that LBCA's referenced exhibits do not correlate with normal conditions when compared with longer periods of time. The exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. In addition, the hearing officer ultimately did not admit the exhibits and therefore, the Finding of Fact becomes irrelevant. (T. 1152-1168, 411-416, 930-933, 948, 969; FR Ex. 50A, SOB). Contrary to Rule 40C-1.564(3), F.A.C., LBCA fails to state wish particularity citations to the record or legal basis as

required by Rule 40C-1.564, F.A.C., in support of its attack on finding 56 and its inferential attack on findings 23, 24, 30, 31, 32, 33, 34 and conclusions 62 and 63. The entire exception is rejected.

LBCA Exception Number 15

The LBCA takes exception to the hearing officer's Conclusion of Law 66 that LBCA's exhibits 61, 64, 65, 71, 75, 76, 78-80, 82 and 83 have limited probative value to the extent it is predicated on FRI's rebuttal testimony. The LBCA argues that the rebuttal testimony is of low probative value. This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. This exception goes to the weight of the evidence and inferences drawn there from by the hearing officer. The finding is supported by competent substantial evidence and, therefore, the exception is rejected. (T. 1152-1168, 411-416, 930-933, 948, 969).

Exception is also taken to Findings of Fact Nos. 32, 36, and 56 and Conclusion of Law 62 because LBCA argues that the testimony on which they are based exceeded the scope of direct examination and the LBCA was not given the opportunity to object. The correct time to object was when the alleged improper testimony was elicited. The LBCA did not object to preserve the record and therefore, has waived the objection. Section 90.104(1)(a), Fla. Stat.

Finally, LBCA asserts that it was denied the opportunity to present rebuttal testimony in violation of Section 120.57(1)(b)4., Fla. Stat. To the contrary, LBCA was not denied the opportunity to present rebuttal testimony but failed to request surrebuttal and consequently failed to preserve any denial of that request by an objection on the record. (T. 1188-1190). Since LBCA never requested surrebuttal, the hearing officer never denied that request and, therefore, LBCA's argument is without merit.

Furthermore, pursuant to the order of presentation under Rule 40C-1.5434(1), F.A.C., which is followed in a permitting proceeding (applicant, petitioner, district), LBCA's entire case tended to be in the nature of rebuttal to the applicant's case. While the hearing officer did state that he did not ordinarily allow surrebuttal (T. 1169) before the rebuttal testimony was concluded, LBCA never affirmatively requested to present surrebuttal evidence or testimony nor did LBCA proffer any such evidence or testimony. Since no proffer was made of any relevant surrebuttal testimony which LBCA contends was excluded, and no objection was made in the record to LBCA's belief that it was prohibited from adducing surrebuttal evidence, it is now precluded from complaining about this perceived adverse ruling. King v. Estate of King, 554 So.2d 600 (Fla. 1st DCA 1989); Holmes v. Redland Construction Co., 557 So.2d 911 (Fla. 3rd DCA 1990); Roberts v. Hollway, 581 So.2d 619 (a. 4th DCA 1991); Diaz v. Rodriguez, 384 So.2d 906 (Fla. 3rd DCA 1980). The exception is rejected.

LBCA Exception Number 16

The LBCA takes exception to the hearing officer's Findings of Fact 17, 18, 19, 20, 21, 52 and 55 and Conclusions of Law 62 and 63. Findings of Fact 18, 19, 21, 52 and 55 and Conclusions of Law 62 and 63 are discussed in subsequent exceptions and therefore arc not addressed in this ruling on exceptions. LBCA's exception to Finding of Fact 20 fails to state with particularity any supporting citations to the record or legal argument as required by Rule 40C- 1.564 (3), F.A.C., and is therefore, rejected. LBCA takes exception to Finding of Fact 17 that the hearing officer incorrectly refers to three distinct water quality studies. In fact, the hearing officer actually refers to "numerous analyses"

LBCA also objects to the reference to "unknown persons" in the finding and apparently to the statement: "They include analyses conducted by the District in 1989 and 1992, including sampling of water quality and an analysis of the background levels of certain parameters, and an assessment of data from HRS testing in March 1989 and May 1992." Clarification that HRS personnel conducted sampling in 1989 and 1992 is provided; however, since these personnel were never specifically named, to that extent the hearing officer's reference to "unknown persons" is accurate. (T. 1035, 379). The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 102-103, 130-133, 451, 1023-1037, 1041- 1048, 1151-1152).

LBCA Exception Number 17

The LBCA takes exception to that part of the hearing officer's Finding of Fact 18 that states: "This theory was predicated on... an assumption that a chemical reaction was occurring because herbicides were used in the dredge pond." LBCA fails to prove any supporting transcript citations in violation of Rule 40C- 1.564 (3), F.A.C. In Finding of Fact 18, the hearing officer reached the conclusion that none of the water quality samples taken from the mine site indicate a violation of state water quality standards. The exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. It is improper for this Board to retry the case after the hearing has concluded by altering findings and reweighing evidence. Tampa Wholesale Liquors, Inc., supra.. This Board cannot judge credibility of witnesses or otherwise interpret the evidence to reach a desired result. The finding is supported by competent substantial evidence and the exception is rejected. (T. 133, 575, 1024-1025).

LBCA Exception Number 18

The LBCA takes exception to the hearing officer's Finding of Fact 19 by arguing that water quality on the mine site says nothing about off site impacts and positing that the finding is predicated on certain speculation. LBCA offers no helpful record citations supporting these allegations. Expert testimony established that water quality sampling by FRI and the District of the surficial aquifer at the locations chosen was where water quality impacts would be most likely to be revealed and consequently was a conservative approach. (T. 133, 144, 1029-1030, 1061, 1073). This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 130-139, 141-144, 575-576, 1028-1031, 1061-10 65, 1073, 1136-1139).

LBCA Exception Number 19

The LBCA takes exception to the hearing officer's Finding of Fact 21 by stating that it misleadingly implies that 212 homes were tested for water quality by HRS. To the contrary, the hearing officer's finding states "12 out of 212 homeowners" (emphasis added) south of the mine site were tested, not 212. In addition, the exhibits referenced do not reflect the testing of 212 homes. The finding is supported by competent substantial evidence and the exception is rejected. (T. 167-168, 379, 990, 1036-1037, 1041, 1048-1050, 1052-1053).

LBCA Exception Number 20

The LBCA takes exception to the hearing officer's Finding of Fact 21 on the basis that it is a legal conclusion which misrepresents and misapplies the state water quality standards. However, LBCA cites no authority or record citation

for the argument as required by Rule 40C-1.564(3), F.A.C. The finding actually states "with the exception of one well... the water from the homeowners' wells did not exceed background water quality for iron and manganese"; clearly, this is a factual statement. This exception, under the guise of an unsupported legal argument, goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial, and uncontroverted, evidence which, incidentally, includes explanation and citation to the relevant exception/standard. Furthermore, the parties stipulated that official recognition was taken of chapter 17-520, F.A.C. The exception is rejected. (T. 1034, 1041, 1077-1078; Prehearing Stip. p 12; Rules 17-520.420(2) and 17-520.200(11), F.A.C.)

LBCA Exception Number 21

The LBCA takes exception to the hearing officer's Finding of Fact 21 that the 1989 water quality samples by HRS were unreliable because of the uncertainty regarding the sampling technique protocol. This exception erroneously states there was no evidence of sampling protocol used by HRS. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 1039-1049).

