4-6-04

St. Johns River Water Management District

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May 12, 2004

Hon. J. Lawrence Johnston
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-3060

AP

JLJ-CWS

RE: Marilyn McMulkin and Diane Mills v.
SJRWMD and Jay and Linda Ginn (Ravenswood Subdivision)
SJRWMD F.O.R. Nos. 2002-24 and 2002-25
Permit No. 40-109-81153-1
DOAH Case Nos. 02-1496 and 02-1497

Dear Judge Johnston:

In accordance with subsection 120.57(1)(m), Florida Statutes, enclosed please find a copy of the Final Order approved by the Governing Board of the St. Johns River Water Management District on May 11, 2004, wherein the Governing Board issued the environmental resource permit. Also enclosed for your convenience is an electronic copy of the District's Final Order. The electronic version of the Final Order was created in MS Word 2000 format.

Sincerely,

Mary Ellen Jones

Mary Ellen Jones
Asst. General Counsel
Office of General Counsel

MEJ:klc

Enclosures

SJR 2004-114

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

MARILYN McMULKIN,
Petitioner,

v. Case No. 02-1496

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
JAY and LINDA GINN,
Respondents.
_____/

DIANE MILLS,
Petitioner.

Case No. 02-1497

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
JAY and LINDA GINN,
Respondents.
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, the Honorable J. Lawrence Johnston, held a formal administrative hearing in the above-styled case on February 4–6, 10, 18, 2004, in the St. Johns County Service Center in the northwest part of the county near Jacksonville, Florida.

A. APPEARANCES

For Petitioners Diane Mills and Marilyn McMulkin	Debra Andrews, Esquire 11 N. Roscoe Blvd. Ponte Vedra Beach, FL 32082

For Respondents Jay And Linda Ginn	Cindy Bartin, Esquire P. O. Box 861118 St. Augustine, FL 32086
For Respondent St. Johns River Water Management District:	Tara Boonstra, Esquire Vance Kidder, Esquire 4049 Reid Street Palatka, FL 32177

On April 16, 2004, the Honorable J. Lawrence Johnston ("Administrative Law Judge" or "ALJ") submitted to the St. Johns Water Management District and all other parties to this proceeding a Recommended Order, a copy of which is attached hereto as Exhibit "A". Petitioners, Marilyn McMulkin and Diane Mills ("Petitioners"), timely filed Joint Exceptions to the Recommended Order. Respondent St. Johns River Water Management District ("District") timely filed Exceptions to the Recommended Order. Respondent St. Johns River Water Management District and Respondents Jay and Linda Ginn timely filed Responses to Exceptions. This matter then came before the Governing Board on May 11, 2004, for final agency action.

B. STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether environmental resource permit (ERP) number 40-109-81153-1 should be issued to allow construction and operation of a surface water management system (project) for a residential development project known as "Ravenswood" in a manner consistent with the standards for issuance of an ERP in accordance with Rules 40C-4.301 and 40C-4.302, Florida Administrative Code.

C. STANDARD OF REVIEW

The rules regarding an agency's consideration of exceptions to a Recommended Order are well established. The Governing Board is prescribed by section 120.57(1)(l), Florida Statutes, Fla. Stat. (2003), in acting upon a Recommended Order. The ALJ, not the Governing Board, is the fact finder. Goss v. Dist. Sch. Bd. of St. Johns County, 601 So.2d 1232 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Regulation, 475 So.2d 1277 (Fla. 1st DCA 1997). A finding of fact may not be rejected or modified unless the Governing Board first determines from a review of the entire record that the findings of fact are not based upon competent substantial evidence or that the proceedings on which the findings of fact were based did not comply with essential requirements of law. § 120.57(1)(l), Fla. Stat., Goss, supra. "Competent substantial evidence" is such evidence as is sufficiently relevant and material that a reasonable mind would accept as adequate to support the conclusion reached. Perdue v. TJ Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA June 16, 1999).

If a finding is supported by any competent substantial evidence from which the finding could be reasonably inferred, the finding cannot be disturbed. Freeze v. Dep't of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Regulation, 530 So.2d 1019 (Fla. 4th DCA 1998). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). The issue is not whether the record contains evidence contrary to the findings of fact in the Recommended Order, but whether the finding is

supported by any competent substantial evidence. Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846 (Fla. 1st DCA 1991). The term "competent substantial evidence" relates not to the quality, character, convincing power, probative value or weight of the evidence, but refers to the existence of some quantity of evidence as to each essential element and as to the legality and admissibility of that evidence. Scholastic Book Fairs v. Unemployment Appeals Commission, 671 So.2d 287, 289 (Fla. 5th DCA 1996).

The Governing Board need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. § 120.57(1)(k), Fla. Stat.

The Governing Board in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction, provided the reasons for such rejection or modification is stated with particularity and the Governing Board finds that such rejection or modification is as or more reasonable than the ALJ's conclusion or interpretation. § 120.57(1)(l), Fla. Stat. Furthermore, the Governing Board's authority to modify a Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. Dept. Human Res. Servs, 419 So.2d 705 (Fla. 1st DCA 1982). In interpreting the "substantive jurisdiction" amendment as it first appeared in the 1996 changes to the Administrative Procedures Act, courts have continued to interpret the standard of review as requiring deference to an agency in interpreting its

own statutes and rules. See, e.g., State Contracting and Engineering Corporation v. Department of Transportation, 709 So.2d 607, 608 (Fla. 1st DCA 1998).

D. RULINGS ON EXCEPTIONS

Petitioners jointly filed 53 exceptions to the ALJ's findings of fact and conclusions of law. The District filed 12 exceptions to the ALJ's findings of fact and conclusions of law. The parties' exceptions to the Recommended Order have been reviewed and are addressed below.

Hereinafter, references to testimony will be made by identifying the witness by surname, followed by the volume and transcript page number (e.g., Wentzel Vol. IV: 609). References to exhibits received by the ALJ will be designated "Petitioners" for Petitioners Marilyn McMulkin and Diane Mills; "District" for Respondent, St. Johns River Water Management District; and "Applicants" for Respondents Jay and Linda Ginn, followed by the exhibit number, then page number, if appropriate (e.g., Applicants 14: 2). Other references to the transcript will be indicated with a "T" followed by the page number (e.g., T. Vol. 1: 84). Reference to the Prehearing Stipulation will be designated by "Prehrg. Stip." followed by the paragraph number (e.g., Prehrg. Stip.: ¶10). References to the Recommended Order will be designated by "R.O." followed by the page number (e.g., R.O.: 13).

E. RULINGS ON EXCEPTIONS

Petitioners' Exception No. 1.

Petitioners take exception to finding of fact no. 21 stating the ALJ relied on the Applicants' intent to retain dewatering from construction onsite and on a dewatering

plan to be submitted to the District. The exception characterizes the District's dewatering plan requirement as the Applicants' failure to provide reasonable assurances that the project meets applicable criteria and characterizes the Applicants' intentions for its dewatering plan as not being competent substantial evidence. In the remainder of the exception, Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence.

First, from reading finding of fact number 21, it is not clear what Petitioners mean by taking exception to the ALJ's reliance on some fact in arriving at a particular finding of fact. Finding of fact no. 21 simply states that the District's Technical Staff Report imposed a permit condition requiring a dewatering plan and that the Applicants intend to retain dewatering onsite. This finding of fact is supported by competent substantial evidence. (Wimpee Vol. I: 82, 89; District Ex. 1, p.10, #10). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club v. Orlando Util. Comm'n, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

Second, failure to provide all of the details of a proposed project at hearing is not fatal to permit issuance provided that there is competent substantial evidence explaining how the project could be designed to meet legal requirements and the permit is appropriately conditioned to insure compliance. Kralik v. Ponce Marina, Inc. and Dep't of Envtl. Regulation., 11 F.A.L.R. 669, 672 (Dep't of Envtl. Regulation 1989), aff'd 545 So.2d 882 (Fla. 5th DCA 1989) (agency concluded that reasonable assurance is given provided that the applicant submitted design and operation specifications prior to construction with notice of submittal to petitioners); Manasota, 88, Inc. v. Agrico Chemical Co., 12 F.A.L.R. 1319 (Dep't of Envtl. Regulation 1990), aff'd 576 So.2d 781,

Fla. 2nd DCA 1991) (hearing officer's summary of the details in the recommended order that are necessary to provide an adequate plan deemed to be sufficient regardless that the specific design was not provided at hearing); Hamilton County Bd. of County Commissioners v. Dep't of Envtl. Regulation, 12 F.A.L.R. 3774 (Dep't of Envtl. Regulation 1990), aff'd 587 So.2d 1388 (Fla. 1st DCA 1991) (absence of specific engineering drawings and other design details is not fatal to a showing of reasonable assurance if other evidence which describes the nature and performance of the design is presented to show reasonable assurance). The provision of a dewatering plan in this case relates to providing reasonable assurance that the project will not result in short term water quality impacts. See §§ 12.2.4.1, ERP-A.H. There is competent substantial evidence in the record to show that the Applicants will provide erosion and sedimentation controls to prevent water quality impacts during construction. (Applicants Ex. 5A, sheet 5 of 17)

Furthermore, pursuant to Florida Administrative Code Rule 40C-4.381(2), the Governing Board "shall impose on any permit granted under this chapter [40C-4] and chapter 40C-40, F.A.C., such reasonable project-specific conditions as are necessary to assure that the permitted system will not be inconsistent with the overall objectives of the District or be harmful to the water resources of the District as set forth in District rules." [Emphasis added.] The condition to which Petitioners object is an example of a project-specific condition that District staff believe should be placed on the permit for this project, and this condition is supported by competent substantial evidence. (Wimpee Vol. I:82; District Ex. 1, p.10. #10). In the Technical Staff Report, District staff recommended a number of permit conditions that require the Applicant to perform

certain activities in the future. See, e.g., District Ex. 1, p. 9-10, #4, 5, 7, 8, 12, 13, 14 as well as additional permit conditions in District Ex. 2 (as indicated on District Ex. 1, p.8). Petitioners have taken exception to only two permit conditions (this exception and Petitioners' exception no. 6).

For the foregoing reasons, Petitioners' exception no. 1 is rejected.

Petitioners' Exception No. 2

Petitioners take exception to last sentence of finding of fact no. 23 wherein the ALJ finds that "birds and small mammals do not forage" in Wetland 2. The last sentence of the paragraph is the sentence that expresses a conclusion reasonably inferred from the preceding findings of the paragraph. The Administrative Law Judge may reasonably infer from the evidence a factual finding. Freeze v. Dep't of Bus. Regulation, 556 So.2d 1204, 1206 (Fla. 5th DCA 1990). The Petitioners do not take issue with any other findings in paragraph 23. The finding may reasonably be inferred from the evidence discussed below and it is certainly in keeping with the rest of the findings in the paragraph that the Petitioners have conceded are based on competent substantial evidence.

The entirety of paragraph 23 prior to that portion of the last sentence finds that the value of the wetland is minimal or low; its vegetation is sparse providing little refuge and nesting; its hydroperiod does not allow for breeding of most amphibians; and the vegetation and hydroperiod do not foster lower trophic animals. Competent substantial evidence exists in the record to support these findings. (Brown Vol. II: 277-78; Wentzel Vol. IV: 622-23). Therefore, there is evidence in the record from which the ALJ could

reasonably infer that birds and small animals do not forage in Wetland 2. Accordingly, Petitioners' exception no. 2 is rejected.

Petitioners' Exception No. 3.

Petitioners take exception to a portion of finding of fact no. 28 wherein it states that "[t]he gopher frog is not a listed species..." As addressed below in the ruling on St. Johns River Water Management District exception number 8, this statement actually involves a legal conclusion because listed species are determined by law. Rule 40C-4.021(20), Fla. Admin. Code; ERP-A.H. §§ 2.0 (q), (cc), (bbb). Accordingly, as a matter of law, the gopher frog is listed as a species of special concern. Rule 68A-27.005(1)(b)10, Fla. Admin. Code. Therefore, the exception is granted. This legal conclusion involves the substantive regulatory jurisdiction of the St. Johns River Water Management District and is more reasonable than the erroneous legal statement contained in the finding. The granting of this exception does not alter any legal conclusions since species of special concern are not subject to ERP Applicant's Handbook 12.2.2.1 and gopher frogs are not aquatic or wetland dependent species, as identified in Applicant's Handbook Table 12.2.7-1, for purposes of ERP Applicant's Handbook 12.2.7.

Accordingly, Petitioners' exception no. 3 is granted and the last sentence of finding of fact no. 28 is modified as follows:

> The gopher frog is listed by the State of Florida as a species of special concern ~~The gopher frog is not a listed species~~; the gopher tortoise is listed by the State of Florida as a species of special concern but is not aquatic or wetland-dependent.

Petitioners' Exception No. 4

Petitioners take exception to finding of fact no. 31 to the extent that the ALJ finds that Wetland 6 is of low quality and not more than minimal value to fish and wildlife. Petitioners contend that because, in paragraphs 28 and 29, findings are made that the gopher frog and woodstork could use Wetland 6, the ALJ cannot make the finding in paragraph 31 that Wetland 6 is of low and not more than minimal value to fish and wildlife. Petitioners further contend that such a finding is "illogical" and, therefore, an elimination and reduction analysis is required.

First, pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record.

Second, this finding is supported by competent substantial evidence. The gopher tortoise burrows, with which gopher frogs are associated, are nearest Wetland 1 and next closest to Wetland 2, not Wetland 6. (Burks Vol. IX: 1325-26). Gopher frogs are more associated with cypress and pines than this type of wetland area. (Wentzel Vol. IV: 642. With the limited number of gopher tortoise burrows on the project site, use of Wetland 6 by gopher frogs is not anticipated. (Wentzel Vol. IV: 642). In finding of fact 29, the ALJ found that Wetland 6 could be used by woodstorks, however, it would not be a significant food source for woodstorks. Furthermore, although woodstork use of wetlands is strongly influenced by the openness of tree canopy, it is the presence of prey that attracts them and non-isolated Wetland 1 is the most productive wetland (Burks Vol. IX: 1326; Wentzel Vol. IV: 617).

Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See § 120.57(1)(l), Fla. Stat.; Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra. Accordingly, Petitioners' exception no. 4 is rejected.

Petitioners' Exception No. 5

Petitioners take exception to finding of fact no. 35. Specifically, Petitioners state that the "ALJ fails to address the influence of the ponds on the groundwater by having the control structures below the seasonal groundwater levels ..." In the remainder of the exception, Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence.

Pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception. Nevertheless, this finding of fact is supported by competent substantial evidence. (Register Vol. V: 799-802; Applicants Ex. 10E, App. B, Fig.1). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

Furthermore, Petitioners' exception is misleading for several reasons. First, contrary to Petitioners' second sentence in their exception no. 5, finding of fact no. 35 specifically addresses the influence of pond DA-1 on the groundwater and specifically references the control elevation of the pond. (R.O. 16-17). Second, finding of fact no. 35 relates to pond DA-1, not pond DA-2. Pond DA-2 is the subject of finding of fact 36,

to which Petitioners did not take exception. (R.O. 17). Third, most of Petitioners' exception no. 5 is related to the upwelling issue, which the ALJ addressed in other portions of the recommended order, such as findings of fact numbers 77 and 78, to which Petitioners did not take exception. (R.O. 34-35).

Petitioners additionally argue that because water level monitoring for wetlands on the project site is not being required, then reasonable assurance is lacking. Under subsection 12.2.2.4(c), ERP-A.H.:

> Whenever portions of a system could have the affect of altering water levels in wetlands or other surface waters, applicants shall be required to monitor the wetland or other surface waters to demonstrate that such alteration has not resulted in adverse impacts; or calibrate the system to prevent adverse impacts. Monitoring parameters, methods, schedules, and reporting requirements shall be specified in permit conditions.

We find that based upon the reasonable assurance provided pursuant to subsection 12.2.2.4(a), ERP-A.H., and finding of fact numbers 35 and 36, no additional monitoring is required under subsection 12.2.2.4(c), ERP-A.H., in this instance.

For the reasons set forth above, Petitioners' exception no. 5 is rejected.

Petitioners' Exception No. 6

Petitioners take exception to finding of fact no. 38 stating that the "ALJ found that it will be determined in the future whether the hardpan at DA-2 has the requisite permeability." Petitioners mischaracterize the finding, which states, in part, the following:

> Because permeability may vary across the project site, the District recommended a permit condition that would require a professional engineer to test for the presence and permeability of the hardpan along the length of the cutoff wall. If the hardpan is not continuous, or if its permeability is

higher than 0.052 feet per day, then a liner will be required to be installed instead of a cutoff wall.

(R.O. 18). In the remainder of the exception, Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence.

Pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception. Nevertheless, this finding of fact is supported by competent substantial evidence. (Register Vol. V: 787-88, 824-25; Jackson Vol. I: 102-03; Applicants Ex. 10E, p.3-4; District Ex. 10). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. As noted above, the issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

To the extent that this exception objects to the permit condition, pursuant to Florida Administrative Code Rule 40C-4.381(2), the Governing Board "shall impose on any permit granted under this chapter [40C-4] and chapter 40C-40, F.A.C., such reasonable project-specific conditions as are necessary to assure that the permitted system will not be inconsistent with the overall objectives of the District or be harmful to the water resources of the District as set forth in District rules." [Emphasis added.] The condition to which Petitioners object is an example of a project-specific condition that should be placed on the permit for this project to verify the data and soil information regarding the design of the cutoff wall, and this condition was supported by competent substantial evidence. (Register Vol. V: 787-88, 824; District Ex. 10). In the Technical Staff Report, District staff recommended a number of permit conditions that require the Applicant to perform certain activities in the future. See, e.g., District Ex. 1, p. 9-10,

#4, 5, 7, 8, 12, 13, 14 as well as additional permit conditions in District Ex.2 (as indicated on District Ex. 1, p.8). Petitioners have taken exception to two of those permit conditions (this exception and Petitioner's exception no. 1).

Most of Petitioners' exception no. 6 is related to the cutoff wall and liner, which the ALJ also addressed in findings of fact 36 and 37, to which Petitioners did not take exception. (R.O. 17-18). Furthermore, in their exception, Petitioners misunderstand the liner as an alternative to the cutoff wall. Finding of fact 38 states that "If the hardpan is not continuous, or if its permeability is higher than 0.052 feet per day, then a liner will be required to be installed instead of a cutoff wall." (R.O. 18). Therefore, the use of the liner is not dependent on the presence of hardpan. (Register Vol. V: 788-89, 816, 837-38; Jackson Vol. I: 98-99, 104-07; District Ex. 10).

For the foregoing reasons, Petitioners' exception no. 6 is rejected.

Petitioners' Exception No. 7

Petitioners take exception to finding of fact no. 39. Specifically, Petitioners take exception to the ALJ's finding that "the partial liner will negate the groundwater influence of DA-2" because the ALJ "failed to address the groundwater elevations and the low level of the control structure ..." Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence.

Pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, this finding of fact is supported by competent substantial evidence. (Register Vol. V: 788; Jackson

Vol. I: 98-99; Boyes Vol. VI: 968, 972, 978). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. In addition, most of Petitioners' exception no. 7 is related to the upwelling issue, which the ALJ addressed in other portions of the recommended order, such as findings of fact 77 and 78, to which Petitioners did not take exception. (R.O. 34-35).

For the foregoing reasons, Petitioners' exception no. 7 is rejected.

Petitioners' Exception No. 8

Petitioners take exception to recommended finding of fact number 40 wherein the ALJ makes certain findings regarding the reduction and elimination analysis for Wetland 1. Petitioners contend that the ALJ's findings were based on hearsay as to cost, ignored the competent evidence of Petitioners and that the last sentence of the paragraph is merely a recitation of the criteria and that more is required.

First, the exception asserts that the evidence regarding the cost of the lift stations should be rejected as hearsay. The Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ. See § 120.57(1)(l), Fla. Stat.; Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001) (the department lacks substantive jurisdiction to overrule the judge's evidentiary ruling regarding hearsay).

Second, this finding of fact is supported by competent substantial evidence. (Wentzel Vol IV: 620-21; Brown Vol. III: 315-18, 388-90; District Ex. 1.) As noted above, the Governing Board may not reweigh evidence submitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise

interpret evidence anew. Goss, supra; Heifitz, supra; Brown, supra. The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

Third, Petitioners assert that this finding should be rejected as being contrary to section 120.569(2)(m), Florida Statutes, because the finding is a "mere recitation of one single rule criteria." Contrary to section 120.57(1)(k), Petitioners fail to identify the statute the finding allegedly duplicates. However, the finding tracks no statutory language. Even so, section 120.569(2)(m) is inapplicable to a finding that paraphrases rule language since the statute applies only to "statutory" language and not to rule language that implements a statute.

Petitioners reference their exception no. 41 as a basis for this exception. Based on the foregoing and the grounds set forth in the ruling on Petitioners exception no. 41, Petitioners' exception no. 8 is rejected.

Petitioners' Exception No. 9

Petitioners take exception to finding of fact no. 41 wherein the ALJ states that "it appears that his [Mills] proposed alternative route is approximately three times as long as the route proposed by the Ginns, so that the total cost of laying the sewer pipeline itself would be approximately equal under either proposal." Petitioners assert that this finding is not supported by competent substantial evidence.

This finding of fact is supported by competent substantial evidence. This finding is based upon the distances for the proposed water/sewer route though Wetland 1, as

compared to the distance for the alternative route along the south side of Ravenswood Drive and Mr. Mills' testimony that "a gravity sewer will cost three times more than a sewer line." (Applicants Ex. 5A, sheet 4 of 17; Mills Vol. VII: 1079). With the aforementioned information, the Administrative Law Judge quite reasonably determined that the Petitioners suggested route was approximately three times as long and the total cost of laying the pipeline would be approximately equal under either proposal. Fla. Chapter of Sierra Club, supra.

Based on the foregoing, Petitioners' exception no. 9 is rejected.

Petitioners' Exception No. 10

Petitioners take exception to finding of fact no. 42 wherein the ALJ found that although there was a possibility that an emergency repair of the water/sewer line may be necessary during the eagle nesting season, it is speculative. The finding that this evidence was speculative is a determination by the ALJ as to its weight. The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown, supra. The decision to believe one witness over another is left to the ALJ as a fact finder and 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.

Accordingly, Petitioners' exception no. 10 is rejected.

Petitioners' Exception 11

Petitioners take exception to recommended finding of fact number 44 wherein the ALJ concluded that the Applicants were not required to perform an elimination and reduction analysis pursuant to section 12.2.1.1, ERP-A.H., for Wetland 6. Petitioners contend that because the ALJ makes findings in paragraphs 28 and 29 regarding potential use of Wetland 6 by gopher frogs and woodstorks, the District's rules require an elimination and reduction analysis.

This finding, more in the nature of an ultimate finding of fact, necessarily involves an interpretation and application of the District's rules and is, therefore, a mixed question of law and fact. Whether a finding of fact should be treated as a conclusion of law instead of a finding of fact is not a basis for rejecting it, but rather determines the Governing Board's ability to modify it. See, Berger v. Dep't of Professional Regulation, 653 So.2d 479, 480 (Fla. 3d DCA 1985) (a finding which involves both a factual and legal conclusion cannot be rejected where there is competent substantial evidence to support the factual conclusion and where the legal conclusion necessarily follows).

Section 12.2.2.1, ERP-A.H., provides:

> Compliance with subsections 12.2.2 - 12.2.3.7, 12.2.5 - 12.3.8 will not be required for regulated activities in isolated wetlands less than one half acre in size, unless:
>
> (a) the wetland is used by threatened or endangered species,
>
> (b) the wetland is located in an area of critical state concern designated pursuant to chapter 380, FLA. STAT.,
>
> (c) the wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined wetland acreage so connected is greater than one half acre, or

(d) the District establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are cumulatively, of more than minimal value to fish and wildlife based on the factors in subsection 12.2.2.3. [emphasis added]

In recommended finding of fact numbers 27, 29 and 58, the ALJ finds that Wetland 6: is isolated and less than one half acre in size; is not used by threatened or endangered species; is not located in an area of critical state concern; is not connected at seasonal high water level to other wetlands; and is not more than minimal value, singularly or cumulatively, to fish and wildlife. (Wentzel Vol. IV: 624-25, 640-41, District Ex. 1). Thus, we find there is competent substantial evidence in the record to support the factual underpinnings for the ALJ's conclusion that no elimination and reduction analysis pursuant to section 12.2.1.1, ERP-A.H., is required for Wetland 6.

Petitioners argue that an elimination and reduction analysis is required because gopher frogs and woodstorks could use the wetland. It is actual use by a threatened or endangered species that triggers such an analysis under section 12.2.2.1(a), ERP-A.H. Further, the gopher frog is listed as a species of special concern. Rule 68A-27.005(1)(b)10, Fla. Admin. Code. Even if the gopher frog used Wetland 6, subsection 12.2.2.1(a), ERP-A.H., would not be triggered because the gopher frog is listed as a species of special concern rather than a threatened or endangered species. Petitioners also argue as they did in their Exception no. 4 that it is "illogical to conclude that Wetland 6 . . . of not more than minimal value to fish and wildlife.

Based on the foregoing and the grounds set forth in our ruling on Petitioners exception no. 4, Petitioners' exception no. 11 is rejected.

Petitioners' Exception No. 12

Petitioners' exception to finding of fact no. 46 merely contains a brief conclusory legal statement and fails to comply with section 120.57(1)(k), Fla. Stat., by identifying the legal basis for such statement. This exception is therefore rejected on that basis as well as the grounds set forth in our rulings on exceptions numbers 3 and 4.

Petitioners' Exception No. 13.

Petitioners assert finding of fact no. 47 should be rejected as contrary to section 120.569(2)(m), Fla. Stat., because the finding merely tracks statutory language without a supporting statement of underlying facts of record. Contrary to section 120.57(1)(k), Petitioners fail to identify the statute the finding allegedly duplicates. However, the finding tracks no statutory language. Even so, the statute is inapplicable to a finding that paraphrases rule language since the statute applies only to "statutory" language and not to rule language that implements a statute. The exception is therefore rejected. Moreover, the finding is best characterized as a legal conclusion or ultimate fact that is otherwise supported by findings of fact 48-52.

Accordingly, Petitioners' exception no. 13 is rejected.

Petitioners' Exception No. 14

Petitioners take exception to finding of fact no. 51 which merely states that a Bald Eagle Management Plan (BEMP) was submitted to avoid secondary impacts to the eagles' nest in Wetland 1. Essentially, Petitioners argue that because the BEMP did not strictly comply with *Habitat Management Guidelines for Bald Eagle in the Southeast*

(*Management Guidelines)* and *Bald Eagle Monitoring Guidelines* (*Monitoring Guidelines)* the Applicants failed to provide reasonable assurance that secondary impacts to the eagle's nest would not occur.

The ALJ's finding of fact no. 51 is supported by competent substantial evidence. (Applicants Ex. 14; Palmer Vol. III: 433-34; Steffer Vol. IV: 510) Furthermore, nothing in the District's requirements requires strict adherence to these publications. See ERP-A.H. 12.2.7. Indeed, ERP-A.H. 12.2.7 (b), the provision of the Applicant's Handbook that mentions the publications, specifically states that applicants may propose measures inconsistent with the guidelines.

Throughout the remainder of this exception, it appears that Petitioners are attempting to re-litigate the case. However, the Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses, or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown, supra. The issue is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether the finding is supported by any competent substantial evidence. Fla. Sugar Cane League, supra.

Accordingly, Petitioners' exception no. 14 is rejected.

Petitioners' Exception 15

It is not clear as to what the Petitioners are taking exception. Finding of fact no. 52 states what activities the BEMP will limit within 750 feet and between 750 and 1500 feet of the eagles' nest during the nesting season. Petitioners again appear to reargue exception no. 14 that because the BEMP did not strictly comply with the *Management*

Guidelines and the *Monitoring Guidelines,* the Applicants failed to provide reasonable assurance that secondary impacts to the eagle's nest would not occur.

First, pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record. Nevertheless, this finding of fact is supported by competent substantial evidence. (Applicants Ex. 14). The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

Based on the foregoing and the grounds set forth in the ruling on Petitioners exception no. 14, Petitioners' exception no. 15 is rejected.

Petitioners' Exception No. 16

Petitioners take exception to finding of fact no. 57 wherein the ALJ finds that the preservation of wetlands will prevent activities that are unregulated from occurring there. Petitioner asserts that because unregulated activities have occurred in the past there is no competent substantial evidence to support this finding. However, the District finds competent substantial evidence to support this finding of fact. (Wentzel Vol. V: 663-66, Applicants Ex. 16; Applicants Ex. 5b, Sheet 8). Thus, this finding of fact is supported by competent substantial evidence and it may not be disturbed. See, § 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra.

Accordingly, Petitioners' exception 16 is rejected.

Petitioners' Exception No. 17

Petitioners take exception to recommended finding of fact no. 58 wherein the ALJ found that mitigation for impacts to Wetlands 2 and 6 was not required. Specifically, Petitioners argue that mitigation should be provided for impacts to Wetland 6.

Section 12.2.2.1, ERP-A.H., provides:

> Compliance with subsections 12.2.2 - 12.2.3.7, 12.2.5 - 12.3.8 will not be required for regulated activities in isolated wetlands less than one half acre in size, unless:
>
> (a) the wetland is used by threatened or endangered species,
>
> (b) the wetland is located in an area of critical state concern designated pursuant to chapter 380, FLA. STAT.,
>
> (c) the wetland is connected by standing or flowing surface water at seasonal high water level to one or more wetlands, and the combined wetland acreage so connected is greater than one half acre, or
>
> (d) the District establishes that the wetland to be impacted is, or several such isolated wetlands to be impacted are cumulatively, of more than minimal value to fish and wildlife based on the factors in subsection 12.2.2.3. [emphasis added]

In recommended finding of fact no. 58, the ALJ finds that Wetland 6: is isolated and less than one half acre in size; is not used by threatened or endangered species; is not located in an area of critical state concern; is not connected at seasonal high water level to other wetlands; and is not more than minimal value, singularly or cumulatively, to fish and wildlife. (Wentzel Vol. IV: 624-25, 640-41, District Ex. 1). Thus, there is competent substantial evidence in the record to support the factual underpinnings for the ALJ's conclusion that no mitigation, pursuant to sections 12.3 through 12.3.8, ERP-A.H., was required for impacts to Wetland 6.

To the extent we find that Petitioners' exception is a reiteration of Petitioners' exception numbers 3, 4, 10, and 11, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' exception no. 17 is rejected.

Petitioners' Exception No. 18

Petitioners take exception to finding of fact no. 63. Specifically, Petitioners take exception to the ALJ's finding that "the project will not cause any adverse flooding impacts off the property downstream" because "the only evidence referred to by the ALJ in this finding is the peak rate of discharge information" and because the Petitioners raised issues "that were ignored by the ALJ ..." In the remainder of the exception, Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence.

Pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception. Nevertheless, this finding of fact is supported by competent substantial evidence. (Wimpee Vol. I: 50-51, 71; Applicants Ex. 7, p.2; Register Vol. V: 791-93). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. As noted above, the issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra. Furthermore, contrary to Petitioners' characterization of the ALJ's handling of the downstream adverse flooding issue, the ALJ addressed offsite adverse flooding impacts elsewhere in the recommended order. See, R.O. at 28, ¶ 65.

For the foregoing reasons, Petitioners' exception no. 18 is rejected.

Petitioners' Exception No. 19

Petitioners take exception to finding of fact no. 65. Specifically, Petitioners take exception to the ALJ's finding that "the overall watershed model provided additional support to demonstrate that the project will not cause additional flooding downstream." First, Petitioners claim the finding is based upon a watershed model and St. Johns County studies that were hearsay. The Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ regarding hearsay. § 120.57(1)(l), Fla. Stat.; Barfield, supra.

Furthermore, the exception essentially requests that the Governing Board reweigh the credibility and reliability of the evidence underlying this finding which was solely the purview of the ALJ and not the Governing Board. Petitioners state that testimony was inconsistent. However, the decision to believe one expert over another is left to the ALJ as the fact finder and 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 finding of fact is supported by competent substantial evidence. (Wimpee Vol. I: 58-63 and Vol. IX:1333-37, 1341-42; Register Vol. V: 796; Applicants Ex. 8). See also, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra. Furthermore, some of Petitioners' exception no. 19 relates to the delineation of the watershed, which was addressed in findings of fact 70-75. (R.O. 30-33). Petitioners did not take exception to findings of fact 70-73 and took exception to findings of fact 74-75 in exceptions 21-22.

Based on the foregoing and the grounds set forth our rulings on Petitioners exception numbers 21-22, Petitioners' exception no. 19 is rejected.

Petitioners' Exception No. 20

Petitioners take exception to finding of fact no. 69. Specifically, Petitioners take exception to the ALJ's finding that "the higher staging in Wetland 1 in the post development condition is 'below flood stages'" on the grounds that there is no competent substantial evidence "setting forth the 'flood stages'" and supporting the finding that the staging in Wetland 1 is below "flood stages."

First, there is competent substantial evidence setting forth a "flood stage." The Applicants' engineer testified that the "flood stage" was 17.1 feet, which was the lowest finished floor elevation in the area (the "area" was node 99, which included Wetland 1). (Wimpee Vol. IX: 1336-37; Applicants Ex. 8). However, we agree that there is no competent substantial evidence to support the finding that the wetland staging in the overall watershed model is below the flood stage of 17.1 feet. The table and graph in Applicants Ex. 8 entitled "Pre vs. Post-Development Wetland Staging for the 25 yr/24 hr Storm" shows staging above 17.1 feet for some time after the peak stage. See also, Wimpee Vol. I: 87-88.

Modifying this finding of fact does not change the outcome of the proceedings. The Applicants' project complies with District criteria even though the overall watershed model indicates that the staging above 17.1 feet in post-development will be slightly higher than in pre-development at a time after the peak stage. (The staging above 17.1 feet in post-development is at most 0.04 feet higher than in pre-development.

(Applicants Ex. 8.) The Applicants' project meets the District's presumptive criteria; the overall watershed model was an additional analysis to confirm that the project would not cause an increase in the peak stage or peak duration of flooding downstream. (Wimpee Vol. I: 58-62 and Vol. IX: 1333, 1336-37; Register Vol. V: 791-93, 796; Applicants Ex. 7 and 8).

For the foregoing reasons, Petitioners' exception number 20 is granted, in part, and rejected, in part. The second sentence of recommended finding of fact number 69 is modified to read: "But those stages are after peak flows have occurred."

Petitioners' Exception No. 21

This exception asserts that finding of fact no. 74 should be rejected as based solely on hearsay. The Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ. § 120.57(1)(l), Fla. Stat.; Barfield, supra. Therefore, the exception is rejected. The exception also incorporates by reference Petitioners exception no. 19 and this incorporation is also rejected on the same grounds as the ruling on Petitioners' exception no. 19.

Petitioners' Exception No. 22

Petitioners' take exception to finding of no. 75 wherein the ALJ found that the Petitioners' witness did not have any documents to support his version of the delineations of basins C and D and the area north of Ravenswood Drive. Petitioners' assert "the ALJ misconstrued Mr. Bullard's testimony, demonstrating a fundamental unfairness of the proceedings by the ALJ since the evidence used by the Applicant's

was sufficient for the ALJ, but the same information used by the Petitioners' results in a finding of no supporting documents."

Pursuant to section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception. Nevertheless, the decision to accept the testimony of one witness over that of another and thereby weigh witness credibility is left to the discretion of the ALJ and cannot be changed absent a complete lack of competent substantial evidence from which the finding of fact could be reasonably inferred. Purdue, supra. There is competent substantial evidence to support the ALJ's finding of fact. (Bullard Vol. VIII: 1179, 1233).

Accordingly Petitioners' exception no. 22 is rejected.

Petitioners' Exception No. 23

Petitioners take exception to the first sentence finding of fact no. 79 that the stormwater system is designed in accordance with District rules because the finding "fails to set forth a concise and explicit statement of underlying facts of record to support the finding, and merely tracks the language of the rules, demonstrating that the ALJ did not comply with the statutory mandate of Section 120.569(2)(m), Fla. Stat."

First, section 120.569(2)(m), Fla. Stat., states that "[f]indings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings." [emphasis added] This section does not apply to the "language of the rules" as stated by Petitioners. Petitioners' exception fails to identify the statute the finding allegedly duplicates, and in fact, nothing in the finding duplicates a statute.

Also, there is competent substantial evidence in the record to support finding of fact no. 79. See, (Wimpee Vol. I: 55, 65, 63, 70 and Vol. IX: 1356, 1363, 1365-68, 1370-71, 1375-77, 1404, 1406; Burks Vol. IX: 1298; Register Vol. V: 803-05; Ginns Ex. 5 and 7; District Ex. 1).

For the foregoing reasons, Petitioners' exception no. 23 is rejected.

Petitioners' Exception No. 24

Petitioners take exception to finding of fact no. 81 wherein the ALJ states that "the Ginns intend to retain dewatering from the construction on the project site. We find that Petitioners' exception is a reiteration of Petitioners' exception no. 1, and as such, for the reason set forth in our ruling on that exception, Petitioners' exception no. 24 is rejected.

Petitioners' Exception No. 25

Petitioners' take exception to recommended finding of fact number 85 wherein the ALJ found that pond DA-1 would have minimal influence on groundwater near the pond. Petitioners' assert that the Applicants have not provided reasonable assurance that DA-1 will not intercept a contamination plume emanating from the landfill. Petitioners' contend that even if DA-1 does not change the groundwater flow, DA-1 will be excavated into the groundwater, thereby exposing contaminants to the surface waters.

Petitioners provide no legal basis for their exception or citations to the record as required in 120.57(1)(k), Fla. Stat. As a result, the Governing Board is not required to

rule on this exception. Nevertheless, the ALJ's findings are supported by competent substantial evidence. (Register Vol. V: 801-02). Thus, this finding of fact may not be disturbed. See, Section 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra.

With respect to Petitioners' contention that the ALJ failed to consider the potential that DA-1 will intercept a contaminated plume emanating from the landfill, this particular water quality issue is addressed in other findings. In findings of fact numbers 88 and 89, the ALJ found that groundwater sampling conducted by the Applicants did not detect any violations of water quality standards. In addition, in findings of fact numbers 95 and 96, the ALJ found that the water quality sampling conducted by the Applicants "included parameters that were representative of contaminants in landfills that would have now spread to the project site" and that "based on the lack of contamination found in these samples taken from groundwater at the project site 50 years after the landfill began operation, the logical conclusion is that either the groundwater does not flow from the landfill toward the project site or the groundwater moving away from the landfill is not contaminated." (R.O. 41). None of these findings were contested by Petitioners.

For the foregoing reasons, Petitioners' exception no. 25 is rejected.

Petitioners' Exception No. 26

Petitioners' take exception to recommended finding of fact number 87, wherein the ALJ finds that the St. Johns County Health Department, in 1989, conducted an investigation on the project site to determine the amount of sewage and garbage on the project site. Petitioners' allege that this statement is not supported by competent

substantial evidence. Petitioners' also recite evidence of other incidences of dumping on the project site and further allege that there is no competent substantial evidence that garbage is not on the site anymore.

In regard to the ALJ's finding that excavations were undertaken in 1989 to determine the amount of sewage and garbage on the project site, there is competent substantial evidence to support this finding (Ginn Vol. 9: 1424-25; Rogers Vol. VII: 1025-29; Applicants Ex. 30). It appears that the Petitioners are requesting that the District make additional findings regarding this issue which this the agency cannot do. Burton vs. Morgan 643 So.2d 1103 (FL 4th DCA 1994).

In the last sentence of this exception, Petitioners state that the ALJ made the finding that there was no longer any garbage on the site. No such finding is made in paragraph 87.

Accordingly, Petitioners' exception 26 is rejected.

Petitioners' Exception No. 27

Petitioners take exception to finding of fact no. 90 wherein the ALJ states that "the sewage sludge and garbage were excavated." Petitioners provide no legal basis for their exception or citations to the record as required by 120.57(1)(k), Fla. Stat. As a result, the Governing Board is not required to rule on this exception. Nevertheless, we find that this finding is not supported by competent substantial evidence, but this does not affect the ultimate conclusion that groundwater at the site meets state water quality standards. See (R.O. 41-42 at ¶ 96-96)

Accordingly, Petitioners' exception is granted and the second sentence of finding of fact no. 90 is deleted.

Petitioners' Exceptions No. 28

Petitioners take exception to finding of fact no. 100 wherein the ALJ found that "[b]ased on the project plans, the terms of the BEMP [Bald Eagle Management Plan], and this analysis, the USFWS [U.S. Fish and Wildlife Service] concluded that the Ravenswood project 'is not likely to adversely affect' the bald eagles at the Ravenswood site." Petitioners assert that finding of fact no. 100 should be rejected as not supported by competent substantial evidence because it is based solely on hearsay, is not scientifically acceptable and is based upon incomplete information.

First, the Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ regarding hearsay. § 120.57(1)(l), Fla. Stat.; Barfield, supra. Also, the reliability or credibility of evidence is the purview of the ALJ as the fact finder, not the Governing Board. The decision to accept the testimony of one witness over that of another and thereby weigh witness credibility is left to the discretion of the ALJ and cannot be changed absent a complete lack of competent substantial evidence from which the finding of fact could be reasonably inferred. Purdue, supra. Moreover, the burden of challenging the credibility or reasonableness of an expert's reliance on certain facts or data rests on cross-examination by opposing party and goes to the weight to be given the evidence by the fact finder. City of Hialeah v. Weatherford, 466 So.2d 1127 (Fla. 3d DCA 1985); G.V. v. Dep't of Children and Families, 795 So.2d 1043 (Fla. 3d DCA 2001).

This finding of fact is supported by competent substantial evidence and may not be disturbed. (Palmer Vol. III: 419-421, 431). See also, Section 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra. Accordingly, Petitioners' Exception no. 28 is rejected.

Petitioners' Exception No. 29

Petitioners assert finding of fact no. 101 should be rejected as based solely upon hearsay and the lack of competence of the testifying witness. The Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ. § 120.57(1)(l), Fla. Stat.; Barfield, supra. Also, the reliability or credibility of evidence is the purview of the ALJ as the fact finder, not the Governing Board. The decision to accept the testimony of one witness over that of another and thereby weigh witness credibility is left to the discretion of the ALJ and cannot be changed absent a complete lack of competent substantial evidence from which the finding of fact could be reasonably inferred. Purdue, supra.

This finding of fact is supported by competent substantial evidence and may not be disturbed. (Palmer Vol. III: 407-11). See also, Section 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra.

Accordingly, Petitioners' exception no. 29 is rejected.

Petitioners' Exception No. 30

Petitioners take exception to finding of fact no. 103 wherein the ALJ finds that it has been learned since publication of the *Management Guidelines* in 1987 that eagles

can tolerate more disturbance than was thought at that time. Petitioners assert that the opinions against the use of the 1987 *Management Guidelines* were not based on "professionally acceptable science and were mere personal opinions."

Pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record.

Nevertheless, the decision to believe one expert over another is left to the administrative law judge as the fact finder and cannot be altered absent a complete lack of competent substantial evidence from which the finding could be reasonably inferred. Fla. Chapter Sierra Club, supra. These are evidentiary matters within the province of the Administrative Law Judge. Bradley, supra. The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977 (Fla. 4th DCA 1996). This finding of fact is supported by competent substantial evidence and it may not be disturbed. (Palmer Vol. III: 433; Steffer Vol. IV: 510). See also, Section 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra.

Accordingly, Petitioners' exception 30 is rejected.

Petitioners' Exception No. 31

An exception is taken to the last sentence of recommended finding of fact no. 104 in which the ALJ expressly accepts and credits the opinion testimony of

Respondent's bald eagle experts, claiming the sentence violates section 120.569(2)(m), Fla. Stat., because the finding merely tracks statutory language without a supporting statement of underlying facts of record. Contrary to section 120.57(1)(k), Petitioners fail to identify the statute this sentence allegedly duplicates, and in fact, the sentence does not duplicate any statute. Moreover, the sentence represents the fact finder's express weighing of the evidence which the Governing Board cannot disturb. Goss, supra; Heifitz, supra; Brown, supra. Accordingly, Petitioners' exception no. 31 is rejected.

Petitioners' Exception No. 32

Petitioners take exception to recommended finding of fact number 105 wherein the ALJ found that "evidence did not suggest a valid reason to assume that the Ginn's proposed eagle monitoring will not be conducted in good faith and effectively." In this exception, Petitioners essentially reargue their case in an attempt to have the Governing Board reweigh and interpret evidence. As previously noted, the Governing Board may not reweigh evidence submitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown, supra. The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

Also, pursuant to Section 120.57(1)(k), Fla. Stat., the Governing Board need not rule on this exception because it does not identify the legal basis for the exception and does not include appropriate and specific citations to the record.

For the foregoing reasons, Petitioners' exception 32 is rejected.

Petitioners Exception 33

Petitioners take exception to the last clause of recommended finding of fact no. 111 in which the ALJ concludes "the project will not be contrary to the public interest," as required by section 373.414(1)(a), Fla. Stat., and Rule 40C-4.302, Florida Administrative Code. Petitioners assert that this legal conclusion or ultimate fact violates section 120.569(2)(m), Fla. Stat., by lacking a statement of underlying facts. The underlying facts supporting this finding are easily located in findings of fact nos. 112-118. Accordingly, Petitioners' exception no. 33 is rejected.

Petitioners Exception 34

In Petitioners' exception no. 34, Petitioners take exception to finding of fact no. 112. Specifically, Petitioners take exception to the ALJ's finding that "the project will not adversely affect the public health, safety and welfare" and that "the project will not cause flooding to offsite properties" because the ALJ "fails to provide a concise and explicit statement of the underlying facts of record that support the finding, as required by Section 120.569(2)(m), Fla. Stat."

First, although labeled as a finding of fact, finding of fact no. 112 is a mixed question of law and fact. If a finding of fact is improperly labeled by the ALJ, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. See, Battaglia Properties, supra. To the extent that finding of fact no. 112 is a conclusion of law, the requirements of Section 120.569(2)(m), Fla. Stat., are not applicable. To the extent that finding of fact no. 112 is a mixed question of law

and fact, a finding that involves both factual and legal conclusions cannot be rejected where there is substantial competent evidence to support the factual conclusion and where the legal conclusion necessarily follows. Berger, supra.

Second, even if we were to conclude that finding no. 112 is solely a finding of fact, the ALJ has complied with Section 120.569(2)(m), Fla. Stat., by setting forth a concise and explicit statement of underlying facts of record. The finding includes facts relevant to the ultimate finding, which is that the "project will not adversely affect public health, safety, or welfare or the property of others *because the surface water management system is designed in accordance with District criteria, the post-development peak rate of discharge is less than the pre-development peak rate of discharge, and the project will not cause flooding to offsite properties.*" (R.O. 48) [emphasis added]. The facts related to the system design, peak rate of discharge, and offsite flooding are in the recommended order. See, R.O. at 16-18, ¶ 33-39; at 26-29, ¶ 61-66; at 34, ¶ 78; at 35-37, ¶ 79-82, and at 47, ¶ 108; See also, ERP-A.H., 12.2.3.1.

For the foregoing reasons, Petitioners' exception no. 34 is rejected.

Petitioners Exception 35

Petitioners assert the first sentence of recommended finding of fact number 113 violates section 120.569(2)(m), Fla. Stat., by lacking a statement of underlying facts. Contrary to section 120.57(1)(k), the exception fails to identify the statute the sentence allegedly duplicates, and in fact, the sentence does not duplicate any statute. Regardless, the finding is otherwise supported by findings of fact nos. 31-33, 46, 47, 51-59, 97-105. Accordingly, Petitioners' exception no. 35 is rejected.

Petitioners Exception 36

Petitioners take exception to fact of fact no. 115 wherein the ALJ found that "[d]evelopment of the project will not adversely affect the legal recreational use of the project site. (Illegal use by trespassers should not be considered under this criterion.) There also will not be any adverse impact on recreational use in the vicinity of the project site." Petitioners allege that there is no competent substantial evidence in the record to support this finding.

Although labeled as a finding of fact, finding of fact no. 115 is a mixed question of law and fact. To the extent that finding of fact no. 115 is a mixed question of law and fact, a finding that involves both factual and legal conclusions cannot be rejected where there is substantial competent evidence to support the factual conclusion and where the legal conclusion necessarily follows. Berger, supra.

First, there is competent substantial evidence to support the ALJ's factual conclusion. (Wentzel Vol. V: 671-72, 687). Second, there is no evidence in the record that Mrs. McMulkin will no longer be able to watch birds and wildlife from her home next to the project site. Therefore, the ALJ reasonably concluded that the project would not result in any adverse impacts to recreational values in the vicinity of the project site.

Accordingly, Petitioners exception no. 36 is rejected.

Petitioners Exception 37

Petitioners assert finding of fact no. 118 violates section 120.569(2)(m) by lacking a statement of underlying facts. Contrary to section 120.57(1)(k), the exception

fails to identify the statute the finding allegedly duplicates, and in fact, the sentence does not duplicate any statute. Regardless, the finding identifies the underlying facts by referring to the mitigation and proposed BEMP supported by findings of fact nos. 51-59, 97-105. Accordingly, Petitioners' exception no. 37 is rejected.

Petitioners Exception 38

Petitioners assert finding of fact no. 119 violates section 120.569(2)(m), Fla. Stat. by lacking a statement of underlying facts. Contrary to section 120.57(1)(k), the exception fails to identify the statute the finding allegedly duplicates, and in fact, the finding does not duplicate any statute. Nonetheless, the underlying factual statements supporting the finding are expressly set forth in findings of fact nos. 111-118. Accordingly, Petitioners' exception no. 38 is rejected.

Petitioners Exception 39

Petitioners argue that the finding in the fifth sentence of paragraph 123 should be rejected because Exhibit 30K[1] is hearsay, lacked competency and relevance. The fifth sentence found that Applicants' Exhibit 30K, although it and the Department of Environmental Protection (f/k/a Department of Environmental Regulation) enforcement file had different numbers, verified compliance with a Consent Order.

First, the exception asserts that the Exhibit 30K should be rejected as hearsay. The Governing Board lacks substantive jurisdiction to confirm, modify or overrule an evidentiary ruling of the ALJ. § 120.57(1)(l), Fla. Stat.; Barfield v. Dep't of Health, 805

[1] Exhibit 30K is a letter from the Florida Department of Environmental Regulation to Mr. Michael Adams dated February 13, 1991, regarding DER v. Clyatt R. Powell et al; OGC File No. 89-0964C.

So.2d 1008 (Fla. 1st DCA 2001) (the department lacks substantive jurisdiction to overrule the judge's evidentiary ruling regarding hearsay).

Second, there is competent substantial evidence in the record to support the ALJ's finding that the terms of the Consent Order had been satisfied. Jay Ginn, who owned the property at the time of the Consent Order and who owns it now, testified that he had taken actions to comply with the Consent Order and that he has not heard from the DEP since he received Exhibit 30K. (Ginn Vol IX: 1428 – 31, 1435). The last sentence of paragraph 123 finds that nothing had been heard about the Consent Order since 1991 and Mr. Ginn testified to that fact. (Ginn Vol IX: 1435). Mr. Ginn also testified on rebuttal that he hired Mr. Adams to oversee the restoration required under the Consent Order and received Exhibit 30K addressed to Mr. Adams indicating satisfaction of the terms of the Consent Order. Because this finding of fact is supported by competent substantial evidence, it may not be disturbed. See Section 120.57(1)(l), Fla. Stat. Freeze, supra; Berry, supra; Fla. Sugar Cane League, supra.

Accordingly, Petitioners' exception 39 is rejected.

Petitioners Exception 40

Petitioners take exception to conclusion of law no. 133 wherein the ALJ concludes that the project will not cause an increase in the stage or duration of downstream flooding. Petitioners allege that there is no competent substantial evidence to support this conclusion. Again, Petitioners fail to identify appropriate and specific citations to the record as required by section 120.57(1)(k), Fla. Stat., and, therefore, the Governing Board need not rule on this exception. Nevertheless, finding of fact numbers

61-78 provide the factual underpinnings for the ALJ's conclusion and we find that there is competent substantial evidence in the record to support those findings. (Wimpee Vol. IX: 1336-37; Applicants Ex. 8 p.10) To the extent that Petitioners' exception is also a reiteration of Petitioners' exception numbers 6, 7, 18, 19, 20 and 21, we incorporate our rulings on those exceptions.

For all of the foregoing reasons, Petitioners' Exception 40 is rejected.

Petitioners' Exception 41

Petitioners argue that paragraph 135 of the conclusions of law should be rejected, contending that the Applicants failed to provide competent substantial evidence for alleged factors that applied and, commensurately, the ALJ failed to make findings on each applicable factor. The Petitioners misread the applicable requirement, make numerous conclusory statements, and once again re-argue the facts. Conclusion of law 135 states that the Applicants proposed to temporarily or permanently impact all wetlands but Wetland 5 and that the Applicants demonstrated practicable design modifications as required for Wetlands 1 and 4. Petitioners exception appears to focus on the ALJ's conclusions regarding Wetland 1.

Petitioners state that ERP-A.H. 12.2.1.1 defines the term "practicable design modification" and then highlight various portions of the Handbook provision. Thereafter, the Petitioners argue that the highlighted portions are each a separate criteria. ERP-A.H. 12.2.1.1 is not a definition of what the term "practicable design modification" is, but a statement of what it is not. The provision states what is not a "modification" and what is not "practicable." It does state that in determining whether a proposed modification is

practicable, consideration shall be given to the cost of the modification compared to the environmental benefit it achieves.

The Applicants proposed and evaluated a modification that involved placing the water and sewer mains outside of Wetland 1 rather than through it. (Applicants' Ex. 11). The analysis demonstrated that routing the proposed utility services around the project site would cost approximately $80,000 to $100,000. (Wentzel Vol.IV: 620; Brown Vol.III: 315-18). The impact avoided is a temporary impact and it is likely that the area to be impacted can be successfully reestablished and restored, and preservation of Wetland 1 is proposed to address lag time for reestablishment. (Wentzel Vol.IV: 620-21; Brown Vol.III: 315-18). The District reviewed the analysis and concurred that routing the water and sewer mains outside of Wetland 1 was not a practicable design modification because the costs of avoidance outweighed the environmental benefits of avoidance. (District's Ex. 1; Wentzel Vol. IV: 621); See also, R.O.18-22. Therefore, the ALJ reasonably concluded that practicable design modifications were implemented for the impacts to Wetland 1.

The Petitioners reargue what the ALJ rejected. The Governing Board may not reweigh evidence submitted in the proceeding, may not resolve conflicts in the evidence, may not judge the credibility of witnesses or otherwise interpret evidence anew. Goss, supra; Heifitz, supra; Brown, supra. The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by competent substantial evidence. Florida Sugar Cane League, supra.

Accordingly, Petitioners' exception no. 41 is rejected.

Petitioners' Exception 42

Petitioners take exception to conclusion of law number 136 wherein the ALJ concludes that Applicants were not required to implement practicable design modifications to eliminate or reduce impacts to Wetlands 2, 3, 6, and 7. We find that Petitioners' exception is a reiteration of Petitioners' exception numbers 3, 4, 11, and 12, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' exception no. 42 is rejected.

Petitioners' Exception 43

Petitioners take exception to recommended conclusion of law number 138 wherein the ALJ concludes that the Applicants do not have to comply with mitigation provisions in ERP-A.H. 12.3 through 12.3.8 as to Wetlands 2 and 6 because those wetlands meet the criteria of ERP-A.H. 12.2.2.1. We find that Petitioners' exception is a reiteration of Petitioners' exception numbers 3, 4, 11, 12 and 17, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' exception no. 43 is rejected.

Petitioners' Exception 44

Petitioners argue that the first sentence of paragraph 139 must be rejected because the ALJ did not make a concise and explicit statement supporting any finding that the mitigation more than replaces the functions provided by the wetlands and

surface waters to be affected by the project and a lack of reasonable assurance that the mitigation will offset the adverse impacts from the project. Paragraphs 22 through 59 of the Recommended Order justify the conclusion in paragraph 139 of the Recommended Order. See also, Wentzel Vol. V: 667.

Accordingly, Petitioners' exception 44 is rejected.

Petitioners Exception 45

Petitioners take exception to conclusion of law no. 140. Specifically, Petitioners take exception to the ALJ's conclusion that "the greater weight of the evidence shows that the stormwater system complies with the applicable rule criteria" because the conclusion "is not supported by concise and explicit findings of fact" and because "conclusory statements ... [do] not constitute competent substantial evidence to support a conclusion of law."

Because Petitioners do not include appropriate and specific citations to the record, the Governing Board is not required to rule on this exception pursuant to § 120.57(1)(k), Fla. Stat. Nevertheless, there is competent substantial evidence in the record to support the ALJ's conclusion. (Wimpee Vol. I: 63, 70; Register Vol. V: 803-05; Ginns Ex. 5 and 7; District Ex. 1). Therefore, this conclusion of law is a proper interpretation of the District's rules based on the findings of fact found by the ALJ and cannot be rejected or modified by the Board. See, § 120.57(1)(l), Fla. Stat.; Berry, supra; Fla. Chapter of Sierra Club, supra.

Furthermore, Petitioners' exception that the conclusion of law is not supported by concise and explicit findings of fact appears to refer to Section 120.569(2)(m), Fla. Stat.,

which applies to findings of fact. This exception is to a conclusion of law, so Section 120.569(2)(m), Fla. Stat., is not applicable.

For the foregoing reasons and for the reasons set forth in our ruling on Petitioners' exception no. 23, Petitioners' exception 45 is rejected.

Petitioners' Exception 46

Petitioners take exception to conclusion of law no. 141. Specifically, Petitioners take exception to the ALJ's conclusion that Applicants have met ERP-A.H. 12.2.4 asserting the Applicant has not submitted a dewatering plan and therefore has not provided reasonable assurances that the project meets District rules.

We find that Petitioners' exception is a reiteration of Petitioners' exception numbers 1 and 49, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' exception no. 46 is rejected.

Petitioners' Exception 47

Petitioners argue, relative to groundwater impacting surface water, that the ALJ could not make a conclusion that because the evidence established the absence of violations in groundwater, reasonable assurance had been provided for compliance with Rule 40C-4.301(1)(e), Florida Administrative Code. The Petitioners provide no basis in fact or law for their argument. The Petitioners merely state the conclusion that the rules do not support paragraph 142 and the Administrative Law Judge misunderstood the burden of proof. Paragraphs 83 through 96 of the Recommended Order justify the

conclusion in paragraph 142 of the Recommended Order. Accordingly, Petitioners' Exception 47 is rejected.

Petitioners' Exception 48

Petitioners take exception to recommended conclusion of law number 143 wherein the ALJ concludes that reasonable assurance was provided that the proposed project will not violate water quality standards. Contrary to section 120.57(1)(k), the exception fails to identify any legal explanation in support of the exception. The conclusion of law is derived from findings of fact 60, 79-96 and is also supported by conclusions of law 140-142. Accordingly, Petitioners' exception number 48 is rejected.

Petitioners' Exception 49

In Petitioners' exception no. 49, Petitioners take exception to conclusion of law no. 145. Specifically, Petitioners take exception to the ALJ's conclusion that "secondary impacts will not cause adverse impacts to the functions of wetlands or surface waters."

The first part of this exception relates to the dewatering plan, which is discussed in Petitioners' exceptions numbered 1, 24, and 46. The second part of this exception relates to the "secondary impacts from the groundwater withdrawals from dewatering since it [the Applicant] has not provided a dewatering plan" and "there was no evidence that there is a consumptive use permit." To the extent that this part of the exception relates to the dewatering plan, we have previously addressed this issue in our rulings on Petitioners' exception numbers 1, 24 and 46. Also, Petitioners' exception misquotes and misapplies ERP-A.H. 12.2.7(a). See, ERP-A.H. 12.2.7(a) and 12.2.2.4.

The third part of this exception relates to impacts to bald eagles and incorporates Petitioners' exceptions to findings of fact numbered 51, 52, 103, 104, and 105, which are addressed in Petitioners' exceptions numbered 14, 15, 30, 31, 32.

We find that Petitioners' exception is a reiteration of Petitioners' exception numbers 1, 14, 15, 24, 30, 31, 32 and 46, and as such, for the reasons set forth in our rulings on those exceptions, Petitioners' exception no. 49 is rejected.

Petitioners' Exception 50

Petitioners take exception to recommended conclusion of law number 146 wherein the ALJ states that "[t]he evidence showed that none of the listed aquatic or wetland dependent species currently use uplands on the project site for nesting or denning. The eagle's nest is in the wetland portion of Wetland 1, and it was addressed under ERP-A.H. 12.2.7(a)." Petitioners contend that the uplands within the primary and secondary protection zones of the *Management Guidelines* enable the existing nesting of the bald eagles and should be considered under section 12.2.7(b), ERP-A.H.

First, part (b) of the secondary impact test is applicable in its entirety to this project. This part of the test requires a permit applicant to provide reasonable assurance that

> the construction, alteration, and intended or reasonable expected uses of a proposed system will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species, but not including:

1. Areas needed for foraging; or

2. Wildlife corridors, except for those limited areas of uplands necessary for ingress and egress to the nest or den site from the wetland or other surface water. (Emphasis added).

See, Section 12.2.7(b), MSSW-A.H. (Table 12.2.7.-1 of the ERP Applicant's Handbook identifies those aquatic or wetland dependent listed species that use upland habitats for nesting and denning).

Second, the only conclusion that can be drawn is that no adverse secondary impacts will occur under this part of the test. Finding of fact numbers 10, 22 and 98 all state that the eagle's nest is located within Wetland 1. The uplands within the primary and secondary eagle protection zones in this case are not uplands used by aquatic and wetland dependent listed animal species for enabling existing nesting or denning. The ALJ's interpretation of ERP-A.H. 12.2.7 (b) is consistent with the District's interpretation, and the District's interpretation is correct. ERP-A.H. 12.2.7(a) and not 12.2.7(b) applied to the eagles and their nest because the text of 12.2.7 (b) clearly indicates that (b) applies to aquatic or wetland dependent species that use uplands for nesting and denning at the time of the application. In the instant case, the eagles' nest was in Wetland 1. Hence, (a), not (b), applies.

Whether (a) or (b) applies is of no consequence to the outcome of the case. Nothing in the District's requirements requires strict adherence to the *Guidelines.* See ERP-A.H. 12.2.7. Indeed, 12.2.7 (b), the provision of the Applicant's Handbook that mentions the publications specifically states that applicants may propose measures other than those contained in the guidelines. In the last sentence of paragraph 146, the ALJ states that the impacts to the eagles and their nest were addressed under (a).

Accordingly, Petitioners' exception no. 50 is rejected.

Petitioners' Exception 51

Petitioners apparently assert conclusion of law no. 152 violates section 120.569(2)(m), Fla. Stat., by lacking an underlying factual statement. Foremost, section 120.569(2)(m) applies to findings of fact, not to conclusions of law. Also, contrary to section 120.57(1)(k), the exception fails to identify the statute the conclusion of law allegedly duplicates, and in fact, the conclusion of law does not duplicate any statute. Accordingly, Petitioners' exception no. 51 is rejected.

Petitioners' Exception 52

Petitioners apparently assert conclusion of law no. 156 violates section 120.569(2)(m), Fla. Stat., by lacking a statement of underlying facts. This exception is rejected on the same grounds as the ruling on exception no. 51.

Petitioners' Exception 53

An exception is taken to conclusion of law no. 157 on the same basis as Petitioners' exception no. 44. The exception is rejected on the same grounds as the ruling on exception no. 44.

RULINGS ON DISTRICT'S EXCEPTIONS

SJRWMD Exception No. 1.

The St. Johns River Water Management District notes that the Recommended Order fails to acknowledge Tara Boonstra as appearing as an attorney of record at the hearing for the St. Johns River Water Management District. The Final Order reflects that Tara Boonstra appeared on behalf of the St. Johns River Water Management District.

SJRWMD Exception No. 2

The St. Johns River Water Management District seeks a clarification of the Statement of the Issue which infers the Environmental Resource Permitting program regulates more than the construction and operation of a surface water management system. The Statement of the Issue has been clarified and is set forth in this Final Order.

SJRWMD Exception No. 3

District staff take exception to finding of fact no. 1 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that the District administers and enforces statutes and "...Florida Administrative Code Rules promulgated by the District..." (R.O. 5-6). No evidence was presented to demonstrate that the District administers and enforces only those Florida Administrative Code rules that are promulgated by the District. Rather, the District administers and

enforces the rules promulgated under Chapter 373, Florida Statutes. See, District PRO at 4, ¶ 2; Ginns PRO at 5, ¶ 2; Petitioners PRO at 2, ¶ 2; ERP-A.H. 1.0. Therefore, finding of fact 1 is modified to read as follows: "...and Florida Administrative Code Rules promulgated under the authority of those statutes." This modification does not change the outcome of the proceedings.

Accordingly, the District Exception no. 3 is granted and the first sentence of finding of fact no. 1 is modified as follows:

> Respondent, the District, is a special taxing district created by Chapter 373, Florida Statutes, charged with the duty to prevent harm to the water resources of the District, and to administer and enforce the cited statutes and Florida Administrative Code Rules promulgated ~~by the District~~ under the authority of those statutes.

SJRWMD Exception No. 4

District staff take exception to a typographical error in the second sentence of Finding of Fact 2 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that the development to be constructed is "a 136-acre residential community." (RO at 6). There is no evidence in the record that the development is 136 acres. Rather, the evidence is undisputed that the development will include 136 units or 136 lots. See, Stip. at 2, ¶ 1 and at 16, ¶ 5(d); RO at 2, "Preliminary Statement." Therefore, the second sentence of Finding of Fact 2 is modified to read "...a 136-unit residential community..." Correcting this typographical error does not change the outcome of the proceedings.

Accordingly, District staff's exception no. 4 is granted.

SJRWMD Exception No. 5

In addition to Exception No. 4, District staff take further exception to the second sentence of finding of fact 2 to the extent that it slightly mischaracterizes the activity that would be authorized by the Environmental Resource Permit that is at issue in this matter on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that the Environmental Resource Permit is "to construct a 136-acre residential community and associated surface water management facilities..." (R.O. 6). As discussed above in Exception No. 2, the Environmental Resource Permit regulatory program authorized under Part IV, Chapter 373, Florida Statutes, regulates surface water management systems. See, Florida Administrative Code Rule 40C-4.041; ERP-A.H. 1.0. The statement in Finding of Fact 2 appears to have been taken from the Applicants' Proposed Recommended Order, which does not contain a citation for the statement. See, Ginns PRO at 5, ¶ 3. There is competent substantial evidence to support modifying the second sentence of Finding of Fact 2 as follows: "...to construct a surface water management system serving a 136-unit residential community." See, Stip. at 2, ¶ 1 and at 16, ¶ 5(a); District PRO at 2. This modification will clarify the activity that would be authorized by the Environmental Resource Permit and does not change the outcome of the proceedings.

Accordingly, District staff's exception is granted and the second sentence of finding of fact no. 2 is modified as follows:

> They are seeking ERP Permit No. 40-109-81153-1 from the District to construct a surface water management system serving a 136-unit residential community ~~136-acre residential community and associated surface water management system~~.

SJRWMD Exception No. 6

District staff take exception to certain sentences in findings of fact nos. 10, 22, and 98 on the grounds that there is no competent substantial evidence in the record to support the findings. The third sentence in Finding of Fact 10 states that "... it was not discovered until November of 2003 that there was an eagle nest..." (R.O. 8). The last sentence in Finding of Fact 22 states that "... in November 2003 an eagle nest was discovered..." (R.O. 12). The first sentence of Finding of Fact 98 states that "When the Ginns were made aware in November 2003, ..." (R.O. 42). The undisputed evidence presented was that the Ginns learned of the presence of an eagle nest in late October 2003 and of the presence of eagles at the nest in November 2003. See, Brown Vol. III: 331, 361, 382; Palmer Vol. III: 400; Steffer Vol. IV: 481. Therefore, the third sentence in finding of fact 10 is modified to read as follows: "...it was not discovered until October of 2003 that there was an eagle nest..." The last sentence in finding of fact 22 is modified to read as follows: "...in October 2003 an eagle nest was discovered..." The first sentence of finding of fact 98 is modified to read as follows: "When the Ginns were made aware in October 2003, ..." Modifying these three sentences does not change the outcome of the proceedings.

Accordingly, District staff's exception is granted and finding of fact nos. 10, 22 and 98 are modified as noted above.

SJRWMD Exception No. 7

District staff take exception to the third sentence in finding of fact no. 24 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that "A 24-inch culvert drains the area into a 600-foot long drainage ditch..." This appears to be a misstatement of a sentence in the Amended Pre-Hearing Stipulation, which states that "Wetland 1 and Wetland 3 are connected by an approximately 600-foot roadside drainage ditch with a 24-inch culvert." (Prehrg. Stip. 17, ¶ 5(l). Evidence was presented that a culvert exists in the drainage ditch, but no evidence was presented that the culvert drains Wetland 3 into the ditch. Rather, undisputed evidence was presented that Wetland 3 was drained by a "ditch" or a "cut" into a 600-foot long drainage ditch leading to Wetland 1. See, Brown Vol. II: 278-79; Wentzel Vol. IV: 627-28; Burks Vol. IX: 1311-12. Therefore, the third sentence of finding of fact 24 is modified to read as follows: "A ditch or cut drains the area into a 600-foot long drainage ditch..." Modifying this sentence does not change the outcome of the proceedings.

Accordingly, District staff's exception is granted and the third sentence of finding of fact no. 24 is modified as follows:

> A ditch or cut ~~24-inch culvert~~ drains the area into a 600-foot long drainage ditch along the south side of Ranvenswood Drive leading to Wetland 1.

SJRWMD Exception No. 8

District staff take exception to the third sentence in finding of fact 28 on the grounds that there is no competent substantial evidence in the record to support the finding. The third sentence states that "The gopher frog is not a listed species;..."

District staff's exception no. 8 is granted for the reasons set forth in our ruling on Petitioners' exception no. 3.

SJRWMD Exception No. 9

District staff take exception to the second sentence of finding of fact no. 44 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that "...the District interprets ERP-A.H. 12.2.1.1 to require a reduction/elimination analysis only when a project will result in adverse impacts such that it does not meet the requirements of ERP-A.H. 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8." (RO at 21). Although labeled as a finding of fact, this portion of finding of fact no. 44 is a conclusion of law. If a finding of fact is improperly labeled by the Administrative Law Judge, the label should be disregarded and the item treated as though it were properly labeled as a conclusion of law. See, Battaglia Properties v. Fla. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1994).

First, no evidence was presented that ERP-A.H. 12.2.1.1 applies when a project will result in adverse impacts such that it does not meet the requirements of ERP-A.H. 12.2.2 through 12.2.3.7 *and 12.2.5 through 12.3.8*. Rather, evidence was presented that ERP-A.H. 12.2.1.1 applies when a project will result in adverse impacts such that it does not meet the requirements of ERP-A.H. 12.2.2 through 12.2.3.7. See, ERP-A.H. 12.2.1.1; District PRO at 35, ¶ 101, footnote 10; Wentzel Vol. IV: 624, 640-41.

Second, the statement in the Recommended Order omits a portion of the rule, which provides that "*Except as provided in subsection 12.2.1.2*, if the proposed system will result in adverse impacts to wetland functions and other surface water functions

such that it does not meet the requirements of subsections 12.2.2 through 12.2.3.7, ..." See, ERP-A.H. 12.2.1.1 [emphasis added]. Although the exception in ERP-A.H. 12.2.1.2 did not apply to Wetlands 2 and 6, which were the subject of finding of fact no. 44, the statement in the Recommended Order is an incomplete statement of the rule and should be corrected for clarification. (The exception in ERP-A.H. 12.2.1.2 was referenced in finding of fact no. 45 with respect to Wetlands 3 and 7.)

This legal conclusion involves the substantive regulatory jurisdiction of the St. Johns River Water Management District and is more reasonable than the erroneous legal statement contained in the finding. Modifying this sentence does not change the outcome of the proceedings.

Accordingly, District staff's exception no. 9 is granted and the second sentence of this conclusion of law (labeled as finding of fact no. 44) should be modified to read as follows:

> As explained in testimony, except as provided in ERP-A.H. 12.2.1.2, the District interprets ERP-A.H. 12.2.1.1 to require a reduction/elimination analysis only when a project will result in adverse impacts such that it does not meet the requirements of ERP-A.H. 12.2.2 through 12.2.3.7 ~~and 12.2.5 through 12.3.8~~.

SJRWMD Exception No. 10

District staff take exception to the second sentence of finding of fact no. 58 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states that "...ERP-A.H. 12.2.2.1(d) does not require compliance with under ERP-A.H. 12.3 through 12.3.8..." First, no evidence was presented that ERP-A.H. 12.2.2.1(d) is the provision that does not require compliance with other sections of ERP-A.H. Rather, evidence was presented that ERP-A.H. 12.2.2.1 does not

require compliance with ERP-A.H. 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8 unless the criteria in ERP-A.H. 12.2.2.1(a) through (d) apply. See, ERP-A.H. 12.2.2.1; Wentzel Vol. IV: 624-25, 641. Second, there is an apparent typographical error by including the word "under" following the word "with." Evidence was presented that ERP-A.H. 12.2.2.1 does not require compliance *with* ERP-A.H. 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8. See, ERP-A.H. 12.2.2.1; Wentzel Vol. IV: 624-25, 641. Modifying this sentence does not change the outcome of the proceedings.

Accordingly, District staff's exception is granted and finding of fact no. 58 is modified to read as follows: "...ERP-A.H. 12.2.2.1 does not require compliance with ERP-A.H. 12.3 through 12.3.8..."

SJRWMD Exception No. 11

District staff take exception to sixth sentence in Finding of Fact 68 on the grounds that there is no competent substantial evidence in the record to support the finding. The finding states the following:

> For the OWM, the final discharge point of the system being modeled was the east-west ditch located just north of Josiah Street, where the tailwater elevation was approximately 18.1 feet, not the 19.27 feet SHW mark to the north in Wetland 1.[2]

(RO at 29-30). There is no competent substantial evidence to support the finding that the tailwater elevation at the east-west ditch located just north of Josiah Street was 18.1 feet. There was disputed evidence presented that the tailwater elevation used in the Overall Watershed Model was 18.1 feet. See, Bullard Vol. VIII:1158-62; District PRO at 12, ¶ 22; Ginns PRO at 10, ¶ 19, 20. However, the evidence that the tailwater used for

[2] OWM is an abbreviation for Overall Watershed Model, and SHW is an abbreviation for seasonal high water.

the Overall Watershed Model was 18.1 feet was based on the witness' testimony that the location of that 18.1-foot tailwater elevation was in the "wetland receiving water," not the east-west ditch. Bullard Vol. VIII:1158-59. Therefore, there is no competent substantial evidence in the record to support the finding that the tailwater elevation was 18.1 feet at the location of the ditch. However, if the clause "..., where the tailwater elevation was approximately 18.1 feet,..." were struck, there is competent substantial evidence to support the following finding of fact:

> For the OWM, the final discharge point of the system being modeled was the east-west ditch located just north of Josiah Street, not the 19.27 feet SHW mark to the north in Wetland 1.

See, Wimpee Vol. IX: 1338-41; Ginns Ex.8 at 33 and 87.

Accordingly, District staff's exception is granted and the sixth sentence of finding of fact no. 68 is modified as stated above. Striking the clause does not change the outcome of the proceedings.

SJRWMD Exception No. 12

District staff take exception to a typographical error in the second sentence of conclusion of law no. 127, which states that "Unless Petitioners present 'contrary evidence of equivalent equality' . . ." The phrase "contrary evidence of equivalent equality" is a direct quote from Florida Dep't of Transportation v. J.W.C., Inc., 396 So.2d 778, 789-90 (Fla. 1st DCA 1981). However, J.W.C. actually states "contrary evidence of equivalent quality." Id. Therefore, this quote should be corrected by replacing the word "equality" with the word "quality."

Accordingly, District staff's exception is granted and this typographical error is corrected as stated above.

FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED:

As to the ERP application, the Recommended Order dated April 16, 2004, attached hereto, is adopted in its entirety except as modified by the final action of the Governing Board of the St. Johns River Water Management District in the ruling on Petitioners, Marilyn McMulkin and Diane Mills, Exceptions 3, 20 and 27 and District's Exceptions 1 through12. Jay and Linda Ginns' application number 40-109-81153-1 for a standard environmental resource permit is hereby granted under the terms and conditions as set forth in the Technical Staff Report dated January 20, 2004, as revised by District Exhibit 10, both of which are attached hereto.

DONE AND ORDERED this 12th day of May, 2004, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: _____
Ometrias D. Long
CHAIRMAN

RENDERED this 12th day of May, 2004.

BY: Sandra Bertram
SANDRA BERTRAM
DISTRICT CLERK

Copies to:

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STANDARD GENERAL ENVIRONMENTAL RESOURCE PERMIT
TECHNICAL STAFF REPORT
January 20, 2004
APPLICATION #: 40-109-81153-1

Applicant: John A. Ginn, III and Linda G. Ginn
421 St Johns Ave, Apt. 3
Palatka, FL 32177

Consultant: Zev Cohen & Associates, Inc.
Attn: Curt Wimpee
55 Seton Tr
Ormond Beach, FL 32176
(904) 677-2482

Project Name:	Ravenswood Forest		
Project Acreage:	47.350		
Receiving Water Body:	San Sebastian River	**Class:**	III Fresh.
County:	St. Johns		
Authority:	40C-4.041(2)(b)2, 40C-4.041(2)(b)8		
Final O&M Entity:	Homeowners/Property Owners Association		
Interested Parties:	No		
Objectors:	Yes		

LOCATION AND BRIEF DESCRIPTION OF SYSTEM:
The 47.35-acre Ravenswood Forest site is located south of Ravenswood Drive and 2,000 feet west of Masters Drive in St. Johns County. The proposed development will consist of a 136-lot subdivision with associated stormwater conveyance and treatment facilities.

A PERMIT AUTHORIZING:

Construction of a surface water management system for a 136-lot subdivision known as Ravenswood Forest with stormwater treatment by wet detention to be constructed as per plans received by the District on November 05, 2003, and as amended by plans received on December 10, 2003.

ENGINEERING COMMENTS:

The project stormwater treatment system is proposed to include two connected wet detention ponds to treat and attenuate the runoff from the project site. Both ponds are designed with an independent control structure. The central pond (DA-1) cascades into the southern pond (DA-2) through its control structure and connecting ~~54~~" pipe. The discharge from DA-1 and the direct runoff from Basin 2 are attenuated in DA-2 before being discharged through a control structure to an onsite wetland.

SJRWMD Exhibit No. 1 ID

The applicant has supplied calculations that demonstrate that the design of the wet detention ponds will function to meet District rule criteria. The proposed wet detention system as designed will attenuate the mean annual and 25-year, 24-hour storm events and will also detain the appropriate runoff volume for water quality treatment.

The permit history related to this site dates back to 1986 when a stormwater permit was issued by the District for a residential subdivision known as Ravenswood Forest, Unit 1 (# 42-109-0032). The initial construction activity related to this permit involved some road clearing and the excavation of the stormwater pond. No control structure was constructed on the pond before work was terminated, and the permit expired upon 5 years of its issuance. The current applicant was required to submit a pre-development peak rate of discharge that reflects the site conditions prior to the construction activities related to the partially completed project under the 1986 permit. To reconstruct this pre-development condition, the applicant used the best available data from the old permit file and recently obtained information.

The applicant has provided additional analysis to address concerns by neighboring property owners that the project will contribute to pre-existing flooding problems. The analysis conducted by the applicant was an overall watershed model that took into account onsite and offsite drainage areas that drain to the affected properties. The watershed model simulations were conducted with and without the project. The conclusion of this analysis demonstrates that the project will not increase the overall peak rate of discharge, and that the project will not contribute to a rise in flood stage or an increase in the duration of flooding on the affected downstream properties.

Normal water levels are proposed to be controlled at elevation 26 in DA-1 and elevation 21 in DA-2. To prevent any adverse impact that the normal water elevation of DA-2 could have on Wetlands 4 and 5 in the southwest corner of the project, the applicant is proposing the installation of a clay cut-off wall around a portion of DA-2 to prevent the drawdown of these up-slope wetlands. The applicant's geotechnical engineer gathered site-specific data and provided a geotechnical report received on December 13, 2002 (confirmed by letter dated November 5, 2003), that demonstrates that the cut-off wall design will reduce the effective drawdown influence so that there is no adverse impact to Wetlands 4 and 5.

The project outfall is to an onsite wetland. This wetland drains to a pipe that flows to a ditch between Avery and Josiah Streets. This drainage ditch flows east towards its ultimate outfall to the San Sebastian River.

A closed municipal landfill is located northwest of the project site, which raised concern that the project could cause contaminated groundwater from the landfill to be drawn into the project's stormwater system. To address this potential problem, the applicant conducted sampling and modeling and analysis. The sampling did not detect any contaminants on the project site at levels of concern, and the modeling and analysis demonstrated that any contaminants that potentially are present will not reach the

stormwater system or will have broken down by the time the groundwater reaches the stormwater system. In addition, the applicant redesigned the stormwater system so that the stormwater pond closest to the landfill will be controlled at a normal water elevation that will not influence groundwater flows in the area of the pond.

ENVIRONMENTAL COMMENTS:

PROJECT DESCRIPTION

The 47.35-acre property includes sandhill pine (FLUCFCS – 413) and pine flatwoods (FLUCFCS – 411) upland communities as well as two isolated coniferous forested wetlands (FLUCFCS – 620), four mixed forested depressions (FLUCFCS – 630), and a man-made borrow area (FLUCFCS – 742). The on-site wetlands and other surface waters total approximately 12.82 acres. The two isolated coniferous wetlands (Wetlands 6 and 2) are 0.28 and 0.29 acres and are located along the western portion of the property. The two smallest mixed forested depressions (Wetlands 4 and 5) are each 0.01 acre and are contiguous with a larger mixed forested depression that is located off-site to the west. The largest mixed forested depression (Wetland 1), is approximately 10.98 acres and occupies the eastern portion of the property. The fourth mixed forested depression (Wetland 3) is 0.28 acres and is contiguous with the largest depression via an upland cut roadside drainage ditch that includes a culverted roadway crossing. Finally, the man-made borrow area (Wetland 7) is approximately 0.97 acres and is located in the southwestern portion of the property. Included within the borrow area is a 0.33-acre vegetated littoral shelf. This borrow area was constructed as part of the stormwater management system approved under permit #42-109-0032. A nest is located within the central portion of Wetland 1. Following consultation with the U.S. Fish and Wildlife Service and based on the characteristics of the nest, the nest was deemed to have been constructed and is currently utilized by a pair of bald eagles (*Haliaeetus leucocephala*). The bald eagle has been listed as a threatened species in section 68-27.004, F.A.C.

IMPACTS

The applicant is required to provide reasonable assurance that a regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters so as to cause adverse impacts to (a) the abundance and diversity of fish, wildlife and listed species; and (b) the habitat of fish, wildlife and listed species [40C-4.301(1)(d), F.A.C and subsections 12.1.1(a) and 12.2.2, A.H.]. The applicant is also required to provide reasonable assurance that the construction, alteration, operation, maintenance, removal and abandonment of a system located in, on or over wetlands or other surface waters will not be contrary to the public interest as determined by balancing the criteria set forth in subsections 12.2.3 through 12.2.3.7 of the Applicant's Handbook: Management and Storage of Surface Waters. Specifically, section 12.2.3(b) requires the weighing of whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats (40C-4.302(1)(a)2., F.A.C.), and section 12.2.3(g) requires the consideration of the current condition and relative value of functions

performed by the wetlands and other surface waters affected by the proposed regulated activity.

The applicant has proposed to temporarily impact approximately 0.18 acres of mixed forested wetlands (Wetland 1) during installation of the water and sewer utility services for the proposed development. The impact will include clearing, excavating a trench, installing the utility line, backfilling the trench, and restoring the original grade of the cleared area. The applicant has proposed to fill the 0.28- and 0.29-acre isolated depressions (Wetlands 6 and 2) during construction of residential lots. Mitigation is not required for these impacts because they are isolated wetlands of less than 0.5-acre that meet the requirements of section 12.2.2.1 of the Applicant's Handbook (A.H.). In addition, the applicant has proposed to fill 0.28 acre of a low quality mixed forested area (Wetland 3) during construction of three residential home lots and an interior roadway. The applicant has also proposed to fill 0.01 acre of a mixed forested area (Wetland 4) during construction of two residential lots. The applicant does not propose any impacts to Wetland 5. The applicant has proposed to fill approximately half (0.45 acre) of the man-made borrow area (Wetland 7) during construction of residential lots and to incorporate the remainder into proposed Detention Pond 1. The value of functions provided to wildlife by the wetlands to be impacted was determined pursuant to section 12.2.2.3, A.H.

ELIMINATION AND REDUCTION

The applicant evaluated practicable design alternatives to eliminate the 0.18 acre of temporary impact to Wetland 1 due to utility installation. The analysis demonstrated that installing the proposed utility services around the project site would cost approximately $80,000 to $100,000. The current design includes encasing the utility lines in concrete to prevent the necessity for fill to be placed within the wetland over the proposed lines. The applicant proposes to replant and monitor this impact area.

The applicant was not required to implement practicable design modifications to eliminate or reduce impacts to Wetlands 2 and 6. Subsection 12.2.1.1, A.H., only requires elimination and reduction of impacts if the proposed impacts do not meet the criteria of subsections 12.2.2 through 12.2.3.7, A.H. Compliance with subsections 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8 is not required for isolated wetlands less than one-half acre in size unless certain specialized indicia are met. Wetlands 2 and 6 are isolated wetlands less than on-half acre in size and they do not meet the specified indicia in 12.2.2.1. Accordingly, the applicant does not need to comply with the elimination and reduction criteria of section 12.2.1, A.H. for these wetlands.

The applicant was not required to implement practicable design modifications to eliminate or reduce impacts to Wetlands 3 and 7 pursuant to section 12.2.1.2(a), A.H. The ecological value of the functions provided by these wetlands is low according to an assessment of the value of functions provided to fish and wildlife by the impact area pursuant to section 12.2.2.3, A.H. The proposed mitigation provides greater long-term ecological value than these wetlands following assessment of the value of functions provided to fish and wildlife by the mitigation area pursuant to section 12.2.2.3, A.H.

The overall condition of the proposed mitigation area is good in that the existing hydrology of the wetland does not appear to be adversely altered, the vegetative composition of the wetlands and uplands is relatively mature and diverse, and the wetland provides water quality functions by treating the existing drainage from the roadside ditch along Ravenswood Drive. The mitigation area is hydrologically contiguous with the San Sebastian River via culverts and upland cut drainage ditches, but provides water quality benefits to downstream wetlands. The mitigation area is not generally a unique community in northeast Florida or in an optimal location, but it does provide a large natural area within a landscape of development. Because of the species diversity and various hydrologic regimes, the mitigation area provides habitat for a variety of wildlife species.

The applicant evaluated a practicable design alternative to reduce or eliminate impacts to Wetland 4 by exploring the elimination of three residential lots. Leaving the small on-site portion of the wetland in post-development would trigger St. Johns County regulations that require that wetlands have an undisturbed upland buffer of 25 feet, an additional building setback of 25 feet, and a roadway setback of 20 feet. The lots are 100 feet in depth. If the wetland were not impacted and the county setbacks are added, there would be approximately 22 feet left in which to construct a home, which renders the area undevelopable. If the on-site portion of Wetland 4 is impacted, the setback requirements would allow for construction of a home within 30 feet, which renders the lots buildable. The Planned Unit Development (PUD) approved by St. Johns County prohibits the applicant from impacting the 0.01 acres of wetland located in the rear of the 10-foot setback. Therefore, the wetland will most likely not be impacted in order to comply with the PUD, but the impact must be permitted in order to develop three lots. The cost associated with elimination of the three lots was determined to be $47, 089, which is an overall loss of approximately 7.4% of the total profit. Approximately half of the proposed impact area is an existing trail road that is void of vegetation and appears to be utilized regularly by vehicles. Mitigation is being proposed for this impact, even though the likelihood of the actual impact occurring is low. Since the value of functions provided by this very small portion of the overall wetland system are moderate, and the remainder of the wetland system, which provides greater value of functions, will remain in its current condition in post-development, the cost associated with elimination of the three lots outweighs the environmental benefit that would be achieved by avoiding this impact.

The applicant has avoided impacts to Wetland 5.

SECONDARY IMPACTS

The applicant is required to provide reasonable assurance a regulated activity will not cause adverse secondary impacts to the water resources [40C-4.301(1)(f), F.A.C.]. Implementation of this portion of the rule criteria is detailed in subsection 12.2.7 (a) of the Applicant's Handbook and states that secondary impacts to the habitat functions of wetlands associated with adjacent upland activities will not be considered adverse if buffers are provided with a minimum width of 15' and an average width of 25' abutting those wetlands that will remain under the permitted design, unless additional measures

are needed for protection of wetlands used by listed species for nesting, denning or critically important feeding habitat.

The applicant has provided a graphic that indicates the location of the eagle nest as well as a Bald Eagle Management Plan that will be implemented during construction associated with the proposed project. The District has received written comments from U.S. Fish and Wildlife Service (USFWS) in coordination with the Florida Fish and Wildlife Conservation Commission (FFWCC). FFWCC assigned the nest number SJ-021. The nest has been deemed active and currently utilized by a pair of bald eagles.

Portions of the proposed project will be constructed within the primary protection zone (0 feet to 750 feet from the nest tree) as well as the secondary protection zone (750 feet to 1,500 feet from the nest tree). Approximately 39 residential lots, underground utility lines, portions of the interior roadway system, and portions of the stormwater management system are proposed to be constructed within the primary protection zone. The remainder of the project site, except for three residential lots, a small portion of roadway, and the active recreation area, is proposed to be constructed within the secondary protection zone.

To provide reasonable assurance that the proposed project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters and to demonstrate that the proposed construction, operation and maintenance of the system will not be contrary to the public interest, the applicant has proposed to implement the Bald Eagle Management Plan received by the District on January 20, 2004. The management plan includes specific restrictions concerning the proposed development so as to ensure the bald eagles will not be adversely impacted. The USFWS, in coordination with FFWCC, has stated that if: 1) the applicant preserves the nest tree in conjunction with 15.7 acres of surrounding wetlands and uplands along the eastern project boundary, 2) the utility lines through the wetlands are installed during the non-nesting season, 3) all site work and construction of the infrastructure and the exterior of the homes is during the non-nesting season (within the primary zone), and 4) the Bald Eagle Monitoring Guidelines (September 2002) will be utilized when conducting any site work, infrastructure installation and exterior home construction in the secondary protection zone during the nesting season, then the proposed project is not likely to adversely affect this pair of eagles at nest SJ-021. Implementation of the Bald Eagle Management Plan provides reasonable assurance that the regulated activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters, and has demonstrated that the proposed construction, operation and maintenance of the system will not be contrary to the public interest relative to Chapter 40C-4.302(a)2. and 7., F.A.C.

In addition to implementing the Bald Eagle Management Plan, the applicant also proposes to plant upland plants within the uplands (25 feet in width), adjacent to the wetlands within the western portion of the utility easement and within the western portion of the upland buffer (25 feet in width) adjacent to the wetland restoration/enhancement area. The applicant also proposes to install a 6' chain link fence that includes a locked gate, from tree to tree uphill of the wetland line along the

eastern portion of the utility easement. Installation of these plantings and fence will help preclude utilization of the utility easement and wetland restoration/enhancement areas for ingress and egress by residents.

The applicant is unable to provide upland buffers between the proposed development and remaining off-site wetlands adjacent to Wetland 4. At Wetland 5, the applicant has proposed to preserve an average 25-foot upland buffer between the proposed development and on-site wetlands. Anticipated adverse secondary impacts by the proposed use of the project include human activity, such as proximity to humans, proximity of domestic pets, residential lighting, and noise. To offset adverse secondary impacts to Wetland 4, the applicant has proposed additional mitigation. Wetland 5 is not being utilized by listed species for nesting, denning, or critically important feeding habitat. Therefore the upland buffers and proposed mitigation will prevent adverse secondary impacts.

The applicant has demonstrated that the proposed project and reasonably expected uses will not cause adverse impacts to significant historical and archaeological resources. The proposed project does not necessitate future impacts to wetlands or other surface waters.

Because Wetlands 2, 3, 6, and 7 will not be present in post-development, the applicant is not required to comply with section 12.2.7, A.H., for these wetlands.

MITIGATION

As compensation for proposed adverse direct and secondary impacts to the value of functions provided to wildlife by 1.44 acres of wetlands (Wetlands 1, 3, 4, and 7), the applicant has proposed to preserve 10.59 acres of on-site wetlands in conjunction with 3.99 acres of upland preservation and 1 acre of upland buffer between the proposed development and Wetlands 1 and 5. The applicant also proposes to restore/enhance 0.12-acre of the existing trail road that traverses Wetland 1. Restoration/enhancement includes removing several areas of fill, replanting with wetland species, and monitoring for five years. Finally, the applicant has also proposed to replant the temporary impact area at the proposed utility crossing with wetland species and monitor the success of vegetative recruitment after installation of the utility lines. The wetland preservation areas, wetland restoration/enhancement areas, upland preservation areas, and upland buffers will be encumbered by a conservation easement that is consistent with section 704.06, F.S.

Preservation of the remaining wetlands will allow these areas to mature, thus providing nesting and roosting habitat lost by impacts to Wetlands 3, 4 and 7, and the temporary disturbance at Wetland 1. Preservation will also preclude future impacts to the on-site wetlands that provide greater value of functions to fish and wildlife. Preservation of the upland islands within Wetland 1 will provide continued habitat diversity and preclude future development within the wetland as well as immediately adjacent to the wetland area. Preservation of the upland buffers will preclude adverse secondary impacts that the use of the project may have on the remaining wetland areas. Finally, restoration/enhancement of the existing trail road through Wetland 1 will provide

additional wetland habitat for breeding, reproduction, and foraging for wildlife, future roosting and nesting habitat, and water quality and flood storage benefits. The mitigation plan offsets anticipated direct and secondary impacts to the value of functions provided to fish and wildlife.

Because Wetlands 2 and 6 meet the criteria of section 12.2.2.1, A.H., the applicant does not need to comply with sections 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8, A.H., and therefore does not need to provide mitigation for those impacts.

CUMULATIVE IMPACTS

The applicant is required to provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in subsections 12.2.8 through 12.2.8.2 of the Applicant's Handbook [40C-4.302(1)(b), F.A.C.]. If an applicant proposes to mitigate these adverse impacts within the same drainage basin as the impacts, and if the mitigation fully offsets these impacts, then the District will consider the regulated activity to have no unacceptable cumulative impacts upon wetlands and other surface waters.

As previously stated, the District issued stormwater permit #42-109-0032 in 1986 for construction of Ravenswood Forest, Unit 1 on the western portion of the existing project site. During a field visit in 1989, District staff identified activity occurring with the wetland area located off-site to the east (currently identified as Wetland 1). The activity included clearing and dredging as well as deposition of what appeared to be construction debris within the wetland area. District staff notified the permittee of permit #42-109-0032 of the violation and the necessity to obtain a Wetland Resource Management Permit in 1989 because the work had occurred in Waters of the State. At the time of the violation, compliance with Chapter 62-312, F.A.C., was delegated to the Florida Department of Environmental Protection (then the Florida Department of Environmental Regulation). Therefore, the District relinquished compliance authority to FDEP. FDEP issued a consent order requiring corrective actions. Pursuant to a February 1991 field inspection by FDEP staff, the permittee of permit #42-109-0032 had completed all corrective actions, and the case was closed. In addition, the permittee of permit #42-109-0032 is a different entity from the applicant for permit #40-109-81153-1. Thus, there are no outstanding violations to be considered under 40C-4.302(2), F.A.C.

Conditions for Application Number 40-109-81153-1:

ERP General Conditions by Rule (October 03, 1995):
1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19

ERP/MSSW/Stormwater Special Conditions (November 09, 1995):
1, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20

1. The proposed wetland impacts must be performed as indicated on Figure 4 received by the District on February 17, 2003.

2. The proposed mitigation plan received by the District on February 17, 2003 is incorporated as a condition of this permit.

3. This permit does not authorize any work, including clearing or stockpiling, outside of the 30-foot utility easement located within the wetlands as indicated on the construction plans received by the District on January 9, 2003. Any work beyond the 30-foot easement will require a modification of this permit.

4. Silt fence/haybales must be installed on either side of the 30-foot utility easement within the wetlands to designate the limits of construction and help prevent any violations in water quality standards within the adjacent wetlands.

5. Before installing the outfall pipe, the permittee must remove the upper 1 foot of soil within the 30-foot utility easement and stock pile it in an adjacent upland site. Immediately after installation of the outfall pipe, this soil must be installed in the upper 1 foot of the utility easement area so as to return the entire utility easement area to the pre-construction elevations. Immediately after completion of all work in the utility easement within the wetland, the permittee must contact District staff for review and approval of this work

6. The proposed surface water management system must be constructed pursuant to the plans ~~and calculations~~ received by the District on November 5, 2003, as amended by sheets 8 and 15 of the plans received on December10, 2003.

7. The stormwater management system shall be inspected by the operation and maintenance entity once within two years after completion of construction and every two years thereafter to insure that the system is functioning as designed and permitted. If a required inspection reveals that the system is not functioning as designed and permitted, then within 14 days of the inspection the entity shall submit an Exceptions Report on form number 40C-42.900(6), Exceptions Report for Stormwater Systems Out of Compliance. The operation and maintenance entity must maintain a record of the required inspection, including the date of the inspection, the name, address and telephone number of the inspector, and whether the system was functioning as designed and permitted, and make such record available for inspection upon request by the District during normal business hours.

8. All species to be planted within the restoration/enhancement area will be of nursery stock and in good health. Tree species will be a minimum of 5 feet in height and planted on 10-foot centers throughout the restoration/enhancement area.

9. A Professional Engineer must act as quality control officer for the installation of the cut-off walls along portions of proposed wet detention pond DA-2. At a minimum, the Professional Engineer must:

    - Certify that the clay cut-off wall exhibits an in-place permeability of no more than 1 x 10-6 cm/sec and a minimum thickness of 1 foot, and
    - Certify that the clay cut-off wall is free of roots, rocks or debris, and
    - Certify that the liner has been constructed in accordance with the specification on the plans received by the District on December 10, 2003.

10. Prior to construction, and within 30 days of permit issuance, the permittee shall submit a site-specific dewatering plan to the District for review and written approval. Construction shall not commence until the permittee receives written approval from the District. Copies of the dewatering plan must be provided to the contractor and kept on-site during construction.

11. The Bald Eagle Management Plan received by the District on January 20, 2004 and as amended by the other conditions of this permit, is incorporated as a condition of this permit and must be implemented prior to beginning any construction associated with the proposed project.

12. All correspondence referenced in the Bald Eagle Management Plan must be forwarded to the Jacksonville Service Center of the St. Johns River Water Management District. The permittee must receive written correspondence from the District prior to conducting any of the activities that require District approval within the Bald Eagle Management Plan.

13. In conjunction with the planting of the wetland restoration/enhancement areas and the replanting of the utility easement, the permittee must plant wax myrtle (*Myrica cerifera*) on three foot centers within the uplands (25 feet in width) adjacent to the wetlands within the western portion of the utility easement and within the western portion of the upland buffer (25 feet in width) adjacent to the wetland restoration/enhancement area. The plants will be a minimum of 5 feet in height and of good health. The permittee will incorporate these planting areas into the monitoring plan received by the District on February 17, 2003 to ensure success.

14. Immediately following installation of the utility lines, replanting of the utility easement and the planting of the wetland restoration/enhancement areas, the permittee must install a 6' chain link fence that includes a locked gate, from tree to tree uphill of the wetland line along the eastern portion of the utility easement. The exact location and extent of the fence must be field verified by the District prior to installation.

Reviewers: Christine Wentzel
Louis Donnangelo

9. A Professional Engineer must act as quality control officer for the installation of the cut-off walls along portions of proposed wet detention pond DA-2. At a minimum, the Professional Engineer must:

   - Perform permeability tests of the soil layer to which the clay cut-off wall is to be keyed into a minimum of every 50 feet along the entire length of the clay cut-off wall;
   - Certify that the soil layer into which the clay-cut off wall is continuous along the entire length of the clay cut-off wall; has a minimum thickness of 2 feet; and a permeability of no more than 0.052 feet per day.
   - Certify that the clay cut-off wall exhibits an in-place permeability of no more than 1 x 10-6 cm/sec and a minimum thickness of 1 foot; and
   - Certify that the clay cut-off wall is free of roots; rocks and debris; and
   - Certify that the clay cut-off wall has been constructed in accordance with the specifications on the plans received by the District on December 10, 2003.

   If the professional engineer is unable to satisfy any of the above requirements then a clay embankment liner shall be constructed along the bottom of pond DA-2 within the area encompassed by connecting the ~~western~~ eastern ends of the dashed lines representing the cut-off wall on sheet 8 of 17 received by the District on December 10, 2003. A professional engineer must act as quality control officer for the installation of the clay embankment liner. At a minimum, the professional engineer must:

   - Certify that the clay embankment liner is continuous over the area described above
   - Certify that the clay liner has been properly installed and compacted so that it exhibits an in-place permeability of no more than 1 x 10-6 cm/sec and a minimum thickness of 2 feet, and
   - Certify that the clay embankment liner is free of roots, rocks and debris; and
   - Certify that a minimum of 12 inches of granular soil material has been placed over the top of the clay embankment liner; and
   - Certify that the clay embankment liner has been constructed in accordance with the specifications listed above.

   All certifications produced by the professional engineer along with all supporting test data must be submitted to the District for review within 30 days of completion of the clay cut-off wall or clay embankment liner.

SJRWMD Ex. 10

D

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARILYN MCMULKIN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-1496
	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and JAY AND LINDA GINN,	)	
	)	
Respondents.	)	
	)	
DIANE MILLS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-1497
	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and JAY AND LINDA GINN,	)	
	)	
Respondents.	)	

RECOMMENDED ORDER

On February 4-6, 10, and 18, 2004, final administrative hearing was held in this case in the St. Johns County Service Center in the northwest part of the County, near Jacksonville, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioners Marilyn McMulkin and Diane Mills:

Deborah J. Andrews, Esquire
11 North Roscoe Boulevard
Ponte Vedra Beach, Florida 32082-3625

For Respondents Jay and Linda Ginn:

Cindy L. Bartin, Esquire
Post Office Box 861118
St. Augustine, Florida 32086-1118

For Respondent St. Johns River Water Management District:

Vance W. Kidder, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177-2529

STATEMENT OF THE ISSUE

The issue in this case is whether, and under what conditions, the Respondent, St. Johns River Water Management District (District), should grant Environmental Resource Permit (ERP) No. 40-109-81153-1 authorizing Respondents, Jay and Linda Ginn (Ginns or Applicants), to construct a 136-unit single-family residential development with associated surface water management system.

PRELIMINARY STATEMENT

In 2001, the Ginns filed an application with the District for a Standard ERP (40-109-81153-1), seeking approval for construction and operation of a 136-unit single-family residential development on approximately 47 acres just west of

St. Augustine in St. Johns County, Florida. After review, on March 8, 2002, the District issued its Notice of Agency Action to approve the application, with conditions, through its Technical Staff Report (TSR) for ERP 40-109-81153-1.

On April 9, 2002, a Petition for Administrative Hearing (Petition) challenging the District's intended action was filed by Marilyn McMulkin; and on April 10, 2002, a second and almost identical Petition was filed by Diane Mills. On April 16, 2002, the District referred both Petitions to the Division of Administrative Hearings. The Petitions were consolidated and initially set for a final hearing in St. Augustine on August 21-23, 2002. However, from May 2002 through November 2003, several continuances were requested for various reasons, mostly unopposed; and the final hearing was rescheduled several times, the last time for February 4-6, 2004, at the St. Johns County Service Center in the northwest part of the County, near Jacksonville, Florida (since no location in or closer to St. Augustine could be secured). During this time of scheduling and rescheduling the final hearing, extensive discovery was conducted, and several prehearing motions were filed and ruled on.

An Amended Prehearing Stipulation was filed on January 26, 2004. On January 30, 2004, the District's Third Motion for Official Recognition (of its Applicant's Handbook, Management

and Storage of Surface Waters, November 11, 2003, and its Applicant's Handbook, Regulation of Stormwater Management Systems, April 10, 2002, which will be abbreviated ERP-A.H. and SW-A.H., respectively) was granted.

The final hearing could not be completed in the three days scheduled and had to be continued to February 10 and again to February 18, 2004.

During the final hearing, the Ginns called the following expert witnesses: Curt Wimpée, P.E., Project Engineer; Jeff Jackson, P.E., Geotechnical Engineer (modeling); Steve Weaver, P.E., Geotechnical Engineer (soil investigations); Jeff Foster, P.G., geologist; William Brown, biologist and environmental permitting consultant; Don Palmer of U.S. Fish and Wildlife Service; and Tony Steffer, eagle expert from Raptor Management Consultants, Inc. In addition, the applicant, Mr. Jay Ginn, testified as a fact witness. Applicants' Exhibits (App. Ex.) 5A, 5B, 6A, 6B, 7-8, 10-15, 15A, 16, 19, 21-29, 30C, 30F, 30G, 30K, 32, 33, and 35[1] were admitted in evidence.

The District called the following witnesses: Louis J. Donnangelo, a fact witness; Michael A. Register, an expert in water resource engineering, surface water and stormwater management systems, and environmental resource permitting and regulation; Thomas Bartol, an expert in environmental site investigation and remediation; and Christine L. Wentzel, an

expert in wetlands and wildlife ecology, mitigation planning, and wetlands delineation. District Exhibits (Dist. Ex.) 1-3, 6-7, and 10 were admitted in evidence.

Petitioners called the following witnesses: Lynda White, coordinator of Audubon's Eagle Watch; Lucy Seeds, a volunteer with Eagle Watch; Stephen Boyes, hydrogeologist; Doug Tyus, Florida Fish and Wildlife Conservation Commission; Robert Bullard, P.E., engineer; Marilyn McMulkin; Albert McMulkin; Gerald Mills; Cynthia Rogers, St. Johns County Health Department; Robert Burks, ecologist; and David Miracle, P.E., Director of the District's Jacksonville Service Center. Petitioners' Exhibits (Pet. Ex.) 1, 2, 4, 5, 17-20, and 27 were admitted in evidence.

After presentation of evidence, the Ginns requested a transcript of the final hearing, and the parties were given ten days from the filing of the transcript in which to file proposed recommended orders (PROs). The Transcript (nine volumes) was filed on March 8, 2004, and the parties' timely-filed PROs have been considered.

FINDINGS OF FACT

A. The Parties and Proposed Project

1. Respondent, the District, is a special taxing district created by Chapter 373, Florida Statutes, charged with the duty to prevent harm to the water resources of the District, and to

administer and enforce the cited statutes and Florida Administrative Code Rules promulgated by the District under the authority of those statutes. (Unless otherwise stated, all Florida Statutes refer to the 2003 codification, and all Florida Administrative Code Rules refer to the current codification.)

2. Respondents, Jay and Linda Ginn, are the owners of 47 acres of land located just west of the City of St. Augustine in St. Johns County, Florida. They are seeking ERP Permit No. 40-109-81153-1 from the District to construct a 136-acre residential community and associated surface water management facilities on the property, to be known as Ravenswood Forest.

3. The 47-acre project site is predominantly uplands, with a large (10.98-acre) wetland (Wetland 1) located on the eastern boundary and completely separating the uplands on the project site from adjacent properties to the east. While the central portion of the site is mostly a sand pine vegetated community, and the western portion is largely a pine flatwood community, there are six other smaller wetlands scattered within the upland areas lying west of Wetland 1, each numbered separately, 2 through 7.

4. The site is currently undeveloped except for some cleared areas that are used as dirt road trails and a borrow pit or pond excavated in the central part of the site. This

clearing and excavation was accomplished in the 1980's for a project that was never completed.

5. The project site is bordered on the north by Ravenswood Drive. On the east lies an existing residential development probably constructed in the 1970's; to the west of the project site is a power-line easement; and to the south is a Time Warner cable facility.

6. The land elevations at the project site are generally higher on the west and slope off to Wetland 1 on the east. Under current conditions, water generally drains from west to east into Wetland 1. Some water from the site, as well as some water entering the site from off-site properties to the west, flows into the existing pond or borrow pit located in the central portion of the site. Under extreme rainfall conditions, the borrow pit/pond can reach a stage that allows it to overflow and discharge into Wetland 1.

7. Some off-site water also enters Wetland 1 at its north end. Water that originates from properties to the west of the Ravenswood site is conveyed through ditches to the roadside ditch that runs along the south side of Ravenswood Drive. Water in this roadside ditch ultimately enters Wetland 1 at its north end and flows south.

8. Once in Wetland 1, water moves north to south. Water leaves the part of Wetland 1 that is located on the Ravenswood

site and continues to flow south through ditches and culverts ultimately to the San Sebastian River.

9. The Wetland 1 system is contiguous with wetlands located on property owned by Petitioner, Marilyn McMulkin. Mrs. McMulkin lives on Hibiscus Street to the east of the project.

10. Mrs. McMulkin is disabled and enjoys observing wildlife from her home. Mrs. McMulkin has observed woodstorks, kites, deer, cardinals, birds, otter, indigo snake, flying squirrels, gopher tortoises, and (more recently) bald eagles on her property or around the neighborhood. Mrs. McMulkin informed the District of the presence of the bald eagle in 2002, but it was not discovered until November of 2003 that there was an eagle nest on the Ginns property in Wetland 1.

11. Petitioner, Diane Mills, owns a house and property on Hibiscus Street to the east of the Project. The proposed stormwater discharge for the Project is to a wetland system that is contiguous with a wetland system that is in close proximity to Mrs. Mills' property.

12. Petitioners' property is not located in a flood plain identified by FEMA. Nevertheless, Petitioners' property experiences flooding. At times, the flooding has come through Mrs. McMulkin's house and exited out the front door. The flood water, which can be 18-24 inches high in some places on

Mrs. McMulkin's property, comes across her backyard, goes through or around her house, enters Hibiscus Street and turns north.

13. The flooding started in the late 1980's and comes from the north and west, from the Ginns' property. The flooding started after Mr. Clyatt Powell, a previous co-owner of the Ravenswood property, started clearing and creating fill roads on the property using dirt excavated from the property. The flooding now occurs every year and has increased in duration and frequency; the flooding gets worse after the rain stops and hours pass.

14. The evidence, including Petitioners' Exhibit 1, indicated that there are numerous other possible reasons, besides activities on the Ginns' property in the late 1980's, for the onset and exacerbation of Petitioners' flooding problems, including: failure to properly maintain existing drainage facilities; other development in the area; and failure to improve drainage facilities as development proceeds.

15. The parties have stipulated that Petitioners have standing to object to ERP Permit No. 40-109-81153-1.

B. Project Description

16. As indicated, water that originates west of the project site currently enters the project site in two ways: (1) it moves across the western project boundary; and (2) it travels

north to a ditch located on the south side of Ravenswood Drive and is conveyed to Wetland 1. The offsite water that moves across the western project boundary comes from a 16-acre area identified as Basin C (called Basin 4 post-development). The offsite water that moves north to the ditch and enters Wetland 1 comes from a 106.87-acre area identified as Basin D (called Basin 5 post-development).

17. The project's stormwater conveyance and treatment facilities include two connected wet detention ponds with an outfall to a wetland on the eastern portion of the project site. Stormwater from most of the project site will be conveyed to a pond, or detention area (DA) DA-1, which will be located near (and partially coinciding with the location of) the existing pond or borrow pit. The water elevation in DA-1 will be controlled at a level of 26 feet. Water from DA-1 will spill over through a control structure into a pipe that will convey the spill-over to DA-2. In addition to the spill-over from DA-1, offsite water that currently enters the project site across the western boundary will be conveyed to a wetland area at the southwest corner of the project site. At that point, some of the water will be taken into DA-2 through an inlet structure. The water elevation in DA-2 will be controlled at level 21. Water from DA-2 will be released by a control structure to a spreader swale in Wetland 1.

18. While some of the water conveyed to the wetland area at the southwest corner of the project site will enter DA-2, as described, some will discharge over an irregular weir (a low area that holds water until it stages up and flows out) and move around the southern boundary of the project site and flow east into Wetland 1.

19. Wetland 1 is a 10.98-acre onsite portion of a larger offsite wetland area extending to the south and east (which includes the wetlands on Mrs. McMulkin's property). For purposes of an Overall Watershed Study performed by the Ginns' engineering consultant, the combined onsite and offsite wetlands was designated Node 98 (pre-development) and Node 99 (post-development). From those areas, water drains south to ditches and culverts and eventually to the San Sebastian River.

20. Best management practices will be used during project construction to address erosion and sediment control. Such measures will include silt fences around the construction site, hay bales in ditches and inlets, and maintenance of construction equipment to prevent release of pollutants, and may include staked sod on banks and turbidity barriers, if needed. In addition, the District's TSR imposed permit conditions that require erosion and sediment control measures to be implemented.

21. The District's TSR also imposed a permit condition that requires District approval of a dewatering plan within 30

days of permit issuance and prior to construction. The Ginns intend to retain the dewatering from construction on the project site.

C. Wetland Impacts

(i) Onsite Wetlands

22. Wetland 1 is a 10.98-acre mixed-forested wetland system. Its overall condition is good. It has a variety of vegetative strata, a mature canopy, dense understory and groundcover, open water areas, and permanent water of varying levels over the course of a year. These attributes allow for species diversity. Although surrounded by development, the wetland is a good source for a variety of species to forage, breed, nest, and roost. In terms of vegetation, the wetland is not unique to northeast Florida, but in November 2003 an eagle nest was discovered in it.

23. A second wetland area onsite (Wetland 2) is a 0.29-acre coniferous depression located near the western boundary of the site. The overall value of the functions provided by Wetland 2 is minimal or low. It has a fairly sparse pine canopy and scattered ferns provide for little refuge and nesting. Water does stand in it, but not for extended periods of time, which does not allow for breeding of most amphibians. The vegetation and inundation do not foster lower trophic animals. For that reason, although the semi-open canopy would

be conducive to use by woodstorks, birds and small mammals do not forage there.

24. A third wetland area onsite (Wetland 3) is a 0.28-acre mixed-forested wetland on the northern portion of the site. The quality of Wetland 3 is low. A 24-inch culvert drains the area into a 600-foot long drainage ditch along the south side of Ravenswood Drive leading to Wetland 1. As a result, its hydroperiod is reduced and, although it has a healthy pine and cypress canopy, it also has invasive Chinese tallow and upland species, along with some maple. The mature canopy and its proximity to Ravenswood Drive would allow for nesting, but no use of the wetland by listed species has been observed. In order to return Wetland 3 to being productive, its hydroperiod would have to be restored by eliminating the connection to the Ravenswood Drive ditch.

25. A fourth wetland area onsite (Wetland 4) is a 0.01-acre portion of a mixed-forested wetland on the western boundary of the site that extends offsite to the west. Its value is poor because: a power line easement runs through it; it has been used as a trail road, so it is void of vegetation; and it is such a small fringe of an offsite wetland that it does not provide much habitat value.

26. A fifth wetland area onsite (Wetland 5) is a 0.01-acre portion of the same offsite mixed-forested wetland that Wetland

4 is part of. Wetland 5 has a cleared trail road through its upland fringe. Wetland 5 has moderate value. It is vegetated except on its upland side (although its vegetation is not unique to northeast Florida), has a nice canopy, and provides fish and wildlife value (although not as much as the interior of the offsite wetland).

27. A sixth wetland area onsite (Wetland 6) is a 0.28-acre wetland located in the western portion of the site. It is a depression with a coniferous-dominated canopy with some bays and a sparse understory of ferns and cord grass that is of moderate value overall. It does not connect with any other wetlands by standing or flowing water and is not unique. It has water in it sufficient to allow breeding, so there would be foraging in it. Although not discovered by the Ginns' consultants initially, a great blue heron has been observed utilizing the wetland. No listed species have been observed using it.

28. Wetland 6 could be good gopher frog habitat due to its isolation near uplands and its intermittent inundation, limiting predation by fish. In addition, four gopher tortoise burrows have been identified in uplands on the project site, and gopher frogs use gopher tortoise burrows. The gopher frog is not a listed species; the gopher tortoise is listed by the State of Florida as a species of special concern but is not aquatic or wetland-dependent.

29. Woodstorks are listed as endangered. Although no woodstorks were observed using Wetland 6, they rely on isolated wetlands drying down to concentrate fish and prey in the isolated wetlands. With its semi-open canopy, Wetland 6 could be used by woodstorks, which have a wingspan similar to great blue herons, which were seen using Wetland 6. However, Wetland 6 would not provide a significant food source for wading birds such as woodstorks.

30. The other surface water area onsite (Wetland 7) is the existing 0.97-acre pond or borrow pit in the southwest portion of the project site. The pond is man-made with a narrow littoral shelf dominated by torpedo grass; levels appears to fluctuate as groundwater does; and it is not unique. It connects to Wetland 1 during seasonal high water. It has some fish, but the steep slope to its littoral shelf minimizes the shelf's value for fish, tadpoles, and larvae stage for amphibians because fish can forage easily on the shelf.

31. The Ginns propose to fill Wetlands 2, 3, 4, and 6; to not impact Wetland 5; and to fill a 0.45-acre portion of Wetland 7 and dredge the remaining part into DA-1. Also, 0.18 acre of Wetland 1 (0.03 acre is offsite) will be temporarily disturbed during installation of the utility lines to provide service to the project. Individually and cumulatively, the wetlands that are less than 0.5-acre--Wetlands 3, 6, 2, 4, and 5--are low

quality and not more than minimal value to fish and wildlife except for Wetland 5, because it is a viable part of an offsite wetland with value.

32. While the Ginns have sought a permit to fill Wetland 4, they actually do not intend to fill it. Instead, they will simply treat the wetland as filled for the purpose of avoiding a County requirement of providing a wetland buffer and setback, which would inhibit the development of three lots.

(ii) Offsite Wetlands

33. The proposed project would not be expected to have an impact on offsite wetlands. Neither DA-1 nor DA-2, especially with the special conditions imposed by the District, will draw down offsite wetlands.

34. The seasonal high water (SHW) table in the area of DA-1 is estimated at elevation 26 to 29. With a SHW table of 26, DA-1 will not influence groundwater. Even with a SHW table of 29, DA-1 will not influence the groundwater beyond the project's western boundary. DA-1 will not adversely affect offsite wetlands.

35. A MODFLOW model was run to demonstrate the influence of DA-1 on nearby wetlands assuming that DA-1 would be controlled at elevation 21, that the groundwater elevation was 29, and that no cutoff wall or liner would be present. The model results demonstrated that the influence of DA-1 on

groundwater would barely extend offsite. The current proposed elevation for DA-1 is 26, which is higher than the elevation used in the model and which would result in less influence on groundwater.

36. The seasonal high water table in the area of DA-2 is 28.5 to 29.5. A cutoff wall is proposed to be installed around the western portion of DA-2 to prevent it from drawing down the water levels in the adjacent wetlands such that the wetlands would be adversely affected. The vertical cutoff wall will be constructed of clay and will extend from the land surface down to an existing horizontal layer of relatively impermeable soil called hardpan. The cutoff wall tied into the hardpan would act as a barrier to vertical and horizontal groundwater flow, essentially severing the flow. A MODFLOW model demonstrated that DA-2 with the cutoff wall will not draw down the adjacent wetlands.

37. The blow counts shown on the boring logs and the permeability rates of soils at the proposed location of DA-2 indicate the presence of hardpan. The hardpan is present in the area of DA-2 at approximately 10 to 15 feet below the land surface. The thickness of the hardpan layer is at least 5 feet.

38. The Ginns measured the permeability of hardpan in various locations on the project site. The cutoff wall design is based on tying into a hardpan layer with a permeability of

0.052 feet per day. Because permeability may vary across the project site, the District recommended a permit condition that would require a professional engineer to test for the presence and permeability of the hardpan along the length of the cutoff wall. If the hardpan is not continuous, or if its permeability is higher than 0.052 feet per day, then a liner will be required to be installed instead of a cutoff wall.

39. The liner would be installed under the western third of DA-2, west of a north-south line connecting the easterly ends of the cutoff wall. (The location of the liner is indicated in yellow on Applicants' Exhibit 5B, sheet 8, and is described in District Exhibit 10.) The liner would be 2 feet thick and constructed of clay with a permeability of no more than 1×10^{-6} centimeters per second. A liner on a portion of the bottom of pond DA-2 will horizontally sever a portion of the pond bottom from the groundwater to negate the influence of DA-2 on groundwater in the area. A clay liner would function to prevent adverse drawdown impacts to adjacent wetlands. The project, with either a cutoff wall or a clay liner, will not result in a drawdown of the groundwater table such that adjacent wetlands would be adversely affected.

D. Reduction and Elimination of Impacts

40. The Ginns evaluated practicable design alternatives for eliminating the temporary impact to 0.18-acre of Wetland 1.

The analysis indicated that routing the proposed utility services around the project site was possible but would require a lift station that would cost approximately $80,000 to $100,000. The impact avoided is a temporary impact; it is likely that the area to be impacted can be successfully reestablished and restored; and preservation of Wetland 1 is proposed to address lag-time for reestablishment. It was determined by the Ginns and District staff that the costs of avoidance outweigh the environmental benefits of avoidance.

41. Petitioners put on evidence to question the validity of the Wetland 1 reduction/elimination analysis. First, Mr. Mills, who has experience installing sewer/water pipes, testified to his belief that a lift station would cost only approximately $50,000 to $60,000. He also pointed out that using a lift station and forced main method would make it approximately a third less expensive per linear foot to install the pipe line itself. This is because a gravity sewer, which would be required if a lift station and forced main is not used, must be laid at precise grades, making it is more difficult and costly to lay. However, Mr. Mills acknowledged that, due to the relatively narrow width of the right-of-way along Ravenswood Drive, it would be necessary to obtain a waiver of the usual requirement to separate the sewer and water lines by at least 10 feet. He thought that a five-foot separation waiver would be

possible for his proposed alternative route if the "horizontal" separation was at least 18 inches. (It is not clear what Mr. Mills meant by "horizontal.") In addition, he did not analyze how the per-linear-foot cost savings from use of the lift station and forced main sewer would compare to the additional cost of the lift station, even if it is just $50,000 to $60,000, as he thinks. However, it would appear that his proposed alternative route is approximately three times as long as the route proposed by the Ginns, so that the total cost of laying the sewer pipeline itself would be approximately equal under either proposal.

42. Mr. Mills's testimony also suggested that the Ginns did not account for the possible disturbance to the Ravenswood eagles if an emergency repair to the water/sewer is necessary during nesting season. While this is a possibility, it is speculative. There is no reason to think such emergency repairs will be necessary, at least during the approximately 20-year life expectancy of the water/sewer line.

43. Practicable design modifications to avoid filling Wetland 4 also were evaluated. Not filling Wetland 4 would trigger St. Johns County wetland setback requirements that would eliminate three building lots, at a cost of $4,684 per lot. Meanwhile, the impacted wetland is small and of poor quality, and the filling of Wetland 4 can be offset by proposed

mitigation. As a result, the costs of avoidance outweigh the environmental benefits of avoidance.

44. Relying on ERP-A.H. 12.2.2.1 the Ginns did not perform reduction/elimination analyses for Wetlands 2 and 6, and the District did not require them. As explained in testimony, the District interprets ERP-A.H. 12.2.1.1 to require a reduction/elimination analysis only when a project will result in adverse impacts such that it does not meet the requirements of ERP-A.H. 12.2.2 through 12.2.3.7 and 12.2.5 through 12.3.8. But ERP-A.H. 12.2.2.1 does not require compliance with those sections for regulated activities in isolated wetlands less than one-half acre in size except in circumstances not applicable to this case: if they are used by threatened or endangered species; if they are located in an area of critical state concern; if they are connected at seasonal high water level to other wetlands; and if they are "more than minimal value," singularly or cumulatively, to fish and wildlife. See ERP-A.H. 12.2.2.1(a) through (d). Under the District's interpretation of ERP-A.H. 12.2.1.1, since ERP-A.H. 12.2.2.1 does not require compliance with the very sections that determine whether a reduction/elimination analysis is necessary under ERP-A.H. 12.2.1.1, such an analysis is not required for Wetlands 2 and 6.

45. Relying on ERP-A.H. 12.2.1.2, a., the Ginns did not perform reduction/elimination analyses for Wetlands 3 and 7, and

the District did not require them, because the functions provided by Wetlands 3 and 7 are "low" and the proposed mitigation to offset the impacts to these wetlands provides greater long-term value.

46. Petitioners' environmental expert opined that an reduction/elimination analysis should have been performed for all of the wetlands on the project site, even if isolated and less than half an acre size, because all of the wetlands on the project site have ecological value. For example, small and isolated wetlands can be have value for amphibians, including the gopher frog. But his position does not square with the ERP-A.H., as reasonably interpreted by the District. Specifically, the tests are "more than minimal value" under ERP-A.H. 12.2.2.1(d) and "low value" under ERP-A.H. 12.2.1.2, a.

E. Secondary Impacts

47. The impacts to the wetlands and other surface waters are not expected to result in adverse secondary impacts to the water resources, including endangered or threatened listed species or their habitats.

48. In accordance with ERP-A.H. 12.2.7(a), the design incorporates upland preserved buffers with minimum widths of 15 feet and an average width of 25 feet around the wetlands that will not be impacted.

49. Sediment and erosion control measures will assure that the construction will not have an adverse secondary impact on water quality.

50. The proposed development will be served by central water and sewer provided by the City of St. Augustine, eliminating a potential for secondary impacts to water quality from residential septic tanks or septic drainfields.

51. In order to provide additional measures to avoid secondary impacts to Wetland 1, which is the location of the bald eagles' nest, the Applicants proposed additional protections in a Bald Eagle Management Plan (BEMP) (App. Ex. 14).

52. Under the terms of the BEMP, all land clearing, infrastructure installation, and exterior construction on homes located within in the primary zone (a distance within 750 feet of the nest tree) is restricted to the non-nesting season (generally May 15 through September 30). In the secondary zone (area between 750 feet and 1500 feet from the nest tree), exterior construction, infrastructure installation, and land clearing may take place during the nesting season with appropriate monitoring as described in the BEMP.

F. Proposed Mitigation

53. The Ginns have proposed mitigation for the purpose of offsetting adverse impacts to wetland functions. They have

proposed to provide mitigation for: the 0.18-acre temporary impact to Wetland 1 during installation of a water/sewer line extending from existing City of St. Augustine service to the east (at Theodore Street); the impacts to Wetlands 3, 4 and 7; and the secondary impacts to the offsite portion of Wetland 4.

54. The Ginns propose to grade the 0.18-acre temporary impact area in Wetland 1 to pre-construction elevations, plant 72 trees, and monitor annually for 5 years to document success. Although the easement is 30 feet in width, work will be confined to 20 feet where vegetation will be cleared, the top 1 foot of soil removed and stored for replacing, the trench excavated, the utility lines installed, the trench refilled, the top foot replaced, the area replanted with native vegetation, and re-vegetation monitored. To facilitate success, the historic water regime and historic seed source will give the re-vegetation effort a jump-start.

55. The Ginns propose to restore and enhance a 0.12-acre portion of Wetland 1 that has been degraded by a trail road. They will grade the area to match the elevations of adjacent wetland, plant 48 trees, and monitor annually for 5 years to document success. This is proposed to offset the impacts to Wetland 4. The proposed grading, replanting, and monitoring will allow the area to be enhanced causing an environmental benefit.

56. The Ginns propose to preserve 10.58 acres of wetlands and 3.99 acres of uplands in Wetland 1, 1 acre of upland buffers adjacent to Wetlands 1 and 5, and the 0.01 acre wetland in Wetland 5. The upland buffer will be a minimum of 15 feet wide with an average of 25 feet wide for Wetland 1 and 25 feet wide for Wetland 5. A conservation easement will be conveyed to the District to preserve Wetlands 1 and 5, the upland buffers, and the wetland restoration and enhancement areas.

57. The preservation of wetlands provides mitigation value because it provides perpetual protection by ensuring that development will not occur in those areas, as well as preventing activities that are unregulated from occurring there. This will allow the conserved lands to mature and provide more forage and habitat for the wildlife that would utilize those areas.

58. Mitigation for Wetlands 2 and 6 was not provided because they are isolated wetlands less than 0.5-acre in size that are not used by threatened or endangered species; are not located in an area of critical state concern; are not connected at seasonal high water level to other wetlands; and are not more than minimal value, singularly or cumulatively, to fish and wildlife. As previously referenced in the explanation of why no reduction/elimination analysis was required for these wetlands, ERP-A.H. 12.2.2.1(d) does not require compliance with under ERP-A.H. 12.3 through 12.3.8 (mitigation requirements) for regulated

activities in isolated wetlands less than one-half acre in size except in circumstances found not to be present in this case. See Finding 44, supra.

59. The cost of the proposed mitigation will be approximately $15,000.

G. Operation and Maintenance

60. A non-profit corporation that is a homeowners association (HOA) will be responsible for the operation, maintenance, and repair of the surface water management system. An HOA is a typical operation and maintenance entity for a subdivision and is an acceptable entity under District rules. See ERP-A.H. 7.1.1(e) and 7.1.2; Fla. Admin. Code R. 40C-42.027(3) and (4). The Articles of Incorporation for the HOA and the Declaration of Covenants, Conditions, and Restrictions contain the language required by District rules.

H. Water Quantity

61. To address water quantity criteria, the Applicants' engineers ran a model (AdICPR, Version 1.4) to compare the peak rate discharge from the project in the pre-project state versus the peak rate discharge after the project is put in place.

62. The pre-project data input into the model were defined by those conditions that existed in 1985 or 1986, prior to the partial work that was conducted, but not completed, on the site in the late 1980's. The project’s 1985/1986 site condition

included a feature called Depression A that attenuated some onsite as well as offsite stormwater. Because of work that was done on the project site after 1985/1986 (i.e., the excavation of the borrow pit and road-clearing activities in the late 1980's), the peak rate of discharge for the 1985/1986 project site condition was lower than the peak rate of discharge for today's project site condition. (Flooding at Mrs. McMulkin's house began after the work was performed on the project site in the late 1980's.) Because this partial work conducted in the late 1980's increased peak rate discharge from the site, by taking the pre-project conditions back to the time prior to that work, the peak rate of discharge in the 1985-86 pre-project condition was lower than it would be under today's conditions.

63. The model results indicated that for the 25-year, 24-hour storm event, the pre-project peak rate discharge is 61.44 cubic feet per second (cfs). The post-project peak rate discharge is 28.16 cfs. Because the completed project reduces the pre-project peak rate discharges, the project will not cause any adverse flooding impacts off the property downstream.

64. A similar analysis of the peak rate discharges under pre-project conditions that exist today (rather than in 1986) was compared to peak rate discharges for the post-project conditions. This analysis also showed post-project peak rate discharges to be less than the peak rate discharges from the

site using today’s conditions as pre-project conditions.

65. As further support to demonstrate that the project would not cause additional flooding downstream, a second modeling analysis was conducted, which is referred to as the Ravenswood Overall Watershed Model (OWM). The Applicants' engineer identified water flowing into the system from the entire watershed basin, including the project site under both the pre- and post-project conditions. The water regime was evaluated to determine what effect the proposed project will have on the overall peak rate discharges, the overall staging, and the duration of the staging within the basin that ultimately receives the water from the overall watershed. This receiving basin area was defined as the "wetland node" (Node 98 pre-project, and Node 99 post-project). As previously stated, the area within this "wetland node" includes more than just the portion of Wetland 1 that is located on the Ravenswood site. It also includes the areas to the south and east of the on-site Wetland 1 (including properties owned by the Petitioners) and extends down to an east-west ditch located just north of Josiah Street.

66. The project’s surface water management system will not discharge to a landlocked basin. The project is not located in a floodway or floodplain. The project is not located downstream of a point on a watercourse where the drainage is five square

miles or more. The project is impounding water only for temporary storage purposes.

67. Based on testimony from their experts, Petitioners contend that reasonable assurances have not been given as to water quantity criteria due to various alleged problems regarding the modeling performed by the Ginns' engineer.

(i) Tailwater Elevations

68. First, they raise what they call "the tailwater problem." According to Petitioners, the Ginns' modeling was flawed because it did not use a 19.27-foot SHW elevation in Wetland 1 as the tailwater elevation. The 19.27-foot SHW was identified by the Ginns' biologist in the Wetland 1 near the location of the proposed utility line crossing the wetland and was used as the pre-development tailwater in the analysis of the project site. The post-development tailwater condition was different because constructing the project would change the discharge point, and "tailwater" refers to the water elevation at the final discharge of the stormwater management system. (SW-A.H., Section 9.7) The post-development tailwater was 21 feet, which reflects the elevation of the top of the spreader swale that will be constructed, and it rose to 21.3 feet at peak flow over that berm. For the OWM, the final discharge point of the system being modeled was the east-west ditch located just north of Josiah Street, where the tailwater elevation was

approximately 18.1 feet, not the 19.27 feet SHW mark to the north in Wetland 1. The tailwater condition used in the modeling was correct.

69. Petitioners also mention in their PRO that "the Applicants' analysis shows that, at certain times after the 25 year, 24 hour storm event, in the post development state, Wetland 1 will have higher staging than in the predevelopment state." But those stages are after peak flows have occurred and are below flood stages. This is not an expected result of post-development peak-flow attenuation.

(ii) Watershed Criticism

70. The second major criticism Petitioners level at the Applicants' modeling is that parts of the applicable watershed basins were omitted. These include basins to the west of the project site, as well as basins to the north of the site, which Petitioners lumped into the so-called "tailwater problem."

71. Petitioners sought to show that the basins identified by the Ginns as draining onto the project site from the west were undersized, thus underestimating the amount of offsite water flowing onto the project site. With respect to Basin C, Petitioners' witness testified that the basin should be 60 acres instead of 30 acres in size, and that consequently more water would flow into pond DA-2 and thus reduce the residence time of the permanent pool volume. In fact, Basin C is 16 acres in

size, not 30 acres. The water from Basin C moves onto the project site over the western project boundary. A portion of the water from Basin C will be directed to pond DA-2 through an inlet structure, and the rest will move over an irregular weir and around the project site.

72. With respect to Basin D, Petitioners' witness testified that the basin should encompass an additional 20 acres to the west and north. West of Basin D, there are ditches routing water flow away from the watershed, so it is unclear how water from an additional 20 acres would enter the watershed. The western boundary of the OWM is consistent with the western boundaries delineated in two studies performed for St. Johns County.

73. Petitioners' witness testified that all of the water from the western offsite basins currently travels across the project site's western boundary, and that in post-development all of that water will enter pond DA-2 through the inlet structure. In fact, currently only the water from Basin C flows across the project site's western boundary. Post-development, only a portion of water from Basin C will enter pond DA-2. Currently and post-development, the water in Basin D travels north to a ditch south of Ravenswood Drive and discharges into Wetland 1.

74. Petitioners also sought to show that a 50-acre area north of the project site should have been included in the OWM. Petitioners' witness testified that there is a "strong possibility" that the northern area drains into the project site by means of overtopping Ravenswood Drive. The witness' estimate of 50 acres was based on review of topographical maps; the witness has not seen water flowing over Ravenswood Drive. The Ginns' engineer testified that the area north of Ravenswood Drive does not enter the project site, based on his review of two reports prepared by different engineering firms for St. Johns County, conversations with one of those engineering firms, conversations with the St. Johns County engineer, reviews of aerials and contour maps, and site observations. Based on site observations, the area north of the project site drains north and then east. One report prepared for St. Johns County did not include the northern area in the watershed, and the other report included an area to the north consisting of 12 acres. The Ginns' engineer added the 12-acre area to the OWM and assumed the existence of an unobstructed culvert through which this additional water could enter Wetland 1, but the model results showed no effect of the project on stages or duration in the wetland. Even if a 50-acre area were included in the OWM, the result would be an increase in both pre-development and post-development peak rates of discharge. So long as the post-

development peak rate of discharge is lower than the pre-development peak rate of discharge, then the conveyance system downstream will experience a rate of water flow that is the same or lower than before the project, and the project will not cause adverse flooding impacts offsite.

75. Petitioners' witness did not have any documents to support his version of the delineations of Basins C and D and the area north of Ravenswood Drive.

(iii) Time of Concentration

76. Time of concentration (TC) is the time that it takes a drop of water to travel from the hydraulically most distant point in a watershed. Petitioners sought to show that the TC used for Basin C was incorrect. Part of Petitioners' rationale is related to their criticism of the watersheds used in the Ginns' modeling. Petitioners' witness testified that the TC was too low because the distance traveled in Basin C should be longer because Basin C should be larger. The appropriateness of the Basin C delineation already has been addressed. See Finding 71, supra. Petitioners' witness also testified that the TC used for the post-development analysis was too high because water will travel faster after development. However, the project will not develop Basins C and D, and thus using the same TC in pre-development and post-development is appropriate. The project will develop Basins A and B (called Basins 1, 2, and 3 post-

development), and the post-development TC for those basins were, in fact, lower than those used in the pre-development analysis.

(iv) Groundwater Infiltration in DA-2

77. One witness for Petitioners opined that groundwater would move up through the bottom of DA-2 as a result of upwelling (also referred to as infiltration or seepage), such that 1,941 gallons per day (gpd) would enter DA-2. That witness agreed that if a liner were installed in a portion of DA-2, the liner would reduce upwelling in a portion of the pond. Another witness for Petitioners opined that 200 gpd of groundwater would enter the eastern part and 20,000 gpd would enter the western part of DA-2. Although that witness stated that upwelling of 200 gpd is not a significant input and that upwelling of 20,000 gpd is a significant input, he had not performed calculations to determine the significance.

78. Even if more than 20,000 gpd of groundwater entered DA-2, DA-2 will provide sufficient permanent pool residence time without any change to the currently designed permanent pool size or the orifice size. Although part of one system, even if DA-2 is considered separate from DA-1, DA-2 is designed to provide an additional permanent pool volume of 6.57 acre-feet (in addition to the 20.5 acre/feet provided by DA-1). This 6.57 acre-feet provided by DA-2, is more than the 4.889 acre-feet of permanent pool volume that would be necessary to achieve a 21-day

residence time for the 24+ acres that discharge directly into DA-2, as well as background seepage into DA-2 at a rate of 0.0403 cfs, which is more upwelling than estimated by Petitioners' two witnesses. There is adequate permanent pool volume in DA-2 to accommodate the entire flow from Basin C and for water entering through the pond bottom and pond sides and provide at least 21 days of residence time.

I. Water Quality Criteria

(i) Presumptive Water Quality

79. The stormwater system proposed by the Ginns is designed in accordance with Florida Administrative Code Rules 40C-42.024, 40C-42.025, and 40C-42.026(4). Wet detention ponds must be designed for a permanent pool residence time of 14 days with a littoral zone, or for a residence time of 21 days without a littoral zone, which is the case for this project. See Fla. Admin. Code R. 40C-42.026(4)(c) and (d). DA-1 and DA-2 contain sufficient permanent pool volume to provide a residence time of 31.5 days, which is the amount of time required for projects that discharge to Class II Outstanding Florida Waters, even though the receiving waterbody for this project is classified as Class III Waters. See Fla. Admin. Code R. 40C-42.026(4)(k)1.

80. Best management practices will be used during project construction to address erosion and sediment control. Such measures will include silt fences around the construction site,

hay bales in ditches and inlets, and maintenance of construction equipment to prevent release of pollutants, and may include staked sod on banks and turbidity barriers if needed. In addition, the District proposed permit conditions that require erosion and sediment control measures to be implemented. (Dist. Ex. 1, pp. 8-9, #4; Dist. Ex. 2, p. 1, ##3, 4, and 5, and p. 6, #10).

81. ERP/MSSW/Stormwater Special Conditions incorporated into the proposed permit require that all wetland areas or water bodies outside the specific limits of construction must be protected from erosion, siltation, scouring or excess turbidity, and dewatering. (Dist. Ex. 2). The District also proposed a permit condition that requires District approval of a dewatering plan for construction, including DA-1 and DA-2, within 30 days of permit issuance and prior to construction. The Ginns intend to retain the dewatering from construction on the project site.

82. As previously described, Petitioners' engineering witness sought to show that DA-2 will not provide the required permanent pool residence time because Basin C should be 60 acres in size. Petitioners' environmental witness also expressed concern about the capacity of the ponds to provide the water quality treatment required to meet the presumptive water quality criteria in the rules, but those concerns were based on information he obtained from Petitioners' engineering witness.

Those issues already have been addressed. See Findings 77-78, supra.

(ii) Groundwater Contamination

83. Besides those issues, Petitioners raised the issue that groundwater contamination from a former landfill nearby and from some onsite sludge and trash disposal could be drawn into the proposed stormwater management system and cause water quality violations in the receiving waters. If groundwater is contaminated, the surface water management system could allow groundwater to become surface water in proposed DA-1.

84. St. Johns County operated a landfill from the mid-1950s to 1977 in an area northwest of the project site. The landfill accepted household and industrial waste, which was buried in groundwater, which in turn could greatly enhance the creation of leachate and impacted water.

85. Groundwater flows from west to east in the vicinity of the landfill and the project site but there was conflicting evidence as to a minor portion of the property. The Ginns' witness testified that if the landfill extended far enough south, a small part of the project site could be downgradient from the landfill. But there was no evidence that the landfill extended that far south. Petitioners' witness testified that the groundwater flow varies on the south side of the landfill so that groundwater might flow southeast toward the site. Even if

Petitioners' witness is correct, the surface water management system was designed, as Petitioners' other witness agreed, so that DA-1 would have minimal influence on groundwater near the pond.

86. In 1989, sewage sludge and garbage were placed in a pit in the central part of the project site, north of the existing pond, which also is the area for proposed DA-1; and at various times refuse--including a couple of batteries, a few sealed buckets, and concrete--has been placed on the surface of the site.

87. In 1989, to determine the amount of sewage and garbage on the project site, the St. Johns County Health Department chose several locations evidencing recent excavation south of Ravenswood Drive, had the areas re-excavated, and found one bag of garbage and debris such as tree stumps and palmettos. In 2001, an empty 55-gallon drum was on the site; there was no evidence what it once contained or what it contained when deposited onsite, if anything. In addition, trespassers dumped solid waste on the property from time to time. Petitioners' witness searched the site with a magnetometer and found nothing significant. On the same day, another of Petitioners' witnesses sampled with an auger but the auger did not bore for core or any other type sample; it merely measured groundwater level.

88. In 1985, 1999, and 2000, groundwater offsite of the project near the landfill was sampled at various times and places by various consultants to determine whether groundwater was being contaminated by the landfill. The groundwater sampling did not detect any violations of water quality standards.

89. Consultants for the Ginns twice sampled groundwater beneath the project site and also modeled contaminant migration. The first time, in 2001, they used three wells to sample the site in the northwest for potential impacts to the property from the landfill. The second time, they sampled the site through cluster wells in the northwest, middle, and south. (Each cluster well samples in a shallow and in a deeper location.) The well locations were closest to the offsite landfill and within an area where refuse may have been buried in the north-central part of the site.

90. Due to natural processes since 1989, no sewage sludge deposited onsite then would be expected to remain on the surface or be found in the groundwater. The evidence was that the sewage sludge and garbage were excavated. Although samples taken near the center of the property contained substances that are water quality parameters, they were not found in sufficient concentration to be water quality violations.

91. There is an iron stain in the sand north of the existing pond in the area where pond DA-1 is to be located.

Based on dissolved oxygen levels in the groundwater, Petitioners' witness suggested that the stain is due to buried sewage, but the oxygen levels are not in violation of water quality standards and, while toward the low end of not being a violation, the levels could be due to natural causes. No evidence was presented establishing that the presence of the iron stain will lead to a violation of water quality standards.

92. Petitioners' witness, Mr. Boyes, testified that iron was a health concern. But iron itself is a secondary drinking water standard, which is not a health-based standard but pertains to odor and appearance of drinking water. See § 403.852(12) and (13), Fla. Stat.

93. Petitioners argued that the Phase I study was defective because historical activity on the project site was not adequately addressed. But the Phase I study was only part of the evidence considered during this de novo hearing.

94. Following up on the Phase I study, the 2001 sampling analyzed for 68 volatile organics and 72 semi-volatile organics, which would have picked up solvents, some pesticides, petroleum hydrocarbons, and polynuclear aromatic hydrocarbons--the full range of semi-volatile and volatile organics. The sampling in August 2003 occurred because some of the semi-volatile parameters sampled earlier needed to be more precisely measured, and it was a much broader analysis that included 63

semi-volatiles, 73 volatile organic compounds, 23 polynuclear aromatic hydrocarbons, 25 organic phosphate pesticides, 13 chlorinated herbicides, 13 metals, and ammonia and phosphorus.

95. The parameters for which sampling and analyses were done included parameters that were representative of contaminants in landfills that would have now spread to the project site. They also would have detected any contamination due to historical activity on the project site. Yet groundwater testing demonstrated that existing groundwater at the project site meets state water quality standards.

96. Based on the lack of contaminants found in these samples taken from groundwater at the project site 50 years after the landfill began operation, the logical conclusion is that either groundwater does not flow from the landfill toward the project site or that the groundwater moving away from the landfill is not contaminated. Groundwater that may enter the stormwater ponds will not contain contaminants that will exceed surface water quality standards or groundwater quality standards. Taken together, the evidence was adequate to give reasonable assurances that groundwater entering the stormwater ponds will not contain contaminants that exceed surface water quality standards or groundwater quality standards and that water quality violations would not occur from contaminated water groundwater drawn into the proposed stormwater management

system, whether from the old landfill or from onsite waste disposal. The greater weight of the evidence was that there are no violations of water quality standards in groundwater beneath the project site and that nothing has happened on the site that would cause violations to occur in the future. Contrary to Petitioners' suggestion, a permit condition requiring continued monitoring for onsite contamination is not warranted.

J. Fish and Wildlife

97. Except for the bald eagle nest, all issues regarding fish and wildlife, listed species, and their habitat as they relate to ERP-A.H. 12.2.2 through 12.2.2.4 already have been addressed.

98. When the Ginns were made aware in November 2003 that there was an eagle nest in Wetland 1, they retained the services of Tony Steffer, an eagle expert with over 25 years of experience working specifically with eagles and eagle management issues, including extensive hands-on experience with eagles and the conduct of field studies, aerial surveys, and behavioral observations as well as numerous research projects on the bald eagle. Mr. Steffer visited the Ravenswood site on numerous occasions since the discovery of the nest, made observations, and was integral in the drafting of the Ravenswood BEMP.

99. It is Mr. Steffer’s opinion that the proposed project, with the implementation of the BEMP, will not adversely affect

the eagles. This opinion was based on Mr. Steffer's extensive knowledge and experience with eagle behavior and human interactions. In addition, Mr. Steffer considered the physical characteristics of the Ravenswood site and the nest tree, the dense vegetation in Wetland 1 surrounding the nest site, and the existing surrounding land uses, including the existing residential community that lies a distance of about 310 feet from the nest site, the existing roadways and associated traffic, and the school (with attendant playground noise) that is to north of the site. In Mr. Steffer's opinion, the eagles are deriving their security from the buffering effects provided by the surrounding wetland. He observed that the nesting and incubating eagles were not disturbed when he set up his scope at about 300-320 feet from the tree. The BEMP requires that Wetland 1, and the upland islands located within it, be preserved and limits the work associated with the water/sewer line to the non-nesting season. With the BEMP implemented, Mr. Steffer expressed confidence that the Ravenswood eagles would be able to tolerate the proposed activities allowed under the BEMP.

100. The Ravenswood project plans and the BEMP were reviewed by the U.S. Fish and Wildlife Service (USFWS). The USFWS analyzed information in their files relating to projects which proposed activities within the primary zone of an eagle

nest and reported abandoned nests. None of the reported abandoned nests could be attributed to human activities in and around the nest tree. Based on the project plans, the terms of the BEMP, and this analysis, the USFWS concluded that the Ravenswood project "is not likely to adversely affect" the bald eagles at the Ravenswood site.

101. According to the coordination procedures agreed to and employed by the USFWS and the Florida Fish and Wildlife Conservation Commission (FFWCC), the USFWS takes the lead in reviewing bald eagle issues associated with development projects. In accordance with these procedures, for the Ravenswood project, the USFWS coordinated their review and their draft comments with the FFWCC. The FFWCC concurred with the USFWS's position that the project, with the implementation of the BEMP, will not adversely affect the Ravenswood eagles or their nest. This position by both agencies is consistent with the expert testimony of Mr. Don Palmer, which was based on his 29 years of experience with the USFWS in bald eagle and human interactions.

102. Petitioners and their witnesses raised several valid concerns regarding the continued viability of the Ravenswood eagle nest during and after implementation of the proposed project.

103. One concern expressed was that parts of the Habitat Management Guidelines for the Bald Eagle in the Southeast Region (Eagle Management Guidelines) seem inconsistent with the proposed project. For example, the Eagle Management Guidelines state: "The emphasis [of the guidelines] is to avoid or minimize detrimental human-related impacts on bald eagles, particularly during the nesting season." They also state that the primary zone, which in this case is the area within a 750 foot radius of the nest tree, is "the most critical area and must be maintained to promote acceptable conditions for eagles." They recommend no residential development within the primary zone "at any time." (Emphasis in original.) They also recommend no major activities such as land clearing and construction in the secondary zone during the nesting season because "[e]ven intermittent use or activities [of that kind] of short duration during nesting are likely to constitute disturbance." But the eagle experts explained that the Eagle Management Guidelines have not been updated since 1987, and it has been learned since then that eagles can tolerate more disturbance than was thought at that time.

104. Another concern was that the Ravenswood eagles may have chosen the nest site in Wetland 1 not only for its insulation from existing development to the north and east but also for the relatively sparse development to the west. Along

those lines, it was not clear from the evidence that the eagles are used to flying over developed land to forage on the San Sebastian River and its estuaries to the east, as the eagle experts seemed to believe. Mr. Mills testified that eagles have been seen foraging around stocked fish ponds to the west, which also could be the source of catfish bones found beneath the Ravenswood nest. But it is believed that the confident testimony of the eagle experts must be accepted and credited notwithstanding Petitioners' unspecific concerns along these lines.

105. Finally, Petitioners expressed concern about the effectiveness of the monitoring during the nesting required under the BEMP. Some of Petitioners' witnesses related less-than-perfect experiences with eagle monitoring, including malfeasance (monitors sleeping instead of monitoring), unresponsive developers (ignoring monitors' requests to stop work because of signs of eagle disturbance, or delaying work stoppage), and indications that some eagle monitors may lack independence from the hiring developer (giving rise, in a worst case, to the question whether an illegal conspiracy exists between them to ignore signs of disturbance when no independent observer is around). Notwithstanding these concerns, Petitioners' witnesses conceded that eagle monitoring can be and is sometimes effective. If Mr. Steffer is retained as the eagle

monitor for this project, or to recruit and train eagle monitors to work under his supervision, there is no reason to think that eagle monitoring in this case will not be conducted in good faith and effectively. Even if the Ginns do not retain Mr. Steffer for those purposes, the evidence did not suggest a valid reason to assume that the Ginns' proposed eagle monitoring will not be conducted in good faith and effectively.

K. Other 40C-4.301 Criteria – 40C-4.301(1)(g)-(k)

106. 40C-4.301.301(1)(g) - No minimum surface or groundwater levels or surface water flows have been established pursuant to Florida Administrative Code Rules Chapter 40C-8 in the area of the project.

107. 40C-4.301.301(1)(h) - There are no works of the District in the area of the project.

108. 40C-4.301.301(1)(i) - The proposed wet detention system is typical and is based on accepted engineering practices. Wet detention systems are one of the most easily maintained stormwater management systems and require very little maintenance, just periodically checking the outfall structure for clogging.

109. 40C-4.301.301(1)(j) - The Ginns own the property where the project is located free from mortgages and liens. As previously indicated, they will establish an operation and maintenance entity. The cost of mitigation is less than $25,000

so that financial responsibility for mitigation was not required to be established. (Costs associated with the proposed BEMP are not included as part of the Ginns' mitigation proposal.)

110. 40C-4.301.301(1)(k) - The project is not located in a basin subject to special criteria.

L. Public Interest Test in 40C-4.302

111. The seven-factor public interest test is a balancing test. The test applies to the parts of the project that are in, on, or over wetlands, and those parts must not be contrary to the public interest unless they are located in, on, or over an Outstanding Florida Water (OFW) or significantly degrade an OFW, in which case the project must be clearly in the public interest. No part of the project is located within an OFW. Balancing the public interest test factors, the project will not be contrary to the public interest.

112. 40C-4.302(1)(a)1. - The project will not adversely affect the public health, safety, or welfare or the property of others because the surface water management system is designed in accordance with District criteria, the post-development peak rate of discharge is less than the pre-development peak rate of discharge, and the project will not cause flooding to offsite properties.

113. 40C-4.302(1)(a)2. - Mitigation will offset any adverse impacts of the project to the conservation of fish and

wildlife or their habitats, and the BEMP is designed to prevent adverse effects on the Ravenswood eagles. Although active gopher tortoise burrows were observed on the site, the impacts to these burrows are addressed by the FFWCC's incidental take permit. The mitigation that is required as part of that permit will adequately offset the impacts to this species.

114. 40C-4.302(1)(a)3. - The project will not adversely affect navigation or cause harmful shoaling. The project will not adversely affect the flow of water or cause harmful erosion. The project's design includes erosion and sediment control measures. The project's design minimizes flow velocities by including flat slopes for pipes. The stormwater will be discharged through an upsized pipe, which will reduce the velocity of the water. The stormwater will discharge into a spreader swale (also called a velocity attenuation pond), which will further reduce the velocity and will prevent erosion in Wetland 1. The other findings of fact relevant to this criterion are in the section entitled "Water Quantity." See Findings 61-67, supra.

115. 40C-4.302(1)(a)4. – Development of the project will not adversely affect the legal recreational use of the project site. (Illegal use by trespassers should not be considered under this criterion.) There also will not be any adverse impact on recreational use in the vicinity of the project site.

Wetlands 1 and 5 may provide benefit to marine productivity by supplying detritus to the marine habitat, and these wetlands will remain.

116. 40C-4.302(1)(a)5. - The project will be of a permanent nature except for the temporary impacts to Wetland 1. Mitigation will offset the temporary adverse impacts.

117. 40C-4.302(1)(a)6. - The District found no archeological or historical resources on the site, and the District received information from the Division of Historical Resources indicating there would be no adverse impacts from this project to significant historical or archeological resources.

118. 40C-4.302(1)(a)7. - Considering the mitigation proposal, and the proposed BEMP, there will be no adverse effects on the current condition and relative value of functions being performed by areas affected by the proposed project.

119. The proposed project is no worse than neutral measured against any one of these criteria, individually. For that reason, it must be determined that, on balance, consideration these factors indicates that the project is not contrary to the public interest.

M. Other 40C-4.302 Criteria

120. The proposed mitigation is located within the same drainage basin as the project and offsets the adverse impacts so the project would not cause an unacceptable cumulative impact.

121. The project is not located in or near Class II waters.

122. The project does not contain seawalls and is not located in an estuary or lagoon.

123. The District reviewed a dredge and fill violation that occurred on the project site and was handled by the Department of Environmental Regulation (DER) in 1989. The Ginns owned the property with others in 1989. Although they did not conduct the activity that caused the violation, they took responsibility for resolving the matter in a timely manner through entry of a Consent Order. The evidence was that they complied with the terms of the Consent Order. Applicants' Exhibit 30K was a letter from DER dated February 13, 1991, verifying compliance based on a site inspection. Inexplicably, the file reference number did not match the number on the Consent Order. But Mr. Ginn testified that he has heard nothing since concerning the matter either from DER, or its successor agency (the Department of Environmental Protection), or from the District.

124. The evidence was that the Ginns have not violated any rules described in Florida Administrative Code Rule 40C-4.302(2). There also was no evidence of any other DER or DEP violations after 1989.

CONCLUSIONS OF LAW

N. Burdens of Proof and Persuasion

125. A DOAH hearing held pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003), is not an administrative review of prior agency final action. This administrative hearing is a de novo proceeding designed to formulate final agency action, and the parties are allowed to present additional evidence on relevant matters not previously included in the application or in the notice of intent to issue or deny the permit. Hamilton County Board of County Commissioners v. State, Dept. of Envir. Reg., et al., 587 So. 2d 1378, 1387-88 (Fla. 1st DCA 1991); Dept. of Transportation v. J.W.C., Co., Inc., et al., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); § 120.57(1)(k), Fla. Stat. The issuance of a permit must be based solely on compliance with applicable permit criteria. Council of the Lower Keys v. Toppino, et al., 429 So. 2d 67 (Fla. 3d DCA 1983).

126. The burden of proof in the proceeding is on the party asserting the affirmative in the proceeding, here the Ginns. See J.W.C., supra at 787. If a regulatory agency gives notice of intent to grant a permit application, the applicant has the initial burden of going forward with the presentation of a prima facie case of the applicant's entitlement to a permit. In the context of this proceeding, the Ginns had the initial burden of

showing that they provided reasonable assurance that their proposed project is consistent with the applicable statutes and rules.

127. Once the Ginns made their prima facie case that the proposed permit should be issued, Petitioners were required to rebut that prima facie case and support the allegations of their petitions challenging the proposed permit. Id. at 789. Unless Petitioners present "contrary evidence of equivalent equality" to the evidence presented by the Ginns and the District, the permit must be approved. Id. at 789-790. See also Ward v. Okaloosa County, 11 F.A.L.R. 217, 236 (DER June 29, 1989).

128. Petitioners cannot carry the burden of presenting contrary evidence by mere speculation concerning what "might" occur. Chipola Basin Protective Group Inc. v. Dept. of Environmental Reg., 11 F.A.L.R. 467 (DER Dec. 29, 1988).

129. The standard for an applicant's burden of proof is one of reasonable assurances, not absolute guarantees, that the applicable conditions for the issuance of a permit have been satisfied. ManaSota-88 Inc. v. Agrico Chemicals Co. and Dept. of Environmental Reg., 12 F.A.L.R. 1319, 1325 (DER Feb. 19, 1990). "Reasonable assurance" contemplates "a substantial likelihood that the project will be successfully implemented." Metropolitan Dade County v. Coscan Florida Inc., 609 So. 2d 644,

648 (Fla. 3d DCA 1992). See also Hamilton County Board of County Commissioners, supra.

130. To meet their respective burdens of proof, the parties to this administrative proceeding must present a preponderance of competent and substantial evidence. See §§ 120.57(1)(j) and 120.57(1)(l), Fla. Stat.; Gould v. Division of Land Sales, 477 So. 2d 612 (Fla. 1st DCA 1985). A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). "Competent" evidence must be relevant, material, and otherwise fit for the purpose for which it is offered. Gainesville Bonded Warehouse v. Carter, 123 So. 2d 336 (Fla. 1960); Duval Utility Co. v. FPSC, 380 So. 2d 1028 (Fla. 1980). "Substantial" evidence must be sufficient to allow a reasonable mind to accept the evidence as adequate to support a conclusion. See Degroot v. Sheffield, 95 So. 2d 912 (Fla. 1957); Agrico Chemical Co. v. Dept. of Environmental Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

O. ERP Criteria Applicable to the Proposed Project

131. The District’s requirements applicable to the Ginns' ERP application are in Florida Administrative Code Rules 40C-4.301 and 40C-4.302, which are further explained in ERP-A.H. and SW-A.H.

(i) 40C-4.301(1)(a), (b), and (c)

132. The Ginns have provided reasonable assurance that the project meets the requirements contained in Florida Administrative Code Rule 40C-4.301(1)(a), (b), and (c) because the project complies with the applicable presumptive criteria in ERP-A.H, 10.2.1, which provides the following:

> It is presumed that a system meets the standards listed in paragraphs 9.1.1.(a) through (c) [which are identical to 40C-4.301(1)(a) through (c)] if the system meets the following criteria:
>
> (a) The post-development peak rate of discharge must not exceed the pre-development peak rate of discharge for the storm event as prescribed in section 10.3.
>
> (b) The post-development volume of direct runoff must not exceed the pre-development volume of direct runoff for systems as prescribed in subsections 10.4.2 and 10.4.3.
>
> (c) Floodways and floodplains, and levels of flood flows or velocities of adjacent streams, impoundments or other watercourses must not be altered so as to adversely impact the offsite storage and conveyance capabilities of the water resources (see section 10.5).
>
> (d) Flows of adjacent streams, impoundments or other watercourses must not be decreased so as to cause adverse impacts (see section 10.6).

133. Because the post-development peak rate of discharge will not exceed the pre-development peak rate of discharge for the 25-year, 24-hour storm event, the requirements of ERP-A.H.

10.2.1(a) have been met. ERP-A.H. 10.2.1(b) does not apply to this project because the system will not be discharging to a landlocked lake and is not located in an area for which separate basin criteria have been established. See ERP-A.H. 10.4.2 and 10.4.3. ERP-A.H. 10.2.1(c) does not apply to this project because the project is not located downstream of the point on a stream or watercourse where the drainage area is five square miles. See ERP-A.H. 10.5.3(a). ERP-A.H. 10.2.1(d) does not apply to this project because the system will not impound water for a purpose other than for temporary detention storage. See ERP-A.H. 10.6.2(a)1. In addition to meeting the presumption in ERP-A.H. 10.2.1, the Ginns further demonstrated compliance with 40C-4.301(1)(a), (b), and (c) by showing that the project will not cause an increase in the stage or duration of downstream flooding.

(ii) 40C-4.301(1)(d)

134. Florida Administrative Code Rule 40C-4.301(1)(d) and ERP-A.H. 9.1.1(d) and 12.1.1(a) require that applicants provide reasonable assurances that the project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

135. The Ginns propose to temporarily or permanently impact Wetlands 1, 2, 3, 4, 6, and 7. These impacts are initially considered adverse. ERP-A.H. 12.2.1.1 provides that

the Ginns must have implemented practicable design modifications to reduce or eliminate these adverse impacts. The Ginns demonstrated that practicable design modifications were implemented for impacts to Wetland 1 and 4, as required.

136. Under the District's reasonable interpretations of its rules, the Ginns were not required to implement practicable design modifications to eliminate or reduce impacts to Wetlands 2, 3, 6, and 7. See Findings 44-46, supra.

137. In compliance with ERP-A.H. 12.2.2.4, the evidence showed that DA-1 and DA-2 will not adversely affect the nearby wetlands, especially considering the permit conditions proposed by the District. (Dist. Ex. 10). See Findings 33-39, supra.

138. As found, under the District's reasonable interpretations of its own rules, the Ginns do not have to comply with mitigation provisions in ERP-A.H. 12.3 through 12.3.8 as to Wetlands 2 and 6 because those wetlands meet the criteria of ERP-A.H. 12.2.2.1. See Finding 58, supra.

139. The evidence showed that the mitigation more than replaces the functions provided by the wetlands and surface water to be adversely affected by the project. Therefore, the requirements of Florida Administrative Code Rule 40C-4.301(1)(d) have been met.

(iii) 40C-4.301(1)(e)

140. Under Florida Administrative Code Rule 40C-42.023(2)(a), it is presumed that the project will not violate water quality standards if the stormwater management system complies with the applicable criteria in Florida Administrative Code Rules 40C-42.024, 40C-42.025, 40C-42.026, and 40C-42.0265. The greater weight of the evidence shows that the stormwater management system complies with the applicable criteria, which are in Florida Administrative Code Rules 40C-42.024, 40C-42.025, and 40C-42.026(4).

141. In addition, the Ginns have provided reasonable assurance that this requirement is met through the stormwater system design, the erosion and turbidity control measures that will be undertaken, the maintenance of construction equipment, and the dewatering plan that will be submitted for construction See ERP-A.H. 12.2.4.

142. The absence of violations of water quality standards in the groundwater beneath the project site provides reasonable assurance that the surface water management system will not adversely affect the quality of receiving waters such that state water quality standards will be violated.

143. For those reasons, the Ginns have provided reasonable assurance that the project will not adversely affect the quality

of receiving waters and that state water quality standards will be violated.

(iv) 40C-4.301(1)(f)

144. The first consideration for secondary impacts is that the applicant must provide reasonable assurances that the secondary impacts from construction, alteration, and intended or reasonably intended uses of a proposed system will not cause violations of water quality standards or adverse impacts to the functions of wetlands or surface waters. ERP-A.H. 12.2.7 (a) also provides in pertinent part that:

> Secondary impacts to the habitat functions of wetlands associated with adverse upland activities will not be considered adverse if buffers with a minimum width of 15' and an average width of 25’ are provided abutting those wetlands that will remain under the permitted design, unless additional measures are needed for protection of wetlands used by listed species for nesting, denning, or critically important feeding habitat. The mere fact that a species is listed does not imply that all of its feeding habitat is critically important. Where an applicant elects not to utilize buffers of the above dimensions, buffers of different dimensions, measures other than buffers, or information may be provided to provide the required reasonable assurance. (Emphasis added.)

145. The evidence showed that the Ginns have proposed an adequate buffer area for Wetland 1 and Wetland 5. The conservation easement along with the permit conditions ensure that an adequate buffer will remain between the wetlands and the

developed portion of the property to address secondary impacts. In addition, the Ginns propose to implement additional measures and the BEMP. The secondary impacts of the project will not cause violations of water quality standards or adverse impacts to the functions of wetlands or surface waters.

146. Under the second consideration for secondary impacts, the Ginns must provide reasonable assurance that the construction, alteration, and intended or reasonably expected uses of the system will not adversely impact the ecological value of uplands to aquatic or wetland dependent listed animal species for enabling existing nesting or denning by these species. Consideration for areas needed for foraging or wildlife corridors will not be required, except for limited upland areas necessary for ingress and egress to a nest or den site from the wetland or other surface water. ERP-A.H. Section 12.2.7(b). The evidence showed that none of the listed aquatic or wetland dependent species currently use uplands on the project site for nesting or denning. The eagle's nest is in the wetland portion of Wetland 1, and it was addressed under ERP-A.H. 12.2.7(a).

147. Under the third consideration for secondary impacts, the project will not cause impacts to significant historical and archaeological resources. ERP-A.H. 12.2.7(c).

148. Under the fourth consideration for secondary impacts, there will be no additional phases for the project. ERP-A.H. 12.2.7(d).

(v) Other Criteria in 40C-4.301

149. Because no minimum surface or groundwater levels or surface water flows in the project area have been established in Florida Administrative Code Chapter 40C-8, the project meets Florida Administrative Code Rule 40C-4.301(1)(g).

150. Because there are no works of the District in the project area, the project satisfies Florida Administrative Code Rule 40C-4.301(1)(h).

151. The Ginns have provided reasonable assurance that the project satisfies Florida Administrative Code Rule 40C-4.301(1)(i) because the surface water management system is typical for a residential development, is based on generally accepted engineering practices, does not include atypical components, and is easily maintained.

152. The Ginns have provided reasonable assurance that the project satisfies Florida Administrative Code Rule 40C-4.301(1)(j) because the project complies with the following presumptive criteria in ERP-A.H.10.2.2(a) through (d):

> Compliance with the following criteria shall constitute reasonable assurance that a proposed system meets the requirements of paragraphs 9.1.1 (d), (e), (f), (j) [which are identical to the requirements in 40C-

> 4.301(1)(j)], and (k) and 10.1.1 (a) through (d):
>
> (a) State water quality standards must not be violated, as set forth in subsections 10.7 through 10.7.2 and 12.2.4 through 12.2.4.5.
>
> (b) The applicant must establish financial responsibility and provide for an operation and maintenance entity, as set forth in subsections 10.8 through 10.8.3.
>
> (c) The environmental criteria set forth in subsections 12.2 through 12.3.8, including mitigation and mitigation banking provisions, must be met.
>
> (d) Applicable basin criteria set forth in section 11 and chapter 40C-41, F.A.C., must be met.

153. In addition to meeting this presumption, the Ginns have provided reasonable assurance that the project satisfies Florida Administrative Code Rule 40C-4.301(1)(j) by demonstrating that the Ginns own the project site free of mortgages and liens and that the stormwater management system will be operated and maintained by a homeowners association with sufficient powers to provide for the long-term operation and maintenance of the system. See Fla. Admin. Code R. 40C-42.027(3) and (4).

154. Because the project is not located in a special basin or geographic area as established in Florida Administrative Code Rules Chapter 40C-41, the project meets Florida Administrative Code Rule 40C-4.301(1)(k).

155. Petitioners did not raise 40C-4.301(2) as an issue of fact or law to be determined. No evidence was presented to demonstrate that the existing ambient water quality does not meet water quality standards. Therefore, the Ginns are not required to comply with ERP-A.H. 12.2.4.5.

(vi) 40C-4.302(1)(a) and Applicant's Handbook

156. The Ginns have provided reasonable assurance that the parts of the surface water management system located in, on, or over wetlands are not contrary to the public interest. See also ERP-A.H. 12.2.3. The evidence established that all of the public interest test factors to be balanced were determined to be at least neutral. The evidence showed that the project will not adversely affect public health, safety, or welfare or property of others; the conservation of fish and wildlife or their habitats; the flow of water; fishing or recreational values or marine productivity; and historical and archeological resources. The project will not cause harmful erosion. The project, including the mitigation, is designed to maintain the current condition and relative value of functions performed by wetlands and surface waters.

(vii) Other Criteria in 40C-4.302

157. Because the mitigation offered for the project will be onsite and within the same drainage basin as the project and will offset the project's adverse impacts, the Ginns have

provided reasonable assurance that Florida Administrative Code Rule 40C-4.302(1)(b) has been satisfied.

158. Because no part of the project is near or in shellfish waters, ERP-A.H. 12.2.5 and Florida Administrative Code Rule 40C-4.302(1)(c) are inapplicable.

159. Since the project does not include any vertical seawalls in estuaries or lagoons, ERP-A.H. 12.2.6 and Florida Administrative Code Rule 40C-4.302(1)(d) are not applicable to this project.

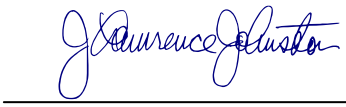
160. Under Florida Administrative Code Rule 40C-4.302(2), the District shall consider the applicant's violation of rules that the District had the responsibility to enforce in determining whether an applicant has provided reasonable assurances. The dredge and fill violation that occurred on the project site in 1989 was not the District's responsibility to enforce. Even so, the evidence was that the matter was resolved in a timely manner through a consent order, and there was no evidence that the Ginns subsequently violated rules falling under Florida Administrative Code Rule 40C-4.302(2).

RECOMMENDATION

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

RECOMMENDED that the St. Johns River Water Management District enter a final order issuing to Jay and Linda Ginn ERP number 40-109-81153-1, subject to the conditions set forth in District Exhibits 1, 2, and 10.

DONE AND ENTERED this 16th day of April, 2004, in Tallahassee, Leon County, Florida.



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Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of April, 2004.

ENDNOTE

1/ Applicants' Exhibit 35, consisting of excerpts from the transcript of the deposition of one of Petitioners' witnesses, Mr. Bullard, was offered by the Ginns during rebuttal. The parties were given 10 days to file memoranda regarding its admissibility. After considering the memoranda, it is ruled that the deposition should be received in evidence for impeachment purposes as, arguably, prior inconsistent statements.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.