STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE THE ST. JOHNS RIVER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case no 90-5247
	)	
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and DAVID A. SMITH,	)	
	)	
Respondents.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing in the above-styled matter was held on February 11-13, 1991, in Titusville, Florida, before Joyous D. Parrish, a designated hearing officer of the Division of Administrative Hearings. The parties were represented at the hearing as follows:

APPEARANCES

For Petitioner:	Mary D. Hansen 1600 Clyde Morris Boulevard Suite 300 Daytona Beach, Florida 32119
For Respondent, St. Johns River Water Management District:	Wayne E. Flowers and Jennifer Burdick P.O. Box 1429 Palatka, Florida 32178-1429
For Respondent, David A. Smith:	Brain D.E. Canter HABEN, CULPEPPER, DUNBAR & FRENCH, P.A. 306 North Monroe Street. Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

The central issue in this case is whether the application for a surface water management permit (permit no. 4-009-0077AM) filed by the Respondent, David A. Smith (Applicant), should be approved.

PRELIMINARY STATEMENT

This case began on June 28, 1990, when the St. Johns River Water Management District (District) issued its notice of intended agency action which recommended the approval with conditions of permit NO. 4-009-0077AM. That

preliminary action was adopted by the governing board of the District at its meeting conducted on July 9, 1990. The Petitioner, SAVE the St. Johns River (Save), received the notice of intended agency action on July 3, 1990 and timely filed a petition challenging the proposed permit with the District on July 16, 1990. The matter was forwarded to the Division of Administrative Hearings for formal proceedings on August 21, 1990.

At the hearing, the Applicant presented the testimony of the following witnesses: Peter J. Singhofen, an expert in the design and analysis of stormwater management systems; Jeffrey Elledge, director of the District's department of resource management; Harold Wilkening, chief engineer in the District's department of resource management; Paul Schmidt, an expert on the impacts on wetlands from development activities; David Smith, the owner of the subject property; Carey Burch, an expert in the assessment of impacts on the environment from development activities; Carol Fall, an expert in water quality and treatment efficiencies for stormwater management systems; and R. Duke Woodson, former director of the District's department of resource management. The deposition testimony of Frank Dempsky, a former officer with the Florida Marine Patrol (identified as Smith exhibit no. 19), was received in evidence as were the Applicant's exhibits numbered 1 through 13 and 16 through 20.

Save presented the testimony of the following witnesses: Leroy Wright, a representative for Save; Edward C. Carr, Jr., a field representative employed by the St. Johns River Water Management District; David T. Cox, a biological administrator for the Florida Game and Fresh Water Fish Commission, an expert in limnology and the fishery habitats of the St. Johns River; Jennifer Cope, an expert in wetlands ecology; Peter Singhofen; and David Smith. Save also presented the deposition testimony of Forrest Dierberg, an expert in water quality chemistry. Save's exhibits numbered 1 and 2 were admitted into evidence.

The District presented the testimony of the following witnesses: Perry Jennings, an expert in civil engineering and the design of stormwater management systems; Jennifer Cope; Cameron Dewey, an expert in environmental and water resource engineering; and Carol Fall. The District's exhibits numbered 1 through 10 were admitted into evidence.

The District requested and official recognition has been taken of the following provisions: Chapters 90, 373, and 403, Florida Statutes; Chapters 40C-1, 40C-4, 40C-41, 400-42, 17-3, 17- 4, 17-312, and 17-660, Florida Administrative Code.

The transcript of the proceedings was filed with the Division of Administrative Hearings on March 7, 1991. The Applicant filed a motion for an extension of the time within which to file proposed recommended orders which was subsequently granted. The Applicant and the District then timely filed proposed orders which have been considered in the preparation of this order. Save has not filed a proposed recommended order. Specific rulings on the proposed findings of fact submitted by the parties are included in the attached appendix.

FINDINGS OF FACT

Based upon the prehearing stipulations of the parties, the testimony of the witnesses, and the documentary evidence received at the hearing, the following findings of fact are made:

1. The Applicant is the owner of the subject property. The Applicant filed an application for a permit to construct a stormwater management system which was proposed to serve a residential and golf course development to be known as Sabal Hammocks.

2. The site of the proposed project is approximately 720 acres in size and is located in township 24 south, sections 28, 29, 30, 32, 33, and 34, range 35 east, Brevard County, Florida. The entire project site for the Sabal Hammocks development is located within the boundaries of the St. Johns River Water Management District. To the west of the project site is an 140 acre public park that treats its own stormwater and releases pre-treated stormwater during some storm events into the canals on the Sabal Hammocks site.

3. The Applicant's site is located adjacent to Lake Poinsett and prior uses of the land have included cattle grazing and the cultivation of rye and oats.

4. The Applicant filed his application for the stormwater management permit (permit NO. 4-009-0077AM) on December 22, 1989. That application was deemed complete by the District on June 19, 1990. The District issued a notice of its intended action to approve the permit application on June 28, 1990. Save timely filed a petition challenging the proposed action.

5. By law the District is the appropriate agency charged with the responsibility of reviewing applications for stormwater management permits within the subject area.

6. Save is an association of individual persons and representatives from groups who utilize the waters of Lake Poinsett and its surrounding areas for recreational and business purposes.

7. The receiving waters for stormwater discharge from the proposed Sabal Hammocks development will be Lake Poinsett. That water body is classified as Class III waters.

8. Currently, a dike system exists along the southern boundary of the subject property. That dike system separates the internal grazing lands of the parcel from the lower marsh and flooded areas external to the dike. A series of ditches cross the parcel to drain the interior areas. Two agricultural discharge pumps are currently in use at the site. The operation of those pumps has been authorized pursuant to a consent order approved by the District's governing board on December 13, 1990.

9. The dike system on the subject site has been in place since the 1970s. The original construction specifications of the dike are unknown.

10. Sometime in the 1980s, several openings or breaches were cut in the dike system. Those breaches were opened pursuant to permits issued by the District and the Department of Environmental Regulation (DER) . The breaches were cut to a sufficient width and depth to allow boats to navigate through to interior areas of the subject property during those times when the water levels

outside the dike would allow such entrance. The breaches were not cut to ground level and the original dike remained intact and uncompromised by the breaches. That is, the dike has not failed to impede water movement and the integrity of the dike was not weakened by the breaches. The original outline, dimension of the dike, remained visible despite the breaches.

11. In 1986, the Applicant requested permission from the District staff in order to close or restore the dike breaches. At that time, the District staff advised David Smith that a permit would not be required to restore the dike since such improvements would be considered a maintenance exemption.

12. Subsequently, and in reliance upon the representations made by the District's director,, the Applicant closed the breaches and restored the continuity of the dike system of the subject property.

13. The Applicant's work to close the breaches was performed in an open manner, would have been visible to persons using the adjacent marsh or water areas for recreational purposes, and was completed at least one year prior to the application being filed in this case.

14. Neither the District nor DER has asserted that the work to complete the original dike in the 1970s, nor the breaches completed in the 1980s, nor the restoration of the breaches in 1986 was performed in violation of law. Further, the District had knowledge of the subject activities.

15. Save contends that the restoration of the dike system was contrary to law and that it was not afforded a point of entry to contest the closure of the breaches. Additionally, Save infers that the original construction of the dike system in the early 1970s was without authorization from authorities. Save's contention is that the prior condition of the property, ie. the parcel with breached openings, must be considered the correct pre- development condition of the land.

16. The District, however, considered the pre- development condition of the parcel to be that of a diked impoundment separated from Lake Poinsett. The same assumption was made regarding the pumping of water from the area enclosed by the dike via an existing 36 inch pump which discharges to Bass Lake (and then to Lake Poinsett) and an existing 12 inch pump that discharges into the marsh areas adjacent to the property (between it and Lake Poinsett). The District's consideration of the site and the application at issue was based upon the actual condition of the land as it existed at the time this application was filed.

17. The pre-development peak rate and volume of discharge from the site was calculated based upon the maximum discharge capacity of the two existing pumps (described above). Accordingly, the maximum pre-development rate of discharge from the two existing pumps is in the range of 90-107 cubic feet per second. The pre-development volume of discharge, based upon actual pump records, was calculated as 710 acre-feet for a 25 year, 96 hour storm event.

18. The total areas encompassed by the Applicant's proposal are the 720 acre site where the golf course and residential homes will be located together with 140 acres from an adjacent public park. The runoff entering the stormwater system from that public park will have already been treated in its own stormwater management system.

19. The Applicant's proposed stormwater system will consist of a series of lakes and interconnected swales. This wet detention system will capture the runoff and direct its flow through the series of swales and lakes via culverts. The waters will move laterally from the northwestern portion of the parcel to she southeastern end of the site. From the final collecting pond, she waters will be pumped to Bass Lake and ultimately flow to Lake Poinsett.

20. Wet detention systems generally provide greater pollutant treatment efficiencies than other types of stormwater treatment systems. The maintenance associated with these systems is also considered less intensive than other types of treatment systems.

21. The wet detention system proposed for Sabal Hammocks accomplishes three objectives related to the flow of stormwater. The first objective, the collection of the. stormwater, requires the creation of several lakes or pools into which water is directed and accumulates. The size and dimension of the lakes will allow the volume of accumulated water to be sufficient to allow stormwater treatment. The capacity of the lakes will also provide for a sufficient volume to give adequate flood protection during rainfall events and storms.

22. The second objective, the treatment of the stormwater, requires the creation of a littoral zone within the system. The littoral zone, an area of rooted aquatic plants within the lakes or ponds, provide for the natural removal of nutrients flowing into the system. The plants serve as a filtering system whereby some nutrients are processed.

23. The proposed littoral zone in this project constitutes approximately 37 percent of the detention system surface area and therefore exceeds District size requirements. The depth of the treatment volume for the proposed system will not exceed 18 inches.

24. A third objective accomplished by the creation of the series of lakes is the provision for an area where pollutants flowing into the detention system may settle and through sedimentation be removed from the water moving through the system.

25. The average residence time estimated for runoff entering the Sabal Hammocks detention system is 48 days. The permanent pool volume will, therefore, be sufficient to assure the proposed project exceeds the District's requirements related to residence time.

26. The design and volume of the Sabal Hammocks system will also exceed the District's requirements related to the dynamic pool volumes. In this case the Sabal Hammocks system will provide for approximately 65 acre-feet of runoff. Thus, the proposed system will adequately control and detain the first 1 inch of runoff from the site.

27. The length to width ratio for the proposed lakes, 18:1, exceeds the District's minimum criteria (2:1).

28. The final lake or pond into which the stormwater will flow will be 17 acres and will have 15 acres of planted wetland vegetation. Before waters will be released into Bass Lake, the site's runoff will pass through 3100 linear feet of this final lake before being discharged.

29. The proposed project will eliminate the two agricultural pumps and replace them with one pump station. That station will contain four pumps with a total pumping capacity of 96 cubic feet per second.

30. Under anticipated peak times, the rate of discharge from the proposed single station is estimated to be less than the calculated peak pre-development rate of discharge (90-107 c.f.s.).

31. The estimated peak volume of discharge will also be lower than the pre-development discharge volumes for the comparable storm events.

32. The proposed pump station is designed to be operated on electrical power but will have a backup diesel generator to serve in the event of the interruption of electrical service.

33. Additionally, the pumps within the station will be controlled by a switching device that will activate the pump(s) only at designated times. It is unlikely that all four pumps will activate during normal rainfall events.

34. The Applicant intends to relinquish maintenance responsibilities for the stormwater system including the pump station to Brevard County, Florida.

35. Finished floor elevations for all residential structures to be built within the Sabal Hammocks development will be at a minimum of 18.2 mean sea level. This level is above that for a 100 year flood. The floor elevations will be at least one foot above the 100 year flood elevation even in the event of the dike or pump failure or both.

36. Finished road elevations for the project will be set at 17.5 feet mean sea level. This elevation meets or exceeds the County's requirements regarding the construction of roadways.

37. It is estimated that the Sabal Hammocks system will retain at least 26 percent of all storm events on site. If the lake system is utilized to irrigate the golf course the proposed system could retain 45 percent of all storm events on site.

38. Of the 31.27 acres of wetlands within the proposed site, only 4.73 acres of wetlands will be disturbed by the construction of this project. Some of the wetlands are isolated and presently provide minimal benefits to off-site aquatic and wetland dependent species.

39. No threatened or endangered species are currently utilizing the isolated wetlands.

40. The areas of wetlands which are productive and which will be disturbed by the development will be replaced by new wetlands to be created adjacent to their current location at a lower elevation. The new wetlands should provide improved wetland function since those areas will be planted with a greater diversity of wetland plant species.

41. Additionally, other wetland areas will be enhanced by the removal of invader species and increased hydroperiod in the area.

42. The integrated pesticide management plan for the proposed project will be sufficient with the additional condition chat use of Orthene, Subdue, and Tersan LSR will be authorized when approved insecticides or fungicides have not been effective.

43. In this case, the estimates regarding the water quality for the proposed project were based upon data from studies of multifamily residential projects. Data from single family/ golf course developments was not available. Therefore, based upon the data used, the projected runoff concentrations for this project should over estimate pollutants and are more challenging to the treatment system than what is reasonably expected to occur.

44. In this regard, the overall treatment efficiencies are estimated to be good for all of the parameters of concern with the exception of nitrogen. The projected increase in nitrogen, however, will not adversely impact the receiving water body.

45. The projected average concentration for each constituent which may be discharged is less than the state standard with the exceptions of cadmium and zinc. In this regard, the District's proposed conditions (set forth in the District's exhibits 4 and 9) adequately offset the potential for a violation of state water quality standards. More specifically, the use of copper-based algaecides in the stormwater management system should be prohibited; the use of galvanized metal culverts in the stormwater management system, or as driveway culverts, should be prohibited; and the use of organic fertilizers or soil amendments derived from municipal sludge on the golf course should be prohibited. Additionally, a water quality monitoring plan should be implemented by the Applicant. The monitoring plan mandates the collection of water samples from areas in order to adequately monitor the overall effectiveness of the treatment facility.

46. The source of cadmium is not be expected to be as great as projected since the most common source for such discharge is automobiles. It is unlikely that the golf course use will generate the volume of discharge associated with automobile use that the multifamily data presumed.

47. The projected quality of the discharges from this project should be similar to the ambient water quality in Lake Poinsett. In fact, the post-development pollutant loading rates should be better than the pre-development pollutant loading rates.

48. The discharge from the proposed Sabal Hammocks project will not cause or contribute to a violation of state water quality standards in Lake Poinsett nor will the groundwater discharges violate applicable state groundwater quality standards.

49. The floodways and floodplains, and the levels of flood flows or velocities of adjacent water courses will not be altered by the proposed project so as to adversely impact the off- site storage and conveyance capabilities of the water resource.

50. The proposed project will not result in the flow of adjacent water courses to be decreased to cause adverse impacts.

51. The proposed project will not cause hydrologically-related environmental functions to be adversely impacted

52. The proposed project will not endanger life, health, or property.

53. The proposed project will not adversely affect natural resources, fish and wildlife.

54. The proposed project is consistent with the overall objectives of the District.

CONCLUSIONS OF LAW

55. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings.

56. The permitting criteria set forth in Chapters 40C-4, 40C-41 and 40C-42, Florida Administrative Code, are applicable to the Applicant's proposed project, Sabal Hammocks.

57. By stipulation of the parties, the Applicant has met the criteria outlined in Rule 40C-4.301(1)(a) 1, 2, 5, 6, 7, 8 and 11 and Rule 40C-4.301(2)(a) 4 and 5, Florida Administrative Code. Pertinent to this case are the following additional provisions of Rule 40C-4.301, Florida Administrative Code:

> (1)(a) To obtain a general or individual permit for operation, maintenance, removal or abandonment of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity will not:
>
> * * *
>
> 3. Endanger life, health, or
>
> 4. Be inconsistent with the maintenance of minimum flows and levels established pursuant to Section 373.042, Florida Statutes;
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> * * *
>
> 9. Cause adverse impacts to the quality of receiving waters;
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> 10. Adversely affect natural resources, fish and wildlife;
>
> * * *
>
> 12. Increase the potential for damages to off-site property or the public caused by:
>
> A. Floodplain development, encroachment or other alteration;
>
> B. Retardance, acceleration, displacement or diversion of surface water;
>
> C. Reduction of natural water storage areas;
>
> D. Facility failure;
>
> 13. Increase the potential for flood damages to residences, public buildings, or proposed and existing streets and roadways; or
>
> 14. Otherwise be inconsistent with the overall objectives of the District.

(b) Because a proposed system may result in both beneficial and harmful effects in terms of various individual objectives, in determining whether the applicant has provided evidence of reasonable assurance of compliance with Rule 40C-4.301(1)(a), F.A.C., the District may consider a balancing of specific effects to show the system is not inconsistent with the overall objectives of the District.

(2)(a) To obtain a general or individual permit for construction, alteration, operation, or maintenance of a system or to obtain a conceptual approval permit, each applicant must give reasonable assurance that such activity meets the following standards:

1. Adverse water quantity impacts will not be caused to receiving waters and adjacent lands;

2. Surface and ground water levels and surface water flow will not be adversely affected;

3. Existing surface water storage and conveyance capabilities will not be adversely affected;

* * *

6. Hydrologically-related environmental functions will not be adversely affected;

7. Otherwise not be harmful to the water resources of the District.

(b) If the applicant has provided reasonable assurance that the design criteria specified in Applicant's Handbook Part II "Criteria for Evaluation" adopted by reference in Rule 40C-4.091(1), F.A.C., have been met, then it is presumed that the standards contained in subsection (2)(a) above have been satisfied.

58. Rule 40C-4.091, Florida Administrative Code, adopted by reference the District's "Applicant's Handbook: Management and Storage of Surface Waters" (Handbook) to outline procedures by which an applicant may provide reasonable assurance that a proposed system will not harm the water resources of the District. The Handbook sets forth the following design criteria which, if met, pursuant to Rule 40C-4.301(2)(b), Florida Administrative Code, create a presumption that the proposed system will provide such reasonable assurance. Paragraph 10.2.1 of the Handbook provides:

It is presumed that a system meets the standards listed in Subsection 10.1.2 if the system meets the following criteria:

(a) The post-development peak rate of discharge must not exceed the pre-development peak rate of discharge for the storm event as prescribed in Section 10.3.

(b) The post-development volume of direct runoff must not exceed the development volume of direct runoff for systems as prescribed in Subsections 10.4.2 and 10.4.3.

(c) Floodways and floodplains, and levels of flood flows or velocities of adjacent streams, impoundments or other watercourses must not be altered so as to adversely impact the off-site storage and conveyance capabilities of the water resource (see Section 10.5).

(d) Flows of adjacent streams, impoundments or other watercourses must not be decreased so as to cause adverse impacts (see Section 10.6).

(e) Hydrologically related environmental functions and water quality must not be adversely impacted (see Section 10.7).

59. Rule 40C-41.063, Florida Administrative Code, provides, in part:

(1) Within the Upper St. Johns River Hydrologic Basin the following criteria are established:

(a) Storm Frequency--For purposes of design and evaluation of system performance, both the 10 year and the 25 year design storm frequencies must be met.

(b) Runoff Volume--For design purposes, those systems utilizing pumped discharge, the total post-development discharge runoff volumes shall not exceed pre-development discharge runoff volumes for the four-day period beginning the third day of the four-day design storm event.

(c) Interbasin Diversion --

1. A system may not result in an increase in the amount of water being diverted from the Upper St. Johns River Hydrologic Basin into coastal receiving waters.

2. It is an objective of the District to, where practical, curtail diversions of water from the Upper St. Johns River Hydrologic Basin into coastal receiving waters.

60. Rule 40C-42.061, Florida Administrative Code, provides, in part:

(1) Whenever the construction of a new stormwater discharge facility requires that a management and storage of surface water permit or works of the District permit be secured pursuant to Chapter 40C-4, 40C-40, or 40C-6, Florida Administrative Code, the stormwater discharge requirements established in this Chapter shall be reviewed as part of those permit applications. A separate permit

application under this Chapter shall not be required. If the applicant requests a separate stormwater permit, the applicant must notify the District of any other District permits, exemptions, or certifications which have or will be requested for the project.

(2) When a permit is required pursuant to this Chapter and an individual permit is required pursuant to Chapter 40C-4 for the same system, the time frames of Chapter 40C-4 shall apply to issuance of a permit under Rule 40C-42.035, F.A.C.

(3) The permit requirements of the Department of Environmental Regulation or other applicable rules, rather than those of this Chapter, shall apply to discharges which are a combination of stormwater and industrial or domestic wastewater or which are otherwise contaminated by non-stormwater sources unless:

(a) The stormwater discharge facility is capable of providing treatment of the non-stormwater component sufficient to meet state water quality standards; and

(b) The applicant receives written approval from the Department of Environmental Regulation that the permit requirements of this Chapter apply.

(4) Applications for conceptual agency review of stormwater management systems, as required by Section 380.06, F.S., will be reviewed in accord with the procedure used by the District to review conceptual approval permit applications pursuant to Rule 40C-4.041(2) , F.A. C.

61. Rule 40C-42.027, Florida Administrative Code, provides, in part:

(1) The District considers the following entities to be acceptable for meeting the requirements necessary to ensure that a stormwater discharge facility will be operated and maintained in compliance with the requirements of this Chapter and other District regulations in Chapter 40C-4 or 40C-40:

(a) Local governmental units including counties or municipalities, or Municipal Service Taxing Units.

62. Rule 40C-42.041, Florida Administrative Code, provides, in part:

(1) Any person intending to construct a new stormwater discharge facility, except as exempted pursuant to Rule 40C-42.031, Florida Administrative Code, or as noted in Rule 40C-

42.035, or as Permitted in Rule 40C-42.035, or as noted in Rule 40C-42.061, Florida Administrative Code, shall apply to the District for an individual permit, using forms Provided by the District, prior to commencement of construction of the stormwater discharge facility.

(2) Construction of a new stormwater discharge facility shall not be undertaken without a valid individual Permit as required Pursuant to this section.

* * *

(4) An individual permit may be issued to the applicant, upon such conditions as the District may direct, only if the applicant affirmatively provides the District with reasonable assurance based on plans, test results and other information, that the construction, expansion, modification, operation, or activity of the stormwater discharge facility will not discharge, emit, or cause pollution in contravention of District standards, rules or regulations, including Chapter 17-3, F.A.C.

(5) A showing by the applicant that the facility design will provide treatment equivalent to either retention, or detention with filtration, as described in this Chapter, of the runoff from the first one inch of rainfall; or, as an option for projects or project subunits which consist of less than 80% impervious surface with drainage areas less than 100 acres the first one-half inch of runoff, shall be presumed to provide reasonable assurance pursuant to subsection (4) above, Provided that adequate provisions have been made for operation and maintenance of the Proposed facility. However, facilities which directly discharge to Class I, Class II or Outstanding Florida Waters shall provide additional treatment as specified in Rule 40C-42.025(10).

(6) In otherwise determining whether reasonable assurance has been Provided, the district shall, where appropriate, consider:

(a) Whether best management practices are Proposed, such as those described in "A Manual of Reference Management Practices for Urban Activities (July, 1978)," "A Manual of Reference Management Practices for Construction Activities (December, 1977)," "A Manual of Reference Management Practices for Agricultural Activities (November, 1978)," "Silviculture Best Management Practices Manual (1979) ," "Stormwater Management Manual (October, 1981) ," or best management Practices described in manuals adopted by the

Environmental Regulation Commission pursuant to Rule 17-25.050, F.A.C., or other appropriate best management practices. The manuals listed above by name are adopted and made a part of this rule by reference. Copies of these documents may be obtained by writing the District and may be inspected at all District offices;

(b) The public interest served by the discharge;

(c) The Probable efficacy and costs of alternative controls;

(d) Whether the Proposed water quality benefits are reasonably related to the costs of the controls; and

(e) Whether reasonable Provisions have been made for the operation and maintenance of the Proposed facility.

63. Section 403.813(2)(g), Florida Statutes, Provides:

(2) No permit under this chapter, chapter 373, chapter 61-691, Laws of Florida, or chapter 25214 or chapter 25270, Laws of Florida, 1949, shall be required for activities associated with the following types of Projects; however, nothing in this subsection relieves an applicant from any requirement to obtain permission to use or occupy lands owned by the Board of Trustees of the Internal Improvement Trust Fund or any water management district in its governmental or proprietary capacity or from complying with applicable local pollution control programs authorized under this chapter or other requirements of county and municipal governments:

* * *

(g) The maintenance of existing insect control structures, 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 waters of the state. In the case of insect control structures, if the cost of using a self-contained upland spoil site is so excessive, as determined by the Department of Health and Rehabilitative Services, Pursuant to s 403.088(1), that it will inhibit proposed insect control, then existing spoil sites or dikes may be used, upon notification to the department. In the case of insect control where upland spoil sites are not used pursuant to this exemption, turbidity control devices shall be used to confine the spoil material discharge to that area Previously

> disturbed when the receiving body of water is used as a potable water supply, is designated as shellfish harvesting waters, or functions as a habitat for commercially or recreationally important shellfish or finfish. In all cases, no more dredging is to be performed than is necessary to restore the dike or irrigation or drainage ditch to its original design specifications.

64. Pursuant to Sections 120.52(12)(b) and 120.57, Florida Statutes, it is concluded that Save has established it has standing in these proceedings. It is further concluded that Save has note established the remaining substantive allegations of its petition. More specifically, Save has not established that the dike system currently in existence was constructed or improved contrary to law. Save was afforded a point of entry in these proceedings to challenge both the permit currently under review and to establish why the District erred in allowing the pre-development condition of the property (as an unbreached dike) to determine to whether this project should be permitted. Save has contended that the pre-development condition of the property should more properly be considered as an undiked parcel or a diked parcel with twelve breaches. The Applicant and the District have asserted that the actual condition of the property, that of a diked parcel, must be considered as the pre-development condition. The District and Applicant have explicated prior actions of the parties and have demonstrated why prior activities to construct and improve the dike system have been correct. Save has not presented its own evidence to the contrary nor rebutted the competent evidence presented by the District and the Applicant. Consequently, Save's challenge to the proposed permit must fail.

65. The Applicant still bears the burden of proof, to establish affirmatively, by a preponderance of the evidence that it is entitled to the requested permit. This Applicant has met that burden.

66. As to each of the engineering, water quality, and environmental criteria applicable as outlined above, the Applicant has established and has provided reasonable assurance, that the construction, operation, