ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. MODERN, INC.; FIRST OMNI SERVICE CORP.; HASLEY HART; B. B. NELSON, Respondents. vs. DEPARTMENT OF TRANSPORTATION, Intervenor.	)	DOAH CASE NOS. 97-4389 97-4390 97-4391 97-4392 97-4393
MODERN, INC., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	DOAH CASE NOS. 98-0426RX 98-0427RU
FIRST OMNI SERVICE CORP., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	DOAH CASE NOS. 98-1180RX 98-1181RU 98-1182RX

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, Daniel Manry, held a formal administrative hearing in the above-styled case on June 1 through 5 and 8 through 12, 1998, in Viera, Florida.

A. APPEARANCES

For Petitioner	WILLIAM H. CONGDON, ESQUIRE MARY JANE ANGELO, ESQUIRE STANLEY J. NIEGO, ESQUIRE St. Johns River Water Management District Post Office Box 1429 Palatka, Florida 32178-1429
For Respondents	ALLAN P. WHITEHEAD, ESQUIRE 1221 East New Haven Avenue Melbourne, Florida 32902-1210
For Intervenor	MARIANNE A. TRUSSELL, ESQUIRE MURRAY M. WADSWORTH, JR. , ESQUIRE Department of Transportation 605 Suwannee Street Mail State 58 Tallahassee, Florida 32399-0458.

B. PRELIMINARY STATEMENT

The underlying proceeding arose from two agency actions that the St. Johns River Water Management District (the "District") took in response to the excavation of two ditches (North-South 1 ["NS1"] and East-West 1 ["EW1"]) in wetlands. The first agency action occurred on May 14, 1997, when the District issued an Emergency Order (District File of Record ["FOR"] 97-1755) authorizing the construction of two earthen weirs intended to stop the drainage of wetlands that allegedly resulted from the excavation of the two drainage ditches. On May 29, 1997, First Omni Services Corp. ("Omni"), Hasley Hart ("Hart"), B. B. Nelson ("Nelson"), and Modern, Inc. ("Modern"), separately,

timely filed petitions for formal review of the Emergency Order (collectively these four petitioners are referred to as "Respondents"[1]).

The second agency action undertaken by the District occurred on August 20, 1997. In that action, the District filed an Administrative Complaint and Proposed Order, FOR 97-1762 ("Administrative Complaint"). In the Administrative Complaint, the District made particular findings of fact that Modern excavated two ditches (NS1 and EW1), and entered a proposed order requiring Modern to restore the ditches to their pre-existing condition using one of two proposed alternative options: 1) the construction of two permanent weirs or 2) the total restoration of the ditches. The proposed order also required that Modern restore the illegally filled wetlands. On September 4, 1997, Modern timely filed a Petition for Formal Administrative Hearing challenging the Administrative Complaint.

On September 17, 1997, the District referred the petitions mentioned above to the Division of Administrative Hearings ("DOAH") to conduct administrative proceedings. DOAH assigned case number 97-4389 to the proceeding involving the challenge to the Administrative Complaint and assigned case numbers 97-4390, 97-4391, 97-4392, and 97-4393 to the separate challenges to the Emergency Order filed, respectively, by Omni, Hart, Nelson, and Modern. On October 27, 1997, the Administrative Law Judge ("ALJ") issued two orders, the first order set a final hearing date on the instant cases for the weeks of March 9-13 and 16-20, 1998, and the second, a prehearing order, required the parties, among other things, to submit

[1] Although Omni, Hart, Nelson, and Modern filed petitions challenging the emergency orders, the Administrative Law Judge chose to refer to them as "Respondents." For the sake of consistency, in this Final Order petitioners Omni, Hart, Nelson, and Modern will be referred to as respondents.

prehearing stipulations 15 days prior to the date of the final hearing. On October 29, 1997, the ALJ consolidated the Administrative Complaint and Emergency Order cases (case numbers 97-4389, 97-4390, 97-4391, 97-4392, and 97-4393) over objections by Respondents.

On February 6, 1998, the District filed two motions to preclude Respondents from discovering evidence of a mitigation plan the District had required in 1988 as one of the conditions of a permit issued to the Florida Department of Transportation ("FDOT") to widen State Road 50 ("SR 50"). FDOT completed the mitigation plan in 1991 in an area approximately 2.5 miles west of the excavation site and is referred to by the parties as the "Hacienda Road project." Before initiating this proceeding, Respondents filed an action in circuit court against the District and FDOT, as co-defendants. Respondents alleged that flooding from the Hacienda Road project had resulted in an inverse condemnation of Respondents' property. The circuit court granted co-defendants' motion to dismiss for failure to exhaust administrative remedies.

In order to exhaust their administrative remedies, Respondents argued in the proceeding below that it was essential for Respondents to discover evidence concerning the Hacienda Road project and its alleged impact on Respondents' property. Without ruling on the admissibility of such evidence at the hearing, the ALJ ruled that Respondents could discover evidence of the Hacienda Road project and its role in the flooding problems allegedly experienced by Respondents on their property. On March 3, 1998, FDOT filed a Petition to Intervene which was granted by the ALJ on March 16, 1998.

In response to discovery requests from the District and FDOT, the corporate officers of Modern asserted their Fifth Amendment protection against self-incrimination, on the ground that subsections 373.430(3), (4) and (5), Florida Statutes, expose Modern to potential criminal penalties. The District and FDOT moved for a continuance to allow additional time to either secure immunity agreements protecting the corporate officers from criminal prosecution or to discover alternative evidence to satisfy the District's burden of proof in DOAH case number 97-4389. The ALJ entered an order rescheduling the hearing of the consolidated cases for the weeks of June 1 through 5 and June 8 through 12, 1998.

On January 23, 1998, Modern filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041 and a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989. DOAH assigned case number 98-0426RX to the former rule challenge and case number 98-0427RU to the latter rule challenge. Both cases were consolidated and set for hearing on March 2, 1998. They were subsequently consolidated with the Administrative Complaint and Emergency Order cases and scheduled for hearing during the weeks beginning June 1 and June 8, 1998.

On March 9, 1998, Omni filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041, a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989, and a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.051. DOAH assigned case number 98-1180RX to the first rule challenge, case number 98-1181RU to the second rule challenge, and case number 98-1182RX to the third rule challenge. On

March 19, 1998, all three cases were consolidated and scheduled for hearing on April 13, 1998. On April 8, 1998, case numbers 98-1180RX, 98-1181RU, and 98-1182RX were consolidated with the previously consolidated cases[2] and set for hearing during the weeks of June 1 and June 8, 1998. On May 29, 1998, the parties filed separate prehearing stipulations in accordance with the Prehearing Order entered on October 27, 1997.

The administrative hearing commenced on June 1, 1998. The parties used all of the time originally set for the administrative proceedings to conclude the matters at issue in case numbers 97-4389 through 97-4393 (cases involving the Administrative Complaint and the Emergency Order). The administrative hearing regarding the Administrative Complaint and the Emergency Order cases concluded on June 12, 1998.

Pursuant to the agreement of the parties, the rule challenge cases were scheduled for final hearing during the week of October 28, 1998. In the interim, the parties adopted substantially all of the record in consolidated case number 97-4389 for use in the rule challenge cases. The parties agreed to submit proposed recommended orders in the Administrative Complaint and Emergency Order cases and proposed final orders after the conclusion of the final hearing regarding the rule challenge cases on October 28 and 29, 1998.

At the hearing conducted on October 28, 1998, and after the conclusion of the hearing regarding the Administrative Complaint and the Emergency Order, Respondents made an *ore tenus* motion for attorney's fees and costs pursuant to

[2] All cases were consolidated into case number 97-4389.

section 120.595, Florida Statutes. The parties agreed to address the issue of reasonable attorneys' fees and costs in a separate evidentiary hearing.

On December 14, 1998, the District filed its Notice of Proposed Rulemaking pursuant to section 120.56(4)(e), Florida Statutes, which encourages an agency to proceed to rulemaking "expeditiously" and "in good faith." The proposed rules address the District statement challenged by Respondents in the rule challenge cases. On February 1, 1999, the District requested official recognition of the publication of proposed rules 40C-4.051(12)(b) and 40C-4.091, Florida Administrative Code. The ALJ granted the request without objection. On February 19, 1999, Omni filed a Petition for Administrative Determination of the Invalidity of Proposed Rules 40C-4.051(12)(b) and 40C-4.091. DOAH assigned case number 99-0632RP to this challenge to the District's proposed rules. The case was set for hearing on March 29, 1999, and pursuant to the agreement of the parties waiving their rights to a hearing in 30 days, the hearing was rescheduled for June 29, 1999. By agreement of the parties the ALJ again rescheduled the hearing for September 16-17, 1999, and then further rescheduled the hearing for December 1-3, 1999.

Following the October 28, 1998, rule challenge hearing, the District timely filed its proposed recommended order and its proposed final order on February 12, 1999. On February 12, 1999, Intervenor timely filed a notice of limited adoption of the District's proposed recommended order and the District's proposed final order. Respondents filed their proposed recommended order and proposed final order on February 18, 1999. On June 15, 1999, the ALJ entered two orders: a recommended order in the Administrative Complaint and Emergency Order cases that is the subject of this Final

Order, and a final order in the rule challenge cases. A copy of the Recommended Order is attached hereto as Exhibit "1." The ALJ's final order in the rule challenge cases is not subject to the Governing Board's review under this Final Order.

By written stipulation, the parties agreed to (1) file exceptions to the recommended order with the District Clerk on July 20, 1999; (2) file responses to each others exceptions with the District Clerk no later than August 10, 1999; and (3) deferred the Governing Board's consideration of the this matter until its September 8 and 9, 1999, at a scheduled public hearing. On August 26, 1999, at the request of the Board's legal counsel, Respondents and District staff agreed to defer the Board's consideration of this matter until the Governing Board meeting scheduled for October 12 and 13, 1999. In early October, 1999, at the request of Respondents and with theagreement of District staff, the Governing Board's consideration of the final order was deferred to November 10, 1999. In accordance with the stipulation, the District and Respondents filed timely filed separate exceptions to the Recommended Order on July 20, 1999. The District timely filed its Response to Respondents' Exceptions to the Recommended Order with the District Clerk on August 10, 1999. Respondents, however, untimely filed their Response to the District's Exceptions to the Recommended Order on August 11, 1999. Nonetheless, the Board has considered Respondents' response, although untimely filed, in the preparation of this Final Order.

As stated previously, the ALJ issued his Recommended Order on June 15, 1999. In his recommendation, the ALJ concludes as follows:

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order upholding the Emergency Order and directing Modern to undertake and complete, in a reasonable time and manner, the corrective actions described in the Administrative Complaint.

Without making any reference of it in the recommendation above, the ALJ also concluded that the District "relies on" a non-rule policy statement, expressed both verbally and in writing, interpreting the maintenance dredging exemption contained in section 403.813(2)(g), Florida Statutes, and rule 40C-4.051(12)(c),[3] Florida Administrative Code. According to the ALJ, the District's policy statement is that this exemption applies only to "routine custodial maintenance." (e.g., R.O. ¶291) The ALJ ruled that the statement was an unadopted rule subject to the "prove-up" provisions of section 120.57(1)(e), Florida Statutes (R.O. ¶305); that discovery of this unadopted rule during the course of a section 120.57(1)(e) administrative proceeding was a "blue spark in time" that automatically required the District to prove the validity of the policy in accordance with the criteria in section 120.57(1)(e)2 (R.O. ¶431); that the existence of a separate section 120.57(1)(e) proceeding apart from the original section 120.57(1) proceeding on the administrative complaint did not have to be raised in any pleadings by Respondents (R.O. ¶430); that the District had failed to prove up the unadopted rule as required by section 120.57(1)(e) (R.O. ¶308); and, ultimately, that the District's interpretation of the exemption was incorrect because the exemption instead applied

only to maintenance that was not routine custodial maintenance. (R.O. ¶343) As a result of his findings of fact and conclusions of law relating to this section 120.57(1)(e) proceeding, the ALJ further ruled "[t]he evidence suggests that the District participated in the Section 120.57(1)(e) proceeding for a frivolous purpose or to needlessly increase the cost of permitting or securing an exemption within the meaning of Section 120.595(1)(e)1." (R.O. ¶543) While making no specific recommendation on this issue, the ALJ nonetheless concluded that a subsequent evidentiary hearing on attorneys fees would be necessary to determine whether attorneys fees should be awarded, and if so how much. (R.O. ¶543) In this Final Order, the Board has reviewed the record in the light of the section 120.57(1)(e) proceeding ignited by the so called "blue spark" and has ruled on the pertinent findings of fact and conclusions of law.

C. STATEMENT OF THE ISSUES

The issues before the Board in this Final Order involve two District actions – the Emergency Order and the Administrative Complaint; and one action of the ALJ – the finding of a section 120.57(1)(e), Florida Statutes, proceeding after the conclusion of the administrative proceeding in this case.

1. Emergency Order. Whether to uphold the Emergency Order issued on May 14, 1997, by the District to address an emergency situation (the draining of open waters and wetlands within the St. Johns National Wildlife Refuge ["Refuge"] resulting from the unauthorized excavation of two ditches and authorizing the U.S. Fish and Wildlife Service to construct two earthen wiers to restore portions of the enlarged ditches to their pre-existing elevations.

[3] The ALJ incorrectly cites to rule 40C-4.051(11)(c), Florida Administrative Code, effective November 25, 1998.

2. Administrative Complaint. Whether to uphold the District's agency action embodied in its Administrative Complaint in which the District found that Modern excavated two ditches (NS1 and EW1) and filled wetlands without a permit, and requiring Modern to remove all spoil material from the wetlands, conduct supplemental plantings should natural recruitment of native vegetation not occur within the restored area, and either construct a permanent wier structure at a specified location in NS1, or restore NS1 to specified elevations and conduct supplemental plantings should natural recruitment not occur within the ditch.

3. Section 120.57(1)(e), Florida Statutes, proceeding. Whether the ALJ property raised the section 120.57(1)(e) proceeding based on his "blue spark" theory even though Respondents never raised this issue by pleading or motion before the conclusion of the administrative proceeding. If the ALJ properly raised the section 120.57(1)(e) proceeding, whether the ALJ's determination regarding the "unadopted rule" is clearly erroneous or does not comply with the essential requirements of law.

D. STANDARD OF REVIEW REGARDING EXCEPTIONS

The rules regarding an agency's consideration of exceptions to a recommended order are well established. An agency may not reject or modify an ALJ's findings of fact contained in the recommended order unless the agency first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with the essential requirements of law. Section 120.57(1)(j), *Fla. Stat.* (1998 Supp.). If an ALJ's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. *Berry v. Dept. of*

Environmental Regulation, 530 So.2d 1019, 1022 (Fla. 4th DCA 1988)(construing similar language formerly in section 120.57(1)(b)10., *Fla. Stat.*). The issue is not whether the record contains evidence contrary to the ALJ's finding, but whether the finding is supported by any competent substantial evidence. *Florida Sugar Cane League v. State Siting Board,* 580 So.2d 846, 851 (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, 289n.3 (Fla. 5th DCA 1996).

With regard to conclusions of law, section 120.57(1)(j), Florida Statutes, as amended during the 1999 legislative session, provides that an "agency in its final order may reject or modify the conclusions of law <u>over which it has substantive jurisdiction</u> and interpretation of administrative rules over which it has substantive jurisdiction." Additional new language is as follows:

> <u>When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.</u>

[Words <u>underlined</u> are 1999 additions.]

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).

Standards for proof under section 120.57(1)(e), Florida Statutes, were not changed during the 1999 legislative session, and remain as follows:

> 3. The recommended and final orders in any proceeding shall be governed by the provisions of (i) and (j), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. (Emphasis added.)

Reading sections 120.57(1)(e)3 and 120.57(1)(j) *in pari materia*, it appears that the standard for proof generally of proceedings under section 120.57(1) are as contained in subsection 120.57(1)(j), but that the "determination" regarding any matter under subsection 120.57(1)(e) is subject to the more specific review procedures contained in that subsection. No case law interprets how these two provisions can be read together.

E. RULINGS ON EXCEPTIONS

The District and Respondents filed extensive 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. The Board has addressed the District's exceptions in the following order: District's Exceptions 1, 5, 3, 2, 4 and finally 6.

RULING ON DISTRICT'S EXCEPTIONS

DISTRICT'S EXCEPTION 1

District staff take exception to part of paragraph17. Paragraph 17 provides, in part: "[t]he recorded plat of Titusville Farm established a drainage system of intersecting east-west and north-south canals." The recorded plat, Modern exhibit 65, was admitted as evidence in this proceeding. The plat does not contain any description or representation of a drainage system of intersecting east-west and north-south canals; the plat describes a system of intersecting east-west and north-south road rights-of way rather than a system of drainage canals. There is no competent substantial evidence in the record from which the finding that "[t]he recorded plat of Titusville Farm established a drainage system of intersecting east-west and north-south canals" could reasonably be inferred. Therefore, paragraph 17 is modified by striking the second sentence from the finding. The Board's acceptance of District's Exception 1 does not change the outcome of this proceeding.

DISTRICT'S EXCEPTION 5

District staff takes exception to the ALJ's application of section 120.57(1)(e), Florida Statutes, to these proceedings. In particular, District staff takes exception to statements the ALJ labeled as findings of facts in paragraphs 277 through 281, 288 through 290, 293, 302 through 309, 318, 319, 322 through 343, 345, and 347 through 349, and statements the ALJ labeled as conclusions of law in paragraphs 426, 427, 429 through 432, 440, 453 through 456, 458, 459, 464, 466 through 524. The District staff summarizes its exceptions as follows:

1. Respondents failed to plead any claim pursuant to Section 120.57(1)(e) in the Section 120.57 enforcement proceedings, and therefore, there was no

basis to consider whether the District had implemented an unpromulgated rule pursuant to this provision.

2. In any event, the District expressly requested/directed the ALJ in the Section 120.57, proceeding that it was not seeking to take any enforcement action against Respondents pursuant to the 1989 memorandum or any unwritten agency statement, and that the enforcement proceedings were to be evaluated solely on the basis of the District's authority under existing statutes and rules. Because the District did not rely upon the subject statement, whether or not it is a rule is irrelevant to the Section 120.57 enforcement proceedings.

3. In any event, based upon the findings of the ALJ, Respondents were not substantially affected by any unpromulgated rule with regard to the agency statement that "maintenance" under Section 403.813(2)(g) only includes routine custodial maintenance because the ALJ found that the subject enforcement action was valid in the absence of this statement.

4. In any event, the alleged statement is not a rule. The statement that the ALJ found to be an unpromulgated rule is the District's interpretation of existing statutes and case law to construe the maintenance exemption in Section 403.813(2)(g) to require "routine custodial maintenance" in conjunction with the other statutory requirements for this exemption. This construction is adequately supported by existing statutes, and therefore, is not a rule because it does not implement, interpret or prescribe law or policy so as to, by its own effect, create rights, require compliance, or otherwise have the direct and consistent effect of law. Moreover, even assuming that the District is incorrect in its statutory interpretation, this incorrect interpretation is expressed in existing rules. Therefore, although these existing rules, under this assumption, would be subject to invalidation pursuant to Section 120.56(3), the District is not liable under Section 120.57(1)(e) for applying an unpromulgated rule against Respondents in the Section 120.57 proceedings.

Threshold Consideration

Before ruling on these exceptions, it is useful to examine the context in which subsection 120.57(1)(e), Florida Statutes, can be raised in a section 120.57(1) proceeding. Subsection 120.57(1)(e) explains this as follows:

> Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

The statutory language indicates that there are three factors that trigger application of Subsection 120.57(1)(e).

1. An agency action, that
2. determines the substantial interests of a party, and
3. is based upon an unadopted rule. [4]

The threshold question, therefore, is whether these three factors exist in this proceeding? If the threshold is met, was the matter properly placed at issue in this proceeding? Finally, if properly at issue, did the District demonstrate the seven factors contained in subsection 120.57(1)(e)2.a-g?

District staff first assert that Respondents failed to plead any claim pursuant to section 120.57(1)(e), Florida Statutes. Prior to considering the assertion, however, the Board must look at a more fundamental issue - whether there even exists the necessary findings of fact in the Recommended Order in order to support the basic element of a "determination" under section 120.57(1)(e). Based upon a careful review of both the Recommended Order and the record, the Board concludes that the necessary findings were never made, and that the record at any rate would not support such findings even if they were made.

For the ALJ in this case to make a determination under section 120.57(1)(e), Florida Statutes, he would first have to find that there was an agency action that determined Respondents' substantial interest and that the action was based upon an

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[4] The seven factors in subsection 120.57(1)(e)2 are as follows:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State constitution, is within that authority;
b. Does not enlarge, modify, or contravene the specific provisions of law implemented;
c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;
d. Is not arbitrary or capricious;
e. Is not being applied to the substantially affected party without due notice;
f. Is supported by competent and substantial evidence; and
g. Does not impose excessive regulatory costs on the regulated person, county, or city.

unadopted rule. More specifically, the ALJ would need to find that the Administrative Complaint and Emergency Order (agency action) against Respondent were "based upon" the District's interpretation of the maintenance exception as including only routine custodial maintenance, and that the interpretation was an unadopted rule.

This case involves agency actions – an Administrative Complaint and an Emergency Order. In this case, Respondents' substantial interests are affected by the agency actions. What is less clear, however, is whether the ALJ determined that the agency action was based upon the District's interpretation of the maintenance exemption. The reason for this lack of clarity is simple: nowhere in the Recommended Order does the ALJ make the most essential finding of fact necessary to make any section 120.57(1)(e) determination, i.e., that the complaint was based upon the interpretation.

What the ALJ finds, instead, is that the District "expresses and applies the statement each time the District enforces agency action based on the statement" (R.O. ¶84) "District practice relies on the statement" (R.O. ¶287); "[t]he District applies the statement with general applicability" (R.O. ¶291); "the statement describes the practice requirements for the District" (R.O. ¶302); and "[t]he District relied on the unadopted rule to determine the substantial interests of Respondents." (R.O. ¶306)

In the same Recommended Order, however, the ALJ also made the following findings:

> 346. The proposed agency action is supported by the evidence-of-record in this proceeding without relying on the unadopted rule. For reasons stated in earlier findings and incorporated here by this reference, the District action taken in the Emergency Order and the action proposed in the Administrative Complaint are supported by the weight of the evidence after the unadopted rule is excluded from consideration. (Emphasis added.)
>
> 347. The excavation of NS1 and EW1 in January 1997 was not "routine custodial maintenance" based on the common and ordinary meaning of the term, rather than the

unadopted rule. Part of the excavation of NS1, EW1, and the larger system was "maintenance," which must satisfy the requirements of any claimed exemptions in order to avoid applicable permitting requirements.

348. That part of the excavation which was maintenance did not satisfy essential requirements for any of the "maintenance" exemptions in Section 403.813(2)(f) and (g) and Rules 40C-4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c). The weight of the evidence did not show that:

(a) the "maintenance" consisted of only that "remedial work" which was necessary to return NS1 and EW1 to their original design specifications within the meaning of Section 403.813(2)(f) and (g) and Rule 40C-4.051(11)(b) and (c) 3;

(b) spoil material was deposited on an upland soil site that prevented the escape of spoil material or return water, or both, into wetlands, other surface waters, or waters of the state within the meaning of Section 403.813(2)(f) and (g); and Rule 40C-4.051(11)(b) and (c) 1;

(c) the excavation was performed in such a way that prevented deleterious dredged material or other deleterious substances from discharging into adjacent waters during maintenance within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b);

(d) the excavation resulted in no significant impacts to previously undisturbed natural areas within the meaning of Section 403.813(2)(f);

(e) no natural barrier was removed which separated NS1 and EW1 from adjacent waters, adjacent wetlands, or other surface waters within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b); and

(f) the excavation performed maintenance dredging on canals or channels within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b).

349. That part of the excavation defined as an alteration of NS1, EW1, and the larger system is not entitled to the "maintenance" exemptions claimed by Respondents. Similarly, that part of the excavation defined as an operation of the ditches is not entitled to the "maintenance" exemptions claimed by Respondents.

350. Pursuant to Sections 373.413 and 373.416, Modern was required to obtain a permit for the excavation of NS1, EW1, and the larger system in January 1997. Modern neither applied for nor obtained a permit for the excavation.

351. Modern violated the permitting requirements authorized in Sections 373.413 and 373.416. Modern is subject to the proposed agency action in the Administrative Complaint.

The ALJ also made the following conclusions of law:

420. Respondents failed to show they are entitled to any of the claimed exemptions. Respondents failed to show that they satisfied essential requirements in Section 403.813(2)(f) and (g) and in Rules 40C-4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c)

* * *

525. The inability of the District to rely on its unadopted rule does not alter the outcome of this proceeding. The proposed agency action in the Administrative Complaint and the action taken in the Emergency Order is supported by the weight of evidence without relying on the unadopted rule. Respondents failed to show by a preponderance of the evidence that Modern is entitled to any of the claimed exemptions. See City of Palm Bay v. State, Department of Transportation, 588 So. 2d 624, 628 (Fla. 1st DCA 1991)(invalidity of rule had no effect on law applied), reh'g denied. (Emphasis added.)

In other words, what the ALJ held, in essence was as follows: the District relies on its routine maintenance custodial maintenance policy in evaluating whether dredging requires a permit; the District determined that Respondents' dredging did not qualify for an exemption under the policy; the District relied on that policy in determining whether to initiate enforcement against Respondents; the District was not legally allowed to rely on the policy and therefore was unable to do so in this proceeding; but in the end such reliance was unnecessary anyway because Respondents did not qualify for an exemption for other reasons identified and proven by the District. None of these holdings, however, support a specific finding that the District's action was "based upon" the policy. The fact that the District may have relied upon a policy in the process of evaluating whether to bring its enforcement action against Respondents does not mean that the District will therefore be basing its final agency action, or did base its proposed action, upon that policy.

The legislature has not defined the term "based upon." In the context of interpreting another law where the term is central to the law but is not defined in the law, the United States Supreme Court has opined as follows:

> Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, see Black's Law Dictionary 151 (6th ed. 1990) (defining "base"); Random House Dictionary 172 (2d ed. 1987) (same); Webster's Third New International Dictionary 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of claim that, if proven, would entitle a plaintiff to relief under his theory of the case. See *Callejo v. Bancomer,* S.A., 764 F.2d 1101, 1109 (CA5 1985) (focus should be on the "gravamen of the complaint"); accord, *Santos v. Compagnie Nationale Air France*, 934 F. 2d 890, 893 (CA7 1991) ("An action is based upon the elements that prove the claim, no more and no less"); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 272 U.S. App. D.C. 240, 246, 855 F. 2d 879, 885 (1988). (Emphasis supplied.)

Saudi Arabia v. Nelson, 113 S.Ct. 1471, 1477 (1993).

The ALJ failed to make the ultimate finding of fact, that is, to find that the District's actions were "based upon" an unadopted rule. His conclusion that the District "relied upon" an alleged unadopted rule does not constitute such a finding, nor is there a finding that the unadopted rule was one of the "elements that proves the claim." The Governing Board has no legal authority to make independent factual findings. Cohn v. Dept. of Professional Regulation, 477 So.2d 1039, 1047 (Fla. 3rd DCA 1985), McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 578 (Fla. 1st DCA 1977). This limitation does not preclude the Board, however, from reviewing the record to determine whether there is competent substantial evidence to support the ultimate finding that the ALJ never did make. Our review of the record as a whole leads us to conclude that there is no competent substantial evidence to support such a finding. Furthermore, it is apparent from the factual findings that the ALJ did make, particularly in paragraphs 346 through 351 as recited above, that there are ample factual findings, supported by competent substantial evidence, to support the factual grounds upon which the District did base its agency action to justify the relief sought in the Administrative Complaint and the Emergency Order.

The Supreme Court definition of "based upon" provides further support for the conclusion that the ALJ could not even make a finding of fact or conclusion of law that the District's action is based upon an unadopted rule. The ALJ's own analysis belies the making of any finding or conclusion that the District's action is based upon an unadopted rule. This is perhaps most pointedly illustrated by the actual recommendation of the ALJ, which is precisely the relief sought by the District in its Administrative Complaint. The ALJ would have no basis upon which to recommend the

requested relief in the instant case should the agency action – Administrative Complaint – be based upon an improperly proven unadopted rule. As the ALJ himself pointed out in substantial detail, there is ample basis for supporting the relief without considering the policy whatsoever, and therefore no basis for a section 120.57(1)(e), Florida Statutes, determination.

As a result of the ALJ's failure to make the ultimate finding of fact, in determining the invalidity of the District's policy, that the District's action was "based upon" an unadopted rule, the ALJ's section 120.57(1)(e) determination was clearly erroneous or did not comply with the essential requirements of law. Furthermore, the Board's substituted conclusion of law, that section 120.57(1)(e) is not applicable to this case, is as or more reasonable that the conclusions that are rejected and therefore the ALJ conclusions are rejected. This conclusion is within the substantial jurisdiction of the Board because it necessarily relates to how the District interprets and applies the regulatory requirements relating to the maintenance of ditches. Therefore, the Governing Board has the authority under sections 120.57(1)(e)3. and 120.57(1)(j), Florida Statutes, to reject the ALJ's determination that section 120.57(1)(e) applies to the instant proceeding, and we so reject the ALJ's determination and the associated findings of fact and conclusions of law that support the determination.

Failure to Plead

The first stated reason for the District's exception regarding the section 120.57(1)(e), Florida Statutes, determination is that Respondents failed to plead a claim pursuant to section 120.57(1)(e), and therefore no basis existed for the ALJ to make the determination. A complete review of the record shows the following:

1. The District's Administrative Complaint dated August 20, 1997, alleges that Respondents unlawfully altered ditches without a permit, and that the maintenance exemption does not apply because the ditches in question "had not been maintained in over 30 years and because dredging material was placed in wetlands." (Complaint ¶¶ 5, 25, 31, 32) There is no allegation in the Complaint that there is a District policy regarding routine custodial maintenance upon which the complaint is being based.
2. Modern's petition dated September 3, 1997, asks for a formal administrative hearing on the Administrative Complaint. The petition contains no mention of a section 120.57(1)(e) proceeding, nor does it mention the District's policy on routine custodial maintenance.
3. The District/FDOT prehearing stipulation dated May 22, 1998, addresses the Administrative Complaint and Emergency Order and also separately filed rule challenges. The stipulation discusses routine custodial maintenance, and the Wilkening memorandum is listed as District exhibit no. 13. The Wilkening memorandum is addressed in the District/FDOT prehearing stipulation only in the context of the rule challenge. There is no mention of a section 120.57(1)(e) proceeding in the stipulation.
4. Respondents separately filed prehearing statement dated May 29, 1997, which states that the Wilkening memorandum is being challenged as an unpromulgated rule as part of the rule challenge cases, which are specifically identified by docket numbers separate from those in the instant case. (Respondents' Prehearing

Statement unnumbered p.7) In Respondents' Prehearing Statement, there is a separate paragraph entitled "Wilkening Policy Statement," which states as follows:

> The Wilkening Memorandum is a flagrant attempt by THE DISTRICT to enforce a "rule" without following the proper rule adoption guidelines. The Wilkening Memorandum is being utilized and treated as a rule and has been adopted as THE DISTRICT'S definition of what constitutes "maintenance". This "rule" exceeds delegated legislative authority and is also being challenged for the same reasons that rules 40C-4.041 and 40C-4.051 are being challenged.

There is no statement, however, that the Administrative Complaint or the Emergency Order were "based upon" the memorandum. The context of the statement indicates that it is part of a rule challenge, and there is no discussion of any need to demonstrate whether or not the statement should be subject to the "prove up" provisions of section 120.57(1)(e)2, Florida Statutes. Respondents' prehearing statement does not request a determination under section 120.57(1)(e).

5. Respondents' Proposed Recommended Order dated February 11, 1999, discusses the Wilkening memorandum starting on page 54, saying it was "widely disseminated" (p. 55) and challenging both the memorandum and the underlying interpretation contained within it, but does not specifically mention section 120.57(1)(e) in any way. Respondents' Proposed Recommended Order does not state that the Wilkening memorandum "was the guideline relied upon and used by the [District] to determine what maintenance actually was exempt" (R.O. p.55), and it does not state that the agency action in the Administrative Complaint was based upon the memorandum or the underlying policy, or that the policy otherwise failed to meet the criteria for determining agency action based upon an unadopted rule under the standards in section 120.57(1)(e), Florida Statutes.
6. A review of the transcript of the administrative hearing indicates that at no time did Respondents move the ALJ to make a determination under section 120.57(1)(e), Florida Statutes, that the policy was an unadopted rule that failed to meet the

criteria therein. While Respondents asserted in their response to the District's exceptions that they "had no opportunity to amend their pleadings" (Respondents' Response p. 10) this argument lacks credibility, as illustrated by the fact that on the very last day of the rule challenge hearing the ALJ granted Respondents' *ore tenus* motion, over the District's objection, to amend certain pleadings to add a claim for attorneys fees. (October 28, 1998 Transcript p. 398)

7. The first specific mention in this proceeding of the existence of a section 120.57(1)(e), Florida Statutes, determination can be found in the ALJ's Recommended Order. The ALJ concluded that "an unadopted rule often remains invisible until the blue spark in time when it emerges from evidence adduced at the hearing," and that Respondents were "not required by section 120.57(1)(e) to amend the original petitions filed pursuant to section 120.57(1)." (R.O. ¶431) Similarly, the ALJ states that there was no need for Respondents "to amend the original petition in a Section 120.57(1) proceeding after discovering an unadopted rule." *Id.*

Whether or not the statement "emerged from evidence adduced at hearing," the above recitation of the pleadings makes clear that the parties were fully aware of the statement and its significance well before the hearing, as evidenced by the fact that the parties all referenced the Wilkening memorandum in their prehearing stipulation statements. The ALJ does not discuss whether there is any mechanism other than the "blue spark" by which a section 120.57(1)(e) determination needs to be placed at issue in a section 120.57(1) proceeding, either in the way of any specific pleading requirement or any other notification by a party seeking such a determination. It is apparent from his Recommended Order that the ALJ takes the position that he has the authority to acknowledge the existence of a section 120.57(1)(e) determination for the first time in a recommended order without any request from any party to the proceeding.

In their response to the District's exception contending that Respondents never pled a claim pursuant to section 120.57(1)(e), Respondents never dispute that they never so pled. Instead, Respondents state that they "had no opportunity to amend their pleadings and, therefore, it would be fundamentally unfair to deny the relief given by the ALJ based upon a failure to plead argument." (Respondents' Response to Exceptions p.10) The irony of that statement is noted in number six above. They also argue that section 120.57(1)(e) "itself obviates the need to plead the specific challenge." *Id.*

It is evident from the record, therefore, as well as the arguments of counsel, that Respondents never submitted a "petition" pursuant to section 120.57(1)(e), never specifically alleged that the District action was based upon an unadopted rule that should be subject to a section 120.57(1)(e) determination by the ALJ, and never made any attempt to amend their petition or otherwise specifically argue that a section 120.57(1)(e) determination should be made. Instead, the ALJ's section 120.57(1)(e) determination was based exclusively on his "blue spark" theory that such a proceeding can arise of its own making as the result of evidence being adduced during the course of a section 120.57(1) proceeding, and that the proof associated with a section 120.57(1)(e) determination can be addressed for the first time by an ALJ in evaluating the evidence after the hearing has been closed and the proposed recommended orders filed.

The Recommended Order notes that the District had argued in its Proposed Recommended Order that Respondents have not raised a challenge to the unadopted rule in their section 120.57(1) petition, and that the pleadings for the section 120.56(4) challenge to an agency statement do not carry over to a section 120.57(1)(e) proceeding. (R.O.¶428) The ALJ states "[t]he District's argument is correct as far as it goes," but the ALJ never explains what is missing from the argument. (R.O. ¶409) The ALJ says that the pleadings from a section 120.56(4) proceeding" do not need to

carry over for a section 120.57(1)(e) to apply in this proceeding," (R.O. ¶429); "that nothing in section 120.56(4) precludes a section 120.57(1)(e) proceeding" (R.O. ¶430); and that Respondents are not required specifically to file a separate petition under section 120.57(1)(e) either at the outset or in an amendment at some subsequent stage of the proceeding. (R.O. ¶431) These ALJ statements beg the question, however. While it is certainly true that a section 120.56(4) proceeding does not prevent a section 120.57(1)(e) determination, that does not mean that the converse is true, that is, that a section 120.56(4) proceeding automatically triggers a section 120.57(1)(e) determination. Even if it were true, and even if section 120.57(1)(e) need not be pled, there is certainly a different standard of proof under section 120.57(1)(e). Under that subsection the action must be "based upon" the unadopted rule. A section 120.56(4) petition does not place that "based upon" standard at issue.

This Board is concerned, to say the least, that the ALJ has a view of the Administrative Procedures Act that in essence holds that an agency has no right to rely on pleadings or even a prehearing stipulation to determine what matters are at issue in an administrative proceeding. Such a concept is fundamentally unfair, denies an agency its own ability to enjoy due process as part of an administrative proceeding, and violates basic tenants of civil procedure also applicable to administrative proceedings. In administrative proceedings conducted under Chapter 120, Florida Statutes, once the matter is referred to DOAH, the agency is to act only as a party litigant. Section 120.569(2)(a), Florida Statutes. The administrative hearing procedures in the Administrative Procedures Act are designed to ensure that the parties will be afforded due process of law. Gtech Corp. v. State, Depart. Of Lottery, 787 So.2d 615, 621 (Fla.

1st DCA 1999). In this case, the ALJ's ruling encourages trial (and ruling) by ambush and results in proceedings like this where the parties do not discover that a section 120.57(1)(e), Florida Statutes, determination is at issue in an administrative proceeding until they read about it in the recommended order.

Nonetheless, it is not clear whether the Governing Board has the legal authority to overrule the ALJ's legal conclusion that section 120.57(1)(e) need not be specifically pled or argued, but can simply appear for the first time in a recommended order, because of the strictures of section 120.57(1)(j), which precludes an agency from overruling conclusions of law over which the agency does not have substantive jurisdiction. In contrast, however, section 120.57(1)(e) appears to allow such conclusion if the ALJ's, "determination is clearly erroneous or does not comply with the essential requirements of law." Because the section 120.57(1)(j) amendments are fairly recent and there is no clear judicial precedent on the issue of an agency's authority in this regard, this Board rejects these legal conclusions recognizing there is uncertainty regarding its legal authority to do so. This action is nonetheless appropriate under the standard set in section 120.57(1)(e), and this would also allow the Board to express its grave concerns over the fundamental unfairness of the way in which the ALJ has unilaterally raised and ruled on this issue.

Therefore, the Board finds that the ALJ's rulings relating to the section 120.57(1)(e) determinations are clearly erroneous and do not comply with the essential requirements of law because of the failure of Respondents to place the matter at issue through appropriate pleadings or motions. Furthermore, while there may be some ambiguity over whether the Board can reject the ALJ's theory of pleading as a matter

outside the "substantive jurisdiction" of the Board, the Board has substantive jurisdiction over matters relating to the permitting and enforcement of construction and excavation activities associated with drainage ditches, as well as the authority to determine whether an ALJ's findings related to those matters (and any conclusions of law that necessarily fall therefrom) are supported by competent substantial evidence, are clearly erroneous or do not comply with the essential requirements of law. In that regard, whether or not properly pled, if the proof relating to a section 120.57(1)(e) determination is lacking, the Board can evaluate the facts found by the ALJ, as well as his conclusions coming from the facts, to determine whether the District can reject them under the section 120.57(1)(j) criteria.

Here, what the pleading deficiencies uncover, and what the ALJ never saw fit to address, is not just whether the basic elements of a section 120.57(1)(e) determination exist, but if so whether those elements have been proven. The ALJ focuses on the "prove up" as part of the determination without even properly analyzing the threshold considerations that must necessarily be made before the "prove up" procedures can be triggered. It is legal error to go through a "prove up" process if that threshold, which the District staff later identifies in its exception as standing requirement, is not crossed. *Cf. Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981) (merits of case are irrelevant if petitioners do not properly "frame their petition . . . in terms which clearly show injury in fact to interests protected" by the substantive statutes). As previously noted, the elements of a Section 120.57(1)(e) determination are:

(1) an agency action, that

(2) determines the substantial interests of a party, and

(3) is based on an unadopted rule.

The statute goes on to state, "[t]he agency action shall not be presumed valid or invalid." Reading this excerpt in conjunction with the well settled principle established in *Florida Department of Transportation v. JWC*, 396 So. 2d 778 (Fla, 1st DCA 1981), the logical interpretation of this statute is that it is incumbent on a challenger of agency action (Respondents in this case) to shoulder his or her burden to go forward and place at issue the three above-listed elements. Once that has been done, only then does the burden shift to the agency to "prove up," in the ALJ's words, the seven elements contained in section 120.57(1)(e)2, Florida Statutes.

Both Respondents and the ALJ appear to be taking the position that because Respondents challenged the District's statement as a statement defined as a rule under section 120.56(4), Florida Statutes, the matter was thereby also placed at issue in the section 120.57(1) proceeding. District staff in their exceptions note that while the section 120.56 and section 120.57 proceedings were consolidated, they remain separate proceedings. District staff point out that the savings clause within section 120.56(4)(f)[5], Florida Statutes, is intended to preserve the right to bring a section 120.57(1)(e) proceeding as a separate and distinct proceeding from section 120.56(4), Florida Statutes. If a party is to bring a proceeding pursuant to section 120.57(1)(e), the party (Respondents) must specifically plead a claim under section 120.57(1)(e) in

[5] Section 120.54(4)(f), Florida Statutes, states: (f) All proceeding to determine a violation of s.120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party

the section 120.57(1) proceeding. See, Rule 28-106.301(1)(e), Fla. Admin. Code. Respondents brought a claim under section 120.54(4) through a separate petition. Respondents did not bring a claim under 120.57(1)(e) in the section 120.57 proceeding. Hence, there is no jurisdiction in the section 120.57(1) proceeding to consider a claim under section 120.57(1)(e).

Beyond the District staff's argument, which is well taken, there is a more fundamental reason why the ALJ has made a determination that is "clearly erroneous or does not comply with essential requirements of law." The ALJ has failed to distinguish the fact a section 120.57(1) proceeding initiated by an agency filing an administrative complaint is a proceeding challenging an agency action, i.e., an order; whereas a section 120.56 proceeding, i.e., a rule or agency statement challenge, is a proceeding challenging an agency rule. The purpose of a section 120.57(1)(e), Florida Statutes, determination is to make an agency prove up an unadopted rule under the same criteria as a rule challenge, but only so that the agency can be able to justify taking agency action based upon that unadopted rule. The underlying challenge, in other words, is not to the rule itself but to an agency order, and the purpose of the proceeding itself, of which the section 120.57(1)(e) is only one part, is to determine whether to uphold or set aside the agency action proposed against the challenger. In contrast, a rule challenge under section 120.56(4), Florida Statutes, is directed exclusively to the existence of that unadopted rule. Whether or not the rule is being applied to petitioner is irrelevant, provided petitioner's substantial interests may be affected by the rule.

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whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e)

The ALJ's fundamental error is illuminated by his following statement: "Section 120.57(1)(e) requires Respondents to prove that the limitation of maintenance exemptions to routine custodial maintenance is a rule." That is not what the provision requires. What section 120.57(1)(e) requires, as illustrated by the context of this case, is that Respondents place at issue their allegations that the Administrative Complaint determined their substantial interests and that the determination was **based upon** an unadopted District rule regarding routine custodial maintenance. Respondents have this burden not only under *JWC*, but also because, as the ALJ himself correctly notes, the case law has clearly established that a person seeking an exemption has the burden of proving entitlement to that exemption. (R.O. ¶356) In other words, the District does not have the burden to prove the nonexistence of an exemption as part of a section 120.57(1)(e) proceeding. Respondents must allege and prove the existence of the exemption.

As *Agrico* indicates, if Respondents claim the District is using an unadopted rule to prevent them from enjoying the exemption, they also need to place that matter at issue so that the ALJ can then make a determination as to whether the unadopted rule is causing Respondents' substantial interests to be affected. Only then does the District have to go through the "prove up" process to justify the validity of the unadopted rule so that it can obtain the relief sought in its agency action, the Administrative Complaint. Whether the unadopted rule may be vulnerable to challenge under section 120.56, is irrelevant if its impact is not at issue in the section 120.57 proceeding because the proceeding was not based upon the unadopted rule. As previously noted, the ALJ

never made the essential finding that the Administrative Complaint was based upon an unadopted rule of the District.

Several explanations can be made for why the ALJ failed to make this essential finding. Perhaps the absence of any pleadings or argument on this issue created difficulties for the ALJ in implementing the proper legal standard. More fundamentally, however, the lack of pleading serves to illustrate the more fundamental problem – the lack of proof. This is demonstrated by a complete review of the record in this case, including both the initial pleadings – the District does not allege a violation of the routine maintenance exemption as part of its Administrative Complaint or Emergency Order or prehearing stipulation, nor do Respondents raise the inappropriate application of that policy in their pleading or prehearing stipulation – as well as the proof presented at trial.

Both the ALJ and Respondents appear to argue that the arguments raised in the section 120.56(4), Florida Statutes, automatically cross over to the section 120.57(1)(e), Florida Statutes, determination. Whether or not this is true, what is true is that there are different proof requirements associated with each proceeding, due to the former constituting a rule challenge and the latter constituting a challenge to an agency action order.

In a rule challenge proceeding the elements of a section 120.56(4), Florida Statutes, petition are that the rule challenger's substantial interests are affected by an agency statement and that the statement violates the requirement in section 120.54(1), Florida Statutes, that agency statements defined as rules be adopted as rules. An agency is nonetheless authorized to "rely upon the statement or a substantially similar statement as a basis for agency action" if the statement meets the requirement of

section 120.57(1)(e), Florida Statutes. Agency reliance on a statement, therefore, is not an element of a petition under section 120.56(4), it simply is available as a defense in the event a proceeding is initiated. There is no need, therefore, for the rule challenger to prove that the challenger's substantial interests have been adversely affected by an action based upon application of the agency statement. The rule challenger is only required to show that the challenger's substantial interests are adversely affected by the rule itself, whether or not it is being applied specifically to the challenger. The rule challenger's standing is established through the fact that his or her substantial interests are affected by the agency statement. Section 120.54(4)(a), Fla. Stat. That is a standing threshold that is considerably less restrictive than a requirement that there be specific agency action determining petitioner's substantial interests and that the agency action is based upon the statement. Section 120.57(1)(e), Fla. Stat.

In contrast, in a section 120.57(1)(e), Florida Statutes, proceeding, a petitioner (Respondents in this case) must show that the specific agency action at issue in the case is **based upon** the unadopted rule. Proof in a section 120.56(4), Florida Statutes, proceeding may be wholly inadequate, therefore, to establish a claim under section 120.57(1)(e). It is clearly erroneous and a departure from the essential requirements of law for an ALJ to conclude, as here, that if all of the elements in a section 120.56(4) proceeding are proven (i.e., the existence of the District's nonrule policy shown), it must necessarily follow that the agency action affecting petitioner's (Respondents in this case) substantial interests were **based upon** that agency statement and that the statement fails to comply with the criteria in section 120.57(1)(e)2.a-g.

Reliance on Unwritten Statement

District staff in the second part of District Exception 5, objects to the ALJ's findings regarding the District's reliance on the Wilkening Memorandum or any unwritten agency statement regarding routine custodial maintenance. "Because the District did not rely on the subject statement," argues District staff, "whether or not it is a rule is irrelevant to the Section 120.57 enforcement proceedings." For reasons discussed in the first part of the Board's analysis of this exception, consideration of whether the District "relied upon" the policy is not the same as whether the District determined that the substantial interests of Respondent were "based upon" the policy. Because the ALJ failed to make the ultimate "based upon" finding, and because he both found and concluded that the proposed agency action was in fact "supported by the weight of the evidence without relying on the unadopted rule" (R.O. ¶¶346, 525) and because he recommended that the Emergency Order be upheld and the corrective actions be undertaken by Respondents as described in the Administrative Complaint, the only appropriate response for this Board is to reject in this Final Order all of the findings and conclusions associated with the ALJ's section 120.57(1)(e), Florida Statutes, determination, and in particular all of Recommended Order paragraphs 277 through 281, 288 through 290, 293, 302 through 309, 318, 319, 322 through 343, 345; 347 through 375, 426, 427, 429 through 432, 440, 453 through 456, 458, 459, 464, 466 through 524.

Under section 120.57(1)(j), Florida Statutes, the Board has the authority to reject findings of fact, based upon a complete review of the record, if the findings "were not based upon competent substantial evidence or . . . the proceedings on which the findings were based did not comply with essential requirements of law." Here, the findings of fact relating to the District's reliance on the so-called unwritten agency statement were not based upon "competent substantial evidence" because the findings

and the underlying facts have no bearing on the recommendation that the Administrative Complaint be upheld. As stated in *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957), in defining "competent substantial evidence," "the evidence relied upon [to] sustain the ultimate findings should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'" Here, the ultimate conclusion reached by the ALJ was to sustain the District's Emergency Order and Administrative Complaint. The ALJ made no finding that the agency actions were based upon any unpromulgated rule, and so the findings relating to the District's reliance on an unpromulgated rule were not "relevant and material."

In addition, the proceedings on which the finding were based did not comply with essential requirements of law, because an essential requirement in a section 120.57(1)(e), Florida Statutes, proceeding is that an agency make a determination affecting the substantial interests of a party that is based upon an unadopted rule, yet there are no findings that this in fact did occur, and the ALJ indicated that such findings were unnecessary to the relief being requested in the proceeding. To the extent the Board has authority to so rule, we also find that essential requirements of law were disregarded because Respondents failed to plead the purported section 120.57(1)(e), proceeding upon which the ALJ's findings and conclusions were based nor did Respondents ever otherwise request that the existence of a section 120.57(1)(e), Florida Statutes, determination be placed at issue in the proceeding. Rather, the section 120.57(1)(e) determination came to life solely as a result of a "blue spark," the effect of which was first identified and articulated by the ALJ in his Recommended Order. We conclude that the essential requirements of law require more than that these findings and conclusions can arise solely as a result of such a "blue spark."

Because of our rejection of the ALJ's findings and conclusions regarding his section 120.57(1)(e) determination, we do not consider it necessary to address any

specific findings of fact regarding the determination, nor any of the consequent conclusions of law upon which the findings of fact were based. Although it may be *obiter dicta*, nonetheless, we do feel obligated to restate our acknowledgment that the District remains bound by the precedent established in *Deseret*, as that precedent has been more fully explained in our response to District Exception 3. We do this as guidance to District staff and the public to avoid any confusion that may arise out of the ALJ's conclusion that *SAVE* has overruled or otherwise limited the holding in *Deseret* regarding routine custodial maintenance. While such conclusion is by the ALJ's own acknowledgment irrelevant to the outcome of the District's Administrative Complaint and Emergency Order, its existence must nonetheless be addressed to make it clear that our rejection of the ALJ's section 120.57(1)(e) determination as clearly erroneous or not in compliance with the essential requirements of law carries with it a rejection of the ALJ's opinion that the District should no longer apply the interpretation of maintenance as being limited to routine custodial maintenance as stated in *Deseret.*

Substantially Affected

In the third part of this exception, District staff argues that Respondents were not substantially affected by the purported unpromulgated rule as routine custodial maintenance. District staff is essentially correct. The Board has addressed this issue as part of its previous discussion regarding the absence of any ALJ findings or other proof that the agency action (i.e., the Administrative Complaint and the Emergency Order) that determined the substantial interests of Respondents was not based upon the purported unpromulgated rule. While Respondents clearly had standing to challenge the Administrative Complaint and the Emergency Order, they never established standing to enlarge their section 120.57(1), Florida Statutes, petition into including a section 120.57(1)(e) determination because they did not allege or prove the essential elements required to trigger such a determination.

Statement Not a Rule

As its last argument in this exception, District staff claims that the alleged statement is not a rule, but merely a correct interpretation of existing statutes and rules. Because we have concluded that the section 120.57(1)(e), Florida Statutes, determination is not properly at issue here and therefore the ALJ's findings and conclusions in this regard are rejected as not relevant to this proceeding, it is neither necessary nor appropriate for us to reconsider the ALJ's rejected findings and conclusions relating to whether the statement is an unpromulgated rule. Such a determination is more properly made in a proceeding initiated under section 120.56(4), Florida Statutes, or a determination made under section 120.57(1)(e), Florida Statutes. Nonetheless, as we explain in our response to District's Exception 3, we do believe the routine custodial maintenance policy is a correct application of existing caselaw and rules for reasons described in detail in response to District Exception 3.

DISTRICT'S EXCEPTION 3

District staff take exception to the following paragraphs labeled by the ALJ as findings of fact - paragraphs 156, 174 through 177, 196, 199, 200, 202, 203, 256, 269 through 275[6], 294 through 301, and the following paragraphs labeled by the ALJ as conclusions of law - paragraphs 381, 382, 385, 388, 394, 395, 408 through 418, and 511 through 522. District staff request that the findings of fact and conclusions of law referenced immediately above, be deleted or modified. These findings and conclusions relate to the application of the maintenance exemptions in Chapters 373 and 403, Florida Statutes, and implementing rules, as those exemptions relate to "routine

custodial maintenance." For reasons previously set forth in our response to District's Exception 5, the Board is deleting rather than modifying these findings and conclusions, because they are not properly at issue in this proceeding. Nonetheless, for reasons also discussed in our response to District Exception 5, the Board has decided to reiterate how it has been and will continue to apply the routine custodial maintenance exemption and explain why the ALJ's analysis on this issue is incorrect so that this Final Order does not result in confusion or create uncertainty over what has been and will be the District's understanding and application of the exemption.

The gist of District staff's exception is that the ALJ has developed a new interpretation of the maintenance exemption in sections 403.813(2)(g) and 373.403(8), Florida Statutes, that is incorrect and contradicts the interpretation of these provisions that has existed consistently since it was first judicially interpreted in *St. Johns River Water Management District v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 7 Fla. Supp. 61 (9th Judicial Circuit, October 29, 1984), *affirmed, Corporation of President of Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District*, 489 So.2d 59 (Fla. 5th DCA 1986), *rev. denied*, 496 So.2d 142 (Fla. 1986). Hereinafter, we will refer to this case as *"Deseret."* On this issue, we agree with District staff. Based upon a complete review of the record we find the ALJ's findings of fact and conclusions of law that support his analysis of the exemption were not based upon competent substantial evidence, and the procedure by which he interpreted the exemption was clearly erroneous or not in compliance with the essential requirements of law. In addition, the District's interpretation of the meaning of

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[6] The ALJ's Recommended Order contains a numbering error – there is no paragraph

maintenance as it relates to routine custodial maintenance is as or more reasonable than the interpretation being given by the ALJ. As discussed further herein, the District has authority to reject the ALJ's interpretation because the District has substantive jurisdiction over these statutes, and is responsible under state law for enforcing them. The following represents what we consider to be the interpretation that has been legally established as precedent, and also is as or more reasonable than the interpretation being given by the ALJ.

While the ALJ discusses this issue in great detail, his approach is best summed up in paragraph 343 of the Recommended Order. After concluding that the District's interpretation of the *Deseret* decision was rejected in *SAVE the St. Johns River v. St. John's River Water Management District*, 623 So. 2d 1193 (Fla. 1st DCA 1993) (hereinafter "SAVE"), the ALJ states as follows:

> 343. The District cannot read the decision in SAVE in isolation from the plain language of Section 373.403(8). Section 373.403(8) provides more than a "conceptual" reason why the exemption in Section 403.813(2)(g) does not apply to routine custodial maintenance. Section 373.403(8) expressly states that maintenance "excludes routine custodial maintenance." The exemption authorized in Section 403.813(2)(g) applies only to maintenance defined in Section 373.403(8) to exclude routine custodial maintenance. Only maintenance that is not routine custodial maintenance must satisfy the requirements in Section 403.813(2)(g) for an exemption. Routine custodial maintenance is "not maintenance" and is not required to either obtain a maintenance permit or qualify for a maintenance exemption. (Emphasis added.)

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number 274.

The Board's Position Reiterated

We believe it important to reiterate the position of this Board: The *Deseret* interpretation of section 403.813(2)(g), Florida Statutes, remains the controlling legal precedent for the District in applying the maintenance exemption in section 403.813(2)(g). Specifically, the statutory maintenance exemption applies only to routine custodial maintenance, as that term is further defined and explained in this Final Order. In addition, under the exemption no more construction or excavation can be done than necessary to restore the dike or irrigation or drainage ditch to its original design specifications. As noted in the Recommended Order, the District has consistently applied this interpretation since the *Deseret* decision. (R.O. ¶¶285, 464) The District will continue to do so until there is a relevant statute or rule change or until a court directs otherwise. Until then, we shall continue to follow the holding in *Deseret*, as it has been consistently understood in judicial and administrative case law other than by the ALJ in the proceedings relating to the instant matter.

Therefore, the Board specifically rejects the ALJ's interpretation of section 403.813(2)(g), Florida Statutes, that "[o]nly maintenance that is not routine custodial maintenance must satisfy the requirements" of the statute. We also specifically reject all the findings and conclusions that are used to support this interpretation. We reject the interpretation for two reasons. First, the ALJ's interpretation is contrary to controlling legal precedent. Contrary to the ALJ's assertion that *SAVE* rejected the District's application of the exemption, the court in *SAVE* upheld the District's interpretation of the exemption. As previously noted, the ALJ has acknowledged that the District's interpretation has not changed since *Deseret*. Secondly, and perhaps more importantly, the ALJ's ruling in this regard, while not clear, could have the effect of establishing a new interpretation of the exemption that could result in substantial environmental harm, notwithstanding the clear statutory direction of the legislature to

the contrary in enacting Chapters 373 and 403, Florida Statutes, as well as the case law interpreting the exemption.

The ALJ never explains what kind of maintenance is not routine custodial maintenance but is maintenance for the purpose for the exemption. He accuses the District of being "unduly restrictive" in its interpretation (R.O. ¶467), but he never tells the District what else is being restricted, unduly or otherwise. The danger, as we see it, is that the ALJ's ruling could be interpreted to allow any dredging that restores to original design specifications, notwithstanding a situation in which the drainage system has not been maintained and the essential character of the impacted area has thereby been substantially changed. Under such an analysis, for example, had Respondents been able to prove that they were restoring to original design specifications (which they could not), they could simply perform the restoration, notwithstanding any damage their activities might cause to the environment or to the property of others.

As the ALJ recognizes, there could be substantial adverse impacts on the property of others if the exemption were interpreted as being based solely upon the ability to restore to original design specifications. In the case before us the adverse impact has been dramatically demonstrated through the ALJ's findings relating to the adverse short and long term impacts that Modern's activities have or could have had upon the St. Johns National Wildlife Refuge. (*See, e.g.,* R.O. ¶¶ 105 through128.) Those findings are summarized in the following paragraph:

> 105. The excavation of NS1 and EW1 by Modern in January 1997 created an emergency within the meaning of Section 373.119(2). The excavation created short-term effects that adversely impacted adjacent wetlands and required immediate action to protect the health of animals, fish, or aquatic life; and recreational or other reasonable uses. If left uncorrected, the excavation would have created long-term effects that would have had additional adverse impacts.

As we explain in detail below, neither the legislature has enacted nor the courts have interpreted the maintenance exemption to have allowed this activity had Modern been able to establish and restore the ditches to their original design specifications and had Modern otherwise been able to comply with the statute - i.e., by depositing spoil in an upland site, which the ALJ found they did not. We recognize that even the ALJ questioned whether such activity would have been "maintenance" that would have otherwise entitled Modern to the exemption had it not deposited spoil in wetlands. (*See, e.g.,* R.O. ¶¶ 310 through 317.) Indeed, the ALJ recognizes that the District's "definition of routine custodial maintenance is based upon a fundamental engineering reality." (R.O. ¶311) As the ALJ states further:

> 317. The bottom line in determining if maintenance is routine custodial maintenance is whether the maintenance is regular enough to maintain continuity of function. Continuity of function is important to persons upstream and downstream of a ditch. Once a ditch has become nonfunctional, other property uses may occur upstream or downstream of the ditch in reliance upon the fact that the ditch is no longer functional.

Nonetheless, the ALJ rejects the District's established interpretation while offering no alternative. If adopted by the District, the ALJ's ultimate conclusion would have the potential of creating substantial confusion over application of the exemption.

The Board must reject, therefore, any inference that might be drawn from the Recommended Order that the maintenance exemption is available simply if a person can restore to original design specifications. As discussed further below, both *Deseret* and *SAVE* specifically recognize the importance of a drainage or dike system's continuing to function as intended by those original design specifications, if available. It appears from a close reading of the Recommended Order that the ALJ does not really

disagree, he simply is unhappy with how the District has explicated its policy in nonrule form. The problem with the analysis, however, is that its effect is to sow unnecessary confusion – unnecessary because, as we point out in our response to the District's Exception 5, the ALJ never had to engage in the analysis in the first place. Respondents never placed at issue in this case whether the District's Administrative Complaint and Emergency Order were based upon its interpretation of the maintenance exemption as applied only to routine custodial maintenance. Because Respondents never properly placed the matter at issue, the ALJ has never had a proper reference point within which to analyze what is intended by the statute as opposed to what is not. And thus the resulting confusion.

Routine Custodial Maintenance Defined

To clarify any ambiguity that may exist due to the ALJ's erroneous interpretation of sections 403.813(2)(g) and 373.403(8), the Board provides below what we believe is the definition of "routine custodial maintenance" as this term is applicable to sections 403.813(2)(g) and 373.403(8), Florida Statutes.

In order to qualify as routine custodial maintenance, the activity must meet the following: The maintenance must occur on a frequent enough basis to ensure that the system continues to function as originally designed. The District recognizes that a small loss of function will occur prior to routine custodial maintenance. However, should a system be allowed to deteriorate over a number of years to the extent that it does not function or the repairs needed to restore the system to original design specifications would cause more than a minimal adverse environmental impact,

restoring the system to its original design specifications is not exempt from the requirement to obtain a permit. Repair of damage caused by a sudden event, such as a large storm, is also considered to be routine custodial maintenance. Additionally, the maintenance must be frequent enough so that when it occurs, it will cause no more than a minimal environmental impact. The evaluation of environmental impacts will compare the environmental condition prior to conducting the proposed maintenance activity with the expected environmental conditions that would result from the proposed maintenance activity.

Statutory Construction

The Board agrees with the ALJ that sections 373.408(8) and 403.813(2)(g), Florida Statutes, should be read *in pari materia*. The ALJ goes astray, however, in developing a new interpretation of sections 403.813(2)(g) and 373.403(8). The interpretation is clearly erroneous as it is in direct conflict with existing case law. Specifically, the ALJ's interpretation is at odds with the interpretation of the maintenance exemption set forth in the *Deseret* case. As described further below, the *Deseret* court has addressed issues virtually identical to those at issue in the instant case. Using traditional principles of statutory construction, the *Deseret* court has provided a clear and logical interpretation of the maintenance provisions in two separate, but related, statutory provisions – sections 373.403(8) and 403.813(2)(g), Florida Statutes. Moreover, the *Deseret* interpretation ensures that the salutary purposes of these two acts will be carried out.

Many of the ALJ's conclusions regarding the "maintenance exemption" are based on the ALJ's narrow reading of section 373.403(8), Florida Statutes, and his failure to read this section *in pari materia* with section 403.813(2)(g), Florida Statutes, as was done by the *Deseret* court. In paragraph 151, the ALJ correctly describes the

definition of "maintenance" in section 373.403(8) as excluding "routine custodial maintenance." The ALJ goes on to conclude that because the definition of "maintenance" in section 373.403(8) excludes "routine custodial maintenance," then the maintenance exemption in rule 40C-4.051, Florida Administrative Code, cannot apply to routine custodial maintenance and must apply to some type of maintenance other than routine custodial maintenance. (R.O. ¶156) The flaw in the ALJ's analysis is in applying this narrow Chapter 373, Florida Statutes, definition of maintenance to the exemption in section 403.813(2)(g), Florida Statutes. Chapter 403, Florida Statutes, does not contain a definition of the term "maintenance." The definition of maintenance in section 373.403, Florida Statutes, describes the type of maintenance that requires a permit under Part IV of Chapter 373 and makes clear that routine custodial maintenance does not require a permit. Although Chapter 403, Florida Statutes, does not define maintenance, it does exempt certain types of maintenance from permitting requirements. The *Deseret* case makes it clear that the type of maintenance that is exempt under section 403.813(2)(g), Florida Statutes, is also "routine custodial maintenance" that is excluded from permitting under section 373.403(8), Florida Statutes. The *Deseret* court stated:

> We agree with the trial court's conclusion that the legislature intended to exclude only routine custodial maintenance having a minimal adverse environmental impact from permit requirements * * * Due to the extensive rebuilding necessary to restore the dike to a functioning condition, the Church clearly does not qualify for the routine maintenance exemption under Chapter 403.

(Emphasis added). *Deseret*, 489 So.2d at 60-61. The court could not have been clearer in describing the maintenance exemption in Chapter 403 as the "routine" maintenance exemption.

As previously noted, the paramount underlying purpose of the regulatory scheme under Chapters 373 and 403, Florida Statutes, is to protect the water resources from

harm. See, e.g., sections 373.413(1), and 373.414(1), Fla. Stat. Clearly, the legislature did not intend section 403.813(2)(g), Florida Statutes, to negate this salutary purpose. One need look no further than section 403.813(3) Florida Statutes, to see explicit evidence of the resource protection parameter surrounding the exemptions delineated in section 403.813(2). In section 403.813(3), the legislature authorized the Department of Environmental Protection ("DEP") or the District to supersede the exemptions through the adoption of general permits under section 373.118, Florida Statutes, authorizing the specified activities. However, such general permits were only authorized where an activity has only "a minimal adverse impact on the water resources." Section 373.118(1), Fla. Stat. In other provisions of Part IV, Chapter 373, the legislature has also explicitly recognized the limitation of permitting exemptions to only those activities having no more than a minimal or insignificant adverse impact on the water resources. Sections 373.406(6) and 373.414(9), Fla. Stat. (sixth sentence). As described below in greater detail, the *Deseret* trial court decision shows that the trial court adopted this reasoning in its analysis. *Deseret,* 7 Fla. Supp. at 66-67.

On March 26, 1989, DEP changed "existing" to "functioning" in rule17-312.050(k), Florida Administrative Code, the precursor to rule 40C-4.051(12)(c), Florida Administrative Code, to incorporate the concept that exempt maintenance must involve maintenance of the existing functional capacity because additional excavations may have more than a minimum adverse environmental impact. In 1993 the legislature consolidated the dredge and fill program under Chapter 403 with the Management and Storage of Surface Waters program under Chapter 373 to establish the Environmental Resource Permitting ("ERP") Program. Chapter 93-213, Laws of Florida, §§19 and 30. In consolidating the two permitting programs the legislature indicated that existing DEP rules "shall be deemed authorized under this part [Part IV, Chapter 373, Fla. Stat.] and shall remain in full force and effect." Chapter 93-213, Laws of Florida, § 30, codified in section 373.414(9), Fla. Stat. Thus, DEP's interpretation of the statute to equate

"functioning" with "existing" had been in effect without legislative modification from 1989 to 1993 and was expressly ratified in 1993 when the legislature indicated that existing DEP rules should carry over to the new program. See, *Jax Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation*, 388 So.2d 1306, 1308 (Fla. 1st DCA 1980)(the presumption of a rule's validity gains added weight from having laid upon the public record in the Florida Administrative Code for several legislative sessions without disapproval or interference by either the legislature or its Joint Administrative Procedures Committee). To consolidate these two existing programs into the ERP program, the DEP and District were directed to adopt rules "relying primarily on the existing rules of the department and the water management district." Chapter 93-213, Laws of Florida, Section 30, codified in section 373.414(9), Fla. Stat.

It seems obvious that to construe the routine maintenance exemptions in sections 373.403(8) and 403.813(2)(g), Florida Statutes, to allow restoration of ditches and dikes that may have been originally constructed decades ago without permit review would be a throwback to the time prior to the enactment of Chapter 373, Florida Statutes, when serious harm was caused to the water resources through unregulated activities that significantly altered the flow of surface waters, thereby undermining the basic purpose of Chapter 373 to protect the water resources.[7] The legislature did not intend the maintenance exemption in section 403.813(2)(g), to be construed so broadly as to effectively eliminate from permit review the restoration of remnant dikes, irrigation and drainage ditches to original design specifications where such restoration has the potential for significant adverse environmental impact. The courts have acknowledged that exemptions are to be narrowly construed so as to avoid defeating the salutary

[7] See *Village of Tequesta v. Jupiter Inlet Corporation*, 371 So.2d 663 (Fla. 1977), *cert. denied*, 444 U.S. 965, 100 S.Ct. 453, 62 L.Ed.2d 377 (1979).

purposes of Chapter 373. *Samara Dev. Corp. v. Marlow*, 556 So.2d 1097 (Fla. 1st DCA 1990).

In effect, Respondents were seeking in this case the implied repeal of sections 373.403(7) and (8), 373.413 and 373.416, Florida Statutes, insofar as they require a permit under Chapter 373 for "alterations" or nonexempt maintenance, based upon the subsequent enactment of section 403.813(2), Florida Statutes. It is well established that the implied repeal of a prior statute by a subsequently enacted statute is disfavored and will only be effectuated when there is a "positive and irreconcilable repugnancy" between the two provisions. *State v. Gadsden County*, 63 Fla. 620, 629, 58 So. 232, 235 (Fla. 1912).[8] There is no conflict between section 403.813(2)(g), Florida Statutes, and the aforesaid provisions within Chapter 373, Florida Statutes, but, assuming a possible conflict existed, these statutory provisions were harmonized by the courts in *Deseret* and *SAVE*.

This interpretation of "routine custodial maintenance" is consistent with the legislative history of the enactment of the two pertinent statutes. Chapter 373 was initially enacted in substantially its current form through the 1972 Water Resources Act, Chapter 72-299, Laws of Florida, with the primary salutary purpose of protecting the water resources from harm. Sections 373.016, 373.616, 373.6161, Fla. Stat. Part IV of Chapter 373 addresses the significant harm the water resources can suffer as a result of the construction or alteration of stormwater management systems, dams, impoundments, reservoirs, or other related "works" as defined in the statute. Sections 373.403, 373.413, 373.416, Fla. Stat.

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[8] *Accord*, *Palm Harbor Special Fire Control District v. Kelly*, 516 So.2d 249, 250 (Fla. 1987); *State v. Quigley*, 463 So.2d 224 (Fla. 1986); *State v. Dunmann*, 427 So.2d 166, 168 (Fla. 1983); *Oldham v. Rooks*, 361 So.2d 140, 143 (Fla. 1978); *Littman v. Commercial Bank and Trust Company*, 425 So.2d 636 (Fla. 3d DCA 1983); *Alterman Transport line, Inc. v. State*, 405 So.2d 456,460 (Fla. 1st DCA 1981).

Chapter 373, reflects the legislative determination that the potential for harm to the water resources exists so as to require permit review when a drainage ditch that has not been maintained in its original condition is sought to be restored to that condition. Pursuant to section 373.413, Florida Statutes, a permit may be required for the "construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works . . . ." "Alter" is defined in section 373.403(7) as meaning:

> to extend a dam or works beyond maintenance in its original condition, including changes which may increase or diminish the flow or storage of surface water which may affect the safety of such dam or works. (Emphasis added.)

The statutory definition of "alter" contemplates that if there has been a failure of maintenance in the original condition, the subject activity, including changes which may increase or diminish the flow or storage of surface water so as to possibly affect the safety of such dam or works, may be required to obtain a permit pursuant to section 373.413, Florida Statutes.

Sections 373.403(7) and 373.413, Florida Statutes, contemplate those maintenance activities to preserve a system in its original condition that will not cause harm to the water resources and do not require a permit under section 373.413. Where, however, there has been a significant lack of maintenance in the original condition, an effort to restore to its original condition represents an "alteration" of the system that has the potential to significantly increase or diminish the flow or storage of surface waters and may affect the safety of the system. From the face of these provisions, these changes are not exempt from permitting.

Sections 373.403(7) and 373.413, Florida Statutes, must also be construed *in pari materia* with the provisions pertaining to maintenance in sections 373.403(8) and 373.416, Florida Statutes. Section 373.416 authorizes the Board to require permits and impose reasonable conditions necessary to "assure that the operation or maintenance

of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works . . . will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district." Section 373.403(8) defines "maintenance" or "repairs" to mean:

> remedial work of a nature as may affect the safety of any dam, impoundment, reservoir, or appurtenant work or works, but excludes routine custodial maintenance.

The plain meaning of these provisions is that "routine custodial maintenance" does not require a permit as "maintenance" under section 373.416, Florida Statutes. Routine custodial maintenance is not defined in Chapter 373, but has the obvious plain meaning of being maintenance that occurs on a routine basis so as to preserve the original condition of the system that is being maintained. It, therefore, is no different than the "maintenance in its original condition" within section 373.403(7), Florida Statutes, which avoids the necessity for a permit under section 373.413, Florida Statutes, as an "alteration." These statutes are readily harmonized when read *in pari materia* to provide for the obvious result that routine custodial maintenance activities do not have a significant potential for harm to the water resources and do not require permit review. In contrast, restoration of a system to its original condition after there has been a significant lapse of routine maintenance has the potential to harm the water resources and requires permit review.

Chapter 373 provisions must also be harmonized and read *in pari materia* with the ditch maintenance exemption in section 403.813(2)(g), Florida Statutes. This statute, which was not drafted as a part of the Water Resources Act, was first enacted in 1975, Chapter 75-22, Laws of Florida, as a part of the program for water quality control implemented by DEP, formerly the Department of Environmental Regulation ("DER"). In its original form section 403.813(2)(g)(1975), Florida Statutes, provided that no permit would be required under Chapters 403, 253 or 373 for:

> The maintenance of existing dikes and irrigation and drainage ditches, provided that spoil material is deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material into the waters of the state; [however,] no more dredging is performed than is necessary to restore the drainage ditch to its original design specifications. (Bracketed word substituted by the Florida Statutes editors for the word "provided.")

The plain meaning of this provision, standing on its own, is that activities that would have a minimal potential for causing water pollution should not be required to obtain a permit. The plain meaning of "maintenance," standing on its own, is that continuity of function is preserved, subject to normal deterioration between maintenance intervals. One is not adequately maintaining a drainage ditch if it is allowed to lose a significant portion of its functional capacity between maintenance intervals. In such instances, where large amounts of material would need to be removed, the potential for water quality impacts would be significant, and it would be inconsistent with the statutory scheme of Chapter 403, Florida Statutes, to exempt such an activity from permit review. Both *Deseret* and *SAVE* recognize the critical importance of continuity of function in determining whether the maintenance exemption applies.

The application of section 403.813(2)(g), Florida Statutes, is, therefore, harmonized with the regulatory scheme under Chapter 373, Florida Statutes, by construing "maintenance" in the Chapter 403 provision the same as "routine custodial maintenance" in section 373.403(8), and "maintenance in its original condition" in section 373.403(7). This is what was accomplished by the court in *Deseret* by direct application of the relevant statutory provisions in the absence of any rules. The District is bound to follow this statutory interpretation, which is the interpretation that was urged upon the court by the District at that time. *Milkolsky v. Unemployment Appeals Com'n*, 721 So.2d 738 (Fla. 5th DCA 1998).

The Deseret Case

The reported decision of the circuit court in *Deseret* must be reviewed in order to appreciate the extent to which the questions presented by this case have been addressed by the *Deseret* appellate decision. In the *Deseret* case, Deseret had sought to rebuild a perimeter dike and drainage ditches that had been constructed in the late 1940's or early 1950's and had not been maintained for about 25 years. *Deseret*, 7 Fla. Supp. at 62. The drainage ditches remained in substantially their original condition, but portions of the perimeter dike had substantially deteriorated, such that about 95,000 cubic yards of fill was needed to rebuild a three-mile segment of the dike to its original design specifications. *Id.* at 62-63. Pumps that discharged water from the internal drainage system over the dike had been removed in the late 1960's or early 1970's, demonstrating the intent to abandon the use of the dike. *Id.* at 63. Deseret asserted the right to restore the dike to its original design specifications pursuant to section 403. 813(2)(g), Florida Statutes. The court denied Deseret's assertion, stating as follows:

> 6. Interpretation of Section 403.813(2)(g), Florida Statutes (1983) is a case of first impression. Neither party to this action has identified any case law interpreting that section. The court has not discovered any authority interpreting that section on its own initiative. The Court concludes that it must construe Section 403.813(g) in order to determine the respective rights of the parties to this action. However the Court is guided by the principle that statutory exemptions are to be strictly construed against those claiming the exemption. *Pal-Mar Water Management District v. Board of County Commissioners,* 384 So. 2d 232 (Fla. 4th DCA 1980).
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> 7. *Deseret* focuses on the words "existing" and "restore" in the statute. *Deseret* claims that because a remnant of a dike, albeit a substantial remnant in some places, is visible on the property, the dike is "existing". *Deseret*'s argument continues that whatever work is required to restore the dike

to its initial design specifications, regardless of its scope or extent and regardless of the lack of maintenance during an extended period of time, the work may be performed without a permit.

8. The District focuses on the terms "maintenance" and "existing". The District contends that maintenance of an existing structure is no more than the routine custodial maintenance necessary to preserve the structure from deterioration within reasonable limits. The District contends that the maintenance exemption in Section 403.813(2)(g), Florida Statutes, was not intended to remove construction activity of the magnitude proposed by *Deseret* from the operation of the statute. The District contends that the concepts of "maintenance" and "restoration" are comparative in nature and require an examination of:

(a) the comparative length of time between normal routine maintenance and actual maintenance activities on the structure; and

(b) the comparative physical characteristics of the existing structure with its original design configuration.

(c) the function of existing remnants of the original system.

9. The Court must turn to traditional principles of statutory construction to determine the meaning of Section 403.813(2)(g), Florida Statutes (1983). One of those principles is to give words their common and ordinary meaning. The term "maintenance" is defined as "the act of maintaining". The term "maintain" is defined as "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline"." Webster's Ninth New Collegiate Dictionary (1983). The use of the phrase "keep in an existing" in the definition of maintain is important in understanding the use of the word "existing" in the statute. *Deseret* does not wish to preserve that perimeter dike in its existing state. Similarly, *Deseret* does not wish to preserve that perimeter dike from failure or decline. Substantial portions of the dike have already failed or declined and *Deseret* now seeks to rebuild those portions of the dike.

While *Deseret* seeks to look at the condition of the perimeter dike by averaging the condition of the dike over its entire length, *Deseret* has admitted that a dike is only as good as

its lowest and weakest point. With two complete breaches and more than one mile of the dike in serious disrepair, the Court must conclude that the work which *Deseret* proposes to accomplish is more than "maintenance". If the Court were to accept *Deseret*'s proposition, then any structure would be "existing", regardless of the extent of deterioration, and could be rebuilt without a permit. That construction of the exemption would destroy the salutary purposes of Chapter 373 and Chapter 403 and, as such, cannot be a proper interpretation of the statute. *Indian Harbour Beach v. Melbourne*, 265 So.2d 422 (Fla. 4th DCA 1972).

10. To the extent that the meaning of the statute may be ambiguous, the Court, may also look to other traditional principles of statutory construction in interpreting Section 403.813(2)(g), Florida Statutes (1983). First, Section 403.813(2)(g) should be read *in pari materia* with Section 373.403(8) which provides as follows:

"Maintenance" or "repairs" means remedial work of a nature as may affect the safety of any dam, impoundment, reservoir, or appurtenant work or works, but excludes routine custodial maintenance.

The legislature excluded only routine custodial maintenance from the permitting requirements of Chapter 373. From the evidence presented, *Deseret* did not perform maintenance of a routine custodial nature for a period of approximately 25 years. Routine maintenance would have been either continuous or on a periodic basis of no more than every 4 to 5 years. In addition, Section 403.813(3) and Section 403.814(1) authorize establishment of a system of general permits for those activities having a minimal adverse environmental impact. To the extent the Secretary of the Department of Environmental Regulation establishes a general permitting program, the exemptions contained in Section 403.813(2)(g) are superseded. While the Secretary has not created a general permitting process for maintenance work, the legislature's conception of the exemption reflects that the exemption applies only to routine maintenance having a minimal adverse environmental effect. The legislative committee tapes introduced into evidence by the District support this interpretation. The amount of water which can be diverted or impounded as a result of increasing the height of *Deseret*'s perimeter dike by one foot is so substantial that the Court can only conclude

> that the possibility of adverse environmental effect is more than minimal. (Emphasis added.)

Deseret, 7 Fla. Supp. at 65-67.

The appellate court affirmed the lower court decision. The court stated:

> We agree with the trial court's conclusion that the legislature intended to exclude only routine custodial maintenance having a minimum adverse environmental impact from permit requirements. . . . Due to the extensive nature of the rebuilding necessary to restore the dike to a functioning condition, the Church clearly does not qualify for the routine maintenance exemption under Chapter 403.

(Emphasis added.) *Deseret*, 489 So.2d at 60-61.

At the time of the *Deseret* decision, rule 40C-4.051(12)(c), Florida Administrative Code, did not exist. The District directly applied section 403.813(2)(g), Florida Statutes, which took substantially its current form in 1978, Chapter 78-98, Laws of Florida. Therefore, the *Deseret* court directly construed section 403.813(2)(g) to equate "existing" with "existing in a functional capacity." The appellate court's harmonizing of Chapters 373 and 403 is obvious in its reference to routine custodial maintenance under Chapter 403. *Id.* at 61. The term "routine custodial maintenance" is not used in section 403.813(2)(g), yet the court considered this terminology to be equally applicable to the Chapter 403 exemption.

Deseret is very similar to the instant ditch excavation case, the only significant difference being that *Deseret* involved the construction of a dike and ditches, while this case involves the excavation of ditches. Like Respondents, the defendants in *Deseret* claimed that the work fell under the maintenance exemptions in section 403.813(2)(g), Florida Statutes. The court found that the work did not involve maintenance because the dikes had declined over time and the defendant would be essentially rebuilding the dike instead of maintaining it. The court found that the maintenance exemption only

allowed "routine custodial maintenance" and that rebuilding the dike would have more than a minimal substantial environmental impact. *Id.* at 60-61.

The *Deseret* interpretation of the ditch maintenance exemption has been followed consistently by all Florida courts and administrative agencies that have addressed the issue.[9] Absent some statutory authority or rule change, neither the District nor an ALJ is free to reinterpret the maintenance exemption. The District must "follow the interpretations of statutes as interpreted by the courts of this state . . . if there is a controlling interpretation by a district court of appeal in this state, the [agency] must follow it . . . [and] must adhere to the interpretation given by those courts. Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated." *Mikolsky v. Unemployment Appeals Com'n*, 721 So. 2d 738 (Fla. 5th DCA 1998).

Moreover, as was recently stated in *Okeechobee Health Care v. Collins*, 726 So.2d 775 (Fla. 1st DCA 1998), "[a] reviewing court properly defers on questions of statutory interpretation to the agency to which the Legislature has given the responsibility and authority to administer the statute, unless the interpretation is clearly erroneous." This is a frequently stated proposition, the viability of which, as indicated above, is not impacted by recent APA amendments. *State Contracting, supra.* In addition to this general requirement, Chapter 373 also requires that it be liberally

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[9] *SAVE the St. Johns River v. St. Johns River Water Management District*, 623 So. 2d 1193 (Fla. 1st DCA 1993); *Department of Environmental Regulation v. C.G. Investment of Polk County, Inc.*, Case No. GC-G086-781 (Fla. 10th Cir. Ct. 1990); *St. Johns River Water Management District v. Henson,* 36 Fla. Supp. 2d 132 (Fla. 4th Cir. Ct. 1989); *James Bunch and Santa Rosa County Board of County Commission v. Department of Environmental Protection*, 19 F.A.L.R. (Fla. Dept. Env. Prot. 1997); *In Re Petition for Declaratory Statement by James D. Bunch*, 18 F.A.L.R. 4031, 4035-36 (Fla. Dept. Env. Prot. 1996); *Manasota-88 v. Hunt Building Corp.*, 13 F.A.L.R. 927 (Fla. Dept. Env. Reg. 1991); *Ericson Marine v. Department of Environmental Regulation*, 8 F.A.L.R. 5092 (Fla. Dept. Env. Reg. 1986); *Island Developers Ltd. V. Department of Environmental Regulation*, 6 F.A.L.R. 5402 (Fla. Dept. Env. Reg. 1983).

construed in order to best effectuate the statutory purposes related to protection of the water resources, Sections 373.616, 373.6161; Fla. Stat.; *Osceola County v. St. Johns River Water Management District*, 504 So.2d 385, 388 (Fla. 1987).

The *SAVE* Case

Respondents have contended that the *SAVE* court rejected the *Deseret* court's interpretation of the maintenance exemption as exempting only routine custodial maintenance. However, the facts allowing the maintenance work in *SAVE* to qualify for the exemption distinguished that work from the rebuilding activity that was held not to be exempt in *Deseret.* These facts are not present here. The *SAVE* court upheld the District's construction of the maintenance section 403.813(2)(g), Florida Statutes, to permit the repair of certain cuts in a dike that had not significantly affected the ability of the dike to divert surface waters. The court expressly considered *Deseret* and did not consider its ruling to conflict with *Deseret.* In *SAVE*, the court stated:

> We agree with the Commission that the principle case relied upon by *SAVE* to support its arguments on this point, *Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management Dist.*, 489 So.2d 59, *rev. denied*, 496 So.2d 142 (Fla. 1986) is materially distinguishable and does not preclude the application of the subsection 403.813(2)(g) exemption in this case. In the cited case, the court held that the applicant seeking to rebuild dikes on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two reasons: (1) the church had failed to carry its burden of proving the original design specifications of the dike system, which could not now be determined, and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during that period. In the case before us, the dike never ceased to function as intended even with the breaks or notches cut in it; it kept water off the land so as to permit farming activities to continue; and there was no problem determining the original design specifications of the dike by visually observing the undisturbed portions of the dike. *(Emphasis added.)*

SAVE, 623 So.2d at 1202-1203.

The *SAVE* court found that the subject dikes had continued to function as originally intended and were, therefore, entitled to the maintenance exemption. This holding does not conflict with either *Deseret* or the instant case. Conversely, in the instant case, Respondents' drainage ditches were non-functional to a great extent and the excavation greatly exceeded the removal of vegetation and minor accumulations of silt and debris associated with routine maintenance. (R.O. ¶159, 169).

Respondents' argue that the *SAVE* case does not limit exempt maintenance to "routine custodial maintenance." This argument is without merit. The *SAVE* court, in discussing the refilling of notches to the original design specifications, merely noted that *SAVE* had failed to cite any authority to support its contention that under the section 403.813(2)(g) exemption routine custodial maintenance "conceptually excludes refilling the breaks [in the dike] from the scope of the exemption." *SAVE*, 623 So. 2d at 1202.

Although the District does not view the *Deseret* and *SAVE* cases as being in conflict, assuming arguendo that a conflict exists between these decisions, the opinion of the First District in *SAVE* would not overrule that of the Fifth District in *Deseret*.[10] Because the District's headquarters and the subject property is within the jurisdiction of the Fifth District, the Board is bound to follow that court's interpretation of section 403.813, Florida Statutes. *State Farm Mutual Automobile Insurance Company v. Adair*, 722 So.2d 958 (Fla 3d DCA 1998). It is only where there is no case on point within the appellate venue of the trial court that the trial court must follow the opinion of an appellate court in another venue. *Pardo v. State*, 596 So.2d 665 (Fla. 1992).

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[10] *SAVE* was not appealed to the Florida Supreme Court.

The ALJ erroneously concludes that the Fifth District in *Deseret* did not adopt certain of the lower court's findings despite the fact that the court affirmed the lower court decision. Specifically, the ALJ concludes that the appellate court did not recognize as a basis for its holding the ruling of the lower court that the maintenance exemptions apply only to routine custodial maintenance. This conclusion is erroneous for two reasons. First, as can be seen from the language quoted above, the appellate court expressly characterized the maintenance exemption in Chapter 403 as the "routine maintenance exemption." Although the appellate opinion does not contain the same level of detail as the lower court opinion, it nevertheless affirms the entire lower court decision and does not reject any of the findings or legal conclusions of the lower court. Moreover, the issues regarding the interpretation of the maintenance exemption in section 403.813(2)(g), Florida Statutes, were expressly at issue in the lower court proceeding. It is plain from the face of the *Deseret* decision that the appellate court did not reject any aspect of the lower court opinion and was harmonizing Chapter 373 provisions with section 403.813(2)(g) to reach a consistent result.

For the purposes of section 403.813(2)(g), there is no significant difference between the plain and ordinary meaning of "maintenance" and "routine custodial maintenance." The lower court in *Deseret* clearly discussed the plain and ordinary meaning of "maintenance" in section 403.813(2)(g) as requiring a continuity of upkeep so that the original condition of the facility is being preserved, subject to the normal amount of deterioration that occurs between regular maintenance intervals.[11] The

[11] The appellate court stated:

analysis of the Recommended Order seeks to create distinctions when (or where) there are none and to obviate the plain purpose of the overall regulatory scheme to require permits for activities that go beyond routine maintenance that preserve the original condition.

The ALJ's legal conclusion that *SAVE* has rejected the District's application of routine custodial maintenance is not even internally consistent within the Recommended Order. The ALJ specifically concluded that "[f]or more than 15 years, the District has consistently limited maintenance exemptions to routine custodial maintenance." (R.O. ¶464) In the *SAVE* case, the First District Court of Appeal upheld the District's application of the maintenance exemption, noting testimony of the District's director of permitting that the activity in that case "was exempted from permitting under the 'Dikes Maintenance Exemption,'" as well as testimony from the "District's current director of permitting (Elledge) . . . that the Section '403 exemption' was applied to Smith's restoration of the dike, and . . . the filling of the breaks 'would have been considered a maintenance activity' under the exemption." *SAVE*, 623 So. 2d at 1202. The "403 exemption" reference is obviously section 403.813(2)(g), as that subsection is specifically referenced twice earlier in the same quoted paragraph.

> We agree with the trial court's conclusion that the legislature intended to exclude only routine custodial maintenance having a minimum adverse environmental impact from permit requirements. . . . Due to the extensive nature of the rebuilding necessary to restore the dike to a functioning condition, the Church clearly does not qualify for the routine custodial maintenance exemption under chapter 403.

489 So.2d at 60-61.

If the District has consistently interpreted the maintenance exemption, and that interpretation was upheld by the District Court in *SAVE*, how can the ALJ possibly claim that "the District had actual knowledge that the underlying statement [i.e., regarding the maintenance exemption] had been rejected in all respects by the [*SAVE*] District Court as lacking any authority?" (R.O. ¶543) If *SAVE* had really rejected the District's interpretation of the maintenance exemption, one would at least think that the court would have told the District that it was doing so.

The ALJ attempts to support this analysis by taking two sentences from *SAVE* entirely out of context. The ALJ's conclusion is based upon his inference that when "[t]he First District Court of Appeal told the parties and the witnesses: 'This is an argument that we reject in all respects'" (emphasis supplied by the ALJ), the court was referring to the District's argument that *Deseret* should be applied in the *SAVE* case. A closer reading of the entire passage discloses that "This argument" referred to the argument of the Petitioner, *SAVE*, regarding its interpretation of the *Deseret* case rather than the interpretation of the District.[12]

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[12] The Save court stated:

> This brings us to SAVE's third contention, that Smith wholly failed to qualify for an exemption under subsection 403.813(2)(g). This is a multifaceted argument that we reject in all respects. SAVE cites no statute, rule, or other authority to support its contention that Smith was required to submit written original design specifications to the agency prior to the commencement of activity covered by that exemption. Nor does SAVE cite any authority to support its contention that the exemption under this subsection is limited to "routine" or "custodial" maintenance that conceptually excludes refilling the brakes from the scope of the exemption.

SAVE, 623 So.2d at 1202.

The Petitioner, SAVE, was not arguing that the District's interpretation of *Deseret* should be applied. Rather, SAVE was arguing that the District's interpretation of *Deseret* was not narrow enough, that the District had misinterpreted *Deseret* by construing the *Deseret* holding too loosely. The First District Court rejected "in all aspects" the argument for a narrower *Deseret* interpretation, not the District's more lenient interpretation.[13] The District's more reasonable interpretation of *Deseret*, an interpretation which allowed Mr. Smith's maintenance work to qualify for the maintenance exemption, was upheld, not rejected, by the *SAVE* court.

In upholding the District's application of *Deseret*, the *SAVE* court concluded that "[i]n the case now before us, [where] the dike never ceased to function as intended even with the breaks or notches cut in it; [and] it kept water off of the land so as to permit farming activities to continue," the filling of breaches in the dike was routine custodial maintenance exempt from permitting requirements. *SAVE*, 623 So.2d at 1203. This is completely consistent with how the District interpreted the maintenance exemption in the instant case. Since the ditches in question "had ceased to function as intended" and had not "kept water off of the land so as to permit farming activities to continue," the re-excavation of the ditches was not routine custodial maintenance exempt from permitting requirements.

The ALJ focuses particularly on the sentence following the excerpt quoted in footnote 7 above to conclude that *SAVE* overruled the District's application of the maintenance exemption. The sentence says, "[s]ubsection 403.813(2)(j) requires only that the dike be restored to 'its original design specifications.'" The word "only" here is being used in conjunction with the prior sentence, in which the court rejects SAVE's

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[13] SAVE espoused an interpretation contrary to that of the District by arguing that *Deseret* precluded exempt maintenance, even where "the 'notches' made in the dike were not brought down to grade, i.e., they did not go to the bottom of the land or to the marsh level. Instead, the cuts stopped three to four feet above the land on which the dike had been constructed." *SAVE*, 623 So.2d at 1202.

argument that the maintenance exemption "conceptually excludes refilling the breaks from the scope of the exemption," by pointing out that restoration to original design specifications does not "conceptually exclude" (i.e., exclude as a matter of law) refilling breaks in a dike. In other words, refilling breaks in a dike can be considered, at least conceptually (as well as particularly in this case), restoration to original design specifications.

The ALJ's effort to read the "only" sentence in *SAVE* in isolation – i.e., to mean that *SAVE* has held that the only requirement for an exemption in section 403.813(2)(g), Florida Statutes, to be applicable is for an applicant to want to restore a drainage ditch to its original design specifications – contradicts the plain language in the statute, the interpretation of the statute in *SAVE*, as well as the rest of the case precedent and even the ALJ's own interpretation of the statute as he explicates it elsewhere in the Recommended Order.

First, the plain language in the statute recognizes two separate components to the exemption in section 403.813(2)(g), Florida Statutes, that there be "maintenance" and that "[i]n all cases, no more dredging is to be performed than is necessary to restore the . . . drainage ditch to its original design specifications." There are, therefore, two main limitations – first, that the activity be maintenance, and second the maintenance be limited to the original design specifications. Contrary to what the ALJ asserts through his analysis of *SAVE*, the statute does not require that the exemption statute only apply to restoration of a drainage ditch to original design specifications – the drainage ditch also has to have been maintained.

Second, the *SAVE* court recognized the distinction between "maintenance" and "original design specifications." *SAVE* specifically upheld the District's position, which was approved by the Governor and Cabinet sitting as the Florida Land and Water Adjudicatory Commission, that there are two main components to the exemption – first, that the system have continued to function (i.e., there must be maintenance), and

second, that maintenance activities be limited to original design specifications. This is illustrated by the following two excerpts from *SAVE*.

> The [Florida Land and Water Adjudicatory] Commission made the following rulings relevant to this issue:
>
> 14. The remainder of SAVE's arguments for rescinding the permit or remanding the case are rejected. Unlike the dike in *Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District*, 489 So. 2d 59 (Fla. 5th DCA 1986), upon which SAVE relies, the dike in this case never ceased to function as a dike because it was never brought to grade. It was not required to be brought to grade unless the alternate dike was constructed and the alternate dike was not constructed. As for the exemption from permitting the restoration of the breaches, Section 403.813(2)(g), Florida Statutes, does not require the submission of original design specifications as SAVE argues. It limits the exemption to original design specifications. Although the Hearing Officer found these to be unknown, the Hearing Officer found that the restoration of the dike entailed filling to conform to the dike's "original design." (R. 194, R.O. p.27, Ruling 46 on Proposed Findings of Fact submitted by the Applicant.") (Emphasis added.)
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> * * *
>
> We also agree with the Commission that the principal case relied on by SAVE to support its arguments on this point, *Church of Jesus Christ of Latter-Day Saints v. St. *1203 Johns River Water Management Dist.*, 489 So. 2d 59 (Fla. 5th DCA), *rev. denied*, 496 So. 2d 142 (Fla. 1986), is materially distinguishable and does not preclude the application of the subsection 403.813(2)(g) exemption in this case. In the cited case, the court held that the applicant seeking to rebuild on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two reasons: (1) the church failed to carry its burden of proving the original design specifications of the dike system which could not be determinated, and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during this period. In the case now before us, the dike never ceased to function as intended even with the breaks or notches cut in it; it kept water off the land so as to permit farming activities

> to continue; and there was no problem determining the original design specifications of the dike by visually observing the undisturbed portions of the original dike. (Emphasis added.)

SAVE, 623 So.2d at 1201 and 1202-1203.

What these excerpts make clear is that the ALJ has taken the holding in *SAVE* out of context. In paragraph 341 of the Recommended Order, the ALJ states, in part, that "[i]n *SAVE*, the court explicitly rejected the contention that the maintenance exemption applied only to routine custodial maintenance. The court did not hold, as the ALJ asserts, that the maintenance exemption only applied to original design specifications. There is another test, a functionality test, that is, the system cannot "[c]ease to function" as intended. And that is where *Deseret* comes back into play – the only way that the system can "never [cease] to function as intended" is through routine custodial maintenance.

Third, elsewhere in the Recommended Order the ALJ acknowledges that a functioning system requires routine custodial maintenance. The ALJ analyzes the logic of this beginning in paragraph 310 of the Recommended Order; he states in paragraph 311, that "[t]he definition of routine custodial maintenance is based upon a fundamental engineering reality." He describes in paragraph 316 the factors in addition to time alone that help explain the concept of routine; and he concludes as follows in paragraph 317:

> 317. The bottom line in determining if maintenance is routine custodial maintenance is whether the maintenance is regular enough to maintain continuity of function. Continuity of function is important to persons upstream and downstream of a ditch. Once a ditch has become nonfunctional, other property uses may occur upstream or downstream of the ditch in reliance upon the fact that the ditch is no longer functional.

Reading this analysis in conjunction with the case law, it is apparent that the ALJ in the Recommended Order, and the courts in *SAVE* and *Deseret* have reached the collective conclusion that maintaining functionality is a key component to the maintenance exemption in section 403.813(2)(g), Florida Statutes, and that such functionality can only be maintained through routine custodial maintenance.

In the end, it is difficult to understand why the ALJ concluded that the District had misapplied the maintenance exemption, because the ALJ also determined that the District's actions should be upheld in their entirety. The final part of this puzzle, perhaps, is illustrated by the following: while the ALJ criticizes the District for its "unduly restrictive" definition of the maintenance exemption (R.O. ¶467), the ALJ never identified what other activities outside of routine custodial maintenance apply to the maintenance exemption. Indeed, in Recommended Order paragraph 317, the ALJ indicated that there may be no other activities. In other words, the ALJ says that routine custodial maintenance is not part of the maintenance exemption because it is "not maintenance" (R.O. ¶299), but he never says what <u>is</u> maintenance, and how that activity differs from "routine custodial maintenance" as that term is applied by the District. What the ALJ appears to have done is to create a distinction without a difference.

In other words, the ALJ has created a theoretical construct that has no bearing upon the essential issue in this case – whether Respondents illegally dredged ditches without a permit, a permit being required because the dredging was not exempt under any provision of law or rule. The ALJ concluded the dredging was illegal, and that is where his Recommended Order should have ended. As explained in the Board's

response to this exception and as previously explained in our response to District Exception 5, the ALJ's findings and conclusions regarding application of the maintenance exemption to routine custodial maintenance must be rejected in their entirety. Specifically, the following findings of facts and conclusions of law are rejected: paragraphs 156, 174 through 177, 196, 199, 200, 202, 203, 256, 269 through 275, 294 through 301, 381, 382, 385, 388, 394, 395, 408 through 418, 511 through 522.

DISTRICT'S EXCEPTION 2

District staff take exception to paragraphs 193, 194, 195, 391 and 392. These findings of fact and conclusions of law relate to the definition of the term "operation." District staff contend that the statements labeled by the ALJ as findings of fact in paragraphs 193, 194, and 195 are not findings of fact, but are conclusions of law regarding the District's rules on the operation of systems. Although a statement is made in the section entitled "Findings of Fact" an agency is not bound by labels affixed by an administrative law judge to findings of fact and conclusions of law. *See*, *Battaglia Properties Ltd. v. Florida Land and Water Adjudicatory Commission*, 629 So.2d 161, 168 (Fla. 5th DCA 1993). The fact that a statement that is factual by nature is labeled a conclusion of law by either the administrative law judge or the agency does not make it so. The agency cannot avoid its obligation to respect the administrative law judge's findings of fact by categorizing a contrary finding of fact as a conclusion of law. *Kinney v. Department of State, Division of Licensing,* 501 So.2d 129 (Fla. 5th DCA 1987). An agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. Section 120.57(1)(j), Fla. Stat.; *Pilsbury v. Department of*

Health and Rehabilitative Services, 1999 WL 606872 (Fla. 2d DCA). When reviewing the District's exception, we must be guided by the true nature of the statement, not the particular appellation affixed to it by either the ALJ or District staff.

Different standards of review attach to findings of fact and conclusions of law. Therefore, the first issue is whether those statements expressed in paragraphs 193, 194, and 195 should be treated as findings of fact or conclusions of law. Paragraph 193 states:

> The term "operation" is not defined in applicable statutes or rules and must be defined by its common and ordinary meaning. The term "operation" has two meanings.

Contrary to the assertion of District staff, whether or not a term is found in the statutes or in the rules is a factual finding. In paragraphs 194 and 195, the ALJ provides two "common and ordinary" definitions of the term "operation." These alternative definitions are also factual by nature. Therefore, to the extent that District staff assert that the paragraphs 193, 194, and 195 are conclusions of law, the exception is rejected.

The ALJ makes a factual determination that the term "operation" is not defined in applicable statutes or rules. This determination is incorrect. "Operation" is defined in paragraph 2.0(kk), APPLICANT'S HANDBOOK: MANAGEMENT AND STORAGE OF SURFACE WATERS ("A.H."), which is incorporated by reference as a rule in Rule 40C-4.091(1)(a), Florida Administrative Code. Paragraph or rule 2.0(kk) defines the terms "operate" and "operations" to mean "to cause or to allow a system to function."

On review of the record, however, this Board finds no competent substantial evidence from which the ALJ's findings may be reasonably inferred. There was no testimony at the hearing that defined the term "operation." The only evidence of record

of the definition of the term is the rule itself. At the hearing the ALJ took judicial notice (official recognition) of the Applicant's Handbook, which as stated above is a rule. (T: ¶18) Therefore, paragraphs 193, 194, and 195 are rejected as not being supported by any competent substantial evidence.

The next issue raised in the District's exception 2 is that the ALJ erred in using the alternative definitions in his conclusions of law, paragraphs 391 and 392. We agree. In paragraph 391, the ALJ concluded that "[p]art of the excavation in 1997 is defined as an operation of NS1 and EW1 for which a permit is required in Section 373.416. The term 'operation' is not defined by statute and must be defined by its plain and ordinary meaning. *Cole Vision,* 688 So. at 410." The second sentence of paragraph 391 is a restatement of finding of fact 193. To the extent that paragraph 391 restates paragraph 193, paragraph 391 is rejected as a finding of fact for the reasons given in our rejection of paragraph 193.

The application of definitions set forth in paragraphs 194 and 195 to the excavation is a legal issue. The application of the definition "operation" as it applies to the instant case is within the substantive jurisdiction of this agency. Because the ALJ applied the wrong definition in paragraphs 391 and 392, the Board rejects paragraphs 391 and 392. In order to prevent any confusion that may occur as a result of the ALJ's misuse of the term "operation," the Board provides the following explanation of the application of the legal term "operation" to the excavation of NS1 and EW1.

After the excavation in 1997 occurred, the newly configured NS1 and EW1 began to function in that it conveyed increases in amounts of water causing changes in hydrologic conditions. The terms "operate" or "operation" are defined at paragraph 2.0

(kk), A.H., to mean "to case or to allow a system to function." Following the excavation the system was allowed to function, creating a new process or way of operating over time. Thus, operation of newly configured NS1 and EW1 occurred, thereby triggering the requirement of a permit under section 373.416, Florida Statutes.

Arguably, the last sentence of paragraph 392 may be construed as a finding of ultimate fact. However, if it is construed as a finding of ultimate fact, it is a fact that is necessarily infused with policy considerations for which this agency has special responsibility. *See, Schrimsher v. School Board of Palm Beach County,* 649 So.2d 856, 682-683 (Fla. 4th DCA 1997)(School board properly disregarded the hearing officer's definition of "incompetence" set forth in the recommended order. The school board was not bound to apply the definition of "incompetency " employed by the hearing officer, and properly substituted its interpretation of the facts for that of the hearing officer.); *see also, McDonald v. Department of Banking and Finance,* 346 So.2d 569 (Fla. 1st DCA 1977), *review denied,* 368 So.2d 1370 (Fla. 1979). That is, this agency has special responsibility for the regulation of the operation of surface water management systems, including the drainage system that is the subject of the underlying proceeding. In context of the Board's explanation, the substitution of this agency's interpretation of the facts as applied to the correct definition of "operation" for the ALJ's misapplication of the definition to the facts is both appropriate and necessary.

DISTRICT'S EXCEPTION 4

District staff take exception to paragraphs 320 and 321. District staff contend that the ALJ mislabeled these statements as findings of fact and that these statements are conclusions of law. Paragraphs 320 and 321 state:

> 320. The unadopted rule modifies and contravenes the specific law implemented in another way. The unadopted rule exempts only the maintenance of "systems." In the statement of criteria, the Memorandum states that work must be done to restore the "ditch system."
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> 321. However, statutory maintenance exemptions are not limited to systems. They apply to individual canals, channels, and drainage ditches. Similarly, Sections 373.413 and 373.416 require permits for works such as individual ditches as well as systems. By limiting the maintenance exemptions to systems, the unadopted rule modifies and contravenes the specific law implemented.

Paragraph 320 contains both a conclusion of law (the first sentence), and findings of fact (the second and third sentences). Paragraph 321 is a conclusion of law.

The application of the maintenance exemption and the determination of what types of activities are "systems" are within the substantive jurisdiction of the District. Pursuant to section 120.57(1)(l), Florida Statutes, the Board may reject or modify the conclusions of law and interpretation of administrative rules over which we have substantive jurisdiction. Therefore, to the extent that statements in paragraphs 320 and 321 are conclusions of law, the Board is free to reject or modify them. For the reasons explained in the Board's response to District's Exception 5, the ALJ improperly considered the issues in the context of section 120.57(1)(e), Florida Statutes, proceeding. For the reasons given in the Board's response to District's Exception 5, paragraphs 320 and 321 are rejected.

Paragraphs 320 and 321 are rejected on additional grounds. The ALJ misunderstands the definition of "system." In paragraph 321, the ALJ states that "Sections 373.413 and 373.416 require permits for works such as individual ditches as well as systems." The definition of "systems" in the District's rules includes individual ditches, canals and other works as well as a combination of such works. Rule 40C-4.021(26), Florida Administrative Code, defines the terms "surface water management system" or "system" as "[a] stormwater management system, dam, impoundment, reservoir, appurtenant work, or works, or any combination thereof . . ." (Emphasis added.) "Works" is defined in rule 40C-4.021(31), Florida Administrative Code, as "all artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, draws water from, drains water into, or is placed in or across waters in the state." District rules define an individual ditch as a work, and a work as a system. Therefore, under District rules, an individual ditch is a system. The ALJ's finding that the alleged unadopted rule exempts the maintenance of "systems" (paragraph 320) is correct although the ALJ misunderstands what was a "system;" however, his conclusion that, the statutory maintenance exemptions are not limited to systems (paragraph 321) is clearly erroneous. Furthermore, the first two sentences in paragraph 320 are not supported by any competent substantial evidence in the record. The ALJ's conclusion of law that "[b]y limiting the maintenance exemptions to systems, the alleged unadopted rule modifies and contravenes the specific law implemented," moreover, is based on an erroneous interpretation of District rules and must be rejected. Therefore, for these additional reasons, paragraphs 320 and 321 are rejected.

In District's Exception 4, District staff suggest a revised conclusion of law paragraph 320). As discussed in our response to District's Exception 5, the Board rejects making any conclusions of law that relate to the section 120.57(1)(e) proceeding because that proceeding was improperly before the ALJ and, by raising the issue for

the first time in the Recommended Order, did not comply with the essential requirements of law.

DISTRICT'S EXCEPTION 6

In its last exception District staff objects to conclusions of law paragraphs 526 through 552, in which the ALJ determined that the District was not a prevailing party in a section 120.57(1)(e), Florida Statutes, proceeding, and stated that the "evidence suggested that the District may have participated in the section 120.57(1)(e), Florida Statutes, proceeding for a frivolous purpose or to needlessly increase the cost of permitting or securing the exemption . . . " (R.O. ¶543), and reserved ruling on the issue of an award of attorneys fees for a subsequent fee hearing. Curiously, the actual recommendation of the ALJ says nothing about the attorneys fee issue, and someone reading the recommendation, which is simply to uphold the District's proposed action in its entirety, might easily conclude that the District was the prevailing party.

We recognize that the Board has no authority to have the "final say on the issue of sanctions imposed against" us. *Department of Health and Rehabilitative Services* v. *S.G.*, 613 So. 2d 1380, 1384 (1st DCA 1993). Nonetheless, we do believe we have authority to address this exception, because if the factual findings and legal conclusions upon which the rationale for imposing such sanctions have no continuing validity, then to allow such an imposition is "clearly erroneous or does not comply with the essential requirements of law." Here, as previously stated we have rejected the ALJ's findings of fact and associated conclusions of law relating to his determination that the Administrative Complaint and Emergency Order were based upon an unadopted rule and that the agency action was therefore subject to review under section 120.57(1)(e),

Florida Statutes. Therefore, there remains no factual basis to support an award of attorneys fees against the District under section 120.57(1)(e), Florida Statutes, and the ALJ's legal conclusions derived therefrom are thus clearly erroneous or do not comply with the essential requirements of law.

Furthermore, the ALJ made no findings of fact regarding liability for attorneys fees, he only made conclusions of law on this issue, concluding as a matter of law that the District was a "'nonprevailing adverse party' in the section 120.57(1)(e), proceeding." (R.O. ¶539) At the same time, however, the ALJ concluded, "Respondents are the nonprevailing adverse party and are not entitled to attorney's fees and costs [Modern, Omni, Hart and Nelson] for that portion of the proceeding concluded pursuant to section 120.57(1), Fla. Stat." (R.O. ¶529) (Emphasis added.) Subsection 120.57(1)(e) is a subsection of section 120.57(1), and therefore all portions of the proceeding were conducted pursuant to section 120.57(1). The ALJ's conclusion, therefore, makes no sense, and contradicts the plain language of sections 120.595 and 120.57, Florida Statutes. Such an interpretation is also contrary to a well settled principle of statutory construction: Statutory phrases are not to be read in isolation, but rather within the context of the entire section. *Acostar v. Richter*, 671 So. 2d 149, 154 (Fla. 1996) also noting that "plain meaning" remains the "polestar of statutory construction." *Id.* at 153.) The ALJ states that a section 120.57(1)(e), Florida Statutes, proceeding is a "separate proceeding conducted pursuant to section 120.57(1) for the purposes of section 120.595(1)(b)." (R.O. ¶531) But if the proceeding is "conducted pursuant to section 120.57(1)," (R.O. ¶531) and Respondents [Modern, Omni, Hart and Nelson] are a "nonprevailing adverse party . . . for that portion of the

proceeding conducted pursuant to Section 120.57(1)," (R.O. ¶529) how can Respondents be both a prevailing and a nonprevailing adverse party in the same proceeding? Even if section 120.57(1)(e), Florida Statutes, is a "separate proceeding," it is still a proceeding "conducted pursuant to section 120.57(1)," as the ALJ repeatedly recognizes. There is, therefore, no legal authority under section 120.595(1) to award attorneys fees to Respondents because the District is not a nonprevailing adverse party in a "proceeding pursuant to Section 120.57(1)." Furthermore, as indicated by the ALJ's recommendation that the Administrative Complaint and the Emergency Order be upheld in their entirety, the District does not fit within the definition of "nonprevailing adverse party" in section 120.595(1)(e)3, Florida Statutes, because the District has not "failed to have substantially changed the outcome of the proposed or final agency action." Obviously, then, Respondents were nonprevailing adverse parties because they did fail to substantially change the outcome of the agency actions.

The ALJ appears to rationalize his contradictory analysis by saying, in essence, that a section 120.57(1)(e) proceeding is really a proceeding conducted pursuant to section 120.56(4), Florida Statutes, when he says that "Section 120.56(4) and 120.57(1)(e) should be read in pari materia." (R.O. ¶534) Under his theory, as a section 120.54(4), Florida Statutes, proceeding, the attorneys fees provisions of section 120.595(4) would then presumably piggy back onto a proceeding under section 120.57(1)(e). Such an analysis, however, would require us to ignore the plain language of the statute. Section 120.56(4)(a) states, "[u]pon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable attorneys fees to petitioner." (Emphasis added.) In contrast,

under section 120.595(1), Florida Statutes, the "final order" can contain an award of attorneys fees, but it must be based on an ALJ's determination in a recommended order of an improper purpose. See, section 120.595(1)(d), Fla. Stat. The ALJ's reliance on section 120.56(4)(a), therefore, is completely misplaced.

The instant proceeding, simply put, is a challenge to agency action. The ALJ's role is to issue a recommended order. If this were a rule challenge the ALJ would have final order authority, and the ALJ would be legally empowered to award attorneys fees as part of that final order. The purpose of section 120.57(1)(e) is to analyze the agency's conduct in the context of a section 120.57(1), proceeding to determine whether the agency has based its action on an unadopted rule. If the ALJ finds that the agency has based its conduct on an unadopted rule, the ALJ makes a determination of validity similar to that in a rule challenge proceeding, and that determination becomes a factor in the ALJ's recommendation as to whether the agency action should be accepted or rejected. Here, while the ALJ never made the ultimate finding as to whether the agency action was "based upon" an unadopted rule, it was not necessary for him to do so, because he concluded with a recommendation that the agency action be upheld in its entirety. There is no factual or legal basis, therefore, for a conclusion that the District was an adverse nonprevailing party.

Furthermore, no Respondent is a "prevailing party" in the section 120.57(1), Florida Statutes, proceeding so as to entitle them to relief under section 120.595(1), Florida Statutes. The ALJ concluded that the District was a "'nonprevailing adverse party' in the Section 120.57(1)(e) proceeding"(R.O. ¶539), but never made the ultimate finding of fact or conclusion of law that the Respondents were a prevailing party. The

closest he comes to making such a conclusion is when the says, "[i]t does not necessarily follow, however, that Respondents are the 'prevailing party' in the Section 120.57(1)(e) proceeding." (R.O. ¶535) Unfortunately, the ALJ never specifically tells us what does follow on this issue, other than to say that since Respondents are not a "nonprevailing adverse party," in the "Section 120.57(1)(e) proceeding," the ALJ then concludes that a party who is not a "nonprevailing adverse party" must therefore be a "prevailing party." (R.O. ¶¶537, 538)

What the statute specifically says, however, is that attorneys fees are available to a prevailing party in a section 120.57(1) proceeding. While the statute does not define "prevailing party," it is not necessary to attempt to make a double negative analysis of "nonprevailing adverse party" to determine what the term "prevailing party" means. The leading case interpreting "prevailing party" is *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807 (Fla. 1992), in which the Florida Supreme Court adopted the U.S. Supreme Court's test – – "whether the party succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.* at 809-810. The "suit" in this case has as it origin the Administrative Complaint and the Emergency Order, and the ALJ recommended that all ~~of the~~ relief sought by the District in both actions be granted. The relief sought by Respondents was for the District not to render as final agency action the Emergency Order and the Administrative Complaint, and the ALJ recommended none of that relief. The ALJ recommended a determination under section 120.57(1)(e), but even if he was correct that his determination was proper in this case, all involved in this case have recognized that Respondents did not specifically seek relief under section 120.57(1)(e). Therefore the section 120.57(1)(e)

determination was not a "benefit . . . sought [by Respondents] in bringing suit," it was simply relief to which the ALJ nonetheless thought Respondents entitled. The ALJ cannot have it both ways. The ALJ cannot say that a section 120.57(1)(e) proceeding can arise out of a "blue spark" without being pled, but then say that Respondents could be entitled to attorney fees because that was a benefit they sought in bringing suit – particularly where the benefit did not affect the outcome. A review of the record as a whole, therefore, manifestly demonstrates that there is no factual or legal basis for a determination that Respondents are a prevailing party in the proceeding before us. For this reason alone, the ALJ's conclusion to the contrary is clearly erroneous or does not comply with the essential requirements of law, and must be rejected.

As a final note, the Board takes strong exception to the ALJ's "suggestion" that the District participated in this proceeding for a frivolous or other improper purpose. (R.O. ¶543) Even assuming the section 120.57(1)(e) proceeding operates separately from the 120.57(1) proceeding, even assuming that the section 120.57(1)(e) proceeding is really a rule challenge under section 120.56(4) and not a part of a challenge to agency action under section 120.57(1), and even assuming the correctness of the ALJ's ruling that the District has been operating under an invalid unwritten rule, the record is still absolutely devoid of any evidence that "the District had actual knowledge that the underlying statement had been rejected in all respects by the district court as lacking in any authority." While denominated as a conclusion of law, the ALJ's statement, that "the District had actual knowledge," is a finding of fact. It is clear from the context of the ALJ's ruling that any determination of improper purpose would have to be based upon such "actual knowledge."

What the record and the Recommended Order show is that the ALJ strongly disagrees with the District's interpretation and application of *Deseret*. The ALJ acknowledges both that he and the District "are bound by" the decision in *Deseret*, (R.O. ¶414), and that the District has cited the circuit court decision and numerous administrative orders to support the continued validity of its interpretation. (R.O. ¶511) Nevertheless, the ALJ states that "the District inexplicably clings to one ruling by a circuit court" and "has constructive knowledge of the decision in *SAVE*" purportedly overruling the prior decision. (R.O. ¶519) As indicated by the Board's response to District's Exception 3, the ALJ and the District continue to disagree over *Deseret*. The ALJ made a major leap, however, to conclude from the existence of the legal disagreement that the District therefore has "actual knowledge" that it is wrongly interpreting *Deseret*, particularly given that the District was a prevailing party in *SAVE* and therefore could have reasonably concluded that the interpretation to which the District continues to "inexplicably cling" appears to have been upheld, not reversed, in *SAVE*. For the sake of argument, even if the District has been wrong all these years in its interpretation of *Deseret*, there is absolutely no competent substantial evidence of record to support any findings or conclusions that the District had "actual knowledge" of its misinterpretation – at least not before the ALJ made his precedent setting determination that *SAVE* overruled the routine maintenance exception interpretation that the District had been applying since *Deseret*. There is a clear legal distinction between "constructive knowledge" and "actual knowledge." As shown most recently by *Mogavero v. State of Florida*, 1999 Lexis 15552 (4th DCA August 25, 1999), it can be considered legal error for a judge to instruct a jury that constructive knowledge is the

same as actual knowledge. Ironically, the first time the District really did obtain "actual knowledge" that it may be participating in a section 120.57(1)(e) proceeding for an improper purpose, because of its misinterpretation of *Deseret,* is when the District discovered, for the first time upon reading the ALJ's Recommended Order, that it had been participating in a section 120.57(1)(e) proceeding. Due to the lack of competent substantial evidence to support the ALJ's "suggestion" of frivolous purpose, therefore, the ALJ's conclusion regarding the District's potential liability for attorneys fees must be rejected.

At any rate the *SAVE* court unmistakably and expressly affirmed the District's *Deseret* interpretation when it held that "the District's interpretation of the language of subsection 403.813(2)(g) . . . [to authorize the exemption] is not clearly erroneous." *Id.* at 1202. Had the ALJ read *SAVE* correctly, he would not have determined that the District's reliance on *Deseret* is flawed, much less determined that reliance is so flawed that adherence to the case could only be for an improper purpose. *See Department of Insurance v. Campos*, 17 FALR, 1229, 1232 (DOAH October 18th, 1994) ("Department did not have an 'improper purpose' . . . [because it] had a reasonably clear legal justification for issuing the administrative complaint").

District staff also objects to the attorneys fee ruling because the matter was not properly pled. Since the Respondents never pled the existence of a section 120.57(1)(e) determination as part of the Administrative Complaint and Emergency Order cases, it is obvious that they did not plead a claim for attorneys fees for such a determination. They did make an *ore tenus* motion for attorneys fees on the last day of the consolidated order and rule challenge proceedings. As District staff points out in its

exceptions, that motion was made specifically for the rule challenge proceeding,[14] and after the record was closed in the section 120.57 proceedings.[15]

As with the ALJ's decision to allow the section 120.57(1)(e) determination to occur absent any pleadings or other argument, we are extremely troubled by the ALJ's apparent lack of consideration towards the Board in terms of any due process rights it might have to be aware that this matter was at issue prior to realization brought about by reading the Recommended Order. The Board is uncertain of its legal authority to overrule the ALJ's decision to consider the *ore tenus* motion sufficient to constitute a request for attorneys fees on the section 120.57(1)(e) determination. Nonetheless, to the extent we have such authority as with the determination issue, we also accept the exception on this ground as being clearly erroneous or not in compliance with essential requirements of law.

RULING ON RESPONDENTS' EXCEPTIONS

RESPONDENTS' EXCEPTION 1:

Respondents take exception to part of paragraph 22. In this finding of fact, the ALJ stated that Modern-3 is bounded on the north by the county line. The Board has determined from a review of the entire record that there is no evidence in the record upon which to base this finding. Therefore, this finding is not supported by any

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[14] Respondents' counsel raised the attorneys fees issue by stating, "I want to make sure that we've preserved our right to seek attorneys fees in the proposed final order." (10/28/98 T-394) (Emphasis added.) Respondents Proposed Recommended Order does request that the ALJ reserve ruling on attorneys fees and costs, (Respondents PRO p. 90) but says nothing about the basis for such reservation.

competent substantial evidence from which the finding could reasonably be inferred. Accordingly, paragraph 22 is modified by striking the finding that Modern-3 is bounded "on the north by the county line". The Board's acceptance of Respondent's Exception 1 and the modification of paragraph 22 does not alter the outcome of this proceeding.

RESPONDENTS' EXCEPTION 2:

Respondents take exception to part of paragraph 31 wherein the ALJ stated that the Titusville Farm is bounded on the west by the St. Johns River. The Board has reviewed the entire record and is itself uncertain as to the western boundary of the Titusville Farm. However, Respondent's exhibit no. 65 and the District's exhibit no. 21 may be interpreted to support the finding that the Titusville Farm is, at least in part, bounded on the west by the St. Johns River. These exhibits provide competent and substantial evidence from which the ALJ's finding could reasonably be inferred. Therefore, Respondent's exception is rejected. The Board also makes note that this finding, correct or incorrect, does not affect the outcome of this proceeding. Therefore, assuming arguendo, that the ALJ is in error, his is harmless error. On this basis, the exception may also be rejected.

RESPONDENTS' EXCEPTION 3:

Respondents take exception to part of paragraph 33 wherein the ALJ determined that "[t]he original design for the Titusville Farm called for a series of parallel east-west canals approximately .25 miles apart on quarter section lines." Respondents argue that the canals were dug in .5 mile intervals. District staff as stated in its Response to

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[15] This is shown, for example, by the fact that the ALJ that day also denied Respondents *ore tenus* request to reopen the section 120.57 proceeding. (October 28, 999, T-399)

Exceptions, agrees with Respondents' Exception 3. Intervenor's exhibit no. 13 and Modern's exhibit no. 25 show that the original design for the Titusville Farm called for a series of parallel east-west canals on quarter section lines, 0.5 miles apart. Absent from the record in this proceeding is any competent substantial evidence from which a finding that the quarter section lines were located .25 miles apart may reasonably be inferred. Therefore, finding of fact 33 is modified in part to provide that "[t]he original design for Titusville Farm called for a series of parallel east-west canals on quarter section lines." The Board's modification of paragraph 33 does not later the outcome of this proceeding.

RESPONDENTS' EXCEPTION 4:

Respondents take exception to paragraph 41. In this finding, the ALJ stated that the Refuge extends to the St. Johns River. Respondents contend that the Refuge is not bounded by the St. Johns River. Respondents failed to specifically cite to the record to support this contention. Respondents do not provide any record evidence evincing the western boundary of the Refuge. There exists no single exhibit or testimony that demonstrates the exact boundary of Refuge. From the record it is difficult for the Board to determine the exact boundary of the Refuge. However, after reviewing the entire record, particularly District exhibit nos. 20 and 21 and Respondents exhibit no. 64, the ALJ could reasonably conclude that the Refuge was bounded by the St. Johns River. Therefore, this finding is supported by competent and substantial evidence. See, District exhibit nos. 20 and 21, and Respondents exhibit no. 64. Accordingly, Respondents' exception 4 is rejected.

RESPONDENTS' EXCEPTION 5:

Respondents take exception to part of paragraph 47. In the exception, Respondents dispute the ALJ's finding that (1) the Refuge provides a habitat for species of special concern to the State, and (2) the Refuge is one of the most important breeding areas in the country for the black rail. Respondents argue that there is no evidence in the record regarding state listed Species of Special concern, and that the record does not support the finding that the Refuge is one of the most important breeding areas in the country for the black rail.

The ALJ made a finding that "[t]he Refuge provides a habitat for species of special concern to both state and federal governments. "Mr. Hight, the Refuge Manager, testified that one of the purposes of the Refuge is "to provide habitat protection for those other species that are threatened and endangered," (T: 735), and to manage for species "termed species of special concern." (T:735) The witness did not differentiate between the state and federal governments. In addition, the Refuge fish and wildlife biologist, Mark Epstein testified that "[t]he affect of the water level declines extended into the wet prairie or prairie wetland habitat and that habitat also becomes much drier so there's an influence on species of special concern by the state and federal agencies like the black rail that use that habitat. This is one of the most important areas in the county for that species." (T: 718) Mr. Epstein then testified that the black rail breed in this area. In response to the question "Would you say it's an important breeding ground for the black rail?, " Mr. Epstein answered "absolutely." (T: 719) In the context of the line of questions asked and answered by Mr. Hight and Mr. Epstein, the statements in paragraph 47 may reasonably be inferred. The testimony of

Hight (T: 734-336) and Epstein (T: 718-721), as well as District exhibit no. 68 provide competent substantial evidence that support this finding. Therefore, Respondents' exception 5 is rejected.

RESPONDENTS' EXCEPTION 6:

Respondents take exception to paragraph 60. Respondents argument is two-fold. First, this finding contradicts paragraph 273, and second, the ALJ has accepted those portions of the McCrone sketch which support his finding, but ignores notations on this same exhibit. Respondents fail to identify by exhibit number of the exhibit to which they refer. There is no exhibit in the record labeled the "McCrone sketch"." However, the Board believes Respondents are referring to District exhibit no. 7.

The Board is not free to weigh the evidence or to otherwise interpret the evidence to fit an ultimate conclusion, but is limited to determining whether particular findings of fact are based upon any competent substantial evidence or whether proceedings in which findings were based complied with essential requirements of law. *Goin v. Commission on Ethics*, 658 So.2d 1131, 1139 (Fla. 1st DCA 1995); *Heifetz v. Department of Business Regulation,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Accordingly, the Board will not weigh the evidence presented in this proceeding and will not substitute its findings of fact for the findings of fact of the ALJ. In this exception, Respondents urge the Board to make a determination that this finding contradicts another, not that the finding is not based upon competent substantial evidence. The Board will limit its inquiry to the determination of whether the finding is based upon any competent substantial evidence or that proceedings in which this finding was based did not comply with essential requirements of law. The Board notes that if any conflict with

paragraph 273 exists, this conflict has been resolved by the rejection of paragraph 273 for the reasons given in our response to District's Exception 3.

Paragraph 60 essentially agrees with the testimony of Ralph Brown. Mr. Brown testified that NSI north of Marsh 1" was dry and heavily vegetated with spartina." (T:815) The testimony of Mr. Brown at T: 819-821 also supports this finding.

It is interesting to note that Respondents did not find any contradiction with paragraph 55 wherein the ALJ determined, in part, that "[b]efore the excavation in January 1997, there was no water connection from EW1 to NS1." Respondents did not find paragraph 55 in error. The record provides competent substantial evidence from which paragraph 60 may reasonably be inferred. (Brown T:815, 819- 821; District exhibit nos. 60-H, 60-G). Therefore, Respondents' exception 6 is rejected.

RESPONDENTS' EXCEPTION 7:

Respondents take exception to part of paragraph 62. In this exception, Respondents dispute the ALJ's finding that "[t]he berm on the west side of NS-1 north of Marsh-1 was one to two feet high and three to five feet wide." Additionally, Respondents dispute the ALJ's finding that south of Marsh-1 the berm was slightly higher. Respondents contend that the berm was much wider than three to five feet along its entire length and considerably higher south of Marsh-1. The record contains competent substantial evidence from which paragraph 62 may reasonably be inferred. (McConnell, T: 109; Reiber, T: 645; and Brown, T: 839, 841).

Respondents cite to other testimony to support their contention. However, it is not within the Board's permissible authority to review both sides of the issue and select, in this final order, the position that simply appears more credible in its judgment. *Koltay*

v. Division of General Regulation, Department of Business Regulation, 374 So.2d 1386 (Fla. 2d DCA 1979). Furthermore, the Board is not authorized to reweigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit a desired ultimate conclusion; rather the Board is limited to determining whether competent substantial evidence exists upon which the finding may reasonably be inferred. *Bay County School Board v. Bryan*, 679 So.2d 1246 (Fla. 1st DCA 1996), *rehearing denied*, (October 16, 1996); *Heifetz v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 475 So.2d 1277 (Fla. 1st DCA 1985); *Glover v. Sanford Child Care, Inc.*, 429 So.2d 91 (Fla. 5th DCA 1983). Essentially, Respondents ask the Board to weigh the evidence, judge the credibility of witnesses, and interpret the evidence. This Board is unwilling to do so. Respondents' exception 7 is rejected.

RESPONDENTS' EXCEPTION 8:

Respondents take exception to part of paragraph 69. In the exception, Respondents dispute the ALJ's finding that the bottom elevations in NS1 north of EW1 are lower than the bottom elevations elsewhere in NS1. The testimony of Mr. Elledge (T: 331-332) and Respondents' exhibit no. 2 provide competent substantial evidence that supports the ALJ's paragraph 69. Therefore, Respondents' exception 8 is rejected.

RESPONDENTS' EXCEPTION 9:

Respondents take exception to paragraph 70. In this exception Respondents extensively reargue their case and seek to have the Board reweigh evidence presented at the hearing. Much of Respondents' argument is irrelevant to this finding. Apparently, Respondents request that the Board reject this finding and substitute a new finding

favorable to them. As stated before, the Board does not have the authority to reweigh the evidence. *Heifetz, 475 So.2d at 1281-1282.* Accordingly, the Board will not reweigh the evidence presented at the administrative proceeding. Upon review of the entire record, this Board concludes that competent substantial evidence is present in the record (Elledge, T: 332) to support this finding of fact. Therefore, Respondents' exception 9 is rejected.

RESPONDENTS' EXCEPTION 10:

Respondents take exception to paragraph 102. In the exception, Respondents simply refer to their exception to paragraph 255. In their exception to paragraph 255, Respondents argue that the ALJ's finding is in direct conflict with paragraph 102. Respondents point out that in paragraph 102, the ALJ stated that Respondents filled 0.5 acre of wetlands and in paragraph 255, the ALJ stated that Respondents filled 1.5 acres of wetlands. Respondents argue further that the material excavated from the ditch was placed on a pre-existing spoil bank located along the west side of the ditch, not within wetlands as stated in paragraphs 102 and 255. The record reflects that the District initially estimated that Modern caused spoil material to be placed in approximately 0.5 of an acre of wetlands. (District Exhibit no. 11; Reiber, T: 646-649). However, evidence in the record also shows that the initial estimate was a quick, conservative estimate, and upon further investigation, the District determined that spoil material was placed into approximately 1.5 acres of wetlands. (Reiber, T: 627-658, 664, 677-683, 693-694; District exhibit no. 3). There is competent substantial evidence to support the ALJ's finding that Modern filled 1.5 acres of wetlands, not 0.5 acre of wetlands (Reiber, T: 627-658, 664, 677-683, 693-694; District exhibit nos. 3, 9, 49B,

60A-E, 66A and B, and 67). The Board finds competent substantial evidence in the record to support the ALJ's finding that "[a]fter excavation, a large spoil pile existed on the west bank of NS1" and that Modern filled wetlands. However, the Board does not find any competent substantial evidence limiting the amount of fill to approximately one-half acre of wetlands. Therefore, paragraph 102 is modified by striking the second sentence. The modification of paragraph 102 does not change the outcome of this proceeding.

RESPONDENTS' EXCEPTION 11:

Respondents take exception to paragraph 163. Paragraph 163 provides: "In 1979, intermittent water appeared in NS1 south of EW1. In 1980, water flowed freely in NS1 north of EW1, but no water flowed in NS1 south of EW1. In the exception, Respondents seek to reweigh the evidence presented in the case below. Respondents cite to portions of the record in support of their argument. For the most part, Respondents references address the condition of NS1 at times other than 1979 and 1980. Nevertheless, upon review of the entire record, the Board finds competent substantial evidence upon which paragraph 163 may be reasonably inferred. In fact, the evidence provided by the testimony of Respondents' witness, Robert Sprinkle, support this finding. (Sprinkle, T: 966 and 968-969; Respondents' composite exhibit nos. 31 and 32.) Therefore, Respondents' exception 11 is rejected.

RESPONDENTS' EXCEPTION 12:

Respondents take exception to part of paragraph 176. District staff also took exception to this statement in District's Exception 3. In the exception, Respondents contend that the ALJ's statement is not a finding of fact. Whether or not the literal

meaning of the terms "original design specifications" and "original condition" are not coterminous is a factual matter not a legal one. Respondents also state in their exception that if the statement in paragraph 176 is a finding of fact, there is no record support for this statement.[16] Upon review of the entire record, the Board agrees that there is no competent substantial evidence in the record from which this finding may be inferred. For the lack of competent substantial evidence in the record to support this finding and for the reasons stated in the Board's response to District's Exception 3, paragraph 176 is rejected.

RESPONDENTS' EXCEPTION 13:

Respondents take exception to part of paragraph 179. In the exception, Respondents dispute the ALJ's finding that the evidence does not establish the original design specifications for NS1 and EW1 or the larger system, including the invert elevation, bottom width, side slopes, top width, ditch bottom profile or slope, hydraulic capacity, or hydrologic function. To adopt Respondents exception would require this Board to reweigh the evidence and judge the credibility of witnesses. As stated previously, this Board will not reweigh the evidence or judge the credibility of witnesses. Respondents argue that the newspaper articles they proffered in the hearing establish the original design specifications for the ditches. We conclude from finding of fact 179 and 182 that the ALJ rejected this argument at the hearing. Furthermore, we do not find that the newspaper articles are competent substantial evidence of the original design specifications. However, there is competent substantial evidence in the record

[16] In Respondent's Exception 12, Respondents allege that the term "original condition" does not appear anywhere in the record. Respondents are mistaken. The term appears during the

to support the ALJ's finding. (Elledge, T: 1543- 1549, 1556; Sprinkle, T: 910, 1226-1227; Respondents exhibit no. 19) Therefore, Respondents' exception 13 is rejected.

RESPONDENTS' EXCEPTION 14:

Respondents take exception to paragraph 181. In the exception, Respondents dispute the ALJ's finding that (1) survey information is not available for the original construction of NS1, ES1 and the larger system; and (2) information contained in more recent surveys does not show that NS1 and EW1 were originally designed to a depth of five to seven feet as Respondents contend. Like Respondents' Exception 13, to adopt Respondents' Exception 14 would require the Board to reweigh the evidence and judge the credibility of witnesses. The record contains competent substantial evidence to support the ALJ's finding. (Elledge, T: 1545-1547; Sprinkle, T: 1171-1172, 1174-1178; Respondents exhibit no. 2 and District exhibit nos. 7, 14, 16, and 17. Therefore, Respondents' exception 14 is rejected.

RESPONDENTS' EXCEPTION 15:

Respondents take exception to paragraph 182. In the exception, Respondents dispute the ALJ's finding that certain newspaper articles do not provide sufficient detail to establish the original design specifications for NS1, EW1, and the larger system. In this exception, Respondents reargue the evidence presented in the proceeding below. As stated in our response to Respondents' Exception 13, the newspaper articles do not constitute competent substantial evidence of the original design specifications of NSI, EWI, and the larger system. There is competent substantial evidence in the record to

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testimony of Mr. Elledge where Mr. Elledge stated: "After means to extend a dam or works beyond maintenance in its original condition. (Elledge, T:359, see also T:360)

support the ALJ's finding. (Elledge, T: 1543- 1545; Sprinkle, T: 1226-1227; Respondents exhibit no. 19) Therefore, Respondents' exception 15 is rejected.

RESPONDENTS' EXCEPTION 16:

Respondents take exception to paragraph 184. In this exception, Respondents seek to substitute the ALJ's finding that "[t]he only evidence of the 'original condition' of NS1 and EW1 before the excavation is evidence of the condition of each [ditch] on the date of a particular piece of evidence. The evidence shows that the 'original condition' of NS1 and EW1 between 1951 and the date of excavation was seriously degraded from the condition to which they were restored after the excavation" with Respondents' finding that the depth and width of concrete culverts located at SR 50 in ditch NS-1 and in EW-1 at its intersection with I-95 conclusively indicate the depth and width of the ditches. Respondents' also refer to their argument in their exception to paragraph 179 (Respondents' Exception 13). Respondents' exception is rejected because there is competent substantial evidence in the record from which paragraph 184 may be inferred. Elledge at 370; Dambek at 508-526, 530-531, 547-548, 562-564, 566-591;Sprinkle at 950-952, 958, 962-963, 966, 968-969, 971, 975, 980-982, 985-986, 995-996, 999, 1001-1007, 1035; District exhibit nos. 28, 29A-D, 30, 31A&B, 32A&B, 33, 34, 35A-C, 36B-D, 37A&B, 38, 39B-D, 40, 41,42A&B, 43, 44A&B, 45, 46A&B, 47, 48A&B, 49A-C, 50B, 51A&B, 53A&C, 54A, 55A-C, 56A&B; Respondents exhibit nos. 27, 31, 32, 33, 34A-C, 35, 36, 39, 40. Therefore, Respondents' exception 16 is rejected.

RESPONDENTS' EXCEPTION 17:

Respondents take exception to paragraph 200. Respondents assert that there is no evidence in the record to support the ALJ's misuse of the terms "maintenance" and "alteration." District staff also takes exception to this finding of fact. The Board rejected paragraph 200 in our response to the District's Exception 3. The Board is not required to respond to exceptions which are cumulative, subordinate, immaterial, or unnecessary for the determination of the proceeding. Health Care Management, Inc. v. Dept. of Health and Rehabilitative Services, 479 So.2d 193 (Fla. 1st DCA 1985). Because the Board has rejected this finding, as explained in our response to District's Exception 3, it is unnecessary to address Respondents' exception 17.

RESPONDENTS' EXCEPTION 18:

Respondents take exception to the first sentence of paragraph 207. The first sentence of paragraph 207 states: "[t]he District told attendees at the meeting that the District would clean out most of the vegetation in the IRCC." The record is vacant of competent substantial evidence from which this finding may be inferred. (Elledge, T: 382-384, 401; M. Moehle; T: 1295-1317, 1337. Therefore, paragraph 207 is modified by deleting the first sentence. The modification of paragraph 207 does not alter the outcome of this proceeding.

RESPONDENTS' EXCEPTION 19:

Respondents take exception to paragraph 215. In the exception, Respondents attempt to have this Board add an additional finding that is not stated in paragraph 215. Paragraph 215 provides :

> "In determining whether a particular piece of property contains wetlands, the District relies on a statewide wetland delineation rule described in Section 373.421 and Rule 62.340. The District considers vegetation, soils, and hydrology to delineate wetlands. The District utilized this delineation rule when it issued permits for Cracker Barrel-1, Cracker Barrel-2, and Lowe's."

Respondents' exception does not dispute this finding. Respondents seek to add an additional finding that the delineation method was not utilized in the District's determination that spoil material was deposited in wetlands. Section 120.57(1), Florida Statutes, does not give this agency the authority to make new findings of fact. Even if this Board had the permissive authority to make additional findings of fact, there is no competent substantial evidence to support Respondents' contention. Evidence provided by the testimony of Michelle Reiber (T: 617-621, 628-636) provides competent substantial evidence from which paragraph 215 may reasonably be inferred. Therefore, Respondents' exception is rejected.

RESPONDENTS' EXCEPTION 20:

Respondents take exception to finding of fact 229. Respondents contend that the ALJ ruled that the evidence underlying this finding of fact was irrelevant and inadmissible. The testimony at the proceeding that supports this finding was elicited by Respondents' attorney. During the proceeding, Respondents argued that testimony regarding the Dr. Boussard matter was relevant. Furthermore, Respondents inaccurately portray the ALJ's ruling. While the ALJ sustained an objection by FDOT to a line of questions regarding the District's pursuit of an enforcement action via an administrative complaint against Dr. Broussard, no objection was made to the facts at issue in paragraph 229. This finding is supported by competent substantial evidence (Elledge, T: 437-438). Assuming arguendo that the ALJ erred in admitting any

testimony relating to the Dr. Broussard matter because that matter was not relevant to the issues in the instant case, this finding does not change the outcome of the case and would therefore be harmless error. Therefore, Respondents' exception 20 is rejected.

RESPONDENTS' EXCEPTION 21:

Respondents take exception to paragraph 231. In this exception, Respondents reargue their case. Respondents argue that the District had prior knowledge of the planned ditch maintenance and that the activity would lower water levels. Respondents' argument is not on point. The ALJ finding of fact addresses the issue of when the District first became aware of the significance of the impacts of the excavation. To rule in favor of Respondents, this Board would be required to reweigh the evidence, judge the credibility of witnesses reject the ALJ's finding, and make a new finding. The Board does not have the authority to reweigh the evidence, to judge the credibility of witnesses or make new findings of fact. *Heifetz*, 475 So.2d at 1281-1282. Moreover, there is competent substantial evidence in the record to support paragraph 231. (Elledge, T: 295, 387-388, 479; Hight, T: 737-738; District exhibit no. 2). If the record contains competent substantial evidence from which the finding may reasonably be inferred, the Board cannot reject the finding. *Schrimsher*, 694 So.2d at 861. Therefore, Respondents' exception 21 is rejected.

RESPONDENTS' EXCEPTION 22:

Respondents take exception to part of paragraph 234. In this exception, Respondents contend that the ALJ erred in finding that "[t]he District has not issued an emergency order prior to the excavation of NS1 and EW1 because an emergency order was not the most appropriate solution in other cases." Respondents are correct, there

is no competent substantial evidence in the record from which this finding may reasonably be inferred. The record clearly establishes that the District has issued emergency orders prior to the excavation of NS1 and EW1. (Elledge, T: 467-468). However, the emergency order that is the subject of this proceeding is the first emergency order issued to protect wetlands; prior emergency orders were issued in response to flooding. (Elledge, T: 467-468). There is no evidence that supports the first sentence of paragraph 234. The remainder of paragraph 234 is supported by competent substantial evidence. (Elledge, T: 485). Therefore, paragraph 234 is modified by deleting the first sentence. The Board's modification of finding of fact 234 does not change the outcome of this proceeding.

Although Respondents are correct that there is no competent substantial evidence to support the first sentence of that finding, the Board rejects the first sentence based on our review of the record. The Board does not adopt Respondents reasoning in support of their exception.

RESPONDENTS' EXCEPTION 23:

Respondents take exception to paragraph 255. In paragraph 255, the ALJ determined, in part, that Modern did not place the excavated spoil material on an upland spoil site; rather, Modern placed the spoil material in approximately 1.5 acres of wetlands. Respondents disagree. Respondents argue that "[m]aterial excavated from the ditch was placed on the pre-existing spoil bank . . ." Additionally, Respondents assert that this finding conflicts with paragraph 102, and that the District failed to implement the wetland delineation methodology discussed in paragraph 215. As for the conflict with paragraph 102, the Board agrees, as stated previously, that paragraph 102,

in part, was not supported by competent substantial evidence. However, there is competent substantial evidence in the record from which paragraph 255 may be inferred. (Reiber, T: 627-658, 664, 677-683, 693-694; District exhibit nos. 3, 9, 49B, 60A-E, 66A&B, and 67). To rule in favor of Respondents, this Board would be required to reweigh the evidence and judge the credibility of witnesses. The Board does not have the authority to rewiegh the evidence or to judge the credibility of witnesses. *Perdue v. TJ Palm Associates, Limited*, 24 Fla.L.Weekly D 1399, 1999 WL 393464 (Fla. 4th DCA 1999), *Heifetz*, 475 So.2d at 1281-1282. Therefore, Respondents' exception 23 is rejected.

RESPONDENTS' EXCEPTION 24:

Respondents take exception to paragraph 256. District staff also takes exception to this finding of fact. For the reasons given in the Board's response to District Exception 3, paragraph 256 is rejected.

In Respondent's Exception 24, Respondents argue that the evidence establishes the original design specification. The Board finds no competent substantial evidence in the record to support Respondents' argument. The newspaper accounts and aerial photographs relied on by Respondents do not establish the original design specification of NS1 and EW1. Additionally, the construction of the culverts under I-95 and SR-50 do not establish the original design specifications of either of the ditches. Although the Board rejects paragraph 256, the Board does not adopt Respondents' argument in this exception.

RESPONDENTS' EXCEPTION 25:

Respondents take exception to paragraph 258. Respondents argue that there is no record evidence to support this finding. To the contrary, this Board finds competent substantial evidence in the record from which this finding may reasonably be inferred. (Elledge, T: 327-329; Cofield, T: 158; Brown, T: 815-816, 821; McConnell, T: 135; and District exhibit nos. 6, 7, 8, and 19). Therefore, Respondents' exception 25 is rejected.

RESPONDENTS' EXCEPTION 26:

Respondents take exception to part of paragraph 259. Respondents argue that there is no record evidence to support the finding that spoil material was placed in adjacent waters. Additionally, in support of this exception, Respondents refer the Board to their exception to finding of fact 255. However, the Board finds competent substantial evidence in the record from which this finding may reasonably be inferred. (Elledge, T: 339-341; 821; D. McConnell, T: 105-116). Therefore, Respondents' exception 26 is rejected.

RESPONDENTS' EXCEPTION 27:

Respondents take exception to paragraph 261. Respondents argue that this finding is not relevant to determining the issues and the remedial action. Paragraph 261 actually consists of two findings. The first finding is that the additional provisions in Section 403.813(2)(f) did not take effect until October 1997. The second finding is that the excavation of NS1 and EW1 occurred in January 1997. This Board finds that the second part of this finding is supported by competent substantial evidence. (D. McConnell, T: 108-131; R. McConnell, T: 133-135). As for the first sentence in the finding, Respondents fail to explain why this finding is not relevant to this proceeding.

Assuming arguendo that the first sentence is not relevant, this finding does not change the outcome of the proceeding and is harmless error. Therefore, Respondents' exception 27 is rejected.

RESPONDENTS' EXCEPTION 28:

Respondents take exception to paragraph 264. Respondents assert that there is no record evidence to this finding. Respondents take exception to the context within which the ALJ uses the term "previous," and again argues that the activity did not exceed the original design of the ditches therefore, the activity could not have had significant impacts. Mr. Elledge and Ms. Reiber testified extensively as to the significant impacts to the excavation site and to the Refuge caused by Modern's excavation NS1 and EW1. The Board finds competent substantial evidence in the record from which paragraph 264 may be reasonably inferred. (Elledge, T: 301, 307-308; Reiber T: 640-659). Therefore, Respondents' exception 28 is rejected.

RESPONDENTS' EXCEPTION 29:

Respondents take exception to paragraph 276. Respondents argue that because the ALJ makes no finding as to what were the original design specifications, there is no record evidence to support a finding that the dredging exceeded the original design specifications. The Board disagrees. There is competent substantial evidence in the record from which this finding may reasonably be inferred. (Elledge, T: 362, 370-371; Dambek, T: 530-531, 5476-548, 562-566; Reiber, T: 646-647, District exhibit nos. 28, 29A-D, 60-A, 60-C, 60-D). Therefore, Respondents' exception 29 is rejected.

RESPONDENTS' EXCEPTION 30:

Respondents take exception to part of finding of fact 348. In its exception Respondents merely state: "See previous exceptions." It is not the responsibility of this Board to guess at which exception and to what degree Respondents object to this finding. Respondents' exception is vague and ambiguous. Therefore, Respondents' exception is rejected. However, District staff also take exception to this finding. See District's exception no. 5.

RESPONDENTS' EXCEPTION 31:

Respondents take exception to paragraph 364. In this exception Respondents reargue their interpretation of the facts of this case as a basis for their conclusion that Respondents' substantial interests are impaired by the District's action. Respondents assert certain common law and expressed easement rights to maintain existing drainage ditches on their property. Respondents cite caselaw construing property easements to support their argument. However, the ALJ correctly concluded in paragraph 403 that the ALJ did not have jurisdiction to determine the existence, nature, and extent of Respondents' property rights. Respondents did not take exception to paragraph 403.

The ALJ expressly rejects the arguments of Respondents in the first sentence of paragraph 404 wherein the ALJ concludes "[a]ssuming arguendo that Respondents possess the easements that they contend are being impaired, the regulatory framework of permits and exemption authorized in Chapter 373 and Chapter 403 does not impair the right of Respondents to use their easements to capture, discharge, and use water

for purposes permitted by law, within the meaning of Section 373.406(1)." Respondents did not take exception to paragraph 404.

In paragraphs 404 through 407, the ALJ determined that the regulations imposed on Respondents are no more severe or strict than is reasonably necessary to achieve the purposes of a valid state police power to preserve and protect the environment. The ALJ also concluded that Respondents retained whatever rights they enjoyed in the drainage ditches and are not prevented from enjoying those rights in a manner compatible with applicable statutes and regulations. In paragraphs 404, 405, 406, and 407, the ALJ rejects the argument made in Respondents exception 31. Respondents did not take exception to paragraphs 404 through 407. Respondents also raise the issue of penalties in this exception. The issue of penalties is not at issue in this proceeding. (District exhibit nos. 2 and 11). Based on the foregoing, Respondents' exception 31 is rejected.

RESPONDENTS' EXCEPTION 32:

Respondents take exception to paragraph 365. Although Respondents agree that the administrative complaint does not propose a fine, Respondents take exception to this conclusion of law because "fines have always been threatened and discussed and were required by the District in all pre-hearing settlement negotiations." Respondents fail to cite any support for this exception. Furthermore, there is no legal or factual support for Respondents' exception.

The ALJ is correct under Section 373.129, Florida Statutes, when he states that the Board must bring an action in a court of competent jurisdiction in order to recover a

civil penalty for the violations described in the Administrative Complaint.[17] Section 373.430(2), Florida Statutes, provides that "[w]hoever commits a violation specified in [Section 373.430(1)] is liable . . . for civil penalties as provided in s. 373.129." Section 373.430(6), Florida Statutes, states that "[i]t is the intent of the Legislature that the civil penalties imposed by the court be of such amount as to ensure immediate and continued compliance with this section. (Emphasis added.) There is no provision of law for rule that gives the Board or the ALJ the authority to impose a civil or administrative penalty for the violations described in the Administrative Complaint. Therefore, Respondents' exception 32 is rejected.

RESPONDENTS' EXCEPTION 33:

Respondents take exception to paragraph 373. In their argument in support of this exception, Respondents apparently, albeit indirectly, question the credibility of the McConnell brothers. In paragraph 373, the ALJ found the testimony of the brothers, Daniel and Randy McConnell, credible and persuasive. It is the testimony of these brothers that links the principals of Modern, Inc., Charles Moehle and Michael Moehle (father and son), to the work that is the subject of the Administrative Complaint. The credibility of the witnesses is not a matter which the Board may consider. As previously explained in this order, the Board is not to judge the credibility of witnesses. *Heifetz*, 475So.2d at 1281-1282; *Fla. Chapter of Sierra Club v. Orlando Utility Commission*, 436b So.2d 383 (Fla. 5th DCA 1983). Additionally, the testimony cited by Respondents

[17] As a point of clarification, although the District does not have the authority to impose a civil penalty, the District may properly receive monetary penalty as a settlement in an administrative enforcement matter pursuant to a voluntary agreement of the parties.

in support of this exception is not relevant to the exception. Therefore, Respondents' exception 33 is rejected.

RESPONDENTS' EXCEPTION 34:

Respondents take exception to paragraph 377. Although Respondents do not take exception to paragraphs 362 and 363, they take exception to paragraph 377. If this Board rejects paragraph 377, we would also have to reject paragraphs 362 and 363. We decline for two reasons.

The first reason is that section 120.57(1)(l), Florida Statutes, restricts this Board's authority to reject or modify conclusions of law to "conclusions of law over which [the Board] has substantive jurisdiction. The Board is uncertain as to whether the standard of proof is a matter over which we have substantive jurisdiction."

If this Board has substantive jurisdiction over this issue, the Board finds that in both the Emergency Order and the Administrative Complaint cases, the correct standard of proof is "preponderance of the evidence." The standard of "clear and convincing evidence" is limited to administrative proceedings that are punitive in nature. *Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company,* 670 So.2d 932, 935 (Fla. 1996), and *Ferris v. Turlington,* 510 So.2d 292, 294 (Fla. 1987). The Emergency Order and the Administrative Complaint are not penal in nature. The Emergency Order authorized the U.S. Fish and Wildlife Service to take emergency action; the Emergency Order did not impose penalties against any person or entity. Likewise, the Administrative Complaint does not propose a fine and is not penal in nature. Absent from Respondents' argument is any

legal authority to support their contention. For the reasons expressed above, Respondents' exception 34 is rejected.

RESPONDENTS' EXCEPTION 35:

Respondents take exception to paragraph 386. Respondents do not contend in their exception that the ALJ has misapplied the law; instead they argue the facts of the case. Respondents contend that the excavation of NS1 and EW1 "did not exceed original design specifications, nor did it have a significant impact on previously undisturbed natural area." Additionally, Respondents argue that the excavation activity was exempt maintenance activity under Section 403.813, Florida Statutes. In paragraph 386, the ALJ concludes that the District satisfied its burden of proof; that no part of the excavation of NS1, EW1 and the larger system in 1997 was routine or custodial; and that the extent of the excavation exceeded the scope of routine custodial maintenance (citing *Deseret* and *SAVE*).

The Board agrees with the ALJ that District staff satisfied the District's burden of proof in the Administrative Complaint and Emergency Order. The ALJ's statements in paragraph 386 are supported by his findings of fact (RFF nos. 54 through 128, 135, 140 through 155, 157 through 172, 178 though 192, 197, 198, 238 through 267, 276 [as modified by any ruling in this Final Order]). Therefore, Respondents exception to paragraph 386 is rejected.

RESPONDENTS' EXCEPTION 36:

Respondents' final exception is to the ALJ's recommendation to enforce the Emergency Order and the Administrative Complaint. The record in case numbers 97-4389 through 97-4393, including the testimony and documentary evidence presented at

the final hearing, and the findings of fact and conclusions of law propounded in the recommended order, as modified in this Final Order, support the ALJ's recommendation. Therefore, Respondents' exception 36 is rejected.

ACCORDINGLY, IT IS HEREBY ORDERED: The Recommended Order dated June 15, 1999, attached hereto as Exhibit 1, 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 rulings on District's Exceptions 1,2, 3, 4, 5, and 6, and Respondents' Exceptions 1, 3, 10, 12, 22, and 24.

This Final Order upholds the Emergency Order dated May 14, 1997, authorizing the construction of two earthen weirs by the U.S. Fish and Wildlife Service in accordance with the specifications set forth in the Emergency Order. A copy of the Emergency Order is attached hereto as Exhibit "2".

This Final Order also directs Modern to undertake and complete the corrective actions described in the Administrative Complaint and Proposed Order dated August 20, 1997, attached hereto and incorporated herein as Exhibit "3." The timeframes to undertake and complete the corrective actions set forth in the Administrative Complaint and Proposed Order shall commence on the date of rendering of this Final Order.

DONE AND ORDERED this 9th day of December, 1999, in Palatka, Florida.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

BY: _____
WILLIAM W. KERR
Chairman

RENDERED this 9th day of December, 1999.

BY: Jodee Breen
~~SANDRA BERTRAM~~
Asst. DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Petitioner, vs. MODERN, INC.; FIRST OMNI SERVICE CORP.; HASLEY HART; and B. B. NELSON, Respondents, vs. DEPARTMENT OF TRANSPORTATION, Intervenor.	Case Nos. 97-4389 97-4390 97-4391 97-4392 97-4393
MODERN, INC., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	Case Nos. 98-0426RX 98-0427RU
FIRST OMNI SERVICE CORPORATION, Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	Case Nos. 98-1180RX 98-1181RU 98-1182RX

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RECOMMENDED ORDER IN CASE NUMBERS 97-4389, 97-4390, 97-4391, 97-4392, and 97-4393

An administrative hearing was conducted on June 1-5 and 8-12, and on October 28-29, 1998, in Viera, Florida, by Daniel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings.

APPEARANCES

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605 Suwannee Street
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STATEMENT OF THE ISSUES

The St. Johns River Water Management District (the "District") alleges in Case Number 97-4389 that Respondent, Modern, Inc. ("Modern"), excavated two ditches in wetlands without a permit, that the excavation was not exempt from a permit, and that Modern committed related acts alleged in the Administrative Complaint. The District proposes alternative plans for corrective action.

Modern and its co-respondents ("Respondents") contend that the excavation was not required to have a permit because either it was not an activity covered by the permitting statutes or it was exempt. In addition, Respondents charge that the proposed agency action is based on an unadopted rule that does not satisfy the requirements of Section 120.57(1)(e), Florida Statutes (1997). (All chapter and section references are to Florida Statutes (1997) unless otherwise stated.)

In Case Numbers 97-4390, 97-4391, 97-4392, and 97-4393, Respondents challenge an Emergency Order issued by the District to stop the drainage of wetlands. Respondents contend that the Emergency Order is facially insufficient, that there was no emergency, and that the corrective action has worsened conditions.

The issue in each of the rule challenge cases is whether an existing rule or an agency statement is an invalid exercise of delegated legislative authority within the meaning of Sections 120.52(8) and 120.56(1). Case Numbers 98-0426RX and 98-1180RX challenge Rule 40C-4.041 pursuant to Section 120.56(3). Case Number 98-1182RX challenges Rule 40C-4.051 pursuant to Section 120.56(3). Case Numbers 98-0427RU and 98-1181RU challenge an agency statement pursuant to Section 120.56(1) and (4). (Unless otherwise stated, all references to rules are to rules published in the Florida Administrative Code as of the date of this Recommended Order.)

The parties identify approximately 57 issues in their respective Proposed Recommended Orders and Proposed Final Orders ("PROs" and "PFOs", respectively). Those issues relevant to the proceeding conducted pursuant to Section 120.57(1), including Section 120.57(1)(e), are addressed in this Recommended Order. The remaining issues are addressed in the Final Order issued on the same date as the date of this Recommended Order.

PRELIMINARY STATEMENT

On May 14, 1997, the District issued an Emergency Order for action intended to stop the drainage of wetlands that allegedly resulted from the excavation of two drainage ditches. On May 29, 1997, First Omni Service Corp. ("Omni"), Mr. Hasley Hart, Mr. B.B. King, and Modern timely filed their respective petitions for formal review of the Emergency Order.

On August 20, 1997, the District filed an Administrative Complaint and Proposed Order alleging that Modern excavated the two ditches and proposing that Modern restore the ditches and adjacent wetlands. On September 3, 1997, Modern timely filed a Petition for Formal Administrative Hearing.

On September 17, 1997, the District referred all of the matters to the Division of Administrative Hearings ("DOAH") to conduct an administrative hearing. DOAH assigned Case Number 97-4389 to the proceeding involving the Administrative Complaint and assigned Case Numbers 97-4390, 97-4391, 97-4392, and 97-4393 to the separate challenges to the Emergency Order filed, respectively, by Omni, Mr. Hart, Mr. Nelson, and Modern.

On October 29, 1997, the cases were consolidated over objection by Respondents. The consolidated proceeding was set for hearing during the weeks of March 9-13 and 16-20, 1998. A Prehearing Order issued on October 23, 1997, required the parties, among other things, to submit prehearing stipulations 15 days prior to the date of the final hearing.

Two motions led to the intervention of the Department of Transportation (the "Department"). On February 6, 1998, the District filed a Motion for Protective Order and a Motion in Limine. Both motions sought to preclude Respondents from discovering evidence of a mitigation plan the District had required in 1988 as one of the conditions of a permit issued to the Department to widen State Road 50 ("SR 50"). The mitigation plan was completed in 1991 in an area approximately 2.5 miles west of the excavation site and is referred to by the parties as the "Hacienda Road project."

Before initiating this proceeding, Respondents had filed an action in circuit court against the District and the Department, as co-defendants. Respondents alleged that flooding from the Hacienda Road project had resulted in an inverse condemnation of Respondents' property. The circuit court granted defendants' motion to dismiss for failure to exhaust administrative remedies, and this proceeding ensued. In order to exhaust their administrative remedies, Respondents argued in this proceeding that it was essential for Respondents to discover evidence

concerning the Hacienda Road project and its alleged impact on Respondents' property.

Without ruling on the admissibility of such evidence at the hearing, the undersigned ruled that Respondents could discover evidence of the Hacienda Road project and its role in the flooding problems allegedly experienced by Respondents on their property. On March 3, 1998, the Department filed a Petition to Intervene which was granted by an Order on Pending Motions entered on March 16, 1998.

In response to discovery requests from the District and the Department, the corporate officers of Modern asserted their Fifth Amendment protection against self-incrimination, on the ground that Section 373.430(3)-(5) exposes Modern to potential criminal penalties. The District and the Department moved for a continuance to allow additional time to either secure immunity agreements protecting the corporate officers from criminal prosecution or to discover alternative evidence to satisfy the District's burden of proof in Case Number 97-4389. The consolidated proceeding was rescheduled for the weeks of June 1-5 and 8-12, 1998.

On January 23, 1998, Modern filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041 and a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989. DOAH assigned Case Number 98-0426RX to the former rule challenge and Case Number 98-0427RU to the latter rule challenge. Both cases

were consolidated and set for hearing on March 2, 1998. They were subsequently consolidated with the earlier cases and set for hearing during the weeks of June 1-5 and 8-12, 1998.

On March 9, 1998, Omni filed a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.041, a Petition Seeking Administrative Determination of the Invalidity of Policy Statement Dated November 20, 1989, and a Petition Seeking Administrative Determination of the Invalidity of Rule 40C-4.051. DOAH assigned Case Number 98-1180RX to the first rule challenge, Case Number 98-1181RU to the second rule challenge, and Case Number 98-1182RX to the third rule challenge. On March 19, 1998, all three cases were consolidated and set for hearing on April 13, 1998. On April 8, 1998, Case Numbers 98-1180RX, 98-1181RU, and 98-1182RX were consolidated with the previously consolidated cases and set for hearing during the weeks of June 1-5 and 8-12, 1998. On May 29, 1998, the parties filed separate prehearing stipulations in accordance with the Prehearing Order entered on October 27, 1997.

Except for three hours one afternoon that were consumed by a 911 call for medical assistance required by the ALJ, the parties used all of the time originally set for the weeks of June 1-5 and 8-12 to conclude the matters at issue in Case Numbers 97-4389 through 97-4393. Pursuant to the agreement of the parties, the rule challenge cases were set for hearing during the week of October 28, 1998. In the interim, the parties adopted substantially all of the record in consolidated Case Number 97-

4389 for use in the rule challenge cases and thereby reduced to two days the time required for the hearing in the rule challenge cases. The parties agreed to submit their PROs and PFOs after the hearing was conducted on October 28-29, 1998.

At the hearing conducted during the weeks of June 1-5 and 8-12, 1998, the District presented the testimony of 11 expert witnesses and submitted 118 exhibits for admission in evidence. Respondents presented the testimony of two fact witnesses and one expert witness and submitted 76 exhibits for admission in evidence. Intervenor presented the testimony of two expert witnesses and submitted 15 exhibits for admission in evidence. The parties also submitted enlarged, demonstrative copies for many of the 209 exhibits submitted for admission in evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the twelve-volume Transcript of the hearing filed on July 24 and August 10, 1998.

Respondent, Nelson, intermittently attempted during discovery and during the hearing to represent himself on some issues and then to reassert his representation by counsel for Respondents on other issues. Mr. Nelson's episodic self-representation created a potential for prejudice to the other respondents and a potential conflict of interest for counsel. Prior to and during the hearing, the ALJ reminded Mr. Nelson of the potential prejudice and instructed Mr. Nelson to either represent himself, obtain separate counsel, or allow counsel for Respondents to represent him. After an extended recess of the

hearing one afternoon, Respondents apparently resolved the potential controversy and the issue did not arise again.

At the hearing conducted on October 28 and 29, 1998, the District presented the testimony of two fact witnesses and one expert witness and submitted three exhibits for admission in evidence. Respondents presented the testimony of no witnesses and submitted eight exhibits for admission in evidence. Intervenor attended the hearing but submitted no evidence for admission in evidence. The identity of the witnesses and exhibits, and the rulings regarding each, are set forth in the three-volume Transcript of the hearing filed on December 14, 1998.

At the hearing conducted on October 28, 1998, Respondents submitted an ore tenus motion for attorney's fees and costs pursuant to Section 120.595. The parties agreed to address the issue of reasonable fees and costs in a separate evidentiary hearing.

On December 14, 1998, the District filed its Notice of Proposed Rulemaking pursuant to Section 120.56(4)(e) which encourages an agency to proceed to rulemaking "expeditiously" and "in good faith." On February 1, 1999, the District filed a request for Official Recognition of the publication of Proposed Rules 40C-4.051(12)(b) and 40C-4.091. The request was granted without objection. The proposed rules address the District statement challenged by Respondents pursuant to Section 120.57(1)(e) and Section 120.56(4).

On February 19, 1999, Omni filed a Petition for Administrative Determination of the Invalidity of Proposed Rules 40C-4.051(12)(b) and 40C-4.091. DOAH assigned Case Number 99-0632RP to the challenge to the District's proposed rules. The case was set for hearing on March 29, 1999, and pursuant to the agreement of the parties waiving their rights to a hearing in 30 days, was rescheduled for June 29, 1999.

The District timely filed its PRO and PFO on February 12, 1999. Respondents timely filed their PRO and PFO on February 18, 1999. On February 12, 1999, Intervenor filed a notice of limited adoption of the PRO and PFO filed by the District.

The only motion that remains to be ruled on in this Recommended Order is the District's Motion in Limine. The motion seeks to preclude the admission of evidence involving the Hacienda Road project. The undersigned reserved ruling on the motion for disposition in this Recommended Order. The ruling is discussed in the Conclusions of Law.

On October 16, 1998, Modern and Omni filed a Stipulated Motion to Amend Petition, and attached amended petitions, which amended their challenges to Rule 40C-4.051 and the agency statement (the "Amended Petition"). The District agreed to the Amended Petition, and Modern and Omni agreed to limit their rule challenges to the matters included in the Amended Petition. In relevant part, the Amended Petition limits the challenge to Rule 40C-4.051 to specific provisions in Rule 40C-4.051(11)(c).

FINDINGS OF FACT

1. This proceeding arises from the excavation of two intersecting canals, or ditches, in January 1997 in Brevard County, Florida. One conveyance runs north and south and is identified by the parties as "NS1." The other conveyance runs east and west and is identified by the parties as "EW1."

2. Part of the excavation occurred inside the St. Johns National Wildlife Refuge (the "Refuge"). The Refuge is owned and managed by the United States Fish and Wildlife Service (the "Wildlife Service"). All of the excavation occurred on property within the jurisdiction of the District and contiguous to property owned by Modern.

3. On May 14, 1997, the District issued an Emergency Order authorizing the Wildlife Service to construct temporary weirs in NS1 and in EW1. The District intended the weirs to restore the bottoms of NS1 and EW1 to elevations which the District claims to have existed in NS1 and EW1 prior to the excavation. The Wildlife Service completed construction of the weirs on May 27, 1997.

1. Excavation Site

4. NS1 runs parallel to Interstate 95 ("I-95"). EW1 runs parallel to SR 50 and lies approximately 25 feet inside the southern boundary of the Refuge.

5. The point where NS1 and EW1 intersect is west of I-95 by approximately .25 miles, or about 1100 feet, and north of SR 50

by approximately one-half mile plus 25 feet, or 2,665 feet. NS1 and EW1 intersect at a point that is approximately 2,903 feet northwest of the intersection of I-95 and SR 50.

6. NS1 bisects a marsh ("Marsh-1") approximately 800 feet south of EW1. EW1 bisects a pond ("Pond-1") approximately 300 feet east of NS1. Pond-1 spans north and south of both EW1 and the southern boundary of the Refuge. Marsh-1 is south of the Refuge boundary and spans east and west of NS1.

7. NS1 continues south of Marsh-1 and intersects SR 50 and an adjacent east-west canal immediately north of and parallel to SR 50 known as the Indian River City Canal ("IRCC"). NS1 proceeds south of the IRCC approximately 1.5 miles to a larger east-west canal, identified as both the Addison Canal and the Ellis Canal (the "Addison Canal"). The Addison Canal flows west from that point approximately four miles into the St. Johns River.

8. NS1 runs north across EW1 approximately 1.5 miles from SR 50 to an east-west road known as Satterfield Road. An adjacent, parallel canal immediately south of Satterfield Road is identified as the Satterfield Road Canal.

9. EW1 continues west from I-95 approximately 2.75 miles until it intersects Hacienda Road. EW1 runs east of I-95 for some distance.

10. The excavation in January 1997 included both NS1 and EW1. NS1 was excavated from its intersection with SR 50 north

approximately 2,687 feet to a point approximately 22 feet north of EW1. EW1 was excavated approximately 30 feet east of NS1.

2. Contested Area

11. The excavation site is in the southeast corner of a "rectangular tract" of land west of I-95 and north of SR 50 which comprises approximately 4.13 square miles. The rectangular tract and a "smaller parcel" east of I-95 make up the "contested area" in this proceeding.

2.1 Rectangular Tract

12. The rectangular tract measures approximately 2.75 miles from I-95 west to Hacienda Road and approximately 1.5 miles, from SR 50 north to Satterfield Road. The intersection of I-95 and SR 50 forms the southeast corner of the rectangular tract.

13. The rectangular tract is bounded on the east by I-95; on the south by SR 50; on the west by Hacienda Road, which is about a mile or so east of the St. Johns River; and on the north by Satterfield Road. Satterfield Road is approximately three miles south of the boundary between Brevard and Volusia counties (the "county line").

2.2 Smaller Parcel

14. A substantially smaller parcel abuts the east side of I-95. The smaller parcel is bounded on the west by I-95; on the south by SR 50; on the east by State Road 405 ("SR 405"); and on the north by the Satterfield Road Canal and what would be

Satterfield Road if Satterfield Road extended east of I-95. SR 405 runs north and south parallel to and approximately .25 miles east of I-95 and approximately 2.7 miles west of the Indian River.

3. Tribulation Harbor

15. In this proceeding, legal interests from five separate sources flow into the contested area like separate rivers flowing into an inland harbor. The confluence of divergent legal interests results in a turbulent mix of the statutory responsibilities of state and federal agencies and the constitutional rights and business interests of private property owners.

16. Respondents own over 4,500 acres of land in and around the contested area and have legitimate business or personal interests in the development or other use of their property. The District is statutorily charged with responsibility for the hydrologic basin of the St. Johns River (the "River Basin"), including the contested area.

17. The contested area is circumscribed by a five-mile by four-mile area platted in 1911 as the Titusville Fruit and Farm Subdivision ("Titusville Farm"). The recorded plat of Titusville Farm established a drainage system of intersecting east-west and north-south canals. Some of the conveyances, including NS1 and EW1, run through the contested area.

18. Federal law charges the Wildlife Service with responsibility for managing the Refuge. A substantial portion of the Refuge lies in that part of the contested area west of I-95. The contested area also includes portions of the Hacienda Road project.

3.1 Private Property

19. Modern is a Florida corporation owned principally by Mr. Charles Moehle who is also the president of the company and the father of Mr. Michael Moehle. Omni is a Florida corporation wholly owned by the younger Moehle.

20. Modern owns two parcels of land in the contested area ("Modern-1" and "Modern-2"). The northern boundary of Modern-1 is just south of EW1 and the Refuge boundary. Modern-1 is bounded on the west by NS1, on the south by SR 50, and on the east by I-95.

21. Modern-2 is inside the contested area in the smaller parcel east of I-95. Modern-2 comprises a substantial portion of the smaller parcel.

22. Modern owns a third tract of land comprising approximately 4,500 acres west and south of Fox Lake ("Modern-3"). Modern-3 is within the District's jurisdiction and includes approximately three miles of land from Satterfield Road north to the county line, including one mile in Titusville Farm immediately north of Satterfield Road.

22. Modern-3 is bounded on the south by Satterfield Road; on the north by the county line; on the east by a north-south section line parallel to and approximately .75 miles west of I-95; and on the west by a section line that is approximately one mile west of what would be Hacienda Road if Hacienda Road extended north of Satterfield Road. A square mile section is carved out of the western half of Modern 3 in Section 10, Township 22 South, Range 34 East.

24. Omni, Mr. Hart, and Mr. Nelson own separate parcels of land outside the contested area but proximate to the contested area. They claim that their property is directly impacted by the action taken in the Emergency Order and by the action proposed in the Administrative Complaint.

25. Omni owns property on the east side of SR 405. Although the Omni parcel is outside of the contested area, it is adjacent to the smaller parcel and within both the River Basin and Titusville Farm.

26. Mr. Hart owns property which is south of SR 50 approximately one mile west of the intersection of SR 50 and I-95. Although the Hart property is outside of the contested area, it abuts the southern boundary of the rectangular tract and is within the River Basin and Titusville Farm.

27. Mr. Nelson owns property located a little more than a half-mile southeast of the intersection of SR 405 and SR 50. Although the Nelson property is outside of and not adjacent to

the contested area, the property is within the River Basin and Titusville Farm.

3.2 The District

28. The District was created in 1972 as the state agency responsible for carrying out the provisions of Chapter 373 and for implementing the programs delegated in Chapter 403. Section 373.069(1)(c) describes the geographical jurisdiction of the District. The jurisdiction of the District includes all of the contested area.

29. The River Basin includes all or part of 19 counties from south of Vero Beach to the border between Florida and Georgia. The counties entirely within the River Basin include Brevard, Clay, Duval, Flagler, Indian River, Nassau, Seminole, St. Johns, and Volusia counties. The counties partially within the River Basin are Alachua, Baker, Bradford, Lake, Marion, Okeechobee, Orange, Osceola, Polk, and Putnam.

3.3 Titusville Farm

30. Titusville Farm contains approximately 20 sections of land, plus an out-parcel to the southeast which has relatively little materiality to the issues in this proceeding (the "out-parcel"). Each of the 20 sections of land contains approximately 640 acres and, together, total approximately 12,800 acres.

31. The exact dimensions of Titusville Farm are recorded in Plat Book 2, page 29 of the Public Records of Brevard County, Florida. With the exception of the out-parcel, Titusville Farm

is bounded on the east by a section line approximately 1.25 miles east of I-95 and approximately 1.7 miles west of the Indian River; on the south by a section line approximately 1.5 miles south of SR 50 at what is now the Addison Canal; on the north by a section line approximately one mile north of what are now Satterfield Road and the Satterfield Road Canal; and on the west by the St. Johns River, which flows north at a point about a mile or so west of and parallel to what is now Hacienda Road.

3.3(a) History

32. Titusville Farm was originally designed so that each quarter section of 160 acres was surrounded by intersecting east-west and north-south drainage canals intended to drain water westerly toward the St. Johns River and southerly toward what is now the Addison Canal. The original designers intended to create a dry and fertile land for farming and fruit groves.

33. The original design for Titusville Farm called for a series of parallel east-west canals approximately .25 miles apart on quarter section lines. The canals ran parallel to the north and south boundaries of Titusville Farm from the east boundary approximately five miles to the St. Johns River to the west.

34. The parties use the label EW1 in this proceeding to designate the first east-west canal north of SR 50. EW1.5 refers to the second east-west canal north of SR 50. EW2 refers to the Satterfield Road Canal in some exhibits and to an intervening canal in others.

35. The original design for Titusville Farm also called for a series of parallel north-south manifold canals, approximately .25 miles apart on quarter section lines. Each canal ran parallel with the east and west boundaries of Titusville Farm from the north boundary approximately four miles to the Addison Canal at the south boundary.

36. The parties use NS1 in this proceeding to designate the first north-south canal approximately .25 miles west of I-95. NS2 identifies the next north-south canal west of NS1. The numbering identification continues west in this proceeding to Hacienda Road.

37. From 1911 through 1916, the original developers of Titusville Farm constructed some of the canals and farmed the area, predominantly with fruit groves. Sometime after 1916, the developers began selling off land to third-party purchasers.

38. Subsequent purchasers altered, expanded, or abandoned the canals in and around their property. By 1943, the canals originally constructed in Titusville Farm remained in place but only one orange grove remained in the southeast corner of Titusville Farm near what is now the excavation site. Other farming within the contested area was sparse.

39. The canals actually constructed by the developers of Titusville Farm continue to be depicted as existing systems on several current maps. They are also evidenced in drainage easements of record.

3.3(b) Drainage Easements

40. The chain of title from Titusville Farm shows that purchasers took title subject to existing easements for "canals and/or ditches, if any." In 1971, when the United States Government established the Refuge, it took fee simple title to approximately 4,163 acres of former Titusville Farm land subject to:

> . . . permanent easement granted to Florida Power and Light Company . . . and subject to other rights outstanding for existing roads, lines, pipe lines, canals, and/or ditches, if any. (emphasis supplied)

OR Book 1580, page 810, Brevard County.

3.4 The Refuge

41. The Refuge is located within the River Basin and within Titusville Farm. The vast majority of the Refuge is located inside the rectangular tract in the contested area. However, the Refuge also extends west of Hacienda Road to the St. Johns River and contains a small "out-parcel" north of Hacienda Road.

42. Except for the out-parcel, the Refuge is more or less rectangular, bounded on the east by I-95, on the south by SR 50, on the north by Satterfield Road, and on the west by the St. Johns River. The distance between the east and west boundaries of the Refuge is approximately 3.75 miles. The distance between the north and south boundaries is approximately 1.5 miles. The Refuge contains approximately 4,163 acres and includes much of

the area from I-95 west to Hacienda Road and from Satterfield Road south to SR 50.

43. The federal government established the Refuge in 1971 to protect the endangered dusky seaside sparrow. The sparrow became extinct in 1990.

44. After 1971, the Refuge became part of a national system for the conservation, management, and restoration of lands for fish, wildlife, plants, and their habitats. The federal government manages the Refuge under the Emergency Wetlands Restoration Act of 1986, which Congress reaffirmed in 1997, as a wetland to provide habitat protection for threatened and endangered species of special concern.

45. The authorized methods for protecting wetlands include a National Wetlands Inventory that identifies wetlands nationally. The Refuge is a particularly important wetland in the sense that it is a high floodplain. A high floodplain is a type of wetland that is diminishing, especially in Florida.

46. The federal government manages the Refuge as an ecosystem. The government attempts to mimic what happens naturally in the area with fire and water. It attempts to restore and maintain the sheet flow of water across natural marshes and to use fire as a means of maintaining marshes in their natural state.

3.4(a) Species of Special Concern

47. The Refuge provides a habitat for species of special concern to both state and federal governments. The Refuge is one of the most important breeding areas in the country for the black rail. The black rail is a migratory species that uses the Refuge for nesting during the summer and for a winter habitat during the fall and winter.

48. Several species use portions of the Refuge near the excavation site. The least bittern uses the area for feeding and nesting. The northern harrier is a migratory species that uses the area for feeding during the fall, winter, and early spring.

49. The Refuge provides habitat for bald eagles, wood storks, otters, and alligators. It also provides habitat for: long-legged wading birds, such as great blue herons and great egrets; shorter-legged wading birds, such as little blue herons, snowy egrets, and little green herons; aerial diving species, such as terns and seagulls; submergent diving species, such as pie billed grebes, mergansers, and cormorants; and red-winged blackbirds and wrens that nest in emergent vegetation.

3.4(b) Wetland Communities

50. The majority of the contested area contains five different wetland community types. There are open-water areas, such as Pond-1; shallow marsh, such as Marsh-1; wet prairies; hydric hammocks; and transitional shrub systems.

51. Shallow marsh contains shallow water and emergent wetland vegetation. Water levels fluctuate throughout the year. The predominant vegetation is cattail and sawgrass.

52. Wet prairie is slightly higher in elevation and somewhat drier than shallow marsh. The primary vegetation found in wet prairie is cord grass.

53. Transitional shrub systems are areas in transition from uplands to wetlands or from wetlands to uplands. The vegetation in these areas typically is wax myrtle.

3.4(c) Pre-Excavation Site

54. In January 1996, Mr. Charles Moehle complained to the District that the Hacienda Road project caused flooding on his property. District staff investigated the matter and concluded that the Hacienda Road project was not the cause of the flooding. The investigation included physical inspection and elevation readings for what became the excavation site in 1997.

3.4(c)(1) Physical Inspection

55. Before the excavation in January 1997, there was no water connection from EW1 to NS1. NS1 and EW1 had been filled-in at various junctures with sediment and wash-outs from rain. Vegetation growth and aquatic vegetation further occluded NS1 and EW1.

56. The east and west banks of NS1 from SR 50 north to Marsh-1 were similar and appeared undisturbed. The west bank of

NS1 disappeared at the point where NS1 intersected Marsh-1. Both banks of NS1 were very low through Marsh-1.

57. Marsh-1 had standing water in it. The predominant vegetation was spartina baderi, a marsh grass found in wetland areas ("spartina").

58. Approximately 500 feet of NS1 between Marsh-1 and EW1 was dry and shallow. This portion of NS1 was only one-half to one-foot deep. It was more characteristic of a swale than a ditch and was heavily vegetated with spartina.

59. The bottom elevation of a portion of NS1 between EW1 and Marsh-1 was approximately 2.5 feet higher than the remainder of NS1. This high spot functioned as an elevation control within NS1.

60. EW1 east of NS1 appeared very similar to that portion of NS1 north of Marsh-1. It was dry and vegetated with spartina. There was no water connection between NS1 and EW1 so that Pond-1 did not routinely drain west through EW1. EW1 also contained a high spot just west of NS1.

61. Pond-1 was a healthy open-water community surrounded by green cattails. Pond-1 was deeper than five feet in some areas.

62. A berm on the west side of NS1 north of Marsh-1 was one to two feet high and three to five feet wide. It served as a fire-break trail and resembled a road. The berm was slightly higher south of Marsh-1 and heavily vegetated with cabbage palms and other vegetation near the intersection of NS1 and SR 50.

3.4(c)(2) Elevations

63. On February 28, 1996, in response to complaints from Modern, District staff took spot readings of bottom elevations within NS1 from Marsh-1 north to EW1 and within EW1 east of NS1. They also took water elevation readings in Pond-1 and at the intersection of NS1 and SR 50.

64. The elevation readings revealed respective control elevations in NS1 and EW1 of 12.9 and 12.79 feet. Other elevations in NS1 were 12.26 feet at a point just north of Marsh-1, 12.9 and 12.7 feet at two points south of EW1, and 12.9 feet at the intersection of NS1 and EW1. The bottom elevation in EW1 varied from 12.4 to 12.79 feet.

65. District staff also reviewed bottom elevation readings in various pre-excavation surveys made between 1995 and January 1997 and referred to by the parties as the Lowe's Report, the Cracker-Barrel survey, the McCrone survey, and the Titusville survey. The McCrone survey recorded bottom elevations for NS1 which were consistent with those taken by District staff. However, elevations varied by as much as a foot for EW1. Water elevation readings varied with seasonal water conditions and other factors.

66. The McCrone survey found respective control elevations in NS1 and EW1 of 12.7 and 11.7 feet. The bottom elevation for NS1 was 12.7 feet at a point just south of EW1. Bottom elevations for EW1 ranged from 10.5 to 11.7 feet. The

investigation by the District established respective high spots in NS1 and EW1 at 12.9 and 12.79 feet.

67. The Titusville survey recorded a water elevation of 10.54 feet in NS1 at SR 50. The water elevation in EW1 east and west of the I-95 culvert was 12.55 feet.

68. The variation in water elevations of 12.55 feet in EW1 at I-95 and 10.54 feet in NS1 at SR 50 suggest high spots in EW1 or NS1. The high spots prevent water from flowing from the culvert at I-95 west through EW1 to NS1 and south through NS1 to SR 50.

3.4(c)(3) Topography

69. A slight ridge exists south of EW1 and supports a more shrubby type of vegetation consistent with transitional wetlands. The topography north of EW1 is lower and characteristic of a deep marsh system. The bottom elevations in NS1 north of EW1 are lower than bottom elevations elsewhere in NS1 and are consistent with surrounding topography.

70. The topography surrounding NS1 south of EW1 is higher and provides a greater source of sediment than does the lower topography north of EW1. More sediment erodes into NS1 south of EW1 because there is more sediment south of EW1.

71. The portion of NS1 north of EW1 is in a marsh and under water most of the year. The submerged topography north of EW1 provides less opportunity for material to erode into NS1 north of EW1.

3.5 Hacienda Road Project

72. The Department widened SR 50 between 1988 and 1991 by adding two east-bound lanes on the south side of SR 50. The District required the Department to obtain a permit for the widening of SR 50 and to offset the adverse impacts to wetlands through a plan of mitigation.

73. The Wildlife Service actually performed the mitigation work for the Department and completed the mitigation plan in 1991. West of Hacienda Road, the Wildlife Service placed fill from adjacent berms in the IRCC, EW1, and EW1.5, which had pre-mitigation depths at that location ranging from 1.5 to 2.0 feet. The Wildlife Service planted spartina on the fill. The Wildlife Service also replaced six 30-inch culverts under Hacienda Road with nine 36-inch culverts. The new culverts were located at the same elevation as the elevation of the pre-mitigation culverts.

74. The Wildlife Service placed riser boards in the new culverts under Hacienda Road. Riser boards are used to facilitate the cleaning of culverts. However, they can also raise the water level above which water must rise before it can pass through the culverts.

75. Respondents contend that the fill west of Hacienda Road eliminated floodplain storage. They also claim the riser boards in the new culverts under Hacienda Road cause water to back-up in the contested area by preventing flow from the contested area through the new culverts into the marsh west of Hacienda Road.

3.5(a) Floodplain Storage

76. The Hacienda Road project did not decrease floodplain storage capacity west of Hacienda Road. The project used only fill from existing berms and did not bring in additional fill from outside the marsh. The fill did not reduce floodwater capacity of the IRCC, EW1, and EW1.5. Their capacity before the mitigation had already been reduced by groundwater from the high groundwater table close to the St. Johns River. The fill displaced high groundwater in the IRCC, EW1, and EW1.5, rather than floodwater capacity. The fill taken from existing berms reduced the size of the berms that had previously displaced floodwater capacity.

3.5(b) Water-flow

77. Neither the mitigation west of Hacienda Road, the new culverts under Hacienda Road, nor the riser boards in the new culverts caused water to back-up and flood Respondents' property. The Hacienda Road project does not prevent water-flow during either low-flow or high-flow conditions.

3.5(b)(1) Low-flow

78. A low-flow condition occurs when water rises above the control elevation that is impeding its flow. The water stages-up in lower areas until it flows over the high spot that operates as a control elevation.

79. During low-flow conditions, neither the mitigation west of Hacienda Road, the culverts, nor the riser boards in the

culverts control the flow of water from I-95 west to Hacienda Road. Rather, bottom elevations in the canals, or ditches, east of Hacienda Road ("upstream") control the flow of water from I-95 west to Hacienda Road. Water that does not exceed the control elevations will pond in the adjacent wetlands and not reach Hacienda Road.

80. Water that ponds behind control elevations during low-flow conditions is also influenced by two basins and a ridge in the contested area. One basin is north of SR 50 and south of EW1, and the other basin is north of EW1. Water from the former basin flows south while water from the latter basin flows toward Hacienda Road.

81. The water elevation at Hacienda Road is approximately 11.0 feet. High spots in the canals, or ditches, upstream from Hacienda Road range from 12.1 feet to 13.3 feet.

82. A control elevation of 12.6 feet exists in EW1 east of Hacienda Road. Water stands behind the high spot at 12.3 feet. Closer to I-95, the bottom elevation in EW1 ranges from 12.1 to 12.6 feet and effectively controls water elevation at 12.0 feet. Water in EW1 west of I-95 and east of Hacienda Road must rise to an elevation of 12.6 feet before it can flow west toward Hacienda Road.

83. Water in EW1.5 near I-95 has an elevation of 13.3 feet. Water in EW1.5 must rise above that elevation before it can flow west toward Hacienda Road. Water in EW-2 at I-95 is above 13.0 feet.

84. The bottom elevations and water elevations measured by District staff in the contested area between Hacienda Road and I-95 are consistent with the I-95 construction plans and the Lowe's Drainage Report used for the construction of the Lowe's store at the intersection of SR 50 and SR 405. The I-95 plans show a design high-water elevation of 14.0 feet for the culvert where EW1 crosses I-95. The Lowe's Drainage Report shows that the 100-year, 24-hour storm event flood elevation east of I-95 is 14.0 feet. In addition, a pre-construction survey for the Lowe's store shows elevations in the wetlands north of EW1 to be approximately 13.0 feet.

3.5(b)(2) High-flow

85. A high-flow condition occurs when there is a storm event that creates significant run-off. The run-off overwhelms the high spots that operate as control elevations during low-flow conditions. Run-off is controlled by other factors including culverts such as those at Hacienda Road.

86. During high-flow conditions, the culverts at Hacienda Road are the controlling factors for the flow of water in the contested area from I-95 west to Hacienda Road. The high-flow conveyance capacity for the new culverts is equal to or greater than that of the old culverts. The replacement culverts do not cause water to back-up in the contested area during high-flow conditions. Riser boards in the new culverts under Hacienda Road

do not raise elevation levels to a point that causes water to flood Respondents' property during high-flow conditions.

3.5(c) Collateral Improvements

87. During either low-flow or high-flow conditions, the possibility that the Hacienda Road project could cause water to back-up in the contested area has been significantly reduced by improvements in drainage capacity to nearby canals, or ditches. The Department improved several north-south canals, or ditches. Brevard County improved the capacity of the IRCC.

88. When the Department widened SR 50, the Department increased the capacity of NS3 and NS4, where each crosses under SR 50, by replacing old culverts with new culverts at the same invert elevation. The Department replaced one 24-inch culvert in NS3 with an elliptical pipe with the effective capacity of a 36-inch pipe. The Department replaced one 24-inch culvert in NS4 with two 18-inch culverts. The Department also replaced the box culvert in NS1 with a culvert of the same size and invert elevation.

89. Brevard County improved the capacity of the IRCC in several ways. The county cleaned out the canal, installed a 36-inch elliptical culvert under Hacienda Road, and replaced a driveway that had previously blocked the canal with a 36-inch culvert.

4. The Excavation

90. Modern, through its President, Mr. Charles Moehle, caused and directed the excavation of NS1 and EW1. In December 1996, Mr. Charles Moehle contracted with Total Site Development, Inc. ("Total Site") to perform the excavation. Modern also supervised the excavation.

91. Total Site is a Florida corporation wholly owned by Mr. Daniel McConnell and Mr. Randy McConnell, his brother. Both men, through their attorney, obtained immunity from criminal prosecution and testified at the administrative hearing.

92. In 1996, Total Site was a subcontractor in the construction of the Cracker Barrel near the intersection of I-95 and SR 50. The superintendent for the Cracker Barrel project gave Mr. Daniel McConnell the telephone number of Mr. Charles Moehle.

93. After several telephone conversations, Mr. McConnell met with Mr. Moehle. The two men walked the length of NS1 from SR 50 north just past EW1. Mr. Moehle directed Mr. McConnell where to excavate NS1 and EW1, how wide and deep to excavate each, and where to place the spoil material.

94. Mr. Moehle showed Mr. McConnell a paper which Mr. Moehle represented to be a permit to perform the excavation. However, neither Mr. Moehle nor Modern ever applied for or obtained a permit to perform the excavation. The District never received an application or issued a permit for the excavation.

95. On January 10, 1997, Mr. McConnell began excavating NS1 and EW1 and completed the excavation in 2.5 days. Mr. McConnell began work on a Friday, worked Saturday, and completed the work on Monday, January 13, 1997.

96. Mr. McConnell excavated NS1 and EW1 in accordance with the instructions of Mr. Moehle. Mr. McConnell began the excavation at SR 50 and worked north in NS1 approximately 2,687 feet to a point about 22 feet north of EW1. Mr. McConnell also excavated EW1 approximately 30 feet east of NS1. Mr. McConnell placed the spoil material on the west bank of NS1 and did not move the spoil material thereafter.

97. When Mr. McConnell reached the intersection of NS1 and EW1, he excavated EW1 sufficiently to complete a water connection from EW1 to NS1. He placed the spoil material on the banks surrounding the intersection of EW1 and NS1 and did not move the spoil material thereafter.

98. During the excavation, Mr. Moehle frequently visited the excavation site, observed the work, and provided instructions to Mr. McConnell. Mr. Moehle visited the site approximately once or twice a day during the excavation to check on the progress of the work. On a few occasions, Mr. Moehle instructed Mr. McConnell to dig deeper.

99. Mr. Moehle paid Total Site $2,500 when Mr. McConnell completed the excavation on January 13, 1997. Mr. Moehle paid in cash.

5. Post-excavation Site

100. After the excavation, water flowed from EW1 to NS1. NS1 was approximately 10 feet wider and approximately 3-4 feet deeper. NS1 was open with water flowing through it from EW1 south through Marsh-1 to SR 50. The bottom elevation for NS1 was 7.5 and 9.5 feet at points where District staff and the McCrone survey previously found bottom elevations of 12.7 and 12.9 feet.

101. After the excavation, the water elevation at the intersection of NS1 and SR 50 was 12.09 feet. The pre-excavation water level had been 10.54 feet.

102. After the excavation, a large spoil pile existed on the west bank of NS1. The spoil pile filled approximately one-half acre of wetlands.

103. The height of the spoil pile ranged from three to eight feet, with the highest points at the intersection of NS1 and EW1. The spoil pile just north of EW1 had been flattened by the weight of equipment used for the excavation. The width of the spoil pile at its base ranged from 20 to 35 feet for the entire length of NS1.

104. The spoil material was primarily white, sandy material without much vegetation in it. The lack of organic material in the spoil pile indicates that the excavation extended beyond the depth necessary to remove surface vegetation.

6. Emergency

105. The excavation of NS1 and EW1 by Modern in January 1997 created an emergency within the meaning of Section 373.119(2). The excavation created short-term effects that adversely impacted adjacent wetlands and required immediate action to protect the health of animals, fish, or aquatic life; and recreational or other reasonable uses. If left uncorrected, the excavation would have created long-term effects that would have had additional adverse impacts.

6.1 Short-Term Effect

106. The excavation created numerous short-term effects that adversely impacted wetlands. Short-term effects included a reduction in the water level of approximately 600 to 800 acres of wetlands, a vegetation and fish kill, an alteration of the existing hydroperiod for the affected area, and an increase in the water level south of the intersection of NS1 and SR 50.

6.1(a) Water Levels

107. The excavation lowered the water level in approximately 600 to 800 acres of wetlands. The reduction in the control elevation in NS1 from 12.9 feet to 10.5 feet increased water flow capacity in NS1 and EW1 by 15 to 25 cubic feet per second. The increased water flow lowered water levels in the surrounding wetland from one to two feet.

108. When the excavation was completed, Mr. Randy McConnell was standing on the head-wall at SR 50. He saw a three or four-

foot wave flow south down NS1 toward him and hit the head-wall before passing through the culvert south to the Addison Canal.

109. Sometime after the excavation, a substantial water flow out of NS1 caused water levels to drop in the adjacent area, including the Refuge. Pond-1 drained one to two feet.

6.1(b) Vegetation and Fish

110. The excavation killed vegetation in the affected area. The cattail marsh adjacent to Pond-1 became stressed, turned brown, and began dying. The dying cattails consumed oxygen in the open water in Pond-1.

111. The excavation killed fish in the affected area. In March 1997, a fish kill occurred in Pond-1. Wildlife Service personnel observed approximately 75 to 100 dead fish. Other dead fish were likely consumed by other species. The fish kill resulted from oxygen depletion caused by the drainage of Pond-1, dying vegetation, and the concentration of animal populations in the Pond-1 community.

6.1(c) Hydroperiod

112. The excavation altered the natural hydroperiod for the affected area. The hydroperiod for a wetland is the natural fluctuation in water levels that result from dry periods followed by periods of recovery. Water levels drop and are replenished by rain.

113. Precipitation in the Titusville area averages approximately 54 inches in a normal year. Evaporation in Florida

for a wetland such as the Refuge is about 48 to 50 inches a year. In a normal year, rainfall and evapo-transpiration would be approximately equal.

114. There are wet and dry seasons for a wetland within a normal year. Approximately 60 percent, or more, of the annual rainfall in a normal year in peninsular Florida occurs in the months of June through October.

115. There are also wet and dry years within longer periods. In the Titusville area, annual rainfall ranges from 35 inches to 80 inches.

116. The adverse impact of any excavation is least during wet months in a normal year and during wet years. During wet conditions, when rainfall generally exceeds evapo-transpiration, the drainage effect of excavation is overwhelmed by rainfall.

117. The adverse impact of any excavation is greatest during dry months in a normal year and during dry years. During dry conditions, the drainage effect of excavation lowers water levels lower than they otherwise would be by lowering elevation controls. The excavation of NS1 and EW1 occurred during dry months in a normal hydroperiod in January 1997.

6.1(d) Stop-loss Ancillaries

118. The adverse impact caused by the excavation was limited by two ancillary factors. One factor was the reduced function of the IRCC, which runs parallel to SR 50, at the time of the excavation. The other factor was the limitation placed on

the drainage capacity of NS1 by two culverts through which NS1 must flow south of SR 50.

119. At the time of the excavation, the IRCC was not functioning to full capacity. Plugs in a driveway crossing SR 50 and fill from the Hacienda Road project contributed to the dysfunction.

120. The capacity of NS1 to drain water approximately 1.5 miles south to the Addison Canal was limited by two 18-inch culverts located approximately 2,000 feet south of SR 50. The flow rates for the two culverts are approximately 15 to 25 cubic feet per second, depending on the difference in water levels across the culverts.

121. The dysfunction of the IRCC and the limit imposed by the two culverts combined to prevent more egregious impacts from the excavation of NS1. However, the same limitations increased water in the area south of SR 50 and north of the two culverts.

122. After the excavation, the water level at the intersection of NS1 and SR 50 increased by approximately two feet. The increased water level exacerbated flooding problems in the retention ponds and parking lot of the Cracker Barrel.

6.2 Long-Term Effect

123. The short-term adverse impacts of the excavation, if left uncorrected, would have had a cumulative effect over several years and would have caused separate long-term adverse impacts. Drainage caused by the excavation differs from natural

fluctuations in the hydroperiod. An uncorrected excavation becomes a permanent feature that continues to alter the hydroperiod by permanently lowering water levels and shortening the time that water stands on the surface and saturates the soil.

124. Once the hydroperiod is changed, the change affects the structural integrity of the entire system. Changes to the hydroperiod result in adverse impacts to vegetation, predator-prey relationships, and the suitability of the habitat for a large number of species.

125. Changes in the hydroperiod caused by reduced water levels can change wet prairie area to a shrubby type vegetation dominated by wax myrtle. Wax myrtle can affect the amount and rate of run-off of water and further dry-out the area over time. It can reduce emergent vegetation used as nesting sites for species like red-winged blackbirds and wrens.

126. A reduction in open water area can reduce the habitat for fish and the type of invertebrates that provide food sources for fish. It can also reduce the suitability of the habitat for other species dependent on fish as a food source.

127. A change in the hydroperiod caused by a draw-down of one to two feet can adversely impact various types of wading birds including little blue herons, snowy egrets, little green herons, great blue herons, and great egrets. It can adversely impact other birds such as bald eagles, wood storks, black rails, least bitterns, terns, seagulls, pie billed grebes, mergansers, cormorants, red winged blackbirds, and wrens. An altered

hydroperiod can also adversely impact larger animals such as otters and alligators.

128. It is possible to restore habitat after a draw-down. However, such a restoration does not prevent adverse impacts on the health of fish and wildlife during the hiatus that precedes the restoration.

6.3 District Investigation

129. On March 31, 1997, the District received a letter from the Wildlife Service dated March 27, 1997. The Wildlife Service expressed concern that rapid daily drainage caused by the excavation of NS1 and EW1 was creating adverse impacts on fish and wildlife in the Refuge.

130. The District conducted a sufficient and appropriate investigation. District staff investigated the extent of the excavation and its impact on surrounding wetlands. Neither the investigation nor the Emergency Order was rendered insufficient or inappropriate by the refusal of the District: to wait until 1998 when it could more fully ascertain the effects of the excavation based on whether annual rainfall made 1997 a dry, normal, or wet year; or to re-investigate the effects of the Hacienda Road project on Respondents' properties.

131. The excavation occurred during the dry season of the normal hydroperiod in January 1997. The District reasonably assumed that 1997 was going to be a normal year and could not

delay appropriate action until 1998 to see if 1997 turned out to be a wet year.

132. Sometime in 1998, the District determined that 1997 was an extremely wet year. However, the subsequent rainfall in 1997 could not have been reasonably anticipated by District staff and did not eviscerate a reasonable basis for either the Emergency Order on May 14, 1997, or the corrective action taken. An uncorrected excavation would have had long-term cumulative impacts on wetlands irrespective of annual rainfall in 1997.

133. The District investigation leading up to the Emergency Order properly excluded another investigation of the effects of the Hacienda Road project. Such an investigation would have duplicated the investigation conducted in the preceding year. Even if the District had conducted another investigation, the weight of the evidence shows that the results of such an investigation would not have altered the reasonableness of the Emergency Order or the corrective action that ensued.

134. At the time of the Emergency Order, the District reasonably concluded that the excavation caused immediate short-term effects that had significant adverse impacts on water levels in approximately 300 acres of wetlands, on fish and vegetation, and on wildlife in the refuge. Later, the District found that the excavation actually affected 600 to 800 acres of wetlands.

7. Emergency Order

135. Pursuant to Section 373.119(2), the District issued an Emergency Order on May 14, 1997. The Emergency Order authorized the Wildlife Service to construct earthen weirs in NS1 and EW1 to prevent further drainage in the River Basin and the Refuge. The findings and conclusions in the Emergency Order are sufficient and correct. The weirs are reasonably necessary to protect the health of fish, animals, and aquatic life in the River Basin, management objectives and reasonable uses of property in the River Basin, and other reasonable uses of property within the River Basin.

136. Pursuant to the Emergency Order, the Wildlife Service constructed two earthen weirs in NS1 and EW1. The Wildlife Service constructed: an earthen weir in NS1 at a crest elevation of 12.7 feet; and an earthen weir in EW1 at a crest elevation of 11.7 feet. The weir in NS1 is located at the southernmost end of NS1 inside the Refuge. The weir in EW1 is inside the Refuge at the west end of EW1 just east of the eastern edge of NS1.

137. The Wildlife Service used spoil material from NS1 and EW1 to construct the weirs. The weirs in NS1 and EW1 span the width of NS1 and EW1 and are approximately five feet from front to back at the height of each weir. The north-south sides of the weir in NS1 and the east-west sides of the weir in EW1 have a 4:1 slope. The top sides of each weir are stabilized with concrete bags.

138. Neither of the weirs caused flooding or other adverse impacts on nearby property. Both weirs in NS1 and EW1 have the same effect on water levels, up and downstream, as the high-elevation areas had in NS1 and EW1 prior to the excavation. The weir in NS1 re-creates the two-foot head difference in NS1 that existed prior to excavation.

139. No county rights-of-way exist in the location of NS1 and EW1. Brevard County never accepted the right-of-way adjacent to NS1 and EW1.

8. Permitting Requirements

140. Pursuant to Sections 373.413 and 373.416, the District requires an environmental resource permit (a "permit") to assure that activities such as construction, alteration, maintenance, or operation, will not be harmful to the water resources of the state and will be consistent with the overall objectives of the District. A permit is required for such activities unless a particular activity qualifies for an exemption authorized by applicable statutes and rules.

8.1 Stormwater Management System or Works

141. The permitting provisions in Sections 373.413 and 373.416, in relevant part, apply to the excavation of NS1, EW1, and the larger system of which each is a part (the "larger system") only if NS1, EW1, and the larger system satisfy the definitions of either a "stormwater management system," "works,"

or a "surface water management system." Each term is defined by statute or rule.

142. The definitions of a "stormwater management system" in Section 373.403(10) and in Rule 40C-4.021(25) are substantially the same. NS1, EW1, and the larger system are each:

> . . . designed and constructed or implemented to control discharges . . . necessitated by rainfall events, incorporating methods to collect, convey, store, absorb, [or] inhibit . . . water to prevent or reduce flooding, overdrainage, environmental degradation . . . or otherwise affect the quantity and quality of discharges from the system.

Section 373.403(10).

143. NS1, EW1, and the larger system are "works" within the meaning of Section 373.403(5) and Rule 40C-4.021(31). NS1 and EW1, and the larger system, are each:

> . . . artificial structures, including . . . ditches, canals, conduits, channels . . . and other construction that connects to, draws water from, drains water into . . . waters in the state.

Section 373.403(5).

144. NS1, EW1, and the larger system are each a "surface water management system" defined in Rule 40C-4.021(26). Each is a system which, in relevant part, is:

> . . . a stormwater management system . . . or works, or any combination thereof. . . . [and] include areas of dredging or filling . . . .

Rule 40C-4.021(26).

145. The definition of a "surface water management system" includes elements not found in the definition of either a

"stormwater management system" or "works." The broader scope of a surface water management system creates the potential that the permit requirement in Rule 40C-4.041(2)(b) may require a permit for elements not subject to Sections 373.413 and 373.416.

146. As applied to the facts in this proceeding, the permit requirement in Rule 40C-4.041(2)(b) for the construction, alteration, maintenance, or operation of a "surface water management system" or "works" does not exceed the statutory authority in Sections 373.413 and 373.416. NS1 and EW1, and the larger system fall within the definition of a stormwater management system in Section 473.403(10) and Rule 40C-4.021(25) and within the definition of "works" in Section 373.403(5) and Rule 40C-4.021(31).

8.2 Thresholds

147. The requirement for a permit in Rule 40C-4.041(2)(b) does not apply if the construction, alteration, maintenance, or operation of a surface water management system does not meet one or more threshold requirements. NS1 and EW1 meet two threshold requirements found in Rule 40C-4.041(2)(b) 2 and 8.

148. Rule 40C-4.041(2)(b) 2 and 8 require a permit for the construction, alteration, maintenance, or operation of a "surface water management system" if the system either:

> 2. Serves a project with a total land area equal to or exceeding forty acres; or
>
> * * *

> 8. Is wholly or partially located in, on, or over any wetland or other surface water.

149. NS1 and EW1 each serve a project with a total land area equal to or exceeding forty acres. NS1 and EW1 each are located wholly or partially in "wetlands" or other "surface water" defined, respectively, in Rule 40C-4.021(30) and Section 373.019(16). The excavation work placed spoil material in wetlands. The larger system also exceeds each of the threshold requirements in Rule 40C-4.041(2)(b) 2 and 8.

8.3 Maintenance

150. None of the parties claim that the excavation of NS1 and EW1 in 1997 was "construction" for which a permit is required in Section 373.413. The District alleges in paragraphs 24-25 and 31-33 of the Administrative Complaint that the excavation satisfies the definitions of maintenance, alteration, or operation.

151. The term "maintenance" is defined in Section 373.403(8) and Rule 40C-4.041(20), in relevant part, to mean:

> . . . remedial work of a nature as may affect the safety of any . . . works . . . but excludes routine custodial maintenance. (emphasis supplied)

Section 373.403(8).

In order for the excavation of NS1 and EW1 to be maintenance, it had to be, inter alia, "remedial work" that was not "routine custodial maintenance."

8.3(a) Remedial Work

152. The term "remedial" is not defined by applicable statutes or rules. The term must be defined by its common and ordinary meaning.

153. Work is "remedial" if it rectifies or corrects a fault or error. The excavation of NS1 and EW1 was remedial. It rectified and corrected a fault or error caused by occlusions from high spots, or elevation controls, vegetation, and other causes. The high spots, in particular, reduced flow capacity in low-flow conditions.

154. There is no evidence that the excavation of NS1 and EW1 in January 1997 was of a nature that affected the safety of NS1 and EW1. The lack of such evidence, however, does not preclude a finding that the excavation was remedial work.

155. Section 373.403(8) and Rule 40C-4.021(20) provide that work is remedial if it is of a nature that "may" affect the safety of works such as NS1 and EW1. The statute and rule do not define remedial work to require that work "shall" affect the safety of NS1 and EW1 in order for the work to be remedial. Thus, work is remedial if it is of a nature that affects either the function or safety of NS1 and EW1.

8.3(b) Routine Custodial Maintenance

156. If the excavation of NS1 and EW1 was routine custodial maintenance, it was excluded from the definition of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20). If the excavation

was not defined as "maintenance," it was neither "maintenance" that is subject to the maintenance permitting requirements nor "maintenance" that must satisfy the requirements for a "maintenance" exemption.

157. The terms "routine" and "custodial" are not defined by applicable statutes or rules. They must be defined by their common and ordinary meanings.

8.3(b)(1) Routine

158. The excavation of NS1 and EW1 was not routine. The excavation was not incident to work performed on a regular basis, according to a prescribed and detailed course of action, a standard procedure, or a set of customary activities. The excavation was not part of a course of action performed on a continuous or periodic basis.

159. Any excavation that occurred prior to 1997 occurred only sporadically or episodically and not pursuant to any discernible interval or course of action. No excavation in prior years occurred at the level or to the extent of the excavation in 1997.

160. From 1951 through 1996, neither NS1 nor EW1 were excavated in and around the excavation site. Experts examined aerial photographs taken between 1943 and 1997 for evidence of changes in water flow, vegetation, canal definition, and new spoil material that would indicate the occurrence of maintenance in and around the excavation site. Experts examined aerial

photographs taken in 1958, 1969, 1972, 1975, 1979, 1980, 1984, 1986, 1989, 1994, and 1995.

161. In 1943, there was a small interruption of water flow in NS1. The width of NS1 ranged from 10 to 14 feet. In 1951, the width of NS1 ranged from 16 to 20 feet.

162. In 1958, there was some water in NS1 south of EW1. However, the same area in NS1 was predominantly covered with dirt and free-floating wetland vegetation.

163. In 1979, intermittent water appeared in NS1 south of EW1. In 1980, water flowed freely in NS1 north of EW1, but no water flowed in NS1 south of EW1.

164. In 1983, much of the definition of NS1 was lost north of Marsh-1. Water was intermittent. In 1984, the same area was seriously occluded. About 75-80 percent of the capacity of NS1 had been lost.

165. In 1986, NS1 south of EW1 and north of Marsh-1 was losing definition. Sometime before 1993, some of the vegetation was cleaned out of NS1 south of Marsh-1.

166. In 1986, a ditch appears next to EW1 from NS1 east to Pond-1. The ditch is not man-made because it is irregular and does not flow in a straight line. The ditch leading out of Pond-1 next to EW1 appears in the 1986 aerial photographs because a controlled fire in 1984 burned much of the free-floating vegetation.

167. In 1989, the ditch next to EW1 was still present but was starting to become overgrown with vegetation. The vegetation included cattails west of Pond-1.

168. In 1994, vegetation had been cleaned out of NS1 from a point approximately 400 feet south of EW1 to SR 50, but no water was present in that part of NS1. In 1994, the ditch next to EW1 contained cattails and some shallow marsh species.

8.3(b)(2) Custodial

169. The excavation of NS1 and EW1 in January 1997 was not custodial. The excavation exceeded the level of work that was reasonably necessary to preserve, or care for, the condition or status of NS1 and EW1 immediately before the excavation.

170. The spoil material next to NS1 and EW1 after the excavation in January 1997 was not consistent with custodial care. The spoil material differed in quantity and content from that which would evidence custodial care.

171. The large quantity of spoil material produced by the excavation in 1997 far exceeded any reasonable amount that would evidence custodial care. The spoil material consisted primarily of sandy soil. The spoil material from custodial care would have consisted primarily of vegetation and possibly some organic soils that would have accumulated at or just beneath the bottom of NS1 and EW1.

8.4 Alteration

172. The term "alter" is defined in Section 373.403(7) and Rule 40C-4.041(2), in relevant part, as meaning:

> . . . to extend . . . works beyond maintenance in its original condition, including changes which may increase . . . the flow or storage of surface water which may affect the safety of . . . such . . . works.

Section 373.403(7); 40C-4.021(2).

8.4(a) Original Condition

173. Respondents contend that the term "original condition" means the condition prescribed in the original design specifications for NS1 and EW1 before 1916. If the excavation in 1997 was not so extensive that it exceeded the original design specifications for NS1 and EW1, Respondents argue that the excavation was not an "alteration" of NS1 and EW1.

174. Respondents are correct. The common and ordinary meaning of the term "original" means first in time. The legislature and the District consistently use the term "original design specifications" as a requirement in Section 403.813(2)(f) and (g) and Rules 40C-4.051(11)(b) and 40C-4.051(11)(c).

175. Original design specifications offer the most reliable standard for defining the "original condition" of NS1 and EW1 and should be used for that purpose whenever the original design specifications are established by the evidence of record. If the evidence is insufficient to establish the original design specifications, however, it does not follow that Respondents are

free to excavate NS1 and EW2 to any extent. An "alteration" of NS1 and EW1 occurs in the absence of original design specifications if the excavation exceeds the "original condition" of the NS1 and EW1 defined by the weight of the evidence.

176. The literal meaning of the terms "original design specifications" and "original condition" are not coterminous. The former term conveys a relatively specific connotation. The latter term is broad enough to be defined by means other than evidence of the "original design specifications" whenever the "original design specifications" cannot be established.

177. The District must show that the excavation in 1997 satisfied the essential requirements of an "alteration" in Section 373.403(7) and Rule 40C-4.021(2). The District must prove the "original condition" of NS1 and EW1 by evidence of the "original design specifications" or, in the absence of such evidence, by evidence of "original condition" before the excavation.

8.4(a)(1) Original Design Specifications

178. The parties submitted considerable evidence in an attempt to show that the "original condition" of NS1 and EW1 was evidenced, alternatively, by original design specifications or by other evidence, including evidence of the condition of NS1 and EW1 immediately before the excavation in January 1997. The evidence included data and other information from:

(a) approximately 78 aerial photographs taken in 1943, 1951, 1958, 1969, 1972, 1979, 1980, 1983, 1984, 1986, 1989, 1993-1995, and 1997;

(b) construction plans for I-95, from the 1960s, and for the widening of SR 50 by the Department;

(c) various reports and surveys, including those identified in this proceeding as the Cofield, Powell, McCrone, and Titusville surveys or reports;

(d) the results of investigations or surveys conducted by the District in 1996 and 1997;

(e) official maps, including the recorded plat of Titusville Farm, the U.S. geologic survey quadrangle map, the map used by the Wildlife Service, the Department's drainage basin map, and the District's basin map;

(f) the record chain of title that includes recorded drainage easements;

(g) approximately 51 pages of local newspaper articles from the early 1900s describing the work at Titusville Farm; and

(h) expert testimony based on the examination of the evidence of record.

179. The evidence does not establish the original design specifications for NS1 and EW1 or the larger system. The evidence does not establish invert elevation; bottom width; side slopes; top width; ditch bottom profile or slope; hydraulic capacity; or hydrologic function.

180. From the early 1900s through the 1970s, various plans proposed the construction of ditches that would discharge water into the Indian River approximately three miles east of I-95. The lower elevation of the River presented an efficient outfall

for drainage. However, neither NS1, EW1, nor the larger system contains an outfall to the Indian River.

181. Survey information is not available for the original construction of NS1, EW1, and the larger system. Information contained in more recent surveys does not show that NS1 and EW1 were originally designed to a depth of five to seven feet as Respondents contend.

182. Newspaper articles from the early 1900s do not provide sufficient detail to establish the original design specifications for NS1, EW1, and the larger system. Most of the articles refer to a system constructed to the southeast of what is now the intersection of I-95 and SR 50. A few references describe canals that are four to five feet deep.

183. Old newspaper articles show photographs of dredging equipment constructing a canal from Bird Lake to the Indian River. Bird Lake is southeast of I-95 and SR 50.

184. The only evidence of the "original condition" of NS1 and EW1 before the excavation is evidence of the condition of each on the date of a particular piece of evidence. The evidence shows that the "original condition" of NS1 and EW1 between 1951 and the date of excavation was seriously degraded from the condition to which they were restored after the excavation.

8.4(a)(2) Condition Before Alteration

185. After 1951, the canals constructed within that portion of Titusville Farm that is in the contested area lost their

original design function. Due to a lack of maintenance and to occlusions through vegetation growth, aquatic vegetation, and sediment, the canals deteriorated over time.

186. Since 1966, the canals have exhibited only sporadic signs of maintenance. Little, if any, new spoil material has been present. Water flow has been intermittent and insignificant. The increased growth in vegetation is consistent with decreased water flow and itself further impedes water flow.

187. Since 1951, the canals in the rectangular parcel have filled with sediment in random locations, producing irregular ditch bottom elevations. High spots in bottom depths create control elevations that impede the flow of water during low-flow conditions west toward the St. Johns River and south toward the Addison Canal.

188. Numerous high spots in bottom elevations create control elevations that impede water flow. The construction plans for I-95 reveal bottom depths in the rectangular parcel that vary from one to two feet. The construction plans for Hacienda Road show bottom depths ranging from 1.5 to 2.0 feet. Other surveys show natural ground elevations of 11.0 to 11.1 feet and bottom elevations of 8.5 to 9.8 feet resulting in bottom depths ranging from 1.3 to 2.5 feet.

189. A survey conducted by the District in 1997 of high spots in bottom elevations between Hacienda Road and I-95 is consistent with the findings of previous surveys. Large sections

of east-west ditches are high and reduce the flow of water west to the St. Johns River.

190. Those canals constructed in Titusville Farm which are located in the smaller parcel east of I-95 have experienced a degradation in function similar to that experienced by the canals in the rectangular parcel. In addition, many of the existing drainage ditches discharge into swamps instead of their intended drainage outlets.

191. During periods of high water, the canals constructed in Titusville Farm and now located in the contested area overflow and flood. During such periods, the natural sheet flow of water occurs from east to west and from north to south.

8.4(b) Safety

192. Section 373.403(7) and Rule 40C-4.021(2) provide that work is an alteration if it includes changes which "may" affect the safety of works such as NS1 and EW1. The statute and rule do not say that work "shall" affect the safety of NS1 and EW1 before the work can be considered to be an alteration. Thus, work can be an alteration if it includes changes which affect either the function or safety of NS1 and EW1. The excavation of NS1 and EW1 affected their function.

8.5 Operation

193. The term "operation" is not defined in applicable statutes or rules and must be defined by its common and ordinary meaning. The term "operation" has two meanings.

194. One meaning for an "operation" is a process or series of acts performed to effect a certain purpose or result, such as a surgical procedure. This definition creates the potential that the excavation of NS1 and EW1 will qualify simultaneously as an operation, maintenance, and an alteration. An "operation" would be neither maintenance nor an alteration only if: the operation was a process or series of acts, other than remedial work; was performed to effect a purpose or result other than the extension of works beyond maintenance in their original condition; and was not routine custodial maintenance.

195. The second definition of "operation" is more easily distinguished from a single event that may also qualify as "maintenance" or "alteration." Under the second definition, an "operation" means an "act," process, or "way of operating" over time. Under this definition, a person can engage in the operation of a stormwater management system, or works, after completing a single event that is defined as either "maintenance" or "alteration."

196. NS1 and EW1 were operating at some level of function and capacity before their excavation in 1997. Section 373.416 could not reasonably be construed as requiring Modern to obtain a permit for allowing NS1 and EW1 to continue their existing operation when Modern became the owner of the property. Modern would have committed no "act" which brought about a "way of operating" NS1 and EW1 that did not already exist at the time of acquisition.

197. The excavation of NS1 and EW1 was an "act" by Modern that brought about a new and different "way of operating" NS1 and EW1. The new "way of operating" would not have occurred but for the act of Modern. After the excavation, Modern operated NS1 and EW1, albeit passively, in a way that Modern did not operate NS1 and EW1 before the excavation.

198. Under either definition, the excavation in January 1997 involved the operation of NS1 and EW1. Pursuant to Section 373.416, the District requires a permit for either type of operation.

8.6 Integrated Transaction

199. The excavation of NS1 and EW1 in January 1997 consisted of three separate steps integrated into a single transaction referred to by the parties as excavation. The first step was maintenance; the second step was alteration; and the third step involved a new operation.

200. In the first step, maintenance removed vegetation and minor occlusions; restored NS1 and EW1 to their original condition immediately before the excavation; and was neither routine nor custodial. In the second step, alteration extended the excavation beyond maintenance of NS1 and EW1 in their original condition; increased the flow of water in each; increased the depth and width of each; and increased the function and capacity of each. The third step in the transaction involved a new way of operating NS1 and EW1 after the first two steps.

201. Even if the new operation were not a step within the excavation, because it arguably did not occur until after the excavation was completed, the transaction consisted of the two steps in the excavation and a third step after the excavation. In either case, the new operation of NS1 and EW1 is a separate activity for which a permit is required pursuant to Section 373.416.

202. The separate permitting requirements in Sections 373.413 and 373.416 apply to each separate step in the transaction. If excavation had ceased after the maintenance step, no alteration or new operation of NS1 and EW1 would have occurred. Nevertheless, permitting requirements would have required a permit for the maintenance performed in the completed step unless that step qualified for a maintenance exemption.

203. Once the excavation progressed beyond maintenance, it involved the additional, but separate, steps of "alteration" and "operation" for which a permit is required and for which no exemption is claimed by Respondents. If each separate step were separated in time, separate permitting requirements would have applied to each step. Modern does not avoid the separate permitting requirements in Sections 373.413 and 373.416 by integrating three separate steps into a single transaction.

9. Estoppel

204. The weight of the evidence does not show that the District is estopped from enforcing applicable permitting and

exemption requirements. The evidence does not show that the District represented to Respondents that the excavation of NS1 and EW1 did not require a permit or qualified for an exemption.

9.1 Factual Representations

205. Prior to the excavation of NS1 and EW1, District staff met with Mr. Charles Moehle, Mr. Michael Moehle, Mr. Nelson, and a number of others. The meeting was held to discuss the proposed cleaning of the IRCC.

206. A number of issues were discussed at the meeting. One issue involved a driveway that had been constructed in the IRCC without culverts. The District determined that the driveway did not create a substantial adverse impact on area property owners because the IRCC did not carry enough water. Most of the water draining south out of the contested area drained south of the IRCC to the Addison Canal.

207. The District told attendees at the meeting that the District would clean out most of the vegetation in the IRCC. Brevard County subsequently installed culverts in the IRCC where the driveway had been constructed originally without culverts.

208. At the southeast corner of the smaller parcel east of I-95, the IRCC turns obliquely northeast for about a half mile and then resumes its eastward direction toward Indian River City. Respondents claim the IRCC turns north at NS1, at a right angle, and then turns east at EW1, at another right angle, and resumes its eastward direction to Indian River City.

209. The District did not represent to Respondents that the IRCC follows NS1 and EW1 and flows under I-95 to Indian River City. The District never indicated that NS1 and EW1 could be cleaned out under a maintenance exemption as part of the IRCC or otherwise.

210. Mr. Frank Meeker, the Ombudsman for the District, met with Mr. Michael Moehle at least three times between February 14 and April 22, 1996, to discuss the problems of high water on Modern property. Mr. Meeker indicated that a culvert needed to be placed under the driveway in the IRCC, which was later done by Brevard County, and that NS1 needed to be cleaned out to eliminate the blockage south of SR 50 in the vicinity of the Titusville Waste Water Treatment Plant.

211. NS1 was cleaned out south of SR 50. Mr. Meeker reviewed the work and indicated to Mr. Michael Moehle that the work constituted borderline maintenance.

212. Mr. Meeker never indicated that the excavation of NS1 and EW1 north of SR 50 would be exempt from statutory permitting requirements. Mr. Meeker has neither the actual nor apparent authority to rule on permit requirements. Mr. Meeker sent a letter to Mr. Charles Moehle in April 1996. Nothing in that letter suggests that the excavation of NS1 and EW1 would be exempt from statutory permitting requirements.

9.2 Disparate Treatment

213. Respondents claim that the District treated them unfairly. The weight of the evidence shows that the action taken by the District did not result in disparate treatment.

9.2(a) Cracker Barrel-1, Cracker Barrel-2, and Lowe's

214. Since 1996, the District has issued three permits for construction of different projects on property owned by Modern or Omni in the area of NS1 and EW1. The three projects involved significant impacts to wetlands. The three projects are referred to in this proceeding as Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

215. In determining whether a particular piece of property contains wetlands, the District relies on a statewide wetland delineation rule described in Section 373.421 and Rule 62.340. The District considers vegetation, soils, and hydrology to delineate wetlands. The District utilized this delineation rule when it issued permits for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

216. The District determines a mitigation ratio for construction on wetlands through a balancing process. The District weighs the quality of the wetlands on a particular construction site against the quality of the mitigation plan. The District relied on this same process when it issued permits for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

217. Cracker Barrel-1 involved approximately 4.5 acres of wetlands on a 5-acre site just south of Modern-1. The District issued a permit for the construction of Cracker Barrel-1 approximately two months after receipt of the application.

218. Cracker Barrel-2 involved approximately 11 acres of wetlands on a 15-acre site. The District issued a permit for the construction of Cracker Barrel-2 approximately two months after receipt of the application.

219. Lowe's is located east of I-95, north of SR 50, west of SR 405, outside the contested area, but adjacent to the contested area. Lowe's involved approximately 22 acres of wetlands on a 25-acre site. Lowe's was not an easy project to permit due to the extensive acreage and wetlands impacts. The District issued a permit for the construction of Lowe's approximately four months after receipt of the application.

9.2(b) Unnecessary Delay and Expense

220. Respondents complain that the District unfairly increases the time and expense associated with permit applications through pre-application negotiations intended to resolve issues that typically arise when formulating a mitigation plan for construction on wetlands. Respondents contend that the delay before an application can be submitted is unreasonable.

221. Respondents point to a delay of almost a year between the time Modern first complained in 1996 of flooding and the refusal of the District to approve any corrective action.

Respondents also cite delays in pre-application negotiations for Cracker Barrel-1, Cracker Barrel-2, and Lowe's.

222. The District did not delay its investigation of the flooding allegedly caused by the Hacienda Road project. The District conducted an appropriate investigation and reasonably determined that the flooding was not attributable to the Hacienda Road project. The delays complained of by Respondents are reasonable incidents of good faith attempts by the District to effectuate its statutory responsibilities through mutual agreement.

223. The weight of the evidence does not show that the delays complained of by Respondents constitute disparate treatment. The delays were not de jure delays that resulted from a design or intent on the part of the District to delay Modern and Omni in their construction and development ventures. The weight of the evidence shows that the delays were reasonably necessary to formulate mitigation plans for each construction project and to carry out the statutory obligations of the District prescribed in Sections 373.413 and 373.416.

9.2(c) Selective Exemption

224. Respondents claim that the District is unfairly applying certain maintenance exemptions to the excavation carried out by Modern. Respondents complain that the District previously granted maintenance exemptions for projects carried out by

entities unrelated to Respondents but denied any maintenance exemption for the excavation of NS1 and EW1.

225. Activities covered by applicable permitting requirements either do or do not qualify for a maintenance exemption. No separate application is required for such an exemption. A person who performs work based on the assumption that the work qualifies for an exemption assumes the risk that the work does not qualify for the exemption. If the work is performed in violation of applicable permitting requirements, it may qualify for an after-the-fact permit or corrective action may be required.

226. The District has previously granted relevant maintenance exemptions for a number of different projects carried out by entities unrelated to Respondents and has also denied maintenance exemptions in other instances including the excavation of NS1 and EW1. The weight of the evidence shows that the District is not applying maintenance exemptions to the excavation of NS1 and EW1 in a manner that results in disparate treatment of Modern or its co-respondents.

227. Brevard County cleaned out a portion of NS1 south of SR 50 based on the mistaken conclusion that the work qualified for a maintenance exemption. After the District began this enforcement action against Modern, the District determined that the work did not qualify for a maintenance exemption and required Brevard County to apply for a permit.

228. Brevard County applied for a permit, albeit belatedly. The District granted the permit because the work complied with applicable criteria and did not result in adverse impacts to wetlands or the Refuge.

229. In another instance, the District discovered some ditch plugs in ditches adjacent to property owned by a person named "Dr. Broussard." The District requested Dr. Broussard to remove the plugs, and Dr. Broussard complied.

9.2(d) Selective Enforcement

230. Respondents allege disparate treatment from the District on the ground that the District did not file an administrative complaint in the foregoing instances but filed such an action against Modern. However, the weight of the evidence shows that enforcement action was not reasonable in other instances because the District reached mutually agreeable resolutions with the regulated parties. The evidence shows that enforcement action was reasonably necessary in this proceeding.

231. The District first became aware of the significance of the impacts of the excavation of NS1 and EW1 when the District received a letter from the Wildlife Service in March 1997. The District brought the matter to the attention of Modern. The District informed Modern of the seriousness of the situation, notified Modern that the excavation required a permit, and made Modern aware of the need to correct the situation by restoring the wetlands to their original condition. The District and

Modern discussed various options for constructing weirs without reaching any agreement.

232. Time was of the essence. When the District concluded that the parties were not going to reach agreement, the District undertook emergency action in May 1997 and filed the Administrative Complaint later in August 1997.

233. The action taken by the District in this proceeding is consistent with the District's historical practice. When the District becomes aware of a potential violation, the District does not immediately file an administrative complaint. The District investigates the matter to confirm the existence and extent of a violation, if any, and makes reasonable efforts to resolve the matter informally.

234. The District has not issued an emergency order prior to the excavation of NS1 and EW1 because an emergency order was not the most appropriate solution in other cases. However, the District has sought injunctions in circuit court against persons unrelated to Respondents. In this proceeding, an emergency order better served applicable statutory mandates to the District because the Wildlife Service was willing to perform the work needed to rectify the condition that existed within the Refuge. This combination of factors made an emergency order particularly well suited and practicable for carrying out the statutory responsibilities of the District.

235. The weight of the evidence does not show that the District threatened criminal prosecution against Modern or its

individual shareholders. The District has not referred this matter for criminal prosecution.

236. However, the issue of whether a threat of criminal sanctions occurred is fairly debatable, even if it is immaterial to estoppel, the permitting requirements, and the exemption requirements. Paragraph 27 in the Administrative Complaint does put Modern on notice that Sections 373.129(5) and 373.136 authorize the District to file a cause of action in circuit court in which the District may seek civil penalties up to $10,000. Section 373.430(3)-(5) puts Modern on notice of the potential for criminal penalties in circuit court.

237. In any event, Modern failed to prove that the District is estopped from requiring a permit or applying applicable exemption requirements to the excavation of NS1 and EW1. Modern neither applied for nor obtained a permit for the excavation of NS1 and EW1. Unless Modern qualifies for one of the exemptions authorized by statute or rule, Modern violated Section 373.430(1)(b) and is subject to the actions and penalties authorized in Sections 373.119 and 373.129(1), (3), (6), and (7).

10. Exemptions

238. Modern claims it is entitled to six exemptions from the permitting requirements in Sections 373.413 and 373.416. Four of the exemptions are found in Rules 40C-4.051(2)(a)1, 40C-4.051(2)(a)3, 40C-4.051(11)(b), and 40C-4.051(11)(c). The other two exemptions are found in Section 403.813(2)(f) and (g).

10.1 Two Grandfather Exemptions

239. Rule 40C-4.051(2)(a) 1 and 3, in relevant part, authorizes exemptions for systems such as NS1, EW1, and the larger system, if they are: located in prescribed areas; and were constructed and operating prior to December 7, 1987, and March 2, 1974, respectively. NS1, EW1, and the larger system are located in the areas described in each rule. On the requisite dates, however, they were not constructed and operating.

240. Rule 40C-4.051(2)(c), in relevant part, provides that the exemptions in Rule 40C-4.051(2)(a) apply only to those systems set forth in plans, specifications, and performance criteria existing on or before December 7, 1983, or March 2, 1974, as the case may be, and then only to the extent:

> 2. Such system is maintained and operated in a manner consistent with such plans, specifications and performance criteria.

Rule 40C-4.051(2)(c) 2.

241. Rule 40C-4.051(3), in relevant part, provides that the exemptions listed in Rule 40C-4.051(2) "shall not apply" to those systems which on either December 7, 1983, or March 2, 1974, as the case may be:

> . . . have ceased to operate as set forth in such system's plans, specifications and performance criteria.

242. Modern does not qualify for either of the exemptions in Rule 40C-4.051(2)(a) 2 or 3. As a threshold matter, the weight of the evidence does not establish plans, specifications, or performance criteria (the "original criteria") for NS1, EW1,

or the larger system on either December 7, 1983, or March 2, 1974. Even if the evidence did establish the original criteria and if the excavation merely restored NS1 and EW1 to the original criteria, the evidence clearly shows that neither NS1, EW1, nor the larger system were constructed and operating in accordance with the original criteria on the prescribed dates. Rather, the evidence shows that NS1, EW1, and the larger system had become seriously degraded and no longer operated at their post-excavation levels.

10.2 Two Maintenance Dredging Exemptions

243. Modern claims that it qualifies for the exemption in Rule 40C-4.051(11)(b). That rule, in relevant part, exempts from the permitting requirements in Sections 373.413 and 373.416:

> The . . . maintenance dredging of existing manmade canals [and] channels . . . where the spoil material is . . . removed and deposited on a self-contained, upland spoil site which will prevent the escape of the spoil material and return water from the spoil site into wetlands or other surface waters, provided no more dredging is performed than is necessary to restore the canal [and] channels . . . to original design specifications and provided that control devices are used at the dredge site to prevent . . . deleterious substances from discharging into adjacent waters during maintenance dredging. . . . This exemption shall not apply to the removal of a natural . . . barrier separating a canal . . . or system from adjacent wetlands or other surface waters.

244. Prior to the amendment of Section 403.813(2)(f) in October 1997, the maintenance exemption in the statute was substantially similar to that in the quoted rule. The two

exemptions are first discussed together as they existed prior to the statutory amendment in 1997. The exemption requirements created by the 1997 amendments are discussed separately.

10.2(a) Requirements Before 1997

245. The excavation of NS1 and EW1 in January 1997 was "dredging" within the meaning of Section 373.403(13). It was excavation by any means in surface waters defined in Section 373.019(16) or wetlands delineated in Section 373.421(1). The excavation also connected Pond-1, a water body, to surface waters or wetlands.

10.2(a)(1) Canals, Channels, or Ditches

246. The maintenance dredging exemptions authorized in Section 403.813(2)(f) and Rule 40C-4.051(11)(b) apply only to canals or channels. The exemptions do not apply to drainage ditches.

247. Neither Section 373.403 nor Rule 40C-4.021 define the terms "canals, channels, or ditches." However, the terms are defined in Section 403.803(2),(3), and (7).

248. The definitions in Section 403.803 may be used to define the terms of the exemptions in Rule 40C-4.051(11)(b). In October 1995, the legislature consolidated the dredge and fill permitting provisions in Chapter 403 with the permitting provisions for the management and storage of surface waters in Chapter 373, Part IV.

249. Section 403.813(2) expressly provides that the exemptions authorized in Section 403.813(2) apply to the permit requirements in Chapter 373. Section 373.413(9) directs water management districts in the state to incorporate the provisions of Rule 62-312.050 into the rules of the districts and to rely on the existing provisions governing the dredge and fill program when implementing the rules of the districts.

250. Neither NS1 nor EW1 is a canal within the meaning of Section 403.803(2). Although each is a manmade trench, the bottom of neither NS1 nor EW1 is normally covered by water within the meaning of Section 403.803(2).

251. Portions of NS1 and EW1 which are upstream from high spots or elevation controls are "normally" covered by water. However, portions which are downstream of high spots are "normally" not covered by water during low-flow conditions and dry conditions in a normal or wet year, and during dry years.

252. Neither NS1 nor EW1 is a channel as defined in Section 403.813(3). Although each is a trench, the length of NS1 and EW1 are not "normally" covered "entirely" with water during low-flow conditions and dry conditions in a normal year or wet year, and during dry years. Neither is the bed of a stream or river.

253. NS1 and EW1 are each a drainage ditch or irrigation ditch within the meaning of Section 403.803(7). Each is a man-made trench created to drain water from the land or to transport water for use on the land, and neither is built for navigational purposes. NS1 and EW1 satisfy the definition of a drainage ditch

or irrigation ditch irrespective of the degree to which the bottom of each is "normally" covered by water: upstream or downstream of high spots or control elevations; during low-flow conditions and dry conditions in normal or wet years; and during dry years.

10.2(a)(2) Additional Requirements

254. Even if NS1 and EW1 were canals or channels, their excavation in 1997 does not qualify for the exemption in Rule 40C-4.051(11)(b). The excavation fails to satisfy several additional requirements for the exemption.

255. The spoil material from the excavation was not placed on an upland spoil site which prevented the escape of spoil material and return water into wetlands and surface waters within the meaning of Section 373.019(16). Rather, Modern placed the spoil material in wetlands. Modern placed approximately 1.5 acres of fill in wetlands in the form of spoil material from the excavation. Modern placed approximately .75 acres of such fill in the wetlands and surface waters north of Marsh-1.

10.2(a)(3) Original Design Specifications

256. More dredging was done than was necessary to restore NS1 and EW1 to their original design specifications. The weight of the evidence does not show the original design specifications for NS1 and EW1, including the bottom elevations, widths, slopes, and other pertinent specifications typically prescribed in original designs. However, the evidence does show the original

condition of NS1 and EW1 immediately before their excavation. More dredging was done than was necessary to restore NS1 and EW1 to their original condition before the excavation.

10.2(a)(4) Natural Barrier

257. The exemptions in Section 403.813(2)(f) and Rule 40C-4.051(11)(b) do not apply to the removal of a natural barrier separating a canal from adjacent wetlands or other surface waters. The term "barrier" is not defined in Sections 373.403 or 403.803; or in Rule 40C-4.021. The term must be defined by its common and ordinary meaning.

258. A barrier is something that acts to hinder or restrict. The high spots that existed in NS1 and EW1 before their excavation functioned as control elevations. The high spots were natural barriers during low-flow conditions, during dry conditions in normal and wet years, and during dry years. They acted to hinder or restrict the flow of water through EW1 and NS1 into adjacent wetlands and eventually to other surface water through the Addison Canal west toward the St. Johns River. The 3-4 foot wall of water that flowed down NS1 to SR 50 immediately after the excavation in 1997 provided vivid evidence of the effectiveness of the high spots that formed two-foot barriers before the excavation.

259. The excavation did not use control devices which prevented deleterious substances from discharging into adjacent waters during maintenance dredging. The term "waters" is defined

in Section 403.031(13) to include wetlands. The term is also defined in Section 373.016(17) and Rule 40C-4.021(29) in a manner that includes wetlands. Spoil material was placed in adjacent waters and not contained by adequate control devices.

10.2(b) Requirements After 1997

260. Additional provisions not found in Rule 40C-4.051(11)(b) were added to Section 403.813(2)(f) in October 1997. In relevant part, the additional provisions extend the exemption in Section 403.813(2)(f) beyond canals and channels to include:

> . . . previously dredged portions of natural water bodies within drainage rights-of-way or drainage easements which have been recorded in the public records of the county . . . provided that no significant impacts occur to previously undisturbed natural areas, and provided that . . . best management practices for erosion and sediment control are utilized to prevent . . . dredged material . . . and deleterious substances from discharging into adjacent waters during maintenance dredging . . . . (emphasis supplied)

10.2(b)(1) Retroactivity

261. As a threshold matter, the additional provisions in Section 403.813(2)(f) did not take effect until October 1997. The excavation of NS1 and EW1 occurred in January 1997.

10.2(b)(2) Drainage Easements

262. Modern claims that it was not required to obtain a permit to excavate NS1 and EW1 because Modern possesses drainage easements for NS1 and EW1 which are recorded in the public records of Brevard County, in accordance with the requirements of

Section 404.813(2)(f). Modern claims that it is entitled to maintain its drainage easements.

263. Assuming arguendo that Respondents possess drainage easements and that the drainage easements are included in the exemption, the owner of drainage easements is no less subject to statutory permitting and exemption provisions than is the owner of the fee simple estate in land through which an easement runs. The existence of drainage easements is only one of the requirements in Section 403.813(2)(f) for an exemption from a permit. Modern must also show that it satisfies the other exemption requirements in Section 403.813(2)(f).

10.2(b)(3) Other Requirements

264. The excavation of NS1 and EW1 resulted in significant impacts to previously undisturbed natural areas. The area subject to significant impacts was not limited to the excavation site but included 600-800 acres inside the Refuge.

265. Modern failed to utilize best management practices to prevent dredged material and deleterious substances from discharging into adjacent waters during dredging. Dredged material and deleterious substances were deposited into adjacent wetlands.

10.3 Two Maintenance Exemptions

266. Rule 40C-4.051(11)(c), in relevant part, provides that no permit is required for the maintenance of "functioning . . . drainage ditches . . ." if:

> 1. The spoil material is deposited on a self-contained upland spoil site which will prevent the escape of the spoil material and return water into wetlands or other surface waters. [and]
>
> * * *
>
> 3. . . . no more dredging is . . . performed than is necessary to restore the . . . drainage ditch to its original design specifications.

267. The quoted requirements for the exemption in Rule 40C-4.051(11)(c) are substantially identical to the requirements for the exemption in Section 403.813(2)(g). However, the exemption in Rule 40C-4.051(11)(c) applies to "functioning" ditches while the exemption in Section 403.813(2)(g) authorizes an exemption for "existing" ditches.

10.3(a) Functioning or Existing

268. The terms "functioning" and "existing" are not defined in Sections 373.403, 403.803, or in Rule 40C-4.021. Each term must be defined by its common and ordinary meaning.

269. The terms "functioning" and "existing" are not equivalent terms. The statutory provision authorizing maintenance exemptions for "existing" ditches precludes a maintenance exemption for initial "construction" of ditches. Existing ditches do not function if they are totally occluded by debris, silt, or vegetation that prevent any conveyance of water. Alternatively, a ditch that is dammed by a man-made device would not function but would exist.

270. Before the excavation in January 1997, NS1 and EW1 each functioned to the extent that it performed the action for which it was particularly fitted or employed, albeit at a degraded capacity. Each existed irrespective of its level of function.

271. The culverts for NS1 under SR 50 and south of SR 50 and those for EW1 under I-95 belie the District's contention that NS1 and EW1 neither functioned nor existed before the excavation. If the contention were correct, it would mean the construction of the culverts under SR 50 and south of SR 50 was a meaningless expenditure of taxpayer dollars.

272. The District's contention suffers another internal inconsistency. If NS1, EW1, and the larger system were not functioning before the excavation, they may have failed one or more of the threshold requirements in Rule 40C-4.041(2)(b)2 because they did not "serve" 40 acres or any other area.

273. NS1 and EW1 functioned and existed before the excavation. NS1 and EW1 each conveyed water when water exceeded high spots during dry and wet conditions in dry, normal, and wet years. EW1 conveyed water into NS1. NS1 conveyed water south through several culverts into the Addison Canal and west toward the St. Johns River. The bottom line is, the works worked.

275. Even though NS1 and EW1 were "functioning" and "existing" before the excavation in January 1997, the excavation did not qualify for the exemptions in Section 403.813(2)(g) and

Rule 40C-4.051(11)(c). The excavation failed to satisfy additional requirements in the statute and rule.

10.3(b) Additional Requirements

276. The excavation did not deposit spoil material on a self-contained upland spoil site which prevented the spoil material and return water from escaping into wetlands and other surface waters. The dredging was more than was necessary to restore NS1 and EW1 to their original design specifications.

11. Unadopted Rule

277. Respondents claim that the District's proposed agency action is based on a policy which satisfies the definition of a rule in Section 120.52(15) but which has not been promulgated in accordance with the rulemaking procedures prescribed in Section 120.54 (an "unadopted rule"). Respondents claim the unadopted rule restricts "maintenance" exemptions in Section 403.813(2)(g) and Rule 40C-4.051(11)(c) to routine custodial maintenance; and to existing ditches that also function.

278. Section 120.57(1)(e), in relevant part, provides:

> . . . Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge . . . .
>
> . . . The agency must demonstrate that the unadopted rule . . . [satisfies the requirements of Sections 120.57(1)(e)2a-g] . . . . (emphasis supplied)

If Respondents show that the District's proposed agency action is based on an unadopted rule and that the District has relied on the rule to determine the substantial interests of Respondents, then the agency must prove-up its unadopted rule by demonstrating in a de novo review that the unadopted rule satisfies the requirements of Section 120.57(1)(e).

11.1 Rule Defined

279. Section 120.52(15), in relevant part, defines a rule to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and . . . includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of any person or plan or procedure important to the public and which have no application outside the agency issuing the memorandum . . . .

280. Section 120.52(15) establishes two conjunctive requirements as a threshold test for a rule. There must be a statement; and the statement must be one that is of general applicability.

281. A statement of general applicability must also satisfy one or more disjunctive requirements. The statement must either implement, interpret, or prescribe law or policy; describe the practice requirements of an agency; amend or repeal a rule; or

impose any requirement or solicit any information not required by statute or rule.

11.1(a) Statement

282. The District published a working definition of routine custodial maintenance in a memorandum dated November 20, 1989 (the "Memorandum"). The Memorandum was authored by the District's Chief Engineer and approved by the Director of the Department of Resource Management (the "Director"). The Memorandum directs field office directors and compliance coordinators in regard to ditch work and routine custodial maintenance.

283. In relevant part, the statement expressed in the Memorandum provides:

> This memorandum serves to clarify the District policy on: 1) the type of ditch maintenance work which qualifies for exemption from . . . permitting as specified in rule section 40C-4.051(2)(a)2.a . . . and, 2) procedures for verification that the work qualifies for this exemption. (emphasis supplied)
>
> This discussion only applies to work in ditches which trips . . . [a] permit threshold. . . . In many cases, none of these thresholds would be exceeded.
>
> Section 40C-4.051(2)(a)2.1. . . . specifically exempts the "maintenance" of "systems" in existence prior to December 7, 1983. Section 403.813(2)(f) and (g) also exempts the "maintenance dredging of canals and ditches. [sic] These exemptions, however, only apply to what is defined as "routine custodial maintenance." Work that results in the alteration of the system is

not exempt and requires a permit from the District if a threshold is exceeded. Section 3.2.1 of the . . . Applicant's Handbook defines "alter" as "works beyond maintenance in its original condition." (emphasis supplied)

Working Definition of "Routine Custodial Maintenance" (emphasis not supplied)

1. Two basic criteria:

a. The proposed maintenance work must be for the purpose of restoring the ditch system to its original design specifications. Such specifications would normally include: invert elevation, bottom width, side slopes, top width, ditch lining, ditch bottom profile (slope). In addition, such specifications may include culvert structures, including culvert type, size, invert elevation, length, slope and endwall detail.

Maintenance work conducted under this exemption must not alter the hydraulic capacity or hydrologic functions of the ditch from that provided by the original design.

b. The maintenance work must occur on a regular basis. The frequency of maintenance will be variable and dependent on site specific conditions and the level of service provided by the particular ditch system. However, for maintenance work to be exempt, the ditch should have been maintained to prevent deterioration to such a degree that it no longer functions as intended. In other words, routine custodial maintenance is limited to maintaining the ditch rather than re-building the ditch. As a rule of thumb, most ditch systems require maintenance at least once every ten to fifteen years. In some cases, more frequent maintenance is required to prevent a ditch form becoming non-functional.

2. Examples of work which meet the test of "routine custodial maintenance" (provided that the ditch has been periodically maintained):

a. Removal of accumulated silt and debris.

b. Clearing of vegetation from the ditch.

c. Clearing of culverts blocked by sediment or debris.

d. Replacement of damaged culvert structures with same size culverts.

e. Regarding and revegetating ditch side slopes.

3. Examples of work which do not meet the test include:

a. increasing the hydraulic capacity by deepening the ditch bottom and/or increasing the ditch cross section;

b. lining an existing ditch with concrete or other material to improve hydraulic capacity;

c. replacing existing culvert structures with different culvert sizes or placement of new culverts at different invert elevations;

d. any maintenance dredging where spoil material is placed in wetlands;

e. dredging or other maintenance work in natural system.

Procedures for conducting maintenance work according to the . . . exemption (Section 40C-4.051(2)9a)2.a. . . . [sic] (emphasis not supplied)

If the work is not routine custodial maintenance, the entity performing the work is responsible for obtaining the required permits prior to starting work. (emphasis supplied) Routine custodial maintenance may be conducted without contacting the District. However, upon request, the district will

> provide written verification that the work is exempt after receiving sufficient information to determine that the work is routing custodial maintenance. This information must include . . . evidence of the original design specifications as described below:
>
> * * *
>
> Case 2. No Design Specifications (Plans) Exist (emphasis not supplied) this will be the case for many ditch systems prior to . . . effective date . . . or not subject to permitting. . . . In this case, it is much more difficult to determine if the work qualifies for the exemption. The following may be used by the applicant to verify that the work qualifies for an exemption:
>
> a. Work will be limited to one or more of the maintenance activities listed above . . . .
>
> b. Other evidence as to the original specifications of the ditch system, such as: historical and current photographs and aerial photographs; contracts, bid documents, etc.; specifications for typical ditch sections; individuals attesting to the original ditch dimensions (such as contractors, former or current government employees); information on the soils and vegetation in the ditch. . . .

Memorandum at unnumbered pages 1-3.

284. The Memorandum is published evidence of the agency statement. However, the statement expressed in the Memorandum exists and is applied by the District independently of the Memorandum.

285. The District expresses and applies the statement each time the District enforces agency action based on the statement and not just when the agency publishes a particular document that captures the statement in writing. The existence, terms, and

scope of the statement are measured on a de facto basis by the effect of the statement. That effect emerges from all of the evidence of record including, but not limited to, the publication of the statement in various documents such as the Memorandum.

286. The District illustrates in its PRO and PFO how easily an agency statement can elude the four corners of a particular document on which it is written and emerge from the evidence as an unwritten statement with broader applicability than that stated in a particular document. In relevant part, the District states:

> 9. The 1989 memorandum was not written to explain the maintenance exemption for . . . drainage ditches in 40C-4.051(11)(c) . . . because this rule did not exist when the memorandum was written. It was written to explain the grandfathering exemption at 40C-4.051(2)(a) . . . which exempts the "maintenance" of "systems" in existence prior to December 7, 1983 from the permitting requirements of Chapter 40C-4. . . . (emphasis supplied)
>
> * * *
>
> 55. Modern claims that the ditch excavation is exempt under the ditch maintenance exemption in 40C-4.051(11)(c). . . . (emphasis supplied)
>
> 56. Not all ditch excavation is exempt under this exemption, just routine custodial maintenance . . . having a minor environmental impact. . . . "Routine" indicates something that is done on a regular basis. (emphasis supplied)
>
> 57. The maintenance exemption for ditches in paragraph 40C-4.051(11)(c) . . . is based on the exemption in paragraph 403.813(2)(g) . . . .

> 13. . . . the ditches that are subject to the grandfathering exemptions under 40C-4.051(2) . . . are the same ditches that may also be exempt under the statute. . . .

PFO at 7; PRO at 28.

287. Although the Memorandum purports to limit the statement to the "grandfathering exemption" in Rule 4.051(2)(a), District practice relies on the statement to apply the exemptions in Section 403.813(2)(g) and Rule 40C-4.051(11)(c). The District has applied the statement consistently since at least 1984.

11.1(b) General Applicability

288. The statement expressed in the Memorandum is a statement of general applicability within the meaning of Section 120.52(15). In effect, the statement creates rights, requires compliance, or otherwise has the direct and consistent effect of law.

289. The District submitted evidence intended to refute the general applicability of the agency statement by showing that the District does not rely on the Memorandum. The District contends that it has never relied on the Memorandum separate and apart from the statutes and rules interpreted by the Memorandum; that it has never initiated an enforcement action that relies on the Memorandum; that the Director forgot about the Memorandum after signing it; and that District staff do not utilize the Memorandum on a regular basis.

290. The District misses the point. The general applicability of a statement is not determined by the

applicability of a particular document in which the statement is expressed. The general applicability of a statement is determined by the effect of the statement evidenced by all of its applications irrespective of the label assigned by the agency to each application.

291. The Director may have forgotten that he signed the Memorandum, but the record shows that neither he nor his staff forgot about the statement expressed in the Memorandum that maintenance exemptions apply only to "routine custodial maintenance." The record is replete with examples of how the District applies the statement with general applicability whenever the District construes the term "maintenance" in Section 403.813(2)(f) and (g); in Rule 40C-4.051(2)(a) 2 and 3; and in Rule 40C-4.051(11)(b) and (c).

292. The District illustrates in its PRO how the statement is applied with the direct and consistent effect of law. In relevant part, the District states:

> Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that dredging must be . . . part of routine custodial maintenance. . . . (emphasis supplied)

District PRO at 83.

293. The statement expressed in the Memorandum is generally applicable within the meaning of Section 120.52(15). The statement defines the scope of the permit requirement in Section 373.416 and the scope of the exemption in Section 403.813(2)(g).

The District consistently applies the statement to create rights, to require compliance, or to otherwise have the direct and consistent effect of law.

11.1(c) Law and Policy

294. Although the statement implements, interprets, or prescribes law or policy, it does not do so by defining routine custodial maintenance as work which restores a ditch to its original design specifications. The requirement that maintenance must be no more than is necessary to restore a ditch to its original design specifications is present in each of the "maintenance" exemptions authorized in Section 403.813(2)(f) and (g) and in Rules 40C-4.051(2), 40C-4.051(11)(b), and 40C-4.051(11)(c).

295. The statement implements, interprets, or prescribes law or policy by applying maintenance exemptions only to routine custodial maintenance. The restricted application of maintenance exemptions effectively amends the definitions of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20).

296. The statement expressed in the Memorandum first refers to the exemptions in Section 403.813(2)(f) and (g). The statement then declares that "these exemptions . . . only apply to what is defined as 'routine custodial maintenance.'"

297. Unlike the agency statement, Section 373.403(8) and Rule 40C-4.021(20) define "maintenance" to exclude "routine custodial maintenance." Because routine custodial maintenance is

"not maintenance," routine custodial maintenance is neither subject to the maintenance permitting requirements in Section 373.416 nor required to satisfy the maintenance exemption requirements in Section 403.813(2)(f) and (g).

298. Maintenance has only one definition. That single definition defines "maintenance" to exclude routine custodial maintenance from maintenance that is subject to the exemption requirements in Section 403.813(2)(f) and (g). There is not another definition that includes routine custodial maintenance in maintenance that must satisfy maintenance exemption requirements.

299. Routine custodial maintenance is the definitional complement to maintenance. Remedial work that is routine custodial maintenance is "not maintenance." Remedial work that is not routine custodial maintenance is maintenance that must either obtain a maintenance permit or satisfy applicable "maintenance" exemption requirements.

300. The terms "exclude" and "exempt" are not synonymous. Routine custodial maintenance that is excluded from the definition of maintenance is "not maintenance" and need not qualify as exempt maintenance.

301. Maintenance that is not routine custodial maintenance is not excluded from the definition of maintenance. Included maintenance is subject to the maintenance permitting provisions but may qualify for a maintenance exemption if the maintenance satisfies the requirements prescribed for maintenance exemptions.

11.1(d) Practice and Procedure

302. Even if the District statement did not amend existing statutes and rules, the statement describes the practice requirements for the District. It prescribes the criteria to be used in applying the ". . . working definition of 'Routine Custodial Maintenance.'" The statement prescribes information that normally should be included in original design specifications. It prescribes mandatory practice requirements including prohibitions against: any alteration of hydraulic capacity or hydrologic function beyond original design; and maintenance at less than regular intervals.

303. The statement describes eligibility requirements used by the District. The statement provides that a permit is required, "If the work is not routine custodial maintenance . . . ." The statement describes information that must be provided in any request for verification that work is exempt. Such information must include ". . . evidence of original design specifications. . . ." Finally, the statement describes the type of evidence that will be considered by the District when original design specifications are not available.

11.1(e) Internal Management Memorandum

304. The Memorandum is not an internal management memorandum that is excluded from the definition of a rule pursuant to Section 120.52(15)(a). The Memorandum has application outside of the agency. It affects the private

interests of Respondents. It also affects a plan or procedure important to the public. Even if the Memorandum were an internal management memorandum, the agency statement exists and is applied by the agency independently of the Memorandum.

11.2 Prove-up Requirements: Section 120.57(1)(e)

305. The statement evidenced in the Memorandum and elsewhere in the record is an unadopted rule within the meaning of Section 120.57(1)(e). The statement is defined as a rule in Section 120.52(15) but is not adopted as a rule in accordance with the rulemaking procedures prescribed in Section 120.54.

306. The District relied on the unadopted rule to determine the substantial interests of Respondents. The District must show that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

307. The unadopted rule satisfies the requirements of Section 120.57(1)(e)2a, part of c, and d. However, the rule does not meet the requirements of Section 120.57(1)(e)2b, the remainder of c, e, f, and g.

11.2(a) Powers, Functions, and Duties

308. The unadopted rule is within the range of powers, functions, and duties delegated by the legislature within the meaning of Section 120.57(1)(e)2a. Section 373.416, in relevant part, delegates authority to the District to require permits and to impose conditions that are reasonably necessary to assure that the "maintenance" of any stormwater system, or works,

complies with the provisions of Chapter 373, Part IV, and applicable rules promulgated pursuant to Chapter 373. Interpretation and application of the maintenance exemption authorized in Section 403.813(2)(g) and Rule 40C-4.051(11)(c) are within the range of powers delegated in Section 373.416.

11.2(b) Bridled Discretion

309. The unadopted rule does not vest unbridled discretion in the District within the meaning of Section 120.57(1)(e)2c. The definition of routine custodial maintenance is bounded by numerous examples that do and do not qualify as routine custodial maintenance. The definition identifies the technical criteria to be used in the working definition of routine custodial maintenance. The definition prescribes reasonable procedures for conducting maintenance under an exemption, and formulates objective requirements for determining the sufficiency of original design specifications.

11.2(c) Arbitrary or Capricious

310. The unadopted rule is not arbitrary or capricious within the meaning of Section 120.57(1)(e)2d. The rule has a rational basis and a legitimate purpose. It is based on fact and logic and seeks to prevent harm to the water resources of the District by requiring permits to review non-exempt maintenance activities which may have the potential for adverse environmental impacts.

311. The definition of routine custodial maintenance is based on a fundamental engineering reality. If a ditch is not maintained, it will, as a general rule, fill-in and diminish in function and capacity.

312. Ditches fill-in at different rates, depending on site-specific conditions, the level of service provided by the ditch, and the level of work performed during each maintenance interval. Ditches with high water-velocity may not require maintenance as frequently in order for the maintenance to satisfy the requirement that it be performed regularly.

313. NS1 and EW1 must be maintained relatively frequently in order for maintenance to qualify as routine maintenance. The water velocity in these ditches is low because the surrounding area is flat and because water velocity is controlled by culverts and water levels south of SR 50. The low water velocities contribute to the filling of NS1 and EW1 with sediment. The high sediment content in the surrounding native lands also contributes to the filling of NS1 and EW1.

314. The Crane Creek ditch in Brevard County illustrates the relativity of the frequency standard. In that case, the District determined that maintenance of the Crane Creek ditch qualified for a maintenance exemption approximately 20 years before when the ditch had last been maintained. There was considerable slope in the ditch. High water velocities in the ditch kept the ditch well scoured. In addition, the surrounding

area was highly developed and covered with either pavement or lawns which provided little sediment material.

315. It is theoretically possible for maintenance to be routine even though the interval of maintenance is 50 years. As a practical matter, however, a maintenance interval of 20 years represents the upper limit for maintenance in the general region of NS1 and EW1.

316. Time is not the only factor in determining whether maintenance is routine. The frequency with which work must be performed to be routine depends on site-specific conditions as well as the level of service provided both by the particular ditch and by the particular work performed at each maintenance interval.

317. The bottom line in determining if maintenance is routine custodial maintenance is whether the maintenance is regular enough to maintain continuity of function. Continuity of function is important to persons upstream and downstream of a ditch. Once a ditch has become nonfunctional, other property uses may occur upstream or downstream of the ditch in reliance upon the fact that the ditch is no longer functional.

11.2(d) Modifies or Contravenes

318. The unadopted rule modifies or contravenes the specific law implemented in violation of Section 120.57(1)(e)2b. For reasons stated in earlier findings and incorporated here by this reference, the unadopted rule modifies and contravenes

Sections 373.403(8), 373.416, and 403.813(2)(g). The unadopted rule also modifies and contravenes Rules 40C-4.021(20), 40C-4.051(2)(a) 2 and 3, and 40C-4.051(11)(c).

319. The term "maintenance" is defined in Section 373.403(8) to exclude routine custodial maintenance. By limiting maintenance exemptions to routine custodial maintenance, the unadopted rule transforms the statutory exclusion of routine custodial maintenance into a statutory inclusion.

320. The unadopted rule modifies and contravenes the specific law implemented in another way. The unadopted rule exempts only the maintenance of "systems." In the statement of criteria, the Memorandum states that work must be done to restore the "ditch system."

321. However, statutory maintenance exemptions are not limited to systems. They apply to individual canals, channels, and drainage ditches. Similarly, Sections 373.413 and 373.416 require permits for works such as individual ditches as well as systems. By limiting the maintenance exemptions to systems, the unadopted rule modifies and contravenes the specific law implemented.

11.2(e) Vague and Inadequate Standards

322. The limits on discretion in the unadopted rule do not grant unbridled discretion to the District. However, some of the standards imposed in the rule are vague and inadequate in violation of Section 120.57(1)(e) 2c.

323. The unadopted rule states two sets of criteria for a working definition of routine custodial maintenance. The first set of criteria address the purpose of the work performed. The second set of criteria address the interval or regularity of the work performed.

324. The unadopted rule states that the purpose of routine custodial maintenance must be to restore the ditch to its "original design specifications." During testimony at the hearing, however, the District explained that the purpose of routine custodial maintenance could be to restore the ditch to its "existing function." A discussion in the proposed findings of the District's PRO illustrates the ambiguity:

> 64. If a ditch has filled in over a number of years so that it no longer retains its original function but does convey some water during high rain events, the ditch could not be cleaned out to its original design under the maintenance exemption. . . . To the extent that it still had some function that was usable for the surrounding area, it could be maintained to maintain that existing level of function. . . . (emphasis supplied)

District PRO at 31.

325. The interval at which work must be performed to satisfy the definition of routine custodial maintenance is vague and inadequate in the unadopted rule. In the Memorandum, the unadopted rule states that most ditch systems in Florida require maintenance once every 10 to 15 years. At the hearing, however, District witnesses who were asked to explain the District policy stated that ditches in Florida typically lose their function if

not maintained every five to ten years. A range of 5 to 15 years is too vague to provide an adequate standard by which regulated parties are able to ascertain whether they are in compliance with the rule.

326. The definition of routine custodial maintenance will necessarily vary with site-specific conditions of the ditch. However, it is clear from the evidence that the unadopted rule defines the purpose and interval of routine custodial maintenance by vague standards that can vary substantially with the person who is interpreting the unadopted rule.

327. Standards prescribed in the unadopted rule are vague and inadequate in another aspect. Time is not the only factor considered in the unadopted rule to determine whether work is routine and custodial. Maintenance must be frequent enough to maintain a continuity of function for a particular ditch.

328. Continuity of function suggests that function may be measured over a continuum of time. However, the unadopted rule does not quantify the continuum and does not identify the site-specific conditions that will be considered in assessing continuity of function during any particular continuum. The unadopted rule does not state whether the site-specific conditions will be assessed during low-flow conditions in dry years, normal years, or wet years; or whether alternating dry and wet conditions within each type of year also factor into the formula for continuity of function. The unadopted rule does not identify the relative weight, if any, assigned by the agency to

these and other site specific-conditions used in the formula for determining continuity of function.

11.2(f) Due Notice

329. The unadopted rule is being applied to Respondents without due notice in violation of Section 120.57(1)(e)2e. An agency cannot provide adequate notice of vague and inadequate standards contained in the unadopted rule; notice of vague and inadequate standards is inherently vague and inadequate. Such notice does not provide regulated parties with due notice of the standards by which they can judge their compliance with the rule.

11.2(g) Evidence of Support

330. The unadopted rule is not supported by competent and substantial evidence within the meaning of Section 120.57(1)(f). Although the technical standards used to define routine custodial maintenance in the unadopted rule are supported by competent and substantial evidence, the basis for the application of that definition is unsupported.

331. The technical standards used to define routine custodial maintenance in the unadopted rule are matters infused with agency expertise and should not be overturned unless clearly erroneous. The technical standards are not clearly erroneous and are supported by competent and substantial evidence.

332. The standards used by the District to apply the definition of routine custodial maintenance are not infused with agency expertise. They are infused with the District's legal

interpretation of relevant case law and, in particular, one circuit court case in 1984. Evidence submitted by the District does not support the standards used by the District to apply the unadopted rule.

333. The District contends that the limitation of maintenance exemptions to routine custodial maintenance in the unadopted rule implements and reiterates principles developed in St. Johns River Water Management District v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, 7 Fla.Supp. 2d 61 (9th Judicial Circuit of Florida, October 29, 1984), affirmed, Corporation of President of Church of Jesus Christ of Latter-Day Saints v. St. Johns River Water Management District, 489 So. 2d 59 (Fla. 5th DCA 1986), rev. denied, 496 So. 2d 142 (Fla. 1986). As the trial court did, the parties in this proceeding refer to the decision in Latter-Day Saints as the "Deseret" case ("Deseret").

334. The District asserts that the unadopted rule is intended to ". . . reiterate the Deseret holding regarding 'routine custodial maintenance' . . .". The District also claims that it:

> . . . relied on the lower court Deseret decision, as well as the common meaning of the terms and the common things that you look for in what is an original design specification. The District's policy [is] to require compliance with the Deseret holding.

District PFO at paragraph 13, page 9.

335. A determination of whether the unadopted rule is supported by competent and substantial evidence of the principles and holdings in Deseret requires a two-step factual examination. Factual findings must first identify the principles developed in Deseret and then elucidate whether the unadopted rule actually implements or reiterates those principles and holdings.

336. In October 1982, the landowner in Deseret increased, by one foot, the height of a perimeter dike system originally constructed between 32 and 42 years earlier to prevent water from either getting into or out of the area protected by the dike. No work had been performed on the dike for approximately 25 years, and portions of the dike had failed or declined in the interim. The landowner claimed the work was exempt pursuant to the maintenance exemption authorized in Section 403.813(2)(g).

337. The trial court entered three holdings in Deseret which are relevant to the authority relied on by the District for its unadopted rule. In relevant part, the trial court held in paragraphs 10 and 12 of its Conclusions of Law:

> 10. . . . The legislature excluded only routine custodial maintenance from the permitting requirements of Chapter 373. (emphasis supplied)
>
> 10. . . . the exemption applies only to routine custodial maintenance having a minimal adverse environmental effect. (emphasis supplied)
>
> 12. . . . Deseret has failed to meet the burden of proving entitlement to the maintenance exemption under Section 403.813(2)(g). . . .

Deseret, 7 Fla.Supp. 2d at 66-67.

338. The district court did not expressly rule on the trial court's holding that the maintenance "exemption" applies only to routine custodial maintenance. The district court expressly approved only the trial court holding that the legislature "excluded" routine custodial maintenance and the trial court holding that the evidence failed to show entitlement to the maintenance exemption. In relevant part, the district court said:

> We agree with the trial court's conclusion that the legislature intended to exclude only routine custodial maintenance . . . from permit requirements.
>
> We also agree that the Church was not entitled to a maintenance exemption because it failed to meet its burden of proving the original design specifications for the dike system. (emphasis supplied)

Deseret, 489 So. 2d at 60-61.

339. The unadopted rule imposes requirements supported by the only ruling in the circuit court decision that was not expressly approved by the district court in Deseret. The unadopted rule reiterates and implements a holding that appears only in the trial court decision.

340. Any reasonable doubt as to the basis for the holding in Deseret was removed in 1993 by the First District Court of Appeal in SAVE the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193 (Fla. 1st DCA 1993). In SAVE, the Sportsmen Against Violating the Environment contended, as the District does in this proceeding, that the maintenance

exemption applies only to routine custodial maintenance. In rejecting that contention, the court explained the basis for the earlier decision in Deseret. The court stated:

> . . . the [Deseret] court held that the applicant seeking to rebuild dikes on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two reasons: (1) the church had failed to carry its burden of proving the original specifications . . . , and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during that period.

SAVE, 623 So. 2d at 1203.

341. In SAVE, the court explicitly rejected the contention that the maintenance exemption applied only to routine custodial maintenance. The court entered the following ruling:

> This brings us to SAVE's third contention, that Smith wholly failed to qualify for an exemption under subsection 403.813(2)(g). This is a multifaceted argument that we reject in all respects. SAVE cites no . . . authority to support its contention that the exemption under this subsection is limited to "routine" or "custodial" maintenance that conceptually excludes refilling the breaks from the scope of the exemption. Subsection 403.813(2)(g) requires only that the dike be restored to "its original design specifications." (emphasis supplied)

SAVE, 623 So. 2d at 1202.

342. The District argues that the court in SAVE did not reject the contention that the exemption applies only to routine custodial maintenance but merely held that there was nothing in routine custodial maintenance that conceptually excludes the

refilling of the breaks. The court goes beyond the "conceptual" realm in the next sentence when the court expressly states that Section 403.813(2)(g) requires "only" that works be restored to their original design specifications.

343. The District cannot read the decision in SAVE in isolation from the plain language of Section 373.403(8). Section 373.403(8) provides more than a "conceptual" reason why the exemption in Section 403.813(2)(g) does not apply to routine custodial maintenance. Section 373.403(8) expressly states that maintenance "excludes routine custodial maintenance." The exemption authorized in Section 403.813(2)(g) applies only to maintenance defined in Section 373.403(8) to exclude routine custodial maintenance. Only maintenance that is not routine custodial maintenance must satisfy the requirements in Section 403.813(2)(g) for an exemption. Routine custodial maintenance is "not maintenance" and is not required to either obtain a maintenance permit or qualify for a maintenance exemption.

11.2(h) Regulatory Costs

344. The District failed to show that the unadopted rule does not impose excessive regulatory costs on Respondents within the meaning of Section 120.57(1)(e)2g. It is true, as far as it goes, that regulatory costs incurred by a proposed activity are not excessive once a determination is made that the activity either is or is not routine custodial maintenance. As this proceeding illustrates, however, the regulatory expense that must

be incurred to show that excavation is routine custodial maintenance can be substantial. Any such expense is excessive when it is incurred to satisfy a requirement that is not found in applicable statutes or rules.

12. Effect of Unadopted Rule

345. The District may not rely on the unadopted rule to affect the substantial interests of Respondents. The District failed to "prove-up" the requirements of Sections 120.57(1)(e)2b, c, e, f, and g.

346. The proposed agency action is supported by the evidence-of-record in this proceeding without relying on the unadopted rule. For reasons stated in earlier findings and incorporated here by this reference, the District action taken in the Emergency Order and the action proposed in the Administrative Complaint are supported by the weight of the evidence after the unadopted rule is excluded from consideration.

347. The excavation of NS1 and EW1 in January 1997 was not "routine custodial maintenance" based on the common and ordinary meaning of the term, rather than the unadopted rule. Part of the excavation of NS1, EW1, and the larger system was "maintenance," which must satisfy the requirements of any claimed exemptions in order to avoid applicable permitting requirements.

348. That part of the excavation which was maintenance did not satisfy essential requirements for any of the "maintenance" exemptions in Section 403.813(2)(f) and (g) and Rules 40C-

4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c). The weight of the evidence did not show that:

> (a) the "maintenance" consisted of only that "remedial work" which was necessary to return NS1 and EW1 to their original design specifications within the meaning of Section 403.813(2)(f) and (g) and Rule 40C-4.051(11)(b) and (c) 3;
>
> (b) spoil material was deposited on an upland soil site that prevented the escape of spoil material or return water, or both, into wetlands, other surface waters, or waters of the state within the meaning of Section 403.813(2)(f) and (g); and Rule 40C-4.051(11)(b) and (c) 1;
>
> (c) the excavation was performed in such a way that prevented deleterious dredged material or other deleterious substances from discharging into adjacent waters during maintenance within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b);
>
> (d) the excavation resulted in no significant impacts to previously undisturbed natural areas within the meaning of Section 403.813(2)(f);
>
> (e) no natural barrier was removed which separated NS1 and EW1 from adjacent waters, adjacent wetlands, or other surface waters within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b); and
>
> (f) the excavation performed maintenance dredging on canals or channels within the meaning of Section 403.813(2)(f) and Rule 40C-4.051(11)(b).

349. That part of the excavation defined as an alteration of NS1, EW1, and the larger system is not entitled to the "maintenance" exemptions claimed by Respondents. Similarly, that part of the excavation defined as an operation of the ditches is

not entitled to the "maintenance" exemptions claimed by Respondents.

350. Pursuant to Sections 373.413 and 373.416, Modern was required to obtain a permit for the excavation of NS1, EW1, and the larger system in January 1997. Modern neither applied for nor obtained a permit for the excavation.

351. Modern violated the permitting requirements authorized in Sections 373.413 and 373.416. Modern is subject to the proposed agency action in the Administrative Complaint.

CONCLUSIONS OF LAW

352. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1). The parties were duly noticed for the hearing.

353. Ruling on the District's motion in limine was reserved for disposition in this Recommended Order. The motion is denied. The District's objection to the relevancy of evidence adopted from the proceeding conducted pursuant to Section 120.57(1) for use in the proceeding conducted pursuant to Section 120.56 is overruled.

13. Burden of Proof

354. The burden of proof is on the party seeking to prove the affirmative of an issue unless the burden is otherwise established by statute. Florida Department of Transportation vs. J.W.C. Company, Inc., 396 So. 2d 778, 786-787 (Fla. 1st DCA 1981); Balino vs. Department of Health and Rehabilitative

Services, 348 So. 2d 349, 350-351 (Fla. 1st DCA 1977). Although Section 120.57(1)(h) prescribes the standard of proof in administrative proceedings, the statute does not prescribe the burden of proof.

13.1 Permitting Requirements

355. The District has the burden of proving the factual and legal allegations in the Emergency Order and those in the Administrative Complaint and the reasonableness of any proposed agency action. The District must ultimately prove that: an emergency existed; the emergency action was reasonable; Modern excavated NS1, EW1, and the larger system; a permit was required for the excavation; and Modern failed to obtain the required permit.

13.2 Exemptions

356. Respondents have the burden of proving that the excavation of NS1, EW1, and the larger system is entitled to the exemptions claimed by Respondents. Robinson v. Fix, 113 Fla. 151, 151 So. 512, 512 (1933); Deseret, 489 So. 2d at 61. Any ambiguity in the statutes and rules authorizing the claimed exemptions must be construed strictly against Modern. Samara Development Corp. v. Marlow, 556 So. 2d 1097, 1100-1101 (Fla. 1990); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997), reh'g denied; Florida Department of Revenue v. James B. Pirtle Construction Company, Inc., 690 So. 2d 709, 711 (Fla. 4th DCA 1997); State, Department

of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. WJA Realty Limited Partnership, 679 So. 2d 302, 304 (Fla. 3d DCA 1996); Pal-Mar Water Management District v. Board of County Commissioners of Martin County, 384 So. 2d 232, 233 (Fla. 4th DCA 1980) reh'g denied; Coe v. Broward County, 327 So. 2d 69, 71 (Fla. 4th DCA 1976), reh'g denied, aff'd 341 So. 2d 762 (Fla. 1976).

13.3 Unadopted Rule

357. When a person challenges an agency statement as an unadopted rule pursuant to Section 120.56(4), the ultimate burden of proof is on the person challenging the agency statement. St. Johns River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 76 (Fla. 1st DCA July 29, 1998), reh'g denied., rev. denied, 727 So. 2d 904 (Fla. Feb. 5, 1999). When a person challenges an agency statement as an unadopted rule pursuant to Section 120.57(1)(e), however, the burden of proof is not controlled by Section 120.56(4).

358. Section 120.57(e)(1)1 prescribes the burden of proof for challenges to agency statements in terms that are substantially similar to those prescribed in Section 120.56(2) for challenges to proposed rules. Neither a proposed rule nor agency action based on an unadopted rule is "presumed valid or invalid" in Sections 120.57(1)(e)2 and 120.56(2)(c). Section 120.56(2)(a) requires the agency to prove that a proposed rule is not an invalid exercise of delegated legislative authority

defined in Section 120.52(8). Section 120.57(1)(e)2 requires that the "agency must demonstrate" that the unadopted rule satisfies the requirements in Section 120.57(1)(e)2a-g. The grounds prescribed in Section 120.52(8)(b)-(g) for the invalidity of a proposed rule are substantially similar to the grounds prescribed in Section 120.57(1)(e)2a-g for the invalidity of an unadopted rule.

359. There is no discernible reason why similar statutory terms should be construed to create distinctly different burdens of proof. A determination of the applicable burden of proof in a particular administrative proceeding must be made in a manner that is consistent with the underlying statutory framework. J.W.C. Company, 396 So. 2d at 787.

360. The statutory terms that prescribe the burden of proof for proposed rules have been judicially construed to impose on the agency the ultimate burden of establishing that a proposed rule is valid. Consolidated-Tomoka, 717 So. 2d at 76. Although the agency has the ultimate burden of persuasion, the challenger must first establish a preliminary factual basis to support any objections to the proposed rule. Id.

361. A similar analysis is applicable to similar terms in Section 120.57(1)(e). Respondents have the burden of proving that the agency statement is an unadopted rule. In addition, Respondents must submit sufficient evidence to provide a preliminary factual basis for their objections. Although Section 120.57(1)(e) does not require a substantially affected party to

file a separate petition challenging an agency statement as an unadopted rule, the statute also does not require an agency to disprove an objection to an unadopted rule before the challenger establishes a preliminary factual basis for the objections in the record of the proceeding conducted pursuant to Section 120.57(1)(e).

14. Standard of Proof

362. Each party must satisfy its respective burden of proof in this proceeding by a preponderance of the evidence. Authority cited by each party to require the other to satisfy its burden of proof by clear and convincing evidence is inapposite to this proceeding.

14.1 Administrative Complaint and Emergency Order

363. The burden of proof borne by the District must be satisfied by a preponderance of the evidence unless the action proposed by the District is punitive in nature. Section 120.57(1)(h) and (j). Cf., Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987)(the standard of proof is "clear and convincing" in administrative proceedings that are punitive in nature). The agency action proposed in the Administrative Complaint is not punitive in nature.

364. The District does not seek to impose a fine, restrict a professional or occupational license, or otherwise impair the

substantial interests of a person. Cf., Osborne Stern, 670 So. 2d at 935 (administrative fines are punitive and subject to "clear and convincing" standard of proof); Latham v. Florida Commission on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997), reh'g denied (ethical sanctions implicate a loss of livelihood and more and are subject to "clear and convincing" standard of proof). In order for the District to seek civil penalties from Modern, pursuant to Section 373.129(5), the introductory paragraph in Section 373.129 expressly requires the District to:

> . . . commence and maintain proper and necessary actions and proceedings in any court of competent jurisdiction. . . .

365. Only circuit courts have jurisdiction to impose "civil" penalties. An administrative law judge may impose only "administrative" fines specifically authorized by statute or rule. Neither Section 373.129, 373.430, nor 373.430(2) authorizes an administrative fine in this proceeding. The District has not proposed a fine.

366. The agency action authorized in the Emergency Order is not punitive. The Emergency Order, in relevant part, authorizes the Wildlife Service to construct two weirs in the Refuge.

14.2 Exemptions

367. The District contends that Respondents must prove the entitlement to exemptions by clear and convincing evidence. In Deseret, 7 Fla.Supp. 2d at 64, the trial court required the landowner to prove entitlement to an exemption by clear and

convincing evidence. The circuit court relied on a 1933 decision in Fix, 151 So. at 512.

368. Section 120.57(1)(h) did not exist in 1933 when the Florida Supreme Court entered its decision in Fix. Furthermore, Section 120.57(1)(h) is limited to administrative proceedings and does not apply to a circuit court proceeding.

369. When the appellate court did not overturn the clear and convincing standard applied by the circuit court in Deseret, the decision did not obviate the application of Section 120.57(1)(h) to administrative proceedings. The standard of proof must be determined by reference to the underlying statutory framework. J.W.C. Company, 396 So. 2d at 787. Thus, findings of fact relevant to the exemptions claimed by Modern are statutorily required to be based on a preponderance of the evidence.

14.3 Unadopted Rules

370. As previously discussed, many similarities exist in statutory terms that prescribe the burden of proof in challenges to proposed rules, pursuant to Section 120.56(2), and in challenges to agency statements pursuant to Section 120.57(1)(e). However, the standard of proof in challenges to proposed rules is uncertain.

371. Some courts have held that the preponderance of evidence standard does not apply to challenges to proposed rules. Agency for Health Care Administration, Board of Clinical Laboratory Personnel v. Florida Coalition of Professional

Laboratory Organizations, Inc., 718 So. 2d 869, 871 (Fla. 1st DCA Sept. 4, 1998), reh'g. denied; Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317, 318 (Fla. 1st DCA Aug. 3, 1998), reh'g. denied. Compare, General Telephone Co. of Florida v. Florida Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984) (quantitative standard such as competent and substantial evidence is inapplicable to challenge to proposed rules; and "reasonably related test" is the appropriate standard for review), with Consolidated-Tomoka, 717 So. 2d at 78-79 and Department of Business and Professional Regulation v. Calder Race Course, 724 So. 2d 100, 101 (Fla. 1st DCA July 29, 1998), reh'g denied (both holding that Section 120.52(8) has overruled the "reasonably related" test). Until there is a specific judicial determination to the contrary, Section 120.57(1)(h) requires that an agency must prove by a preponderance of the evidence that an unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

15. Fifth Amendment

372. The District argues that an adverse inference should be drawn from the invocation by Mr. Charles Moehle and Mr. Michael Moehle of their Fifth Amendment protection against self-incrimination. An adverse inference may be drawn from the invocation of a party's Fifth Amendment protection against self-incrimination. Atlas v. Atlas, 708 So. 2d 296, 299 (Fla. 4th DCA 1998); 8 J. Wigmore, Evidence Section 439 (McNaughton rev. 1961).

373. The inference is discretionary and not mandatory. No inference is drawn from the invocation of the Fifth Amendment in this proceeding. No such inference is required to make relevant findings of fact and conclusions of law in this case. The testimony of Mr. Daniel McConnell and Mr. Randy McConnell was credible and persuasive and supported by other competent and substantial evidence.

16. Emergency Order and Administrative Complaint

374. The District satisfied the burden of proof required to support the Emergency Order. A preponderance of the evidence supports the factual and legal allegations in the Emergency Order and the agency action authorized in the Emergency Order.

375. Section 373.119(2) authorizes the procedure followed and action taken in the Emergency Order. The emergency action was reasonably necessary to avoid the threat to environmental concerns and the harm to such concerns that could have resulted from a delay in taking timely action. The Emergency Order did not violate applicable due process requirements. West Coast Regional Water Supply Authority v. Southwest Florida Water Management District, 646 So. 2d 765, 766 (Fla. 5th DCA 1994), reh'g denied. The record supports the Emergency Order and does not provide a sufficient basis for quashing the order at the conclusion of the hearing. Id.

376. The Emergency Order states with particularity the facts supporting the finding of an emergency. Compare, Denney v.

Conner, 462 So. 2d 534, 536-537 (Fla. 1st DCA 1985)(emergency order issued pursuant to Section 120.59(3) was factually sufficient even though the order did not allege that destroyed trees were healthy or infected with citrus canker). For reasons stated in earlier findings and incorporated here by this reference, the evidence supports the facts alleged in the Emergency Order as well as the agency action taken pursuant to the Emergency Order.

377. The District satisfied the burden of proof required to support the Administrative Complaint. A preponderance of the evidence supports the factual and legal allegations in the Administrative Complaint and the agency action proposed therein.

17. Permitting Requirements

378. In relevant part, Section 373.413(1) provides:

> Except for the exemptions set forth herein, the . . . department may require such permits and impose such reasonable conditions as are necessary to assure that the . . . alteration of any stormwater management system . . . or works will comply with the provisions of this part and applicable rules . . . and will not be harmful to the water resources of the district.

379. In relevant part, Section 373.416(1) provides:

> Except for the exemptions set forth in this part, the . . . department may require such permits and impose such reasonable conditions as are necessary to assure that the operation or maintenance of any stormwater management system . . . or works will comply with the provisions of this part and applicable rules . . . will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

380. Pursuant to the permissive authority in Sections 373.413(1) and 373.416(1), the District requires a permit for the alteration, operation, and maintenance of a stormwater management system or works. NS1, EW1, and the larger system each are a stormwater management system or works within the meaning of Section 373.403(5) and (10) and Rule 40C-4.021(25) and (31).

17.1 Maintenance

381. The District does not expressly charge Modern with the maintenance of NS1 and EW1 without a permit. In relevant part, the Administrative Complaint alleges:

> 32. Respondent's [Modern] alteration and operation of the two preexisting ditches without being authorized by a permit issued by the District constitute a violation of Sections 373.413 and 373.416, and Sections 40C-4.041(1), 40C-4.041(2)(b)2., and 40C-4.041(2)(b)8. . . .

Administrative Complaint at 10.

382. The District charges Modern with the maintenance of NS1 and EW1 without a permit by necessary implication. In relevant part, the Administrative Complaint alleges:

> 30. Pursuant to Rule 40C-4.041 . . . permits are required for the construction, alteration, maintenance, or operation of surface water management systems.
>
> 31. Because the ditches . . . have not been maintained for over 30 years and because dredge material was placed in wetlands, the maintenance exemption in 403.813(2)(g) . . . does not apply to the ditch alteration work done in the instant case.

Administrative Complaint at 9-10.

383. The allegation that the excavation does not qualify for maintenance exemptions is unnecessary without an implied allegation that the excavation constitutes maintenance. Maintenance exemptions, by necessary implication, apply only to work that is maintenance.

384. The burden of proof is on the District to show that the excavation of NS1, EW1, and the larger system satisfied the definition of "maintenance" in Section 373.403(8) and Rule 40C-4.021(20). The term "maintenance" is defined, in relevant part, to mean:

> . . . remedial work as may affect the safety of any . . . works, but excludes routine custodial maintenance.

Section 373.403(8).

385. Among other things, the District must prove that the excavation of NS1 and EW1 was not "routine custodial maintenance" that is excluded from the statutory definition of "maintenance." As previously discussed in the Findings of Fact and incorporated here by this reference, an exclusion is not an exemption. The exclusion of routine custodial maintenance is one of the elements of the statutory definition of maintenance. The District has the burden of proving that the excavation in 1997 satisfied the statutory requirements within the definition of maintenance, including proof that the excavation was not an excluded activity.

386. The District satisfied its burden of proof. No part of the excavation of NS1, EW1, and the larger system in 1997 was routine or custodial. The extent of the excavation exceeded the

scope of routine custodial maintenance. Deseret, 489 So. 2d at 61. Cf. SAVE, 623 So. 2d at 1203 (distinguishing the holding in Deseret, in relevant part, based on differences in the extent of work performed).

17.2 Alteration

387. The term "alteration" is defined, in relevant part, in Section 373.403(7) and Rule 40C-4.021(2)as meaning:

> . . . to extend . . . works beyond maintenance in its original condition, including changes which may increase . . . the flow . . . of surface water which may affect the safety of such . . . works.

Section 373.403(7).

388. Part of the excavation in January 1997 was defined as an alteration of NS1, EW1, and the larger system within the meaning of Section 373.403(7) and Rule 40C-4.021(2). That part of the excavation extended NS1 and EW1 beyond maintenance in their original condition before the excavation. It included changes that increased the flow of surface water.

17.3 Safety

389. Even though the excavation in 1997 did not affect the safety of NS1 and EW1, both the maintenance and the alteration of NS1 and EW1 satisfied their respective definitions in Section 373.403(7) and (8) and Rule 40C-4.021(2) and (20). When the legislature uses the term "may" in Section 373.403(7) and (8), the term must be defined by its common and ordinary meaning unless such a meaning would frustrate legislative intent for the

statute. Cole Vision Corporation v. Department of Business and Professional Regulation, Board of Optometry, 688 So. 2d 404, 410 (Fla. 1st DCA 1997); Eager v. Florida Keys Aqueduct Authority, 580 So. 2d 771, 772 (Fla. 3d DCA 1991), review denied, 591 So. 2d 181; Boca Raton Artificial Kidney Center, Inc. v. Department of Health and Rehabilitative Services, 493 So. 2d 1055, 1057 (Fla. 1st DCA 1986), reh'g denied; Gar-Con Development, Inc. v. Department of Environmental Regulation, 468 So. 2d 413, 415 (Fla. 1st DCA 1985), rev. denied, 479 So. 2d 117; Department of Health and Rehabilitative Services v. McTigue, 387 So. 2d 454, 456 (Fla. 1st DCA 1980). The term "may" is not defined in the enabling legislation, is not a scientific term, and is not a word of art. The term should be given its plain and ordinary meaning. State, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Salvation Limited, Inc., 452 So. 2d 65, 67 (Fla. 1st DCA 1984).

390. If the term "may" were construed to mean "shall," the result would exclude from the permitting requirements any alteration that only affected the function and capacity of a covered system or works and did not affect its safety. Such a construction would constrict the scope of public interest protected by Chapter 373 and frustrate the legislative intent stated in Sections 373.413(1) and (6), 373.016, and 403.021. Statutes intended to protect the public should be liberally construed in favor of the public. Samara Development, 556 So. 2d at 1100. The legislature is presumed to enact effective laws and

does not intend any act to be a nullity. See, e.g., North Miami General Hospital v. Central National Life Insurance Company, 419 So. 2d 800, 802 (Fla. 3d DCA 1982) and City of Indian Harbour Beach v. City of Melbourne, 265 So. 2d 422, 423 (Fla. 4th DCA 1972)(courts should avoid interpretation that renders legislatively created provision ineffective or purposeless), reh'g denied. Compare, Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099, 1102 (Fla. 1989) and Vildibill v. Johnson, 492 So. 2d 1047, 1049 (Fla. 1986)(holding that literal context must yield to legislative intent).

17.4 Operation

391. Part of the excavation in 1997 is defined as an operation of NS1 and EW1 for which a permit is required in Section 373.416. The term "operation" is not defined by statute and must be defined by its plain and ordinary meaning. Cole Vision, 688 So. 2d at 410.

392. The excavation involved a series of acts performed to effect a certain purpose or result. The American Heritage Dictionary 871 (second college ed. 1982) ("Dictionary"). It also created a new process or new way of operating over time. Id.

17.5 Integrated Transaction

393. In this proceeding, the facts show that the excavation of NS1 and EW1 consisted of three separate steps performed in a single integrated transaction. Each step in the transaction satisfied the respective definitions of maintenance, alteration,

and operation for which Sections 373.413 and 373.416 impose separate permitting requirements.

394. The first step in the transaction satisfied the statutory definition of "maintenance." That step involved only remedial work other than routine custodial maintenance. The second step progressed in scope to an alteration. It extended the ditches beyond maintenance in their original condition and included changes that increased the flow of surface water. The third step involved the operation of NW1 and EW1 in a new way and at an increased level of operation that did not exist before the excavation.

395. If the excavation had been halted after the first step in the transaction, the completed step would have required a permit as maintenance unless it qualified for a maintenance exemption. Each step in the transaction resulted in separate impacts on the overall objectives of the District and created separate and different risks of harm to the water resources of the District.

396. One of the purposes of the permitting requirements in Sections 373.413 and 373.416 is to prevent the maintenance, alteration, and operation of drainage ditches, such as NS1 and EW1, in a way that is inconsistent with the legislative goals stated in Sections 373.413(1), 373.416(1), 373.016, and 403.021. The legislative goals for Chapter 373 and Chapter 403 are intended to protect natural resources vital to the public. Statutes intended to protect the public should be liberally

construed in favor of the public. See, e.g, Samara Development, 556 So. 2d at 1100-1101 (the Interstate Land Sales Full Disclosure Act was intended to protect the public and should be liberally construed); Town of Indialantic v. McNulty, 400 So. 2d 1227, 1233 (Fla. 5th DCA 1981) (coastal construction line permitting requirements are intended to protect valuable natural resources in the public interest from imprudent construction and should be balanced against the threat of harm from proposed construction). Chapter 373 and Chapter 403 are best served by evaluating the impacts of each step in a single integrated transaction as well as the cumulative impacts of the transaction as a whole.

397. If separate steps in a single transaction were viewed as mutually exclusive, the recognition of one step, such as maintenance, would require the impacts of the other steps to be excluded from consideration. Similarly, the exemption of one step, such as maintenance, arguably would require the exemption of other steps that were excluded from consideration. The result of either alternative could greatly expand the scope of the maintenance exemptions and significantly constrict the salutary purposes of Chapter 373 and Chapter 403.

398. The legislature does not intend any enactment to be a nullity. Sharer v. Hotel Corporation of America, 144 So. 2d 813, 817 (Fla. 1962). Significance and effect must be accorded each section in Chapter 373 and Chapter 403 in a manner that gives effect to each chapter as a whole. Villery v. Florida Parole and

Probation Commission, 396 So. 2d 1107, 1111 (Fla. 1980), corrected on reh'g denied; State v. Gale Distributors, Inc., 349 So. 2d 150, 153 (Fla. 1977), reh'g denied; Ozark Corporation v. Pattishall, 185 So 333, 337 (Fla. 1938); Topeka Inn Management v. Pate, 414 So. 2d 1184, 1186 (Fla. 1st DCA 1982).

17.6 Estoppel

399. Respondents allege numerous acts which allegedly provide a basis for estopping the District from enforcing the permitting requirements in Sections 373.413 and 373.416. An agency is estopped from enforcing authorized action only where the agency misrepresents a material fact. Tri-State Systems, Inc. v. Department of Transportation, 500 So. 2d 212, 215-216 (Fla. 1st DCA 1986). Estoppel does not operate upon a mistake of law. Id.

400. Respondents must prove three elements to estop the District from its proposed action in this proceeding. Respondents must show:

(1) a representation by an agent of the state as to a material fact that is contrary to a later asserted position;

(2) reasonable reliance on the representation;

(3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon.

Harris v. State, Department of Administration, Division of State Employees' Insurance, 577 So. 2d 1363, 1366 (Fla. 1st DCA 1991).

401. A determination of whether estoppel applies in a particular case requires a factual examination of the evidence of record. Department of Labor and Employment Security v. Little, 588 So. 2d 281, 282 (Fla. 1st DCA 1991)(findings of fact do not support estoppel); Harris, 577 So. 2d at 1367 (the impediment relates to the lack of sufficient record pertaining to reasonable reliance and detrimental change in Respondents' position). The evidence presented by Respondents is not sufficient to satisfy the three essential requirements for estoppel.

402. Respondents failed to show that the District misrepresented a material fact that would estop the District from enforcing statutory permitting requirements. Respondents failed to show that they relied to their detriment on any misrepresentation of a material fact. Compare Harris, 577 So. 2d at 1367 (the lack of sufficient evidence), Nelson Richard Advertising v. Department of Transportation, 513 So. 2d 181, 183 (Fla. 1st DCA 1987)(implicit acceptance by agency representatives of factual understanding by applicant does not satisfy requirements of estoppel), and State of Florida Department of Environmental Protection v. C.P. Developers, Inc., 512 So. 2d 258, 263 (Fla. 1st DCA 1987)(doctrine of equitable estoppel inapplicable when record shows dispute of fact between the parties); with Council Brothers, Inc. v. City of Tallahassee, 634 So. 2d 264, 266 (Fla. 1st DCA 1994)(misunderstanding of the law does not transform factual representations into legal representations) and Warren v. Department of Administration, 554

So. 2d 568, 570 (Fla. 5th DCA 1989)(record supported finding of estoppel). See also Title Plus v. Albanese, 546 So. 2d 93, 94 (Fla. 1st DCA 1989) and Jones v. Citrus Central, Inc., 537 So. 2d 1123, 1127 (Fla. 1st DCA 1989)(for cases discussing an inference adverse to a party).

17.7 Impairment of Property Rights

403. As a threshold matter, the undersigned has no jurisdiction to determine the existence, nature, and extent of the property rights of Respondents whether an alleged property right is a fee estate or an easement such as a drainage easement. Buckley v. Department of Health and Rehabilitative Services, 516 So. 2d 1008, 1009 (Fla. 1st DCA 1987), reh'g denied. Jurisdiction over such matters lies in the circuit court. State ex rel Department of General Services v. Willis, 344 So. 2d 580, 588 (Fla. 1st DCA 1977). When issues before an administrative agency are intertwined with issues that can only be decided by a circuit court, the circuit court must decide the issues over which it alone has jurisdiction. See, e.g., Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Ruff, 592 So. 2d 668, 668 (Fla. 1991) (emergency rules were intertwined with constitutional issues), reh'g denied.

404. Assuming arguendo that Respondents possess the easements they contend are being impaired, the regulatory framework of permits and exemptions authorized in Chapter 373 and Chapter 403 does not impair the right of Respondents to use their

easements to capture, discharge, and use water for purposes permitted by law, within the meaning of Section 373.406(1). The regulatory framework imposed on Respondents by applicable statutes and rules is no more severe or strict than is reasonably necessary to achieve the purposes of a valid state police power. McNulty, 400 So. 2d at 1232.

405. There is no question that the police power of the state can be used to protect and preserve the environment. McNulty, 400 So. 2d at 1231; City of Miami Beach v. First Trust Co., 45 So. 2d 681, 684 (Fla. 1949), reh'g denied. A prohibited limitation on the use of private property rights must be more than a limitation on "the highest and best" use of the property. McNulty, 400 So. 2d at 1232.

406. The burden of proving the effect of a regulatory statute or rule is on Respondents. Id. The harm intended to be prevented for the public good must be weighed against the owners' rights in the private property at issue. Id.

407. Respondents failed to satisfy their burden of proof. Respondents retain whatever rights they enjoy in the drainage ditches and are not prevented from enjoying those rights in a manner compatible with applicable permitting and exemption statutes and rules. See Florio v. City of Miami Beach, 425 So. 2d 1161, 1162 (Fla. 3d DCA 1983)(inclusion in redevelopment area did not preclude ownership rights and renovation), reh'g denied.

18. Maintenance Exemption

408. The question of whether the excavation of NS1 and EW1 qualifies for a maintenance exemption must be answered in two parts. The threshold issue is whether, as the District contends, the claimed maintenance exemptions apply only to routine custodial maintenance. If the scope of the exemption is not limited to routine custodial maintenance, it is necessary to determine whether the excavation of NS1 and EW1 qualifies for any of the exemptions claimed by Respondents.

18.1 Routine Custodial Maintenance

409. The District contends that maintenance exemptions apply only to routine custodial maintenance. For reasons previously stated and incorporated here by this reference, the District is incorrect. Maintenance exemptions apply to maintenance. Maintenance excludes routine custodial maintenance. See Sections 373.403(8) and 403.813(2)(g) and Rules 40C-4.021(20) and 40C-4.051(11)(c).

410. The District cites several cases in support of its contention and argues that both the District and the ALJ are bound to follow these cases. In relevant part, the District states:

> 37. Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that the dredging must be conducted as part of routine custodial maintenance to maintain an existing, functional system to its original design specifications so that it remains usable for its intended purpose. (emphasis supplied)

St. Johns River Water Management District v. Corporation of the President of the Church of Latter-Day Saints, 7 Fla.Supp. 61,66 (Fla. 9th Cir. Ct. 1984), aff'd 489 So. 2d 59 (Fla. 5th DCA 1985), rev. denied 496 So. 2d 142 (Fla. 1986); Save the St. Johns River v. St. Johns River Water Management District, 623 So. 2d 1193 (Fla. 1st DCA 1993); Department of Environmental Regulation v. C.G. Investment of Polk County, Inc., Case No. GC-G086-781 (Fla. 10th Cir. Ct. 1990); St. Johns River Water Management District v. Henson, 36 Fla. Supp. 2d 132 (Fla. 4th Cir.Ct. 1989); James Bunch and Santa Rosa County Board of County Commission v. Department of Environmental Protection, 19 F.A.L.R. (Fla. Dept. Env. Prot. 1997); In Re Petition for Declaratory Statement by James D. Bunch, 18 F.A.L.R. 4031, 4035-36 (Fla. Dept. Env. Prot. 1996); Manasota-88 v. Hunt Building Corp., 13 F.A.L.R. 927 (Fla. Dept. Env. Reg. 1991); Ericson Marine v. Department of Environmental Regulation, 8 F.A.L.R. 5092 (Fla. Dept. Env. Reg. 1986); Island Developers Ltd. v. Department of Environmental Regulation, 6 F.A.L.R. 5042 (Fla. Dept. Reg. 1983).

38. Neither the District nor an ALJ is free to reinterpret the maintenance exemption. The District must "follow the interpretations of statutes as interpreted by the courts of this state, if there is a controlling interpretation by a district court of appeal in this state, the [agency] must follow it . . . [and] must adhere to the interpretation given by those courts. Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated." Mikolsky v. Unemployment Appeals Com'n, 721 So. 2d 738 (Fla. 5th DCA 1998).

District PRO at 83-84.

411. The District is correct. The District and the ALJ must follow the decisions of the district courts of appeal in this state. Mikolsky v. Unemployment Appeals Commission, 721 So. 2d 738, 740 (Fla. 5th DCA Sept. 11, 1998), motion for

certification denied (Nov. 6, 1998). In SAVE, the First District Court of Appeal expressly rejected the contention that the maintenance exemption in Section 403.813(2)(g) is limited to "routine custodial maintenance." In relevant part, the court held:

> This brings us to SAVE's third contention, that Smith wholly failed to qualify for an exemption under subsection 403.813(2)(g). This is a multifaceted argument that we reject in all respects. SAVE cites no statute, rule, or other authority to support its contention that . . . the exemption under this subsection is limited to "routine" or "custodial" maintenance. . . . Subsection 403.813(2)(g) requires only that the dike be restored to "its original design specifications." . . .

SAVE, 623 So. 2d at 1202.

412. In SAVE, the court explained the basis for the appellate court's decision in Deseret. In relevant part, the court in SAVE said:

> . . . the [Deseret] court held that the applicant seeking to rebuild dikes on ranch land was not entitled to a subsection 403.813(2)(g) maintenance exemption for two reasons: (1) the church had failed to carry its burden of proving the original design specifications . . ., and (2) the rebuilding would require extensive work since the dikes had not been maintained for over 25 years, the dike system had subsided, and the dike failed to keep water off the ranch during that period.

SAVE, 623 So. 2d at 1203.

413. Neither of the district courts in SAVE and Deseret recognized, as a basis for their respective holdings, the ruling by the trial court in Deseret that maintenance exemptions apply

only to routine custodial maintenance. The District and the ALJ are bound by the district court decisions in SAVE and Deseret.

414. The circuit court decision in Deseret and the other two circuit court decisions cited by the District are not controlling in this proceeding. First, they are not district court decisions. Second, they are not binding to the extent they are in conflict with the district court decisions in SAVE and Deseret.

415. The five decisions of administrative agencies cited by the District are neither district court cases nor circuit court cases. The requirement that great weight must be given to an administrative construction of a statute by the agency responsible for its administration is limited to matters infused with agency expertise. Zopf v. Singletary, 686 So. 2d 680 (Fla. 1st DCA 1997), reh'g denied; SAVE, 623 So. 2d at 1202.

416. Application of the District statement is not infused with agency expertise. It requires no technical expertise in engineering, hydrology, excavation, wetlands management, or the placement and construction of weirs. However, the statement does require the ability to read SAVE and Deseret in concert with the plain language of Section 373.403(8) and Rule 40C-4.021(20).

417. Even if the District's contention were infused with agency expertise, the contention is clearly erroneous. SAVE, 623 So. 2d at 1202. The District's statutory construction "includes" routine custodial maintenance in "maintenance" that must qualify for an exemption or obtain a permit. The statute "excludes"

routine custodial maintenance from "maintenance" that must either qualify for an exemption or obtain a permit. The District's statutory construction conflicts with the clear terms of the statute. The statute controls any conflict or ambiguity between the terms of the statute and the unadopted rule. See Hughes v. Variety Children's Hospital, 710 So. 2d 683, 685 (Fla. 3d DCA 1998); Johnson v. State, Department of Highway Safety & Motor Vehicles, Division of Driver's Licenses, 709 So. 2d 623, 624 (Fla. 4th DCA 1998)(statute prevails over adopted rule that conflicts with statute); Willette v. Air Products, 700 So. 2d 397, 401 (Fla. 1st DCA 1997)(statute controls any conflict between statute and rule), reh'g denied; Florida Department of Revenue v. A. Duda & Sons, Inc., 608 So. 2d 881,884 (Fla. 5th DCA 1992)(conflict between a subsequent statute and preexisting rule does not give rise to ambiguity in the subsequent statute), reh'g denied; Roberts v. Department of Professional Regulation, Construction Industry Licensing Board, 509 So. 2d 1227, 1227 (Fla. 1st DCA 1987)(agency interpretation that statute requires four years' experience as "certified contractor," rather than "building contractor," imposes a requirement not found in the statute); Board of Optometry, Department of Professional Regulation v. Florida Medical Association, Inc., 463 So. 2d 1213, 1215 (Fla. 1st DCA 1985)(proposed rule in conflict with statute is invalid), reh'g denied.

418. Like Section 373.403(8), Rule 40C-4.021(20) defines maintenance to exclude routine custodial maintenance from

maintenance that must either obtain a permit or qualify for an exemption. The unadopted rule includes routine custodial maintenance in maintenance that must either obtain a permit or qualify for an exemption. The unadopted rule conflicts with the unambiguous language of the rule. An agency's construction that conflicts with the unambiguous language of the rule is clearly erroneous. Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County, 642 So. 2d 34, 36 (Fla. 1994); Arbor Health Care Company v. State, Agency for Health Care Administration, 654 So. 2d 1020, 1021 (Fla. 1st DCA 1995); Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 197 (Fla. 1st DCA 1991), reh'g denied.

18.2 Exemption Requirements

419. Respondents claim entitlement to the maintenance exemptions authorized in Section 403.813(2)(f) and (g); and Rules 40C-4.051(2)(a)1 and 3, 40C-4.051(11)(b), and 40C-4.051(11)(c). Respondents have the burden of proving by a preponderance of the evidence that the excavation of NS1 and EW1 satisfies the requirements for each exemption. SAVE, 623 So. 2d at 1203; Desert, 489 So. 2d at 61.

420. Respondents failed to show they are entitled to any of the claimed exemptions. Respondents failed to show that they satisfied essential requirements in Section 403.813(2)(f) and (g) and in Rules 40C-4.051(2)(a), 40C-4.051(11)(b), and 40C-4.051(11)(c).

18.3 Drainage Easements

421. The legislature amended Section 403.813(2)(f) to add an exemption for maintenance dredging of certain drainage easements. The amendments became effective on October 1, 1997. 1997 Laws of Florida, Chapter 97-22, Section 4, page 152.

422. In relevant part, the 1997 amendments exempt:

> . . . previously dredged portions of natural water bodies within . . . drainage easements which have been recorded in the public records of the county. . . . provided that no significant impacts occur to previously undisturbed natural areas . . . and best management practices for erosion sediment control are utilized to prevent bank erosion and scouring and to prevent . . . dredged material [and] deleterious substances from discharging into adjacent waters during maintenance dredging. Further . . . an entity that seeks an exemption must notify the . . . water management district . . . at least 30 days prior to dredging and provide documentation of original design specifications or configurations where such exist. . . .

1997 Laws of Florida, Chapter 97-22, Section 3, pages 150-151.

423. As a threshold matter, the undersigned lacks jurisdiction to determine the property rights of Respondents, including recorded drainage easements. Cf. Ruff, 592 So. 2d at 668 (where other rights are intertwined with administrative issues, all issues should be resolved in circuit court); Buckley, 516 So. 2d at 1009 (an administrative hearing is not the appropriate forum to determine interests in property). Any reasonable doubt as to jurisdiction should be resolved in favor of arresting the further exercise of that power. Edgerton v.

International Company, 89 So. 2d 488, 490 (Fla. 1956); State v. Atlantic Coast Line R. Co., 56 Fla. 617, 637, 47 So 969, 976 (Fla. 1908); Fraternal Order of Police, Miami Lodge 20 v. City of Miami, 492 So. 2d 1122, 1124 (Fla. 3d DCA 1986), reh'g denied, rev'd, City of Miami v. Fraternal Order of Police, Miami Lodge 20, 511 So. 2d 549, 551 (Fla. 1987)(upholding agency deferral to arbitrator to interpret contract).

424. Even if Respondents possess recorded drainage easements, the relevant amendments to Section 403.813(2)(f) do not apply to this proceeding. The amendments became effective on October 1, 1997, and the excavation at issue was completed in January 1997.

425. Even if the drainage easements described in the statute were applied to the drainage easements claimed by Respondents, it is not determinative of whether Respondents satisfied other requirements for the exemption. If Respondents are entitled in Section 403.813(2)(f) to the benefits that travel with the new provisions pertaining to drainage easements, Respondents also incur the burdens associated with the new provisions. For example, Respondents must satisfy the new requirements for 30-day notice, no significant impacts to previously undisturbed natural areas, and best management practices. Respondents failed to satisfy the foregoing requirements in Section 403.813(2)(f).

19. Unadopted Rule

426. Respondents challenge as an unadopted rule the District's working definition of routine custodial maintenance. Respondents allege that the "working" part of the definition limits maintenance exemptions to routine custodial maintenance; and to functioning ditches.

427. As previously discussed, the requirement for routine custodial maintenance is intended to preserve the continuity of function for a drainage ditch. Therefore, the requirement for routine custodial maintenance the requirement that a ditch must be functioning. The limitation of maintenance exemptions to functioning ditches is addressed hereinafter only in the context of the requirement for routine custodial maintenance.

19.1 Procedural Issues

428. The District argues that Respondents have not raised a challenge to the unadopted rule in their petitions in the proceeding conducted pursuant to Section 120.57(1). "Nor could they," the District asserts, because the pleadings from the rule challenge cases filed pursuant to Section 120.56(4) do not carry over to this proceeding.

429. The District's argument is correct as far as it goes. The pleadings from the rule challenge cases under Section 120.56(4) do not carry over to this proceeding. However, the pleadings do not need to carry over for Section 120.57(1)(e) to apply in this proceeding. Section 120.57(1)(e) authorizes a de

novo review of an unadopted rule independently of Section 120.56(4).

430. Nothing in Section 120.56(4) precludes Respondents from challenging an unadopted rule in a ". . . proceeding conducted pursuant to Section 120.57(1)(e). . . ." Section 120.56(4)(f). Nothing in Section 120.57(1)(e) requires Respondents to file a separate petition in a proceeding conducted pursuant to Section 120.57(1)(e) or to amend the original petition in the Section 120.57(1) proceeding after discovering an unadopted rule.

431. The absence of a statutory requirement for a separate petition in Section 120.57(1)(e) acknowledges the practical reality that an unadopted rule often remains invisible until the blue spark in time when it emerges from evidence adduced during the hearing. Section 120.57(1)(e) authorizes a substantially affected party to challenge such a rule without first filing a separate petition in the same action in which the party previously filed the original petition. Respondents filed their petitions in this proceeding several months before they filed any rule challenges pursuant to Section 120.56(4) and are not required by Section 120.57(1)(e) to amend the original petitions filed pursuant to Section 120.57(1).

19.2 Statutory Interplay

432. The District argues that judicial interpretations of former Section 120.535, Florida Statutes (1995), apply to this proceeding. The District argues that those decisions state that the exclusive method to challenge an agency's failure to adopt agency statements of general applicability as rules is found in Section 120.56(4). Cf. Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc., 683 So. 2d 586, 590 n.1 (Fla. 1st DCA 1996) and Christo v. Florida Department of Banking and Finance, 649 So. 2d 318, 321 (Fla. 1st DCA 1995), rev. dismissed mem., 660 So. 2d 712 (Fla. 1995)(in which the court considered statutory requirements for "expeditious" and "good faith rulemaking" now found in Section 120.56(4)).

433. The authority in Section 120.56(4) to challenge an unadopted rule does not nullify any portion of Section 120.57(1)(e). The legislature does not intend any enactment to be a nullity. Sharer, 144 So. 2d at 817. Significance and effect must be accorded each section in Chapter 120 in a manner that gives effect to Chapter 120 as a whole. Villery, 396 So. 2d at 1111; Gale Distributors, 349 So. 2d at 153; Ozark Corporation, 185 So at 337; Topeka Inn, 414 So. 2d at 1186.

434. Sections 120.56(4) and 120.57(1)(e) were enacted in the same act and relate to the same subject matter. 1996 Laws of Florida, Chapter 96-159, Sections 16 and 19, pages 180-188. Such statutes must be considered in pari materia in a manner that

harmonizes them and gives effect to legislative intent for the entire act. Major v. State, 180 So. 2d 335, 337 (Fla. 1965); Abood v. City of Jacksonville, 80 So. 2d 443, 444-445 (Fla. 1955); Tyson v. Stoutamire, 140 So 454, 456 (Fla. 1932); Agency for Health Care Administration v. Wingo, 697 So. 2d 1231, 1233 (Fla. 1st DCA June 27, 1997); Armas v. Ross, 680 So. 2d 1130, 1130 (Fla. 3d DCA 1996); State Farm Mutual Automobile Insurance Company v. Hassen, 650 So. 2d 128, 133 n. 5 (Fla. 2d DCA 1995); Schorb v. Schorb, 547 So. 2d 985, 987 (Fla. 2d DCA 1989); Escambia County Council on Aging v. Goldsmith, 465 So. 2d 655, 656 (Fla. 1st DCA 1985); Jackson v. State, 463 So. 2d 373, 373 (Fla. 5th DCA 1985), reh'g denied. Such statutes are imbued with the same spirit and actuated by the same policy.

435. Sections 120.56(4) and 120.57(1)(e) are successors to former Sections 120.535 and 120.57(1)(b)15, Florida Statutes (1995). Like their predecessors, Sections 120.56(4) and 120.57(1)(e) are intended to maximize the scope of statutory rulemaking requirements. House of Representatives Committee on Governmental Operations Final Bill Analysis & Economic Impact Statement (HB 1879, 1991) at 3-4, Florida State Archives, Series 19, Box 2182 ("HB 1879"). Sections 120.56(4) and 120.57(1)(e), whenever possible, should be construed as having a cumulative and harmonious effect, rather than a mutually exclusive effect, so as to maximize the scope of statutory rulemaking requirements.

436. Sections 120.56(4) and 120.57(1)(e) are not redundant statutes. Sections 120.56(4) and 120.57(1)(e) contain different

provisions that create different incentives for rulemaking and also provide different disincentives for failing to do so.

437. Section 120.56(4)(e), in relevant part, encourages rulemaking by permitting an agency to rely on an unadopted rule if the agency satisfies two conjunctive requirements. The agency must proceed expeditiously and in good faith to rulemaking before the entry of a final order; and the unadopted rule must satisfy the requirements of Section 120.57(1)(e).

438. Section 120.57(1)(e) does not require expeditious and good faith rulemaking as a condition of enforcing an unadopted rule. If a party wishes to require an agency to proceed to rulemaking, the party must file a petition pursuant to Section 120.56(4). Section 120.57(1)(e) does not authorize a challenge to a rule on the ground that the rule is an invalid exercise of delegated legislative authority defined in Section 120.52(8)(a).

19.3 Rule Defined

439. Section 120.57(1)(e) requires Respondents to prove that the limitation of maintenance exemptions to routine custodial maintenance is a rule. Section 120.52(15), in relevant part, defines a rule to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and . . . includes the amendment or repeal of a rule. The term does not include:
>
> (a) Internal management memoranda which do not affect either the private interests of

> any person or any plan or procedure important to the public and which have no application outside the agency. . . .

Section 120.52(15).

19.3(a) Conjunctive Requirements

440. The statutory definition of a rule creates a threshold test that includes two conjunctive requirements. There must be a statement; and the statement must be one of general applicability.

19.3(a)(1) Statement

441. The limitation of maintenance exemptions to routine custodial maintenance is a statement within the meaning of Section 120.52(15). Although the statement is expressed in the Memorandum, the Memorandum is only published evidence of the statement. The statement exists and is applied independently of the Memorandum.

442. The District expresses and applies the statement each time the District takes agency action based on the statement and not just when the agency publishes a particular document that captures the statement in writing. The existence, terms, and scope of the statement are measured on a de facto basis by the effect of the statement. The effect of the statement emerges from all of the evidence of record including, but not limited to, the publication of the statement in various documents and the consistent enforcement of agency action based on the statement. In other words, the statement is defined not only by the talk the

agency talks, but also by the walk the agency walks. See North Broward Hospital District v. Eldred, 466 So. 2d 1210, 1210 (Fla. 4th DCA 1985)(finding that a hospital is an agency on the grounds that "if it looks, walks, quacks and swims like a duck, that is what it is"), approved as modified, Eldred v. North Broward Hospital District, 498 So. 2d 911 (Fla. 1986). For other cases analyzing legal issues based on the way facts "walk and talk," see State v. O'Brien, 633 So. 2d 96, 99 n.5 (Fla. 5th DCA 1994)(if it "quacks like a duck and waddles like a duck" but lacks "webbed feet," it is not certain whether testimony is Williams rule evidence), rev. denied, 639 So. 2d 981 (1994); Rubenstein v. Sarasota County Public Hospital Board, 498 So. 2d 1013, 1014 (Fla. 2d DCA 1986)(rejecting appellant argument that if county organization "looks like a duck and quacks like a duck, then it must be a duck"); DeToro v. Dervan Investments Limited Corp., 483 So. 2d 717, 722 (Fla. 4th DCA 1986)(the old saying that "if it looks like a duck and walks like a duck . . . doesn't necessarily apply" to determine existence of partnership), amended on reh. denied; Booker Creek Preservation, Inc. v. Pinellas Planning Council, 433 So. 2d 1306, 1308 (Fla. 2d DCA 1983)(rejecting argument by appellant that county organization is an agency on the ground that if it "looks like a duck and quacks like a duck, then it must be a duck").

19.3(a)(1)[a] Law

443. The principle of law that Section 120.52(15) includes unwritten statements has existed for more than 23 years. In 1976, the Florida Supreme Court held that unwritten standards imposed by the Department of Revenue in connection with certain bond requirements were rules and were unenforceable because they had not been promulgated pursuant to Section 120.54. Straughn v. O'Riordan, 338 So. 2d 832, 834 n. 3 (Fla. 1976).

444. The unwritten agency statements at issue in Straughn were requirements: which the chief of the sales tax bureau "considers"; for which the area supervisor "plays it by ear"; and for which the Department itself had developed a "rule of thumb." Straughn, 338 So. 2d at 833 and n. 2. In rejecting unwritten standards as invalid rules, the court observed that Chapter 120 has as one of its principal goals:

> . . . the abolition of "unwritten rules" by which agency employees can act with unrestrained discretion to adopt, change and enforce governmental policy. . . .

Straughn, 338 So. 2d at 834 n. 3.

445. The requirement to invalidate an unadopted rule is intended to:

> . . . close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know.

McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977).

446. In 1997, the First District Court of Appeal followed the 1976 holding in Straughn. The court held that unwritten agency procedures are statements of general applicability and are invalid rules. Department of Highway Safety and Motor Vehicles v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997), reh'g denied. The dissent, in relevant part, argued that there was no statement because the agency procedures had not been reduced to writing. In rejecting the requirement that a statement be reduced to writing, the majority stated:

> The dissent's primary focus, as to the last three of the disputed procedures, appears to be that because none of the statements had been reduced to writing . . . they could not be considered to comply with section 120.52(15)'s definition of a rule. In espousing this position, [the dissent] has failed to cite any authoritative legislative or judicial source for [its] novel contention. Indeed, [its] reference to Straughn v. O'Riordan . . . supports an opposite conclusion. Nothing in Straughn reveals that the court's decision was influenced by the existence of written standards. In fact, the quotes from Straughn regarding "unwritten rules" and "invisible policy-making" strongly suggest the contrary.
>
> Even if it were possible to interpret Straughn as implying that the standards there attacked had been reduced to writing, any decision which requires a writing as a necessary ingredient of an unpublished rule is, in our judgment, clearly at variance with the legislative purpose behind the adoption of the 1974 Administrative Procedure Act. (citations omitted)

Schluter, 705 So. 2d at 84.

447. The legal principle that unwritten agency statements fall within the ambit of Section 120.52(15) has been approved by

the legislature pursuant to the doctrine of long-standing legislative reenactment. Subsequent reenactment of a statutory provision that has received a definite judicial construction is presumed to constitute legislative approval of the judicial construction. State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529, 531 (Fla. 1973), reh'g denied; Walsingham v. State, 250 So. 2d 857, 859 (Fla. 1971); Collins Investment Company v. Metropolitan Dade County, 164 So. 2d 806, 809 (Fla. 1964), reh'g denied; Advisory Opinion to Governor, 96 So. 2d 541, 546 (Fla. 1957) (en banc); Depfer v. Walker, 125 Fla. 189, 169 So 660, 664 (Fla. 1935), on reh'g, further reh'g denied; Cole Vision, 688 So. 2d at 408; Davies v. Bossert, 449 So. 2d 418, 420-421 (Fla. 3d DCA 1984); Aronson v. Congregation Temple De Hirsch of Seattle, Washington, 138 So. 2d 69, 73 (Fla. 3d DCA 1962), reh'g denied.

19.3(a)(1)[b] Evidence

448. Although an unwritten agency statement clearly falls within the ambit of Section 120.52(15), the specific terms of a particular statement must be established in the record. Unwritten agency statements must be sufficiently described by the party challenging the statement as a rule. Aloha Utilities, Inc., v. Public Service Commission, 723 So. 2d 919, 921 (Fla. 1st DCA January 31, 1999). See also Wigenstein v. School Board of Leon County, 347 So. 2d 1069, 1072 (Fla. 1st DCA 1977)(school board required to adopt superintendent's policy as a rule once

the board is aware of the policy); Krestview Nursing Home v. Department of Health and Rehabilitative Services, 381 So. 2d 240, 241 (Fla. 1st DCA 1979)(final agency action can occur in form of summary letters, telephone calls, and other conventional communications of government).

449. In this proceeding, Respondents adequately and precisely describe the statement of the District. The Memorandum expressly applies maintenance exemptions only to routine custodial maintenance. The terms of the statement emerge from consistent applications of the statement evidenced in the record.

450. The District expresses the terms of the statement each time the agency enforces action based on the statement. Agency statements are expressed through agency action to enforce the statement. Cf. Reiff v. Northeast Florida State Hospital, 710 So. 2d 1030, 1032 (Fla. 1st DCA May 27, 1998)(enforcement of clinical privileges in hospital by-laws is an invalid rule); Federation of Mobile Home Owners, 683 So. 2d at 591-592 (unpromulgated policy of general applicability that repeals an existing promulgated rule is itself a rule under former Section 120.535 even when agency denies existence of the unpromulgated policy); Department of Revenue of State of Florida v. Vanjaria Enterprises, Inc., 675 So. 2d 252, 255 (Fla. 5th DCA 1996) (enforcement of tax assessment procedure in training manual is an invalid rule); Christo, 649 So. 2d at 319 (enforcement of "CAMEL" ratings as a means to recover costs of examination and supervision of an institution is an invalid rule under former

Section 120.535); Florida Public Service Commission v. Central Corporation, 551 So. 2d 568, 570 (Fla. 1st DCA 1989) (administrative order is invalid rule); McCarthy v. Department of Insurance and Treasurer, 479 So. 2d 135, 136 (Fla. 2d DCA 1985) (letter establishing qualifications for eligibility and revoking certification is invalid rule), reh'g denied; Department of Administration, Division of Personnel v. Harvey, 356 So. 2d 323, 324 (Fla. 1st DCA 1977)(statement denying application is an invalid rule), reh'g denied; Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 887 (Fla. 1st DCA 1977) (orders may not be employed to prescribe substantive standards), cert. denied, 359 So. 2d 1210 (Fla. 1978).

451. The statement of the District is expressed through directives issued by the Director and other District staff. An agency statement may be evidenced in its directives to agency staff. Department of Revenue v. U.S. Sugar Corporation, 388 So. 2d 596, 597 (Fla. 1st DCA 1980)(denial of request for tax refund is an invalid rule when based on administrative determination that delivery to contract carrier, rather than to common carrier, is a sale inside the state); Harris v. Florida Real Estate Commission, 358 So. 2d 1123, 1126 (Fla. 1st DCA 1978)(directive approved at meeting of Commission which limited use of name of franchisor unless it was preceded by individual broker name was a statement and an invalid rule), reh'g denied, cert. denied, 365 So. 2d 711; State, Department of Administration v. Stevens, 344 So. 2d 290, 296 (Fla. 1st DCA 1977)(directive and guidelines

expressed in employee "bumping" and "retention" procedures and guidelines are statements and an invalid rule). See also Florida Department of Offender Rehabilitation v. Walsh, 352 So. 2d 575, 575 (Fla. 1st DCA 1977)(administrative directive is a statement and an invalid rule).

452. The District statement is expressed in the Memorandum. Agency memoranda provide sufficient evidence of an agency statement defined as a rule. Department of Corrections v. Sumner, 447 So. 2d 1388, 1390 (Fla. 1st DCA 1984)(statement expressed in interoffice memorandum concerning prisoner visitation is an invalid rule); Amos v. Department of Health and Rehabilitative Services, District IV, 444 So. 2d 43, 45 (Fla. 1st DCA 1983)(statement expressed in document entitled "CSE Policy Clearance 79-6" is an invalid rule), reh'g denied; Florida State University v. Dann, 400 So. 2d 1304, 1305 (Fla. 1st DCA 1981) (statement in faculty memorandum setting out procedures for awarding merit salaries and pay increases is an invalid rule).

453. The District does not ascribe the label "moratorium" to its refusal to grant a maintenance exemption for maintenance that is not routine custodial maintenance. However, the effect of the refusal is the same as the effect of a "moratorium" of indefinite duration.

454. The District statement is expressed in the District's self-imposed "moratorium" on exemptions for any work that does not qualify as routine custodial maintenance. An agency's self-imposed moratorium limiting applications for permits has been

held to be a statement. Balsam v. Department of Health and Rehabilitative Services, 452 So. 2d 976, 977 (Fla. 1st DCA 1984) (holding that self-imposed moratorium on applications for certificates of need is an invalid rule).

455. Rule 40C-4.021(20) defines maintenance as remedial work that is not routine custodial maintenance. The District statement defines "maintenance" entitled to the maintenance exemption as only routine custodial maintenance. An agency statement is a rule if it adopts an interpretation of a rule that is clearly contrary to the unambiguous language of the rule. Kearse v. Department of Health and Rehabilitative Services, 474 So. 2d 819, 820 (Fla. 1st DCA 1985)(agency must comply with its own rules), reh'g denied.

456. A statement is expressed in the District's deviation from its own rule. An agency is not free to deviate from a valid existing rule. Section 120.68(7)(e)2. An agency must follow its own rules. See, e.g., Vantage Healthcare Corporation, 687 So. 2d at 307(agency statement that does not follow its own rules is an invalid rule); Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1241 (Fla. 1st DCA 1996)(change in procedure expressed in adopted rule must be undertaken by rulemaking), reh'g denied; Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994)(agency cannot use declaratory statement to alter exemption authorized in rule); Florida H-Lift v. Department of Revenue, 571 So. 2d 1364, 1366-1367 (Fla. 1st DCA 1991)(agency statement

imposing requirements not in agency rule simply to enhance state revenue is an invalid rule), reh'g denied; Decarion v. Martinez, 537 So. 2d 1083, 1087 (Fla. 1st DCA 1989)(agency interpretation of its own rule to impose different requirements is a statement and an invalid rule); Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency deviation from personnel procedures in rule is a statement and an invalid rule).

457. The District statement is expressed in letters and other written communications of the District. An agency statement can be expressed in agency memoranda, letters, and forms. See, e.g., Department of Natural Resources v. Wingfield Development Company, 581 So. 2d 193, 196-197 (Fla. 1st DCA 1991)(letter to developer limiting exemption from coastal construction control line permit is a statement that is an invalid rule), reh'g denied; Department of Business Regulation, Division of Alcoholic Beverages and Tobacco v. Martin County Liquors, Inc., 574 So. 2d 170, 173 (Fla. 1st DCA 1991)(form required by agency but not filed with Secretary of State and agency policy requirements for completing the forms are statements and an invalid rule), reh'g denied; State, Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 887-888 (Fla. 1st DCA 1988)(form which provides the substantive standard for review in all instances is a statement and an invalid rule), reh'g granted, clarified; McCarthy, 479 So. 2d at 137 (letter setting out requirements and prerequisites for

certification as a fire marshal is a statement and an invalid rule).

19.3(a)(2) General Applicability

458. The requirement of general applicability in the statutory definition of a rule is a threshold distinction between a statement that is a rule and a non-rule statement. A non-rule statement is the definitional complement to a statement defined as a rule in Section 120.52(15). A non-rule statement is one that is, inter alia, not generally applicable. A statement that is not generally applicable cannot be defined as a rule.

459. Agency statements satisfy the test of general applicability if they:

> . . . are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law.

McDonald, 346 So. 2d at 581.

460. Whether a statement is an incipient non-rule statement or has emerged into a rule is determined by the effect of the statement rather than the label ascribed to it by the agency. Vanjaria Enterprises, 675 So. 2d at 255; Balsam, 452 So. 2d at 978; Amos, 444 So. 2d at 46-47; Harvey, 356 So. 2d at 325. Compare Investment Corp. of Palm Beach v. Division of Pari-Mutuel Wagering, Department of Business and Professional Regulation, 714 So. 2d 589, 591 (Fla. 3d DCA July 8, 1998)(declaratory statement is a rule because it is generally applicable) with Environmental Trust v. State, Department of Environmental Protection, 714 So.

2d 493, 498 (Fla. 1st DCA June 3, 1998)(rejecting the notion that an agency must adopt a rule for each "particular set of facts") and Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 154 (Fla. 1st DCA 1998)(a declaratory statement is not transformed into a rule merely because it addresses a matter of interest to more than one person). The District's limitation of maintenance exemptions to routine custodial maintenance satisfies the test of general applicability.

461. The application of maintenance exemptions only to routine custodial maintenance is not, as the District argues, a single isolated occurrence in the Memorandum which was allegedly buried and forgotten by District staff. The Memorandum is merely published evidenced of the statement.

462. The record is replete with other evidence of how the District applies the limitation of exemptions to create rights, require compliance, or otherwise have the direct and consistent effect of law as if the limitation were actually included in the maintenance exemptions enacted by the legislature. As the District explains in its PRO:

> Florida Courts and agencies have consistently interpreted and applied the maintenance exemption to include the requirement that the dredging must be conducted as part of routine custodial maintenance to maintain an existing, functional system to its original design specifications so that it remains usable for its intended purpose. (emphasis supplied) (citations omitted)

District PRO at 83.

463. The record shows that the District limited maintenance exemptions to routine custodial maintenance in 1984 in Deseret. On November 20, 1989, the District published its statement in the Memorandum. In 1993, the First District Court of Appeal rejected the statement that maintenance exemptions are limited to routine custodial maintenance. SAVE, 623 So. 2d at 1202. In 1999, the District continues to consistently apply the rejected statement.

464. For more than 15 years, the District has consistently limited maintenance exemptions to routine custodial maintenance to create rights, require compliance, or otherwise have the direct and consistent effect of law. The statement that a maintenance exemption applies only to routine custodial maintenance satisfies the test of general applicability. Central Corporation, 551 So. 2d at 570; Balsam, 452 So. 2d at 978; Stevens, 344 So. 2d at 296.

19.3(b) Disjunctive Requirements

465. The statutory definition of a rule requires that a statement of general applicability must also satisfy one of several disjunctive requirements in the Section 120.52(15). The statement of general applicability, in relevant part, must either:

> (a) implement, interpret, or prescribe law or policy;
>
> (b) describe the procedure or practice requirements of an agency; or
>
> (c) amend or repeal a rule.

466. The District's limitation of exemptions to routine custodial maintenance implements, interprets, and prescribes the policy of the District as well as the law in Section 403.813(2)(f) and (g); and Rules 40C-4.051(2)(a) 1 and 3, 40C-4.051(11)(b), and 40C-4.051(11)(c). The statement that maintenance exemptions apply only to routine custodial maintenance amends and repeals the express language of relevant statutes. It imposes an interpretation on Section 403.813(2)(g) that is not readily apparent from the statute. Ocala Breeder Sales Company, Inc. v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 464 So. 2d 1272, 1274 (Fla. 1st DCA 1985); Amos, 444 So. 2d at 47; Gulfstream Park Racing Association, Inc. v. Division of Pari-Mutuel Wagering, Department of Business Regulation, 407 So. 2d 263, 265 U.S. Sugar, 388 So. 2d at 598; Price Wise Buying Group v. Nuzum, 343 So. 2d 115, 116 (Fla. 1st DCA 1977). See also Allied Marine Group v. Department of Revenue 701 So. 2d 630, 631 (Fla. 4th DCA 1997)(statute imposing tax on use cannot be applied to tax sales).

467. The limitation of maintenance exemptions to routine custodial maintenance is unduly restrictive. Administratively imposed limits on statutory exemptions are unduly restrictive. See Campus Communications, Inc. v. Department of Revenue, State of Florida, 473 So. 2d 1290, 1295 (Fla. 1985)(the term "newspaper" cannot be interpreted narrowly to deny a statutory exemption); Pederson v. Green, 105 So. 2d 1, 4 (Fla. 1958)(rule restricting statutory exemption for feed to particular types of

feed is unduly restrictive of the feeds legislatively exempted); McTigue, 387 So. 2d at 456 (rule construing statutory exemption for physician statement to mean statement from a Florida physician is unduly restrictive); Salvation Limited, 452 So. 2d at 66-67 (rule interpreting statutory terms "restaurant" and "serve" to require food to be cooked on premises is unnecessarily restrictive).

468. The District statement is not an internal management memorandum. The statement prescribes specific procedures and practice requirements of the agency and affects the private interests of Respondents. Cf. Alexander v. Singletary, 626 So. 2d 333, 335 (Fla. 1st DCA 1993)(operating procedure that prohibits inmates from earning more than $100 a month is invalid rule); Martin City Liquors, 574 So. 2d at 174 (policies and procedures held to be invalid rules); Department of Transportation v. Blackhawk Quarry Company of Florida, Inc., 528 So. 2d 447, 450 (Fla. 5th DCA 1988)(standard operating procedures established agency policy for accepting materials produced for agency) rev. denied 536 So. 2d 243; Department of Corrections v. Holland, 469 So. 2d 166, 167 (Fla. 1st DCA 1985)(inmate clothing and linen policy is invalid rule); Sumner, 447 So. 2d at 1390 (interoffice memorandum concerning prisoner visitation is an invalid rule); and Amos 444 So. 2d at 45 (document entitled "CSE Policy Clearance 79-6" is a statement), reh'g denied; Dann, 400 So. 2d at 1305 (faculty memorandum setting out procedures for awarding merit salaries and pay increases is an invalid rule).

But see State ex rel. Bruce v. Kiesling; Florida Public Service Commission Nominating Council v. Kiesling, 632 So. 2d 601, 604 (Fla. 1994)(statements of procedure requiring appointment of commissioners from three nominees are not rules).

469. The limitation satisfies the statutory definition of a rule and has not been adopted and promulgated in accordance with the statutory rulemaking procedures prescribed in Section 120.54. The District may not rely on the unadopted rule unless it demonstrates that the rule satisfies the requirements of Section 120.57(1)(e)2a-g. Section 120.57(1)(e)2.

19.4 Prove-up Requirements

470. Section 120.57(1)(e), in relevant part, provides:

> . . . Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge . . . .

In the de novo review, the "agency must demonstrate" that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a-g.

471. The District demonstrated by a preponderance of the evidence that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2a and d. However, the District failed to demonstrate that the unadopted rule satisfies the requirements of Section 120.57(1)(e)2b, c, e, f, and g.

19.4(a) Section 120.57(1)(e)2a and d

472. The unadopted rule meets the requirements of Section 120.57(1)(e)2a and d. The rule is within the powers, functions, and duties delegated by the legislature in accordance with Section 120.57(1)(e)2a. The rule is not arbitrary or capricious within the meaning of Section 120.57(1)(e)2d.

19.4(a)(1) Range of Powers Test

473. Section I20.57(1)(e)2a requires, inter alia, that the unadopted rule must fall ". . . within the powers, functions, and duties delegated by the legislature." The terms of the requirement in Section 120.57(1)(e)2a are substantially similar to those prescribed in the introductory paragraph in Section 120.52(8). In relevant part, Section 120.52(8) defines an invalid exercise of delegated legislative authority to include:

> . . . action which goes beyond the powers, functions, and duties delegated by the Legislature.

474. Section 120.52(8) has been judicially construed to require a proposed rule to fall within the:

> . . . range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented. . . .

Consolidated-Tomoka, 717 So. 2d at 80.

475. There is no discernible reason why terms as similar to those in Sections 120.52(8) and 120.57(1)(e)2a should be

construed differently. Both statutes address the subject of an agency seeking to enforce a statement which has not yet been adopted but which is proposed for enforcement. Statutes addressing the same subject matter should be construed in pari materia. See Consolidated-Tomoka, 717 So. 2d at 80 (construing Sections 120.52(8) and 120.54(1) together).

476. The District's limitation of exemptions to routine custodial maintenance is within the "range of powers," functions, and duties delegated by the legislature to the District for the purpose of enforcing and implementing Section 373.416. See Consolidated-Tomoka, 717 So. 2d at 80. The unadopted rule regulates a matter directly within the class of powers and duties identified in the statute implemented. Standards for permitting and exemptions fall within the class of powers and duties identified in Sections 373.413 and 373.416.

477. The requirement in Section 120.57(1)(e)2a which is subject to the "range of powers" test is separate and distinct from the requirement in 120.57(1)(e)2b. The distinction is best illustrated by an analysis of Sections 120.52(8)(b) and 120.52(8)(c) in Consolidated-Tomoka. In relevant part, the court stated:

> . . . section 120.52(8)(b) provides that a rule is invalid if "[t]he agency has exceeded its grant of rulemaking authority" Additionally, section 120.52(8)(c) provides that a rule is invalid if it "enlarges, modifies, or contravenes the specific provisions of law implemented." These subsections address two different problems: the former pertains to the adequacy of the grant of rulemaking authority and the latter

> relates to limitations imposed by the grant of rulemaking authority. . . .

Consolidated-Tomoka, 717 So. 2d at 81.

478. A rule that satisfies the "range of powers" test applicable to Sections 120.57(1)(e)2a and 120.52(8) must independently satisfy the requirements of Sections 120.57(1)(e)2b and 120.52(8)(c). In other words, an agency may take action that is within its "range of powers" but do so in an invalid manner. Cf. Koontz v. St. Johns River Water Management District, 720 So. 2d 560, 561-562 (Fla. 5th DCA 1998)(District had power to create river basin even though the power was executed without adequate basis in the record), reh'g denied; Witmer v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 662 So. 2d 1299, (Fla. 4th DCA 1995), reh'g denied (agency had authority to promulgate rule regarding issuance of license but no authority to include vague or inadequate standards); But See Department of Business and Professional Regulation v. Calder Race Course, Inc., 724 So. 2d 100, 102-103 (Fla. 1st DCA 1998)(a proposed rule that authorized agency to conduct warrantless searches of wagering facilities is not within the range of powers).

479. The requirements in Section 120.57(1)(e)2a-g are substantially similar to those in Section 120.52(8)(b)-(g). Section 120.52(8)(b)-(g) was enacted, in relevant part, to overrule judicial use of the so-called "reasonably related" test to determine the validity of a rule. Section 120.52(8), flush

paragraph; Consolidated-Tomoka, 717 So. 2d at 78; Calder Race Course, 724 So. 2d at 101. There is no discernible reason why similar statutory terms in Section 120.57(1)(e)2a-g should be construed differently from those in Section 120.52(8)(b)-(g). The "reasonably related" test should not be used to determine the validity of an unadopted rule pursuant to Section 120.57(1)(e)2a-g. Consolidated-Tomoka, 717 So. 2d at 78; Calder Race Course, 724 So. 2d at 101.

480. Under the "reasonably related" test used prior to 1996, rules were deemed valid if they were "reasonably related" to the purposes of the enabling legislation and were not "arbitrary or capricious." Marine Industries Association of South Florida, Inc. v. Florida Department of Environmental Protection, 672 So. 2d 878, 882 (Fla. 4th DCA 1996); Cortes v. State, Board of Regents, 655 So. 2d 132, 135 (Fla. 1st DCA 1995), reh'g denied; State, Department of Environmental Regulation v. SCM Glidco Organics Corporation, 606 So. 2d 722, 728 (Fla. 1st DCA 1992), reh'g denied; Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So. 2d 1363, 1367 (Fla. 1st DCA 1992); Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991). The "reasonably related" and "arbitrary or capricious" standards evolved over the course of 20 years as a judicially created two-prong test for determining the validity of a rule. Motel 6, Operating L.P. v. Department of Business Regulation, Division of Hotels & Restaurants, 560 So. 2d 1322, 1323 (Fla. 1st DCA 1990),

reh'g denied; Adam Smith Enterprises, Inc. v. State, Department of Environmental Regulation, 553 So. 2d 1260, 1274 (Fla. 1st DCA 1989), reh'g denied; Island Harbor Beach Club, Ltd. v. Department of Natural Resources, 495 So. 2d 209, 215 (Fla. 1st DCA 1986); Austin v. Department of Health and Rehabilitative Services, 495 So. 2d 777, 779 (Fla. 1st DCA 1986), reh'g denied.

481. Some decisions applied one or the other prong of the "reasonably related" test in determining the validity of a rule. See, e.g., Cataract Surgery Center v. Health Care Cost Containment Board, 581 So. 2d 1359, 1360-1361 (Fla. 1st DCA 1991)(agency interpretation of a statute must be shown to be arbitrary and capricious), reh'g denied; Department of Corrections v. Hargrove, 615 So. 2d 199, 201 (Fla. 1st DCA 1993)(rule must be shown to be arbitrary and capricious), reh'g. denied. Other decisions applied a variation of the reasonably related and arbitrary or capricious test. PPI, Inc. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 698 So. 2d 306, 309 (Fla. 3d DCA 1997)(where agency is granted rulemaking authority, it is given "wide discretion" in exercising that authority), reh'g denied; Hobe Associates, Ltd. v. State, Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes, 504 So. 2d 1301, 1306 (Fla. 1st DCA 1987)(rule need only be within "general statutory duties"), reh'g denied.

482. In 1996, the legislature enacted new legislation intended to overrule earlier case law to the extent the decisions in those cases applied the "reasonably related" test for determining the validity of a rule. Consolidated-Tomoka, 717 So. 2d at 78-79. The "arbitrary and capricious" standard survived in Sections 120.52(8)(e) and 120.57(1)(e)2d. However, the "reasonably related" standard is no longer applicable in determining the validity of a rule. Calder Race Course, 724 So. 2d at 101.

483. In Consolidated-Tomoka, the court cited specific cases which the legislature intended to overrule to the extent the cases had applied the "reasonably related" test to determine the validity of a rule. The cited cases are: General Telephone Company of Florida v. Florida Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984); Department of Labor and Employment Securities, Division of Workers' Compensation v. Bradley, 636 So. 2d 802, 807 (Fla. 1st DCA 1994); Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984), reh'g denied; Florida Waterworks Association v. Florida Public Service Commission, 473 So. 2d 237 (Fla. 1st DCA 1985); Agrico Chemical Company v. State, Department of Environmental Regulation, 365 So. 2d 759, 762 (Fla. 1st DCA 1978), reh'g. denied (dissent), cert. denied, sub nom., 376 So. 2d 74; Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975).

484. Prior to 1996, many cases had determined the validity of agency action based on a test of whether the agency's action was within the "range of permissible interpretations" of the delegated statutory authority. When the court adopted the new "range of powers" test in Consolidated-Tomoka, the court did not distinguish the "range of powers" test from the "range of permissible interpretations" test. See, e.g., Suddath Van Lines, Inc. v. State, Department of Environmental Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996), reh'g denied; Golfcrest Nursing Home v. State, Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995); Koger v. Department of Professional Regulation, Board of Clinical Social Work, Marriage Family Therapy and Mental Health Counseling, 647 So. 2d 312, 312 (Fla. 5th DCA 1994); B.K. v. Department of Health and Rehabilitative Services, District 7, Orange County, 537 So. 2d 633, 635 (Fla. 1st DCA 1989), reh'g denied; Department of Health and Rehabilitative Services v. Framat Realty, Inv., 407 So. 2d 238, 242 (Fla. 1st DCA 1981); Moorehead v. Department of Professional Regulation, Board of Psychological Examiners, 503 So. 2d 1318, 1320 (Fla. 1st DCA 1987).

19.4(a)(2) Arbitrary or Capricious

485. A determination of whether a rule is arbitrary or capricious is a separate inquiry from that required to determine whether a rule falls within the range of powers delegated to the agency. State, Department of Insurance v. Insurance Services

Office, 434 So. 2d 908, 913 (Fla. 1st DCA 1983). The latter inquiry looks to whether the rule regulates something within its "range of powers" while the former inquiry looks to the wisdom of the rule. Id.

486. A rule is arbitrary if it is not supported by facts or logic or is despotic. Agrico, 365 So. 2d at 763. A rule is capricious if is not supported by thought or reason, or it is irrational. Board of Trustees of the Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995).

487. A determination of whether the unadopted rule of the District is arbitrary or capricious must be supported by the evidence of record. Florida Marine Fisheries Commission v. Organized Fishermen of Florida, 610 So. 2d 92, 92 (Fla. 1st DCA 1992). The inquiry is usually a "fact-intensive" one. Dravo Basic Materials Company, Inc. v. State, Department of Transportation, 602 So. 2d 632, 634 (Fla. 2d DCA 1992), reh'g denied. See also General Telephone, 446 So. 2d at 1067 (upholding a rule based, in part, on testimonial evidence of record); State, Department of Health and Rehabilitative Services v. Health Care and Retirement Corporation of America, 593 So. 2d 539, 541 (Fla. 1st DCA 1992)(a rule that is lacking in factual support is arbitrary and capricious).

488. The unadopted rule of the District is neither arbitrary nor capricious. For reasons stated in the Findings of Fact and incorporated here by this reference, the rule is not without thought or reason. Dravo, 602 So. 2d at 634. Rather,

the rule is supported by logic, thought, and reason. It is grounded in the engineering reality that a drainage ditch that is not maintained routinely will eventually degrade and cease to function. There is a rational relationship between fundamental engineering principles and the requirement for routine custodial maintenance. See Department of Natural Resources v. Sailfish Club of Florida, Inc., 473 So. 2d 261, 263 (Fla. 1st DCA 1985) (rule is not arbitrary and capricious if it bears a rational relationship with a legitimate purpose). A rule based upon appropriate study and the recommendations of technical staff is not arbitrary or capricious. Florida Agricultural Research Institute v. Florida Department of Agriculture and Consumer Services, 416 So. 2d 1153, 1156 (Fla. 2d DCA 1982), as amended on denial of reh'g.

489. The unadopted rule does not defy a deliberative reading. It is not thick with terms more uncertain by passive grammatical construction than the statutory language it purports to define. The rule does not serve more to obfuscate the statutory language than to elaborate statutory criteria or standards. It does not prescribe standards to guide discretion that depend totally on the judgment of agency staff for determination. Cf. Merrit v. Department of Business and Professional Regulation, Board of Chiropractic, 654 So. 2d 1051, 1054 (Fla. 1st DCA 1995)(a rule is arbitrary and capricious if it violates the foregoing requirements). The rule is not irrational or without basis in fact or logic. Humana, Inc. v. Department of

Health and Rehabilitative Services, 469 So. 2d 889, 890 (Fla. 1st DCA 1985). But see Department of Health and Rehabilitative Services v. Johnson and Johnson Home Health Care, Inc., 447 So. 2d 361, 362 (Fla. 1st DCA 1984)(a rule that allows an agency to ignore some statutory criteria and to emphasize others is arbitrary and capricious).

19.4(b) Section 120.57(1)(e)2b, c, e, f, and g.

490. The evidentiary deficiencies underlying the District's failure to satisfy its burden of proof for Section 120.57(1)(e)2b, c, e, f, and g are stated in the Findings of Fact and incorporated here by this reference. Some of the issues relevant to the requirement for support in Section 120.57(1)(e)2f are discussed in the Findings of Fact and incorporated here by this reference.

19.4(b)(1) Modifies or Contravenes

491. The District's limitation of the maintenance exemption to routine custodial maintenance enlarges, modifies, or contravenes the specific law implemented in violation of Section 120.57(1)(e)2b. The unadopted rule limits exempt maintenance to routine custodial maintenance. Section 373.403(8) excludes routine custodial maintenance from exempt maintenance in Section 403.813(2)(g).

492. The unadopted rule imposes a requirement not found in Sections 373.403(8) and 403.813(2)(g). A rule cannot impose a requirement not found in the statute implemented. See DeMario v.

Franklin Mortgage & Investment Co., Inc., 648 So. 2d 210, 213-214 (Fla. 4th DCA 1994)(agency lacked authority to impose, by rule, time requirement not found in statute) reh'g and reh'g en banc denied, rev. denied, 659 So. 2d 1086; Cataract Surgery, 581 So. 2d at 1361 (agency lacked authority to require 45 data items from patients of free-standing ambulatory surgical centers); Wingfield Development Company, 581 So. 2d at 196 (additional limitations that affect exemption from permit imposes requirements not specifically authorized by statute); Board of Trustees of the Internal Improvement Fund of the State of Florida v. Board of Professional Land Surveyors, 566 So. 2d 1358, 1360-1361 (Fla. 1st DCA 1990)(agency cannot impose technical standards not authorized by statute); Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419, 423 (Fla. 5th DCA 1988)(agency cannot vary impact of statute by creating waivers or exemptions); Capeletti Brothers, Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)(rule cannot expand statutory coverage) rev. denied, 509 So. 2d 1117; Salvation, Limited, Inc., 452 So. 2d at 66-67 (agency cannot add requirement for exemption not authorized in statute); Department of Health and Rehabilitative Services v. Petty-Eiffert, 443 So. 2d 266, 267 (Fla. 1st DCA 1983)(existing rule that imposes requirement not found in statute is invalid); Gulfstream Park, 407 So. 2d at 265 (agency cannot deny permit based on statutory interpretation that is not readily apparent from the terms of the statute).

493. The District cannot interpret its rule to define exempt "maintenance" as only routine custodial maintenance. Administrative convenience or expediency cannot dictate the terms of a valid existing rule. Cleveland Clinic, 679 So. 2d at 1241-1242; South Broward Hospital District v. Clinic Florida Hospital, 695 So. 2d 701 (1997); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)(agency must follow its own rule); Flamingo Lake RV Resort, Inc. v. Department of Transportation, 599 So. 2d 732, 732 (Fla. 1st DCA 1992); Boca Raton Artificial Kidney Center, 493 So. 2d at 1057.

494. An agency's deviation from a valid existing rule is itself a rule that is invalid and unenforceable. Federation of Mobile Home Owners, 683 So. 2d at 592 (repeal of rule implements "non-rule policy" that is a statement of "general applicability"); Gadsden State Bank v. Lewis, 348 So. 2d 343, 346-347 (Fla. 1st DCA 1977)(order denying hearing in derogation of existing rule is an invalid rule); Price Wise, 343 So. 2d at 116 (declaratory statement that repeals prior interpretation of a rule is itself an invalid rule). But see Florida Department of Environmental Protection v. Environmental Corporation of America, Inc., 720 So. 2d 273, 274 (Fla. 2d DCA Oct. 16, 1998)(agency can revise existing rule without complying with rulemaking procedures); Florida Coalition of Professional Laboratory Organizations, 718 So. 2d at 871 (existing rule can be abolished under Section 120.52(8)); Environmental Trust, 714 So. 2d at 498

(agency can revise and clarify existing rule without adopting revision as a rule).

9.4(b)(2) Vague and Inadequate Standards

495. The unadopted rule is vague and fails to provide adequate standards for the purpose and the interval required to satisfy the definition of routine custodial maintenance. Cf. Witmer, 662 So. 2d at 1302 (rule punishing "corrupt" and "fraudulent" practices without defining terms must refer to adequate standards by which practice may be judged), reh'g denied; State v. Reisner, 584 So. 2d 141, 144 (Fla. 5th DCA 1991) (HRS rule requiring annual checks of intoxilyzer for "accuracy" and "reproducibility" are vague and ambiguous). Criteria provided in the unadopted rule are inadequate to enable a regulated party to know whether a particular activity satisfies the requirements for exemption. Grove Isle, Ltd. v. State, Department of Environmental Regulation, 454 So. 2d 571, 573-574 (Fla. 1st DCA 1984), reh'g denied.

19.4(b)(3) Due Notice and Unadopted Rules

496. Adequate notice of agency action is a fundamental due process requirement that is central to the fairness of administrative hearings. Amos, 444 So. 2d at 47; Willis, 344 So. 2d at 590. The adequacy of notice of an agency statement is tested by separate standards depending on whether the statement satisfies the statutory definition of a rule.

497. Adequate notice of an agency statement that does not satisfy the statutory definition of a rule is provided through adjudication of individual cases. McDonald, 346 So. 2d at 582. Non-rule statements in agency orders must also comply with the indexing requirements prescribed in Section 120.53. Plante, V.M.D. v. Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, 716 So. 2d 790, 791-792 (Fla. 4th DCA 1998), clarified (Aug. 12, 1998); Caserta v. Department of Business and Professional Regulation, 686 So. 2d 651, 653 (Fla. 5th DCA 1996); Gessler, M.D. v. Department of Business and Professional Regulation, 627 So. 2d 501, 503 (Fla. 4th DCA 1993), reh'g denied, dismissed, 634 So. 2d 624 (Fla. 1994).

498. Adequate notice of an agency statement that satisfies the statutory definition of a rule requires the statement to be adopted and promulgated in accordance with the rulemaking procedures prescribed in Section 120.54. McDonald, 346 So. 2d at 581. Rulemaking is not a matter of agency discretion.

> Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable. (emphasis supplied)

Section 120.54(1)(a).

499. Rulemaking by agencies is a quasi-legislative function. Booker Creek Preservation, 534 So. 2d at 422; Properly adopted and promulgated rules have the force and effect of law. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985), reh'g denied; Florida Livestock Board v. Gladden, 76 So. 2d 291, 293

(Fla. 1954); Canal Insurance Company v. Continental Casualty Company, 489 So. 2d 136, 137 (Fla. 2d DCA 1986).

500. A statement which effectuates agency policy and also satisfies the definition of a rule must be invalidated if it has not been legitimated by the rulemaking process prescribed in Section 120.54. McDonald, 346 So. 2d at 580. Invalidation of unadopted rules is the necessary effect if rulemaking procedures prescribed in Chapter 120 are not to be atrophied by non-use. Id.

501. Over the course of approximately 20 years, a judicially created "prove-up" exception evolved which allowed agencies to "prove-up" statements defined as a rule but not promulgated pursuant to Section 120.54. The result caused the rulemaking procedures prescribed in Section 120.54 to fall into relative non-use.

502. Several factors contributed to the non-use of rulemaking requirements. Some courts construed the definition of a rule narrowly. See, e.g., Department of Highway Safety and Motor Vehicles v. Florida Police Benevolent Association, 400 So. 2d 1302, 1303-1304 (Fla. 1st DCA 1981)(characterizing a proceeding as a "marginal" rule challenge). Other courts did not construe the "other incentives" doctrine enunciated in McDonald in a manner that limited agencies to "proving-up" incipient non-rule statements.

503. Some courts allowed agencies to "prove-up" statements defined as a rule but not adopted as a rule. Police Benevolent Association, 400 So. 2d at 1304; McDonald, 346 So. 2d at 583.

Cf. Amos, 444 So. 2d at 47 (invalidating an unadopted rule, in relevant part, because the agency had not shown the reasonableness and factual accuracy of the policy). By 1983, several decisions held that attempts to label agency action as either a rule or non-rule policy had been largely discarded. Department of Revenue v. American Telephone and Telegraph Company, 431 So. 2d 1025, 1027 (Fla. 1st DCA 1983); Barker v. Board of Medical Examiners, Department of Professional Regulation, 428 So. 2d 720, 722 (Fla. 1st DCA 1983). See Patricia A. Dore, Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders, 19 FLA. ST. U. L. REV. 437 (1991)("[b]efore long . . . the limited McDonald exception swallowed the rule"). See also Rini v. State, Department of Health & Rehabilitation, 496 So. 2d 178, 180 (Fla. 1st DCA 1986) (creation of classes for providing routine dental treatment is "non-rule policy" that is an "agency statement of general applicability" and agency assumes the burden of "articulating the rule").

604. The judicial "prove-up" exception to rulemaking was not the only cause for the non-use of statutory rulemaking requirements. Prior to 1984, former Section 120.68(12), Florida Statutes (1983), authorized an agency to deviate from an adopted rule if the agency explicated the basis for the deviation. In 1984, the legislature eliminated the statutory authority for an agency to deviate from an adopted rule. Since then, cases have

generally invalidated agency action to enforce unadopted rules. Investment Corp. of Palm Beach, 714 So. 2d at 591; Vanjaria, 675 So. 2d at 255-256; Central Corporation, 551 So. 2d at 570; Department of Corrections v. Piccirillo, 474 So. 2d 1199, 1202 (Fla. 1st DCA 1985), reh'g granted, in part; Gar-Con Development, 468 So. 2d at 415; Department of Corrections v. Adams, 458 So. 2d 355, 356-357 (Fla. 1st DCA 1984).

505. Despite the legislature's attempt to prohibit the non-use of statutory rulemaking requirements, courts continued to apply the "prove-up" exception to allow agency reliance on unadopted rules. The legislature explicitly intended former Sections 120.535 and 120.57(1)(b)15, Florida Statutes (1995), to reverse the judicially created "prove-up" exception to rulemaking requirements in several cases. The cases expressly rejected in HB 1879, supra, are: Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission, 443 So. 2d 92, 96-97 (Fla. 1983); Florida Cities Water Company v. Florida Public Service Commission, 384 So. 2d 1280, 1282 (Fla. 1980); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397, 406 (Fla. 1st DCA 1991); Florida Power Corporation v. State of Florida, Siting Board, 513 So. 2d 1341, 1343 (Fla. 1st DCA 1987), reh'g denied; Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182 (Fla. 1st DCA 1981); Hill v. School Board of Leon County, 351 So. 2d 732, 733 (Fla. 1st DCA 1977), as corrected on denial of reh'g. HB at 3-4.

506. In 1996, the legislature retreated from its historical insistence on compliance with statutory rulemaking requirements by enacting the "due notice" standard in Section 120.57(1)(e)2e. The "due notice" standard does not require an agency statement defined as a rule to provide notice through the rulemaking procedures prescribed in Section 120.54(1)(a). If the requirement for "due notice" were construed to mean rulemaking, such a construction would invalidate any unadopted rule for violating Section 120.57(1)(e)2e and reduce the remaining grounds in Section 120.57(1)2 to a nullity.

507. The relaxed notice standard in Section 120.57(1)(e)2e represents a retreat from the historical legislative mandate to invalidate unadopted rules. The retreat seeks to balance the desire to preserve wise agency policy with the due process requirement for adequate notice in Section 120.54(a)(1).

508. The plain and ordinary meaning of "due notice" should be construed in accordance with the specific purpose for which the "due notice" requirement is intended. Section 120.57(1)(e)2e is intended to require both timely and sufficient notice of the existence and terms of an unadopted rule.

509. The District provided Respondents with timely notice of the existence of the unadopted rule and its terms. The notice provided a reasonable period in which Respondents could prepare the evidence required to make the required preliminary showing.

510. The District failed to provide Respondents with sufficient notice of the unadopted rule. The standards in the

unadopted rule are vague and inadequate. Any notice of such standards is itself necessarily vague and inadequate.

19.4(b)(4) Support

511. The District cites the decision in the 1984 Deseret case, the circuit court opinion in Deseret, and numerous administrative orders in support of the unadopted rule. The specific citations are set forth in the Findings of Fact and incorporated here by this reference. Any support the District gleaned from these collective authorities was specifically rejected by the First District Court of Appeal in 1993. SAVE, 623 So. 2d at 1202-1203.

512. The District argues that the ALJ must follow the decision in Deseret. In support of its argument, the District cites Mikolsky, 721 So. 2d at 738.

513. In Mikolsky, former Section 443.101(1)(a) disqualified an individual from unemployment benefits for the week in which the individual voluntarily left work without good cause. The statute was amended in 1994 to define work to include full-time or part-time work. The Unemployment Appeals Commission (the "agency") interpreted the amendment to mean that quitting either part-time or full-time employment without good cause results in the termination of all benefits.

514. Cases decided before the statutory amendment in 1994 held that leaving a part-time position did not affect an individual's right to compensation for losing another full-time

position. The agency reasoned that the 1994 amendment was intended to change that result.

515. In 1995, the Fifth District Court of Appeal rejected the agency's interpretation of the 1994 amendment. The decision was followed in subsequent cases in other districts. However, the agency continued to apply its statutory interpretation to individual cases. In reversing the agency's order disqualifying Ms. Mikolsky from receiving unemployment compensation benefits, the court stated:

> . . . we have difficulty understanding why the [agency] continues to adhere to its rejected interpretation of the statute. The result is delay and expense for . . . people who can little afford either and who may ultimately lose because they lack sufficient knowledge and ability to successfully pursue an appeal. . . . (citation omitted)

Mikolsky, 721 So. 2d 739.

516. The agency moved the appellate court to certify the question as one of great public importance. In denying the motion, the court stated:

> . . . the [agency] admits that it has continued to apply the penalty prescribed by the statute, pursuant to its rejected interpretation, and has not followed the interpretation of the district courts of appeal. By way of explanation, the [agency] asserts it cannot circumvent an unambiguous statutory provision (its own interpretation of the statute), and implies it cannot and will not follow the interpretations of the district courts of appeal. (emphasis not supplied)
>
> An agency of this state . . . must follow the interpretations of statutes as interpreted by

> the courts of this state. . . . The bottom line here is that the [agency] is not free to continue following its interpretation of the statute. The district courts of appeal have spoken on this issue, and the [agency] must adhere to the interpretation given by those courts. Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated.

Mikolsky, 721 So. 2d at 740.

517. Like the rejected agency interpretation in Mikolsky, the District's statement that the maintenance exemption in Section 403.813(2)(g) applies only to routine custodial maintenance has been rejected in all respects by the First District Court of Appeal. SAVE, 623 So. 2d at 1202. The court ruled that such a contention lacks any authority.

518. Six years later, the District continues to apply its rejected interpretation of Section 403.813(2)(g). Like the court in Mikolsky, it is difficult to understand why the District continues to adhere to its rejected interpretation of the statute. The District's continued application of its rejected interpretation results in delays and regulatory costs for those who can little afford either and who may ultimately lose because they lack the knowledge and ability to pursue their remedies.

519. The statement of the District in this proceeding has even less raison d'être than did the statement of the agency in Mikolsky. There is no statutory amendment after 1993 upon which the District can base its statement in this proceeding. Rather, the District inexplicably clings to one ruling by a circuit court 15 years ago which was not expressly approved by the reviewing

district court and which was expressly rejected six years ago in SAVE. Not only does the District have constructive knowledge of the decision in SAVE, the District was a party in SAVE and has actual, first-hand knowledge. Moreover, a key witness who explicated the basis of the unadopted rule in this proceeding was a key witness in SAVE.

520. If the District has always construed Section 403.813(2)(g) according to its rejected interpretation, that is not precedent for continuing to do so. The length of time during which an agency has done something wrong does not make correct the continued commission of the wrong.

521. The District cannot amend or deviate from the definition of "maintenance" in its own rule. An agency must follow its own rule. If the rule proves to be impracticable or otherwise ineffective, the District must seek changes through the rulemaking procedures prescribed in Section 120.54.

522. The District cannot adopt a statutory interpretation that conflicts with the statute. If the District does not agree with the statute, the appropriate remedy is a legislative one.

523. Until the District obtains a legislative solution, the District is not free to follow its own interpretation of Section 403.813(2)(g). The First District Court of Appeal has spoken on this issue. The District must adhere to that interpretation.

> Failure to do so puts the constitutional structure of the court system at risk and such conduct cannot be tolerated.

Mikolsky, 721 So. 2d at 740.

19.4(b)(5) Regulatory Costs

524. The District failed to show that the limitation of maintenance exemptions to routine custodial maintenance does not impose excessive regulatory costs on Respondents. The District did not show that it had adequately considered the economic burden of its unadopted rule on those subject to its effect. See Humana, 469 So. 2d at 890 (upholding an economic impact statement that was not a model of financial forecasting but did consider the economic effects of the rule upon existing and potential providers). Any costs incurred to prove compliance with an exemption requirement not authorized in Sections 373.03(8) and 403.813(2)(g) are excessive. Framat Realty, Inc., 407 So. 2d at 242. See also Department of Health and Rehabilitative Services v. Mitchell, 439 So. 2d 937, 941 (Fla. 1st DCA 1083)(absence of economic impact statement renders rule invalid).

20. Effect of Unadopted Rule

525. The inability of the District to rely on its unadopted rule does not alter the outcome of this proceeding. The proposed agency action in the Administrative Complaint and the action taken in the Emergency Order is supported by the weight of evidence without relying on the unadopted rule. Respondents failed to show by a preponderance of the evidence that Modern is entitled to any of the claimed exemptions. See City of Palm Bay v. State, Department of Transportation, 588 So. 2d 624, 628 (Fla.

1st DCA 1991)(invalidity of rule had no effect on law applied), reh'g denied.

21. Attorney's Fees and Costs

526. Section 120.595(1) authorizes an award of reasonable attorney's fees and costs to a prevailing party. Although the parties agreed to a separate hearing to determine entitlement of attorney fees and costs and the amount, if any, to be awarded, certain determinations are made based on the record thus far in an effort to narrow the scope of the evidentiary hearing on fees and costs. As a threshold matter, it should be noted that neither the District nor the Department is a "party" within the meaning of Section 120.52(12).

527. Respondents filed a motion for attorney's fees on October 28, 1998. Respondents are entitled to an award only if Respondents are a prevailing party and the District is a nonprevailing party.

21.1 Section 120.57(1) Proceeding

528. The term "prevailing party" is not defined by applicable statutes or rules. However, Section 120.595(1)(e), in relevant part, defines a "nonprevailing adverse party" to mean:

> 3. . . . a party that has failed to have substantially changed the outcome of the . . . agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing

> adverse party. The recommended or shall state whether the change is substantial for purposes of this subsection . . . . (emphasis supplied)

Section 120.595(1)(b).

529. Except for Respondents' challenge to the District's unadopted rule, Respondents are not the prevailing party in the proceeding conducted pursuant to Section 120.57(1). Respondents are the nonprevailing adverse party and are not entitled to attorney's fees and costs for that portion of the proceeding conducted pursuant to Section 120.57(1).

21.2 Section 120.57(1)(e) Proceeding

530. Respondents' challenge to the District's unadopted rule is described by the legislature in Section 120.56(4)(f) as a proceeding. In relevant part, Section 120.56(4)(f) states:

> . . . Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e). (emphasis supplied)

21.2(a) Proceeding

531. A challenge to an unadopted rule under Section 120.57(1)(e) is a separate proceeding conducted pursuant to Section 120.57(1) for purposes of Section 120.595(1)(b). Section 120.57(1)(e) authorizes a unique remedy not otherwise available in Section 120.57(1). The scope of review and applicable standards are distinctly different from those authorized in Section 120.57(1) generally.

532. A party who challenges an unadopted rule in a proceeding brought pursuant to Section 120.57(1)(e) incurs additional litigation expenses to "prove-down" separate requirements in Section 120.57(1)(e). Section 120.595(4) authorizes attorney's fees and costs only for challenges to agency statements based on violations of Section 120.54(1)(a) and not for violations of Section 120.52(8)(b)-(g). Without a separate award for fees and costs in a Section 120.57(1)(e) proceeding, an agency can, with impunity, require substantially affected parties to incur the litigation costs of repeatedly "proving-down" agency statements for violations of Section 120.57(1)(e)2a-g. Compare, Section 120.52(b)-(g).

533. A separate award of attorney's fees for a proceeding brought pursuant to Section 120.57(1)(e) serves the legislative goals of abolishing unpromulgated rules and maximizing the scope of statutory rulemaking requirements. One of the principal purposes of Chapter 120 is the abolition of unpromulgated rules. Straughn, 338 So. 2d at 834 n. 3.

534. Unlike Section 120.56(3), Section 120.56(4) contains neither a limit on the amount of fees that can be awarded nor an exemption if the failure to promulgate a rule is "substantially justified." Moreover, the fact that Section 120.56(4) limits attorney's fees to violations of Section 120.52(8)(a) underscores the legislative intent to use attorney fees and costs to encourage rulemaking. Sections 120.56(4) and 120.57(1)(e) should be read in pari materia. Section 120.56(4)(e). See also

Consolidated-Tomoka, 717 So. 2d at 76 (sections 120.54 and 120.56 should be read in pari-materia).

21.2(b) Prevailing Party

535. By any plain and ordinary meaning of the term, the District is not the "prevailing party" in the Section 120.57(1)(e) proceeding. It does not necessarily follow, however, that Respondents are the "prevailing party" in the Section 120.57(1)(e) proceeding.

536. It is clear that Respondents are not the "nonprevailing adverse party" defined in Section 120.595(1)(e)3. Respondents raised this issue in the petitions filed pursuant to Section 120.56(4) in this consolidated proceeding. The consolidated proceeding resulted in a substantial modification that both sides intended, adamantly believed, and vehemently argued would resolve the matters raised in Respondents' petition filed pursuant to Section 120.57(1).

537. If Respondents are not a "nonprevailing adverse party," are they a "prevailing party" in the Section 120.57(1)(e) proceeding? The answer to this question requires a determination of whether the undefined term, a "prevailing party," is intended to be the definitional complement of the defined term, a "nonprevailing adverse party."

538. The plain and ordinary meaning of the double negative, "not a nonprevailing adverse party," if the meaning of a double negative is ever plain and ordinary, means that a party who is

"not a nonprevailing party" is a "prevailing party." The only express exception to this construction is the exception in Section 120.595(1)(e)3 for a party who is an intervenor. Respondents are not intervenors in this proceeding.

21.2(c) Nonprevailing Adverse Party

539. The District is the "nonprevailing adverse party" in the Section 120.57(1)(e) proceeding. The District failed to change the outcome of the rule challenge in the Section 120.57(1)(e) proceeding.

21.2(d) Improper Purpose

540. The next issue is whether the District participated in the Section 120.57(1)(e) proceeding for an improper purpose. The "improper purpose" issue is an issue of fact. State v. Hart, 677 So. 2d 385, 386 (Fla. 4th DCA 1996). Intent and motivation must be determined based on the evidence. Hart, 677 So. 2d at 386; Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So. 2d 324, 325 (Fla. 3d DCA 1992); Burke v. Harbor Estates Associates, Inc., 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991).

541. The evidence in this proceeding does not support the rebuttable presumption authorized in Section 120.595(1)(c). The District did not participate in two or more other such proceedings involving the same Respondents.

542. Although the District has not participated in two or more other proceedings against Respondents, the District has participated in two other proceedings in Deseret and SAVE which

involved the same matter at issue in this proceeding. In both district court cases, the District was a full-party participant. The individual responsible for explicating the unadopted rule in this case was a witness in SAVE. The First District Court of Appeal told the parties and the witnesses:

> This is an argument that we reject in all respects. SAVE cites no statute, rule, or other authority to support its contention . . . . (emphasis supplied)

SAVE, 623 So. 2d at 1202.

543. When the District participated in the Section 120.57(1)(e) proceeding in this case, the District had actual knowledge that the underlying statement had been rejected in all respects by the district court as lacking any authority. The evidence suggests that the District participated in the Section 120.57(1)(e) proceeding primarily for a frivolous purpose or to needlessly increase the cost of permitting or securing an exemption within the meaning of Section 120.595(1)(e)1. Dolphins Plus, 598 So. 2d at 325; Harbor Estates Associates, 591 So. 2d at 1037. However, the District will have an opportunity to present evidence at the evidentiary hearing which will explain why the District did not participate in the Section 120.57(1)(e) proceeding for an improper purpose.

21.2(e) Reasonable Amount

544. Pursuant to the agreement of the parties, no evidence was submitted during the hearing in this consolidated proceeding concerning the amount of attorney's fees and costs that is

attributable to the Section 120.57(1)(e) proceeding. A determination of that amount must be deferred until the parties have an opportunity to show whether fees and costs should be awarded and, if so, to sort through the record and quantify the amount of fees and expenses that should be awarded for the Section 120.57(1)(e) proceeding; unless the parties reach a mutually satisfactory agreement before the hearing.

545. In the interim, determinations based on the record to date may assist the parties in preparing for the evidentiary hearing on attorney's fees and costs. The "record" in this proceeding is defined in Section 120.57(1)(f). The record includes 209 exhibits; many duplicate enlargements for the exhibits; the testimony of 16 witnesses contained in a 15-volume Transcript; matters officially recognized; and motions, orders, objections, and rulings.

546. An additional 163 items were filed in the record during the 544 calendar days between September 17, 1997, when the first five cases were referred to DOAH, and March 15, 1999. The items identified on the DOAH docket sheet include notices for depositions, requests for subpoenas, subpoenas for depositions, various types of other discovery requests, objections to depositions and discovery requests, responses to discovery requests, petitions, motions, responses to petitions and motions, responses to the responses, orders, prehearing stipulations, hearings, and proposed orders.

547. In the 115 business days between December 22, 1997, and June 1, 1998, the parties filed 31 motions, or an average of one motion every 3.71 business days. The parties filed 44 "other documents" including responses to the motions, requests for discovery, objections to discovery requests, and responses to discovery. The parties filed an average of a motion or other document every 1.53 business days prior to the hearing.

548. In 28 business days between February 2 and March 10, 1998, the parties filed 16 motions and 29 other documents. The parties filed an average of one motion every 1.75 days and 1.61 motions and other documents every business day.

549. During the hearing, the parties filed additional motions and made ore tenus motions which the undersigned disposed of in orders entered on the record during the final hearing. The hearing required two and a half weeks to complete.

550. Several factors have contributed to the voluminous record in this proceeding. They include the number of parties and matters at issue, the technical complexity of the issues, and the reluctance of the undersigned to preclude as irrelevant evidence concerning the Hacienda Road project without first hearing the evidence concerning the project.

551. A significant portion of this consolidated proceeding has involved discovery, evidence, and legal argument concerning routine custodial maintenance. Some of that time and expense was reasonably necessary for the District to show that the excavation

was not excluded from the definition of maintenance in Section 373.403(8) and Rule 40C-4.021(20).

552. However, a substantial part of the time and expense related to routine custodial maintenance was attributable to the District's attempt to limit maintenance exemptions to routine custodial maintenance. The effort to limit exemptions to routine custodial maintenance needlessly extended an already long and arduous proceeding, wasted administrative resources of the state, and imposed undue expense and financial burdens on Respondents.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order upholding the Emergency Order and directing Modern to undertake and complete, in a reasonable time and manner, the corrective actions described in the Administrative Complaint.

DONE AND ENTERED this 15th day of June, 1999, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 15th day of June, 1999.

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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.