LBCA Exception Number 22

The LBCA takes exception to the hearing officer's Finding of Fact 52 that the receiving body of water will not be seriously harmed, by characterizing the finding as being predicated on an unproven theory that the surficial aquifer receives all groundwater discharged from one site. LBCA has failed to read the entire finding which clearly reveals that the hearing officer did not confine his consideration to the surficial aquifer. He found that water quality standards would not be violated in the surfical aquifer, where the highest concentrations of any potential contaminants would appear, then they would not be violated in any intermediate aquifer similarly, no violations would occur in one Floridan aquifer. The decision to believe one expert over another is the role of the hearing officer, and the decision cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter of Sierra Club, supra.. This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. Heifetz, supra.; Freeze, supra.. If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry, supra.. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 105, 141-142, 1025-1030, 1034-1035).

LBCA Exception Number 23

The LBCA takes exception to the hearing officer's Finding of Fact 55 that water quality sampling was collected to evaluate a water budget for the dredge pond. In their responses to this exception, FRI explicitly notes it has no response to this exception and District counsel concedes that although water quality samples were taken from the dredge pond and a water budget was calculated for the dredge pond, these two procedures were not linked to one another. The testimony of FRI witnesses is that water quality sampling and data to determine the water budget for the dredge pond were performed. (T. 76, 103). Counsel for FRI and the District have stipulated that the testimony does not support the finding that the water quality samples were used to evaluate the

water budget. Since, as stipulated, this portion of the hearing officer's finding is not supported by any evidence in the record, the exception is accepted.

LBCA Exception Number 24

The LBCA takes exception to the nearing officer's Finding of Fact 55, arguing that the applicant did not perform an environmental assessment of Lake Brooklyn, and thus cannot fairly draw any conclusions about its operation's impact on that lake. The Finding of Fact describes the site-specific information which supports the application. The pertinent part of the finding states: "FRI conducted an assessment of the environmental impacts to the wetland and wildlife resources of the area lakes, including White Sands, Spring and Gator Bone Lakes." To the extent Lake Brooklyn is encompassed by use of the term "area lakes", the existence of an assessment of the impacts to Lake Brooklyn is supported by expert testimony. (T. 281, 899). Additionally, the finding is otherwise supported by competent substantial evidence. (T. 266-280). The exception is rejected.

LBCA Exception Number 25

The LBCA takes exception to the hearing officer's Finding of Fact 31 which states in pertinent part: "petitioner's witness Dr. Stewart opined that there is insufficient data to determine whether any impacts to lake levels are occurring." LBCA is essentially complaining that the entirety of Dr. Stewart's testimony should be credited not just a portion. The role of the hearing officer is to consider and weigh all the evidence, resolve conflicts and judge credibility of the witnesses. The hearing officer apparently did not view all of Dr. Stewart's testimony in the same manner as LBCA's attorney; such is his legal prerogative. If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry, supra.. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 784-786, 145-146, 232-233, 285-286, 288-289, 897-898, 1085).

LBCA Exception Number 26

The LBCA takes exception to the hearing officer's Finding of Fact 24 that the rate of decline (in Spring, White Sands and Gator Bone Lakes) during the APT test was not distinguishable from the declines which occurred before or after the test. LBCA provides no record citations to support its argument that since the hearing officer rejected its use of certain APT data in an attempted correlation between pumping and Lake Brooklyn levels, that all the APT data was entirely discredited and could have no value in an analysis regarding Spring, White Sands or Gator Bone Lakes. If a hearing officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry, supra.. This exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. The finding is supported by competent substantial evidence and therefore the exception is rejected. (T. 941-948, 1015-1016, 1123, 1168).

B. RULINGS ON EXCEPTIONS TO CONCLUSIONS OF LAW

LBCA Exception Number 1

The LBCA takes exception to the hearing officer's Conclusion of Law 62 and 63 and Findings of Fact 42 through 54 (which LBCA alleges should be conclusions

of law) that FRI has established its entitlement to the permit. LBCA argues that the applicant failed to present sufficient information about conditions at Lake Brooklyn. LBCA's numerous "factual" statements in this exception are unsupported by record citations. The burden of proof in an administrative hearing falls initially upon the party asserting the affirmative of an issue, i.e. entitlement to a permit. Rules 40C-1.545 and 40C-2.301(7), F.A.C.; Capeletti Brothers v. Department of General Services, 432 So.2d 1359 (Fla. 1st DCA 1983); Department of Transportation v. J.W.C., Inc., 396 So.2d 778 (Fla. 1st DCA 1981). The party must prove its case by a preponderance of the evidence. Florida Audubon Society v. South Florida Water Management District, 13 F.A.L.R. 4169 (undated).

The applicant's burden is to establish reasonable assurances that the proposed use is a reasonable-beneficial use, will not interfere with any presently existing legal use of water, and is consistent with the public interest. Section 373.223, Fla. Stat. The burden of reasonable assurances is not one of absolute guarantees. City of Sunrise v. Indian Trace Community Dev. Dist., 14 F.A.L.R. 866 (January 16, 1992). The impacts which are reasonably expected to result from issuance of the permit must be addressed, not potential impacts or those that might occur Hoffert v. St. Joe Paper Co., 12 F.A.L.R. 4972 (December 6, 1990); Chipola Basin Protective Group Inc. v. Florida Chapter of Sierra Club, 11 F.A.L.R. 467 (Department of Environmental Regulation, December 29, 1988); Florida Keys Citizen Coalition v. 1800 Atlantic Developers, 8 F.A.L.R. 5564 (Department of Environmental Regulation, October 17, 1986). Once the party asserting the affirmative, FRI, has presented its prima facia case, the burden shifts to the LBCA to present contrary evidence. 1800 Atlantic Developers, supra.; Hoffert, supra..

LBCA cites Booker Creek Preservation, Inc. v. Mobil Chemical Co., 481 So.2d 10 (Fla. 1st DCA 1986) in support of the exception. In Booker Creek, the Court held that additional testing, beyond that offered by the applicant, should have been done before the permit could be issued. Booker Creek was limited to its unique set of facts by the case of Berry v. Dept. of Env. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). The Berry Court, in dealing with a dredge and fill permit, refused to extend the Booker Creek holding to such permits, noting that the permit under consideration in Berry, was not a pollutant discharge permit. The permit in issue here also is not a pollutant discharge permit. More importantly, like the applicant in Berry, FRI offered evidence of extensive testing and analysis regarding where water comes from and goes to at the mine site and in the surrounding vicinity. Finding of Fact No. 55.

LBCA incorrectly argues that the modeling information submitted by FRI has no applicability to impacts at Lake Brooklyn, because the model "did not include Lake Brooklyn". Particularly, in view of findings of fact 23, 28, 31-36 (exceptions to which have been previously rejected), it is apparent that the hearing officer rejected LBCA's view of the "facts" stated in this exception. While the model boundary (which is based on water level data for Floridan wells in the region (T. 164)) is between Lake Brooklyn and the pumping wells at the mine, the drawdown at the model boundary is based on a distance-drawdown relationship that relates to the pumping rate at the mine. The 1991 transient model showed that within the 9 square mile boundary, the impacts at the boundary were no more than 0.1 feet. (T. 129, 178). The reduced boundaries in the 1992 model accurately predicted what was happening at the mine site. (T. 178). The distance-drawdown relationship established by the model shows that the drawdown contour ceases before the model boundary is reached and therefore, before Lake Brooklyn is reached. (FR Exs. 5, 22). Impacts to Lake Brooklyn were also assessed through the review of water levels in the Floridan aquifer well (C-

120) between 1960 and 1992. (T. 928-933). The data showed that water levels in the well at Lake Brooklyn actually continued to rise when the 1989 and 1991 pump tests were conducted. (T. 411-412, 931-933; SJRWMD Ex. 13). In addition, when the pumping wells at the mine were turned off, the water level in the well at Lake Brooklyn did not recover. This indicates that there were outside influences for the fluctuation in the well. (T. 415, 933). The data does not show impacts from the pumping at the sand mine. (T. 942). LBCA also erroneously states that groundwater in the Floridan aquifer beneath Lake Brooklyn flows toward the mine. (See ruling on LBCA's factual exception 5). As listed in responses to LBCA's factual exceptions, particularly those regarding exceptions 8 and 12, there is competent, substantial evidence to support the bindings regarding no adverse impact to Lake Brooklyn.

The hearing officer found that the applicant met its burden or proof in Conclusion of Law 62. In Conclusion of Law 63, the hearing officer concluded that the LBCA did not meet its burden of presenting contrary evidence that the withdrawals at the sand mine correlate with the decline in water levels at Lake Brooklyn. The exception goes to the weight of the evidence and inferences drawn therefrom by the hearing officer. This Board cannot reweigh conflicting evidence, judge credibility of witnesses, or otherwise interpret the evidence to reach a desired result. Heifetz, supra.; Freeze, supra.. This exception is rejected.

LBCA Exception Number 2

The LBCA takes exception to the hearing officer's Conclusion of Law 63 that additional permit conditions in the case of a water shortage or a shorter permit duration are not necessary. The LBCA is reargue their case in the exception. The District has authority to require FRI to reduce its water use during a water shortage within the seven year life of the permit. Sections 373.175 and 373.246, Fla. Stat., and Rules 40C-2.381(2)(a)2. and 40C-21.271, F.A.C.

Rule 40C-2.381(2)(a)2., F.A.C., which is incorporated into the permit as a limiting condition, states:

> Nothing in this permit should be construed to limit the authority of the St. Johns River Water Management District to declare a water shortage and issue orders pursuant to section 373.175, F.S., or to formulate a plan for implementation during periods of water shortage, pursuant to section 373.246, F.S. In the event a water shortage, is declared by the District Governing Board, the permittee must adhere to the water shortage restrictions, as specified by the District, even though the specified water shortage restrictions may be inconsistent with the terms and conditions of this permit. (emphasis added).

Rule 40C-21.271, F.A.C., General Water Use Restrictions, specifies the restrictions which may be imposed during a water shortage on all water users and states, in pertinent parts:

> (2) The Board may order use of general water use restrictions and the water use restrictions specified in Part VI for the

> appropriate water shortage phase for each affected source class. Further, the Board may order any combination in lieu of or in addition to the restrictions specified in Part VI of the restrictions described in Subsection (3), by use or method of withdrawal class, within each source class, if necessary to achieve the necessary percent reduction in overall demand. (emphasis added).
>
> (3) General water use restrictions which may be imposed include
>
> (a) provisions that facilitate the right of water users in an area to make voluntary agreements among themselves, with the concurrence of the Board or the Executive Director, providing for the mutual reduction, sharing, or rotation of use;
>
> (f) restrictions on the total amount of water that may be used, diverted, impounded, extracted, or withdrawn during any day, month, or year during the declared shortage;
>
> (g) restrictions on the timing of use, diversion, impoundment, extraction, or withdrawal of water;
>
> (h) restrictions on pumping rates and schedules or diversion rates and schedules; or
>
> (i) such other provisions or restrictions as are necessary to protect the water resources from serious harm.

With the above cited authority, the District can require the withdrawals at the sand mine to be reduced during periods of water shortage within the seven year term of the permit by reducing the total amount withdrawn, controlling the schedule of withdrawals or "by other restrictions which arc necessary to protect the water resources." The hearing officer's conclusion is consistent with the rules and statutes which govern the Board. The exception is rejected.

LBCA Exception Number 3

The LBCA takes exception to the hearing officer's Conclusion of Law 63 and Finding of Fact 47 that FRI satisfied the criteria regarding water conservation measures. See Rule 40C-2.301(4)(e), F.A.C. The LBCA reargues the facts which the hearing officer found to support the conclusion. However, the LBCA offered no evidence to rebut the testimony of FRI. In addition, the LBCA cites no authority that the hearing officer's conclusion is contrary to law. Florida Audubon Society v. Department of Environmental Regulation, 9 F.A.L.R. 565 (October 31, 1986). LBCA also renews its attack on the allocation amount, essentially iterating its factual exception which is rejected for the reasons set forth therein. It is improper for this Board to retry the case after the hearing has concluded by altering findings and reweighing evidence. Tampa Wholesale Liquors, Inc., 376 So.2d 1195 (Fla. 2d DCA 1979). LBCA's exception lacks any record citations or legal authority in support of this exception. The conclusion and finding are supported by competent substantial, and uncontroverted, evidence and the exception is rejected. (T. 43-52, 106, 234-237, 988-989, 1103- 1104, 1111, 1132-1133) LBCA Exception Number 3 (sic).

The LBCA takes exception to the hearing officer's Conclusion of Law 63, by arguing that the use of water from the surficial aquifer requires a separate permit. Section 40C-2.051, F.A.C., states:

> No permit shall be required under the provisions of this rule for the following water uses:
>
> (3) Withdrawals of ground or surface water to facilitate construction on or below ground surface ..., in the following circumstances:
>
> (a) ground water may be withdrawn if it is recharged on site to the aquifer from which it was withdrawn by either infiltration or direct injection;
>
> (b) surface water may be withdrawn only from wholly owned impoundments or works which are no deeper than the lowest extent of the uppermost water bearing stratum and which have no surface hydrologic connection off site, and the surface water must be recharged on site to the uppermost water bearing stratum by either infiltration or direct injection.

This exemption from permitting is applicable here, and therefore, no additional permit is required. An agency's interpretation of its rules is afforded great weight. Franklin Ambulance Service v. DHRS, 45 So.2d 580 (Fla. 1st DCA 1989). LBCA offered no auth-orty or evidence that the District's interpretation is contrary to established law. This conclusion is supported by competent substantial evidence. The exception is rejected. (T. 38-39, 105, 249, 972, 1101-1102).

C. RULINGS ON EXCEPTION TO CONCLUSIONS OF LAW CONTAINED IN POST-HEARING EVIDENTIARY RULING

LBCA excepts the hearing officer's rulings in Finding of Fact No. 56 and Conclusion of Law No, 66 excluding LBCA exhibits nos. 61, 64, 71, 75, 76, 78, 79, 80, 82 and 83 as inadmissible for failure of LBCA to comply with subsection 90.956, Fla. Stat., regarding use of summaries of evidence. LBCA takes exception to FRI's objection post-hearing alleging that the exhibits had been admitted. In fact, the exhibits were not admitted at hearing. The LBCA's citation to the transcript is not the hearing officer's ruling on the exhibits. The hearing officer did not admit the ten exhibits on the record, as he did with every other exhibit that he admitted. The LBCA's assertion that it believed the exhibits were admitted is belied by LBCA's failure to list them as admitted in its Proposed Recommended Order on page 3. Therefore, LBCA's claim that FRI's continuing objection was a surprise is without merit.

LBCA asserts that FRI cannot make a post-hearing objection to the exhibits in its Proposed Recommended Order and infers gnat FRI's objection to the admission of the exhibits was not preserved at hearing. Rule 40C-1.561, F.A.C., provides for the submission of legal briefs along with proposed findings of fact and conclusions or law. For matters that remain pending at the close of a

hearing, a party may file a legal brief in support of its position. FRI did not object to the opinion testimony of the LBCA expert witness, only to the graphic depictions of such testimony. (T. 356). LBCA stated at hearing that the excluded exhibits were simply graphic depictions of the expert's opinion testimony. (T. 354). The record is abundantly clear that FRI preserved its objection to the exhibits and the hearing officer reserved ruling on their admission until the recommended order was issued. (T. 353, 358, 360, 363, 369, 370, 375, 377, 524, 531, 537, 1079-1080, 1178).

LBCA essentially asserts that the exhibits are not "summaries" and therefore not subject to subsection 90.956, Fla. Stat., which, of course, the fact-finder found otherwise. LBCA's reliance on Marks v. Marks, 576 So.2d 859 (Fla. 3d DCA 1989) is misplaced. Marks did not hold that expert testimony is not subject to subsection 90.956, but only that an expert is not required to utilize subsection 90.956 when presenting underlying data relied on for his opinion. The hearing officer found that the hydrographs were summaries and the underlying information was not indicated on the summary. The hearing officer allowed FRI time to review the data and present rebuttal. The fact-finder is entitled to great latitude in admitting or excluding summary evidence. Wright v. Southwest Bank, 554 F.2d 661 (5th Cir. 1977)(trial court without jury is entitled to great latitude covering the admission or exclusion of summary evidence). LBCA has failed to show that the hearing officer abused this discretion in excluding the exhibits. LBCA also takes exception that LBCA was denied rebuttal, or surrebuttal, on FRI's rebuttal case. As discussed in the ruling on LBCA's Exception 15, LBCA failed to request rebuttal of FRI's case. The hearing officer allowed cross-examination and LBCA did not offer any additional evidence from LBCA witnesses. Since the LBCA never requested to offer rebuttal testimony, then the hearing officer could not and did not deny that request. It is well-settled that an objection must be preserved during an administrative proceeding or it will be deemed waived. DeMendoza v. First Federal Savings and Loan, 585 So.2d 453 (Fla. 4th DCA 1991)(even if mistake was made in trial, party's waived its right to appeal the issue since it failed to call the deficiency to the court's attention during trial); Yachting Arcade, Inc. v. Riverwalk Condominium Assoc., 500 So.2d 202 (Fla. 1st DCA 1986)(party's failure to object to matters at administrative hearing made those matters unreviewable, even though party claimed fundamental procedural errors, it failed to show how it was prejudiced by any such action or omission; National Dairy Products, Corp. v. Odham, 121 So.2d 640 (Fla. 1959). Therefore, LBCA's exception based on the denial of rebuttal is rejected.

LBCA argues that-the proper vehicle for the objection was a motion for rehearing. LBCA does not cite authority for its assertion. Since the hearing officer never ruled on the admissibility, there was no order on which to base a motion for rehearing.

Nevertheless, the alleged error, if any, of excluding the exhibits, was harmless. Sims v. Brown, 574 So.2d 131 (Fla. 1991)(exclusion of manual was harmless since experts testified to the same matters in the manual); Little v. Banker's National Life Insurance Co., 369 So.2d 637 (Fla. 3d DCA 1979)(harmless error to exclude letter since witnesses otherwise testified at length as to its contents and conclusions). The LBCA expert testified extensively regarding the basis of each excluded exhibit and the information it depicts in relation to the conclusions of his expert opinion which the hearing officer weighed in rendering his factual findings and conclusions. (T. 346, 349, 351, 352, 358, 359, 364, 366, 371, 373, 411, 456, 457, 458, 481, 486, 501, 504, 507, 509, 511, 512, 516, 517, 518, 519, 542). The hearing officer concluded that even if the exhibits had been admitted it would not have altered his factual findings stating that

they had limited probative value. (Conclusion of Law No. 66). Therefore, the exception is rejected.

D. RULING ON RECOMMENDED ORDER'S COMPLIANCE WITH SECTION 120.59(2), FLA. STAT.

LBCA asserts that the hearing officer failed to comply with subsection 120.59(2), Fla. Stat., by not providing a sufficiently explicit ruling on each of the parties' proposed findings of fact. Section 120,59(2), Fla. Stat., requires "a ruling upon each proposed finding" The Appendix to the Recommended Order does not contain an omnibus "blanket" ruling on all of LBCA's proposed findings which the courts have found inadequate. Cf. Island Harbor beach Club v. DNR, 476 So.2d 1350 (Fla. 1st DCA 1985); Health Care Management, Inc. v. DHRS, 479 So.2d 193 (Fla. 1st DCA 1985). The Appendix clearly contains a ruling upon each of LBCA's proposed findings. Section 120.59(2), Fla. Stat., requires no more.

LBCA relies on Island Harbor Beach Club v. DNR, 476 So.2d 1350 (Fla. 1st DCA 1985), to support this argument. Island Harbor Beach Club, differs significantly from this case. The order Island Harbor Beach Club did not individually address each specific proposed finding as the Recommended Order in this case does. The only reference to proposed findings made in the Island Harbor Beacon Club order was a single paragraph which stated: The parties proposed findings of fact have been considered and where unsupported by the weight of the evidence, immaterial, cumulative, or subordinate. This differs from the Recommended Order in the instant case which specifically addresses each proposed finding and specifies where (by paragraph) in the Recommended Order that proposed finding is addressed. It is elementary to then read the paragraph referred to in the Recommended Order to determine what portion of the proposed finding was accepted.

More applicable to this case is the case of Schomer v. Department of Professional Regulation, 417 So.2d 1089 (Fla. 3d DCA 1982). The order in Schomer did not contain specific rulings on each proposed finding submitted by the Appellant. The substance of the final order, however, demonstrated that each finding had been considered and ruled on. The Court noted that, for purposes of complying with Section 120.59(2) Fla. Stat., It would not elevate form over substance." An agency need not Independently quote verbatim each proposed finding and independently dispose of that proposed finding; rather, it is sufficient that the agency provide in its decision a written foundation upon which the reviewing court may assure that all proposed findings of fact have been consider and ruled upon and not overlooked or concealed. Id. at 1090. The Court held that it could discern from the substance of the order that each of the proposed findings were addressed, and to the extent the technical requirements of Section 120.59(2), Fla. Stat., were departed from, the departure did not materially impair the fairness or correctness of the proceedings. Id. at 1091.

LBCA merely has to compare the hearing officer's findings with its proposed findings to discern those portions accepted. Therefore, the exception is rejected.

E. RULING ON MOTION FOR REMAND

Pursuant, to Rule 1.540(b), Fla. R. Civ. P., LBCA has filed a Motion for Remand asserting that newly discovered evidence establishes that a finding by the hearing officer is inaccurate because of allegedly false testimony by

District expert witness, Dr. Larry Lee. The hearing officer found that Lake Brooklyn had been in a period of decline before and after the 1989 aquifer pump test and that due to rainfall deficits Brooklyn Bay was separated from the main body of Lake Brooklyn for at least 18 to 24 months before and during the 1989 aquifer performance test. The hearing officer determined that the rate and character of declines during the pumping were not distinguishable from the declines occurring before and after the test. Thus, he found that impacts to Lake Brooklyn water levels from the pumping were indistinguishable from the declines due to drought. (Finding of Fact No. 30).

LBCA asserts that a newly discovered Department of Transportation (D.O.T.) survey, dated October 11, 1988, shows that Brooklyn Bay was not segregated from the remainder of the lake due to drought conditions prior to the 1989 aquifer pump test as testified by Dr. Lee and seeks the Board to remand the issue to the hearing officer for consideration of this new evidence.

The only reasons for remand regarding fact finding are if an erroneous legal conclusion by a hearing officer warrants taking of evidence on the issue, or if a factual issue was never ruled upon by the hearing officer. See Miller v. Dept. Envt'l Reg., 5504 So.2d 1325 (Fla. 1st DCA 1987)(agency's modification of legal conclusions necessitated factual findings on issue which hearing officer had initially disregarded as irrelevant) and Cohn v. Dept. of Prof. Reg., 477 So.2d 1039 (Fla. 3d DCA 1985)(when the hearing officer fails to find a specific fact, agency must remand to the hearing officer to do so). Clearly, neither of these reasons have any application to Petitioner's arguments. Although subsection 40C-1.512, F.A.C., provides that the Florida Rules of Civil Procedure are applicable to District administrative proceedings to the extent not inconsistent with Chapter 120 or Chapter 40C-1, the applicability of Rule 1.540(b), Fla. R. Civ. P., is problematic and inconsistent with a subsection 120.57 proceeding. First, the civil procedure rule only applies to final judgments and in this subsection 120.57 administrative proceeding LBCA is attempting to apply the civil procedure rule to a nonfinal recommended order. Second, LBCA has not expressly excepted Finding of Fact No. 30 as not supported by competent substantial evidence or that a Board rule or policy has been incorrectly interpreted /1 , but actually seeks the Board to allow LBCA to supplement the record after remand with new facts for the hearing officer to weigh in applying those facts to the applicable District rules. Thus, unlike a trial court, Finding of Fact No. 30 cannot be altered by this Board if supported by any competent substantial evidence. Section 120.57(1)(b)10., Fla. Stat.; Freeze v. Dept. of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); School Board of Leon County v. Weaver, 556 So.2d 443 (Fla. 1st DCA 1990). The Board may only consider whether the findings actually made by the hearing officer are sustained by the evidence, and whether, if so, they support the recommended legal conclusions. Cohn v. Dept. of Professional Regulation, 477 So.2d 1039 (Fla. 3d DCA 1985). Unlike a judge with plenary and equitable powers in a judicial setting, this Board, under Chapter 120, cannot authorize fact-finding after a hearing's conclusion except in the most narrow circumstances, none of which are applicable to the motion before the Board. Cf. Manasota 88, Inc. v. Tremor, 545 So.2d 439 (Fla. 1st DCA 1989)(may remand if hearing officer makes erroneous legal interpretation); Cohn, supra.. (may remand if a necessary factual issue was not determined by the hearing officer); Friends of Children v. DHRS, 504 So.2d 1345 (Fla. 1st DCA 1987)(may remand if hearing officer makes erroneous evidentiary ruling). In effect, LBCA wants to utilize a civil procedure rule for the Board to authorize additional fact-finding on a matter already considered by the hearing officer regarding a finding supported by competent substantial evidence. Section 120.57, Fla. Stat., simply does not authorize the Board to take such action. Section 120.57(1)(b)10, Fla. Stat.;

Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981)(chapter 120 does not allow additional or cumulative evidence on matters already considered and the APA does not envision a never-ending process). Consequently, the application of Rule 1.540(b), Fla. R. Civ. P., is inconsistent with Chapter 120 and LBCA is free to raise any alleged error at hearing on appeal of the final order.

Even assuming Rule 1.540(b), Fla. R. Civ. P., is applicable to this subsection 120.57 proceeding, LBCA has failed to clearly establish the extraordinary circumstances warranting the granting of its motion. The material issue of whether FRI's proposed pumping would impact the area lake levels already effected by a rainfall deficit was expressly raised by LBCA in its initial petition for hearing as far back as August 1992 and was also an issue stipulated in the Prehearing Stipulation prior to the February 1993 hearing. (Petition for Administrative Hearing paragraph f. 2, 3, 4.; Prehearing Stip. paragraphs B. 2, G. 1). Consequently, LBCA had over five months prior to hearing to elicit all relevant evidence to that Issue.

If Rule 1.540(b) was applicable, LBCA's burden would be to clearly establish the following to receive relief: (1) it must appear that the evidence is such as will probably change the-result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before one trial by the exercise of due diligence; and (4) that it is material and not merely cumulative or impeaching. City of Winter Haven v. Tuttle/White Construction Inc., 370 So.2d 829 (Fla. 2d DCA 1979); King v. Harrington, 411 So.2d 912 (Fla. 2d DCA 1982), rev denied, 418 So.2d 1279 (Fla. 1982). The predicate for LBCA's motion is that Dr. Lee's testimony regarding the lake separation was false, therefore LBCA could not have exercised due diligence in discovering the alleged new evidence. LBCA has filed no express exception with record support establishing that Finding of Fact No. 30 is not supported by competent substantial evidence and therefore the Board by law cannot alter that factual finding. Section 40C-1.564(3), F.A.C.; Section 120.37(1)(b)10., Fla. Stat.; Freeze, supra.. Consequently, Dr. Lee's testimony is not false. Importantly, Dr. Lee's testimony was not the only evidence supporting this finding. LBCA's own witness, the president of the association, testified that Brooklyn Bay had been segregated for four or five years from the main part of the lake and that he had been able to walk across the lake without getting wet for the last four or five years. (T. 863, 870). Likewise, LBCA's own expert stated that Lake Brooklyn's condition between 1989 to 1991 had receded to such an extent as it was no longer a continuous lake. (T. 317). Accordingly, the predicate for LBCA's motion is factually inaccurate and misplaced.

Furthermore, LBCA must clearly establish that even though the exercise of due diligence before the hearing, it would not have discovered the 1988 D.O.T. survey. Brav v. Electric Door-Lift Inc., 558 So.2d 43 (Fla. 1st DCA 1989)(movant's burden to establish due diligence); Plisco v. Union Railroad Co., 379 F.2d 15 (3d DCA 1967)(motion for new trial on newly discovered evidence is granted only where extraordinary circumstances are present). Even though the effects of FRI's proposed pumping on lake levels in time of rainfall deficit was an issue dating back to August 1992, LBCA asserts that it could not have obtained the survey prior to hearing in February 1993 "because of the logistics of requesting public records and the delay in delivery of same." LBCA could have reasonably anticipated that witnesses would testify regarding the disputed issue, particularly its own witnesses, and obtained the survey with the exercise of due diligence. LBCA offers no basis why D.O.T. would not have supplied the survey as required by law or that LBCA could not obtain it and, in fact, the

public records law contains a provision for obtaining immediate relief if a request for records is denied. See subsection 119.11, Fla. Stat. In Florida Audubon Society v. Ratner, 497 So.2d 672 (Fla. 3d DCA 1986), a 1981 judgment had been entered finding that limestone mining would be inconsistent with the water management purposes of a water management district's flowage easement on platiff's property. Plaintiff sought a new trial because of newly discovered opposing evidence in a 1980 Corps of Engineers report on the effects of limestone mining. The trial court denied the motion. The appellate court agreed finding that the granting of such motions was disfavored and that the report was prepared in September 1980 well before the trial and judgment in June 1981 and could have been discovered prior to the with the exercise of due diligence. Likewise in this proceeding, the proffered D.O.T. survey was prepared in October 1988, nearly four and one-half years before the February 1993 hearing and LBCA has failed to show that due diligence would not have discovered the survey prior to the administrative hearing in this proceeding. See also, Morhaim v. State Farm Fire & Casualty Co., 559 So.2d 1240 (Fla. 3d DCA 1990)(no new trial granted based on post-judgment affidavits regarding evidence on known issue that could have been discovered prior to trial).

LBCA also asserts that Dr. Lee misrepresented the contents of Clark's "Report of Investigations No. 33-Hydrology of Brooklyn Lake Near Keystone Heights, Florida" regarding its conclusions and his opinion concerning the separation of Brooklyn Bay from Lake Brooklyn and thus prejudiced LBCA's case. LBCA argument is an attack on the weight of the conflicting evidence which is the job of the hearing officer to resolve. An expert witness is not required to disclose the facts and data underlying his opinion. Marks v. Marks, 576 So.2d 859 (Fla. 3d DCA 1991). LBCA could have cross examined Dr. Lee regarding the separation. LBCA was aware of the "Clark Report" (T. 844) and even anticipated testimony regarding water levels in its case in chief (T. 846). Indeed, the report was listed by LBCA as its Exhibit 13 in the Prehearing Stipulation, although LBCA chose not to introduce it into evidence during the hearing. Dr. Lee testified not once but twice about the location of the staff gauge (T. 946 and 962-966). On cross, LBCA did not inquire about the location of the staff gauge or the lack of water beneath the bridge. (T. 991-1017). It was LBCA's burden to challenge the factual basis for Dr. Lee's opinion. City of Hialeah v. Weatherford, 466 So.2d 1127 (Fla. 3d DCA 1985). An insufficiency in the expert opinion offered, if any, should have been addressed in cross-examination by LBCA, not by a post-hearing motion.

LBCA alleges that the outcome would be different if the DOT survey were part of the evidence. The Board cannot accept new evidence or rule on the admissibility of evidence which was not presented to the hearing officer. The Finding of Fact to which LBCA refers states six reasons why the correlation between the pumping at the sand mine and its effects on Lake Brooklyn water level were not established. See Recommended Order, Finding of Fact 32. The location of the staff gauge in Brooklyn Bay rather than Lake Brooklyn was one of those six. LBCA's error was in not knowing the location of the staff gauge (T. 418-420) rather than the testimony of Dr. Lee. Therefore, LBCA's allegation that but for the testimony of Dr. Lee, the hearing officer would have found differently is unfounded. The mere chance that the hearing officer might have found differently is insufficient to remand the hearing for additional fact finding. Cluett v. Dep't of Professional Regulation, 530 So.2d 351, 355 (Fla. 1st DCA 1988). The courts look with disfavor on motions based on newly discovered evidence because to look with favor would bring about a looseness in practice and encourage counsel to neglect to gather all available evidence for a first trial by speculating upon the outcome, and then, being defeated, become for the first time duly diligent in securing other evidence to cure the defects

or omissions in their showing upon the first trial. Rushing v. Chappell, 247 So.2d 749 (Fla. 1st DCA 1971); Henderson Sians v. Fla. Dept. of Transp., 397 So.2d 769 (Fla. 1st DCA 1981). It is well-settled that no abuse of discretion occurs on the part of an agency by refusing to direct a remand to receive evidence which could have been introduced during the course of the original proceedings. Department of Transportation v. J.W.C., Inc., 396 So.2d 778 (Fla. 1st DCA 1981) LBCA has failed to clearly establish a right to relief and therefore the motion is denied.

F. RULING ON MOTION FOR OFFICIAL RECOGNITION AND MOTION TO SUPPLEMENT THE RECORD

LBCA has filed a Motion for Official Recognition and to Supplement the Record seeking the Board to accept into evidence the October 11, 1988 D.O.T. survey which was the subject of LBCA's Motion for Remand and also the U.S.G.S. publication "Report of Investigations No. 33-Hydrology of Brooklyn Lake Near Keystone Heights, Florida", by Clark, also referenced In LBCA's Motion for Remand.

The Board is not a fact-finder in this subsection 120.57 proceeding and it is reversible error for the Board to supplement the record through post-hearing evidence. Section 120.57(1)(b)10, Fla. stat., Marks v. Northwest Florida Water Management District, 566 So.2d 46 (Fla. 5th DCA 1990)(court refused to take judicial notice of factual matter based on records that could have been offered at administrative hearing); Nest v. Dept. of Professional Regulation 490 So.2d 987 (Fla. 1st DCA 1986); Shongut v Mark, 173 So.2d 708 (Fla. 3d DCA 1965)(Where matters raised on motion for relief from judgment could have been available to movant during trial proceedings, denial of motion was not abuse of discretion); Weaver, supra.. Moreover, the Motion for Remand has been denied. LBCA's post-hearing motions will be available as part of the record of this proceeding for purposes of any appeal which may be pursued.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. The Recommended Order dated June 4, 1993, attached hereto as Exhibit A, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District (Ruling on LBCA Exception 23). Florida Rock Industries' application for consumptive use permit no. 2-019-0012AUR is hereby granted under the terms and conditions as provided herein.

2. The post-hearing Motion for Remand, Motion for Official Recognition and Motion to Supplement the Record filed by LBCA are hereby denied.

DONE AND ORDERED this 14th day of July 1993, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

By:_____
JOE E. HILL
CHAIRMAN

RENDERED this 14th day of July 1993.

By:_____
SANDRA L. BERTRAM
ASSISTANT DISTRICT CLERK

ENDNOTE

1/ The inferential exception to Finding of Fact 30 found in factual exception 14 is not premised on one of these bases.

COPIES FURNISHED:

DONALD R. ALEXANDER, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550;

PATRICE FLINCHBAUGH BOYES, ESQUIRE
Attorney for Lake Brooklyn
Civic Association
Post Office Box 1424
Gainesville, Florida 32601

PETER B. BELMONT, ESQUIRE
Attorney for Lake Brooklyn
511 31st Avenue North
St. Petersburg, Florida 33704

MARCIA PENMAN PARKER, ESQUIRE
EMILY G. PIERCE, ESQUIRE
Attorneys for Florida Rock Industries
1301 Gulf Life Drive
Suite 1500
Jacksonville, Florida 32207

WAYNE E. FLOWERS, ESQUIRE
JENNIFER L. BURDICK, ESQUIRE
Attorneys for St. Johns River
Water Management District
Post Office Box 1429
Palatka, Florida 32178-1429

==========

FLWAC AGENCY FINAL ORDER

==========

STATE OF FLORIDA
LAND AND WATER ADJUDICATORY COMMISSION

LAKE BROOKLYN CIVIC ASSOCIATION, INC.	)	
	)	
Petitioner,	)	
	)	DOAH CASE NO. 92-5017
vs.	)	CASE NO. RFR-93-003
	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, and FLORIDA ROCK INDUSTRIES,	)	
	)	
Respondents.	)	
	)	

FINAL ORDER

This cause came before the Governor and Cabinet sitting as the Florida Land and Water Adjudicatory Commission ("Commission") on Tuesday, September 28, 1993, at a duly convened meeting conducted in Tallahassee, Florida. After due consideration, this order is hereby issued to reflect the Commission's actions.

PRELIMINARY STATEMENT

This matter concerns an application to the St. Johns River Water Management District (the "District") pursuant to Chapter 40C-2, Florida Administrative Code ("F.A.C."), by Florida Rock Industries ("FRI") for a consumptive use permit, to operate a sand mine in Clay County, Florida. The Lake Brooklyn Civic Association ("the Association" or "Petitioners") petitioned the Commission for review of this permit. The Secretary of the Commission deemed the Petition sufficient on August 9, 1993.

FINDINGS OF FACT

1. On July 22, 1992, the District published its intent to issue a consumptive use permit to FRI. On August 6, 1992, the Association filed a petition with the District for an administrative hearing on this matter, pursuant to Sections 120.57 and 403.412(5), Florida Statutes ("F.S."). The administrative hearing took place February 16-19, 1993. On July 15, 1993, the District rendered its Final Order in this case.

2. On August 4, 1993, the Association filed a Request for Review with this Commission pursuant to Section 373.114, F.S., seeking review of the Final Order of the District granting permit application No. 2-019-0012 AUR (the "Permit").

3. The Final Order granted FRI's application for a consumptive use permit for its sand mining activities.

4. The case came before this Commission for a hearing and disposition on September 28, 1993. The scope of review in this case is whether the District's

Order granting the Permit is consistent with the provisions and purposes of Chapter 373, F.S. Section 373.114, F.S.

5. FRI and the District have filed statements in opposition to the Association's Request for Review and the District has filed a Motion to Deny Jurisdiction. The Association has filed a response. The Department of Environmental Protection ("DEP") has filed a recommendation essentially agreeing with the District's conclusions that the permit should issue.

6. The 1993 Legislature, in enacting Chapter 93-213, Laws of Florida, amended Section 373.114, F.S., relating to review by this Commission of orders and rules of water management districts. That enactment, in relevant part, provides:

> In order for the commission to accept a request for review initiated by a party below, with regard to a specific order, four members of the commission must determine on the basis of the record below that the activity authorized by the order would substantially affect natural resources of statewide or regional significance. Review of an order may also be accepted if four members of the commission determines that the order raises issues of policy, statutory interpretation, or rule interpretation that have regional or statewide significance from the standpoint of agency precedent. The party requesting the commission to review an order must allege with particularity, and the commission must find, that:
>
> 1. The order is in conflict with statutory requirements; or
> 2. The order is in conflict with the requirements of a duly adopted rule.

Chapter 93-213, Section 26, Laws of Florida.

CONCLUSIONS OF LAW

1. The consumptive use permit issued by the District is plainly an order of a water management district. We have jurisdiction. Section 373.114, F.S.

2. The District and FRI have challenged the Commission's jurisdiction in this matter on the basis that recently enacted Chapter 93-213, Section 26, Laws of Florida, applies and that Petitioners failed to meet the newly established standards under that section. The Department of Environmental Protection essentially agrees with the District and FRI.

3. Chapter 93-213, Section 26, Laws of Florida, provides that the Commission must base a recommendation on whether to accept review of a case "solely on the record below." In this case, the record was established prior to the date of the amendments becoming effective. The parties in that administrative hearing were without notice of the need to put into the record facts which would support or rebut a contention that the Order would substantially affect natural resources of statewide or regional significance or a contention that this case would raise issues of policy, statutory interpretation or rule interpretation that have regional or statewide significance from a standpoint of agency

precedence. Likewise, the Hearing Officer's Order was rendered prior to July 1, 1993, the effective date of the amendments. These jurisdictional issues are new to this proceeding.

4. It is well established in case law that a substantive law is to be construed as having a prospective effect only, as opposed to laws which relate to procedure or remedies that are properly applied retroactively to pending cases. Young v. Altenhaus, 472 So.2d 1152 (Fla. 1985). See also, Chandra v. Gadodia, 610 So.2d 15 (Fla. 5th DCA 1992) where the court held that a legislative change was substantive where an amendment required additional evidence be shown in an administrative hearing in order to obtain relief. Hence, the amendment applied only prospectively.

5. Chapter 373, F.S., grants this Commission the power to review orders of water management districts to ensure consistency with the provisions and purposes of this chapter. Chapter 373, F.S., provides that:

> (1) The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use.
> (2) It is further declared to be the policy of the Legislature:
> (a) To provide for the management of water and related land resources;
> (b) To promote the conservation, development, and proper utilization of surface and ground water;
> (c) To develop and regulate dams, impoundments, reservoirs, and other works and to provide water storage for beneficial purposes;
> (d) To prevent damage from floods, soil erosion, and excessive drainage;
> (e) To minimize degradation of water resources caused by the discharge of stormwater;
> (f) To preserve natural resources, fish, and wildlife;
> (g) To promote the public policy set forth in s. 403.021;
> (h) To promote recreational development, protect public lands, and assist in maintaining the navigability of rivers and harbors; and
> (i) Otherwise to promote the health, safety, and general welfare of the people of this state.

Among the policies set forth in Section 403.021, F.S., is that:

> (6) The Legislature finds and declares that control, regulation, and abatement of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe

> environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.

These are broad policy goals, and one of the ways the statute empowers the citizens of the state to challenge actions which may offend these broad policy goals is through s. 373.114, F.S.

6. A statutory amendment which increases the burden of a petitioner challenging a district order and which restricts the scope of review of water management district orders and the ability of the public to challenge those orders on the grounds of inconsistency with the State Water Policy and the provisions and purposes of Chapter 373, F.S., is substantive in nature and so should apply prospectively only. There is no way to be certain that the Petitioners could not have put into the record facts that the Commission could use to make a jurisdictional decision. The need for such additional facts and the knowledge that the parties could not have known of the need for such facts also shows the substantive nature of the legislative changes. 1/

7. In Chapters 373 and 403, F.S., the Legislature has carved out specific policies and standards of protection of natural resources, and granted review of final orders which may be inconsistent with those provisions and purposes. 2/ The District's intent to issue the permit, the initial challenge, the hearing and the rendition of the Recommended Order all took place prior to the law being in effect. In light of this and the public policy articulated in the statutes regarding protection of water resources, the new requirements are hereby deemed substantive, they do not apply in this case, and the District's Motion to Dismiss and FRI's request to deny acceptance of the Association's request for review is DENIED.

8. The Association raises four broad issues on appeal, which the District and FRI reject. The DEP generally concurs with the District and FRI. The first issue raised is that the District erred in issuing the Permit because FRI did not show that the use was reasonable and beneficial. Second, it argues that FRI did not provide reasonable assurances that the use would not cause impermissible declines in four off-site lakes and that FRI did not show that the use was consistent with the public interest. Petitioners contended that the Permit should not issue, or should have a shorter duration. The Hearing Officer specifically found that the operation of the wells used by FRI in its mining activities would not have a significant and adverse impact on the water levels in the lakes and wetlands and would not cause water quality violations and would not have an adverse impact on the environment. (See Findings of Fact 8, 11, 20, 23, 25, 28, 30, 36, 38, 40 and 47.)

9. The Hearing Officer specifically found that FRI evaluated its water use under severe drought conditions and at a rate twice the normal usage. Finding of Fact 23. The results of those tests showed no adverse impacts to the levels of the lakes or to the aquifer. Further, there are no findings of fact which show a link between the pumping by FRI and the water levels in surrounding lakes and wetlands. These findings are supported by competent and substantial evidence and therefore must be accepted. Heifetz v. Dept. of Business

Regulation, 475 So.2d 1277 (Fla. 1988). Therefore, there is no rational basis on which to establish a shorter time period for the permit duration, as Petitioner has requested.

10. The Association also argues that FRI failed to provided assurances under worst-case scenarios that the use would cause impermissible water level declines. FRI argues that the tests that it used exceeded "worst case" scenarios, and that even under those conditions, the effect on surrounding lakes was negligible. Regardless of FRI's arguments, the applicant is not required to make such a showing. See, Florida Marine Fisheries Commission v. Organized Fishermen of Florida, 14 FALR 47, 54, 69.

11. Further arguments put forward by the Association that the amount of water requested under the permit is greater than that which is necessary for economic and efficient utilization are also rejected here as there is ample evidence in the record to support FRI's consumption and use of the water resources at the annual average rate of 2.09 MGD as reasonable. The Hearing Officer found that the use was both reasonable and consistent with the public interest. See, Finding of Fact 44. Clearly, any other use by FRI could result in an enforcement action against it.

12. The Association argues also that the exclusion of its graphs as evidence was error, and the effect of such exclusion was to negate the Association's related evidence regarding the cause-effect relationship between pumping at the mine and lake level declines. Generally, the Commission's scope of review does not extend to evidentiary matters. Hawley v. St. Johns Water Management District, 12 F.A.L.R. 3058 (FLWAC Order, September 18, 1992). In addition, we note that the Association's expert was allowed to testify as to the graphs. Therefore, the exclusion of the Petitioner's graphs was not error.

13. The Association's final argument is that the District erred in not setting aside the Hearing Officer's findings of fact in which the Hearing Officer had allegedly violated his duties under s. 120.59, F.S., to explicitly rule on proposed findings of fact, and that his failure to do so hampers appellate review. We find that the Hearing Officer properly ruled on the Association's proposed findings of fact in the Appendix to the Recommended Order in this case, and we reject this argument.

14. Although the facts of this case show that there is no connection between the consumptive use and the low levels of Lake Brooklyn, the Commission notes that the fact that this case is before the Commission illustrates the importance of the establishment of minimum flows and levels for wetlands and water bodies within the drainage basins of this water management district as well as other water management districts. We also note that the Fifth District Court of Appeal has recently held that the establishment of minimum flows and levels is mandatory under Section 373.042, F.S. Concerned Citizens of Putnam County for Responsive Government v. St. Johns River Water Management District, 18 Fla. L. Weekly D1643 (Fla. 5th DCA, July 23, 1993). We agree with the Fifth District Court of Appeals, and direct the District to report back to this Commission by July 1, 1994, informing the Commission of the District's schedule for establishing minimum flows and levels, including the priorities for the various wetlands and waterbodies, as provided in Section 373.042, F.S., within the District.

15. The Commission modifies the District's Final Order to add a specific condition that if the consumptive use authorized in the Permit is inconsistent with subsequently adopted minimum flows and levels for these waterbodies, the

District shall initiate proceedings to modify the Permit to conform it to the adopted minimum flows and levels.

WHEREFORE, in accordance with the foregoing, the Final Order of the St. Johns River Water Management District in this cause is AFFIRMED as modified herein.

DONE AND ORDERED, this 30th day of September 1993, in Tallahassee, Florida.

_____

David K. Coburn, Secretary,
Florida Land and Water
Adjudicatory Commission

FILED with the Clerk of the Florida Land and Water Adjudicatory Commission this 30th of September 1993.

_____

Clerk, Florida Land and Water
Adjudicatory Commission

ENDNOTES

1/ Endress v. Debt. of Corrections, 612 So.2d 645 (Fla. 1st DCA 1993) and Rothermel v. Fla. Parole and Probation Com'n, 441 So.2d 663 (Fla. 1st DCA 1983) are not applicable here. Endress was a prison inmate who challenged a rule of the Department of Corrections. His case was pending when the Legislature amended s. 120.52(12)(d), F.S., to remove the authorization of inmates to file challenges under ss. 120.56 or 120.68 proceedings. In Endress the court, citing Rothermel, issued orders to show cause to see if there were any legal impediment to the application of s. 120.52, F.S., as amended such that would impede a prisoner's access to review, and found that there was no legal impediment. The public policy issues in these cases were clear: it is proper to restrict an inmate's rights to review under one section of the statutes so long as all avenues for that inmate's ability to appeal were not eliminated. The cases cited by FRI and the District, and those cited by the courts in Endress and Rothermel are by and large inmate relief cases, where inmates in our prison system are challenging the application of rules to their presumptive release dates. This is a very narrow area of the law and inapplicable here.

2/ There is no similar provision in the statutes governing inmates challenges to release dates.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to the parties listed below this 30th of September 1993.

_____

DAVID K. COBURN, Secretary
Florida Land and Water
Adjudicatory Commission

The Honorable Lawton Chiles
Governor
210, The Capitol
Tallahassee, Fl 32399-0001

Division of Administrative Hearings
1230 Apalachee Parkway
DeSoto Building
Tallahassee, Fl 32399-1550

The Hon. Robert Butterworth
Attorney General
PL01, The Capitol
Tallahassee, Fl 32399-0001

Robin S. Hassler, Esquire
Counsel, FLWAC
Room 210, Capitol
Tallahassee, Fl 32399-0001

The Hon. Bob Crawford
Commissioner of Agriculture
LL-29, The Capitol
Tallahassee, Fl 32399-0001

Peter B. Belmont, Esquire
511 31st Avenue North
St. Petersburg, Fl 33704

The Hon. Gerald Lewis
Comptroller
2001, The Capitol
Tallahassee, Fl 32399-0001

Robert S. Gough, Esquire
Office of General Counsel
Department of Environmental Protection
2600 Blair Stone Road, Twin Towers
Tallahassee, Fl 32399-2400

The Hon Tom Gallagher
Treasurer
LL-27, The Capitol
Tallahassee, Fl 32399-0001

Patricia Schultz, Clerk
St. Johns River Water Management District
Post Office Box 1429
Palatka, Fl 32178-1429

The Honorable Betty Castor
Commissioner of Education
LL-24, The Capitol
Tallahassee, Fl 32399-0001

Patrice Flinchbaugh Boyes, Esquire
500 East University Avenue, Suite B
Gainesville, Fl 32601

The Hon. Jim Smith
Secretary of State
LL-10, The Capitol
Tallahassee, Fl 32399-0001

Marcia Penman Parker, Esquire
Emily G. Pierce, Esquire
1301 Gulf Life Drive, Suite 1500
Jacksonville, Fl 32207

Florida Administrative Law Report
Post Office Box 385
Gainesville, Fl 32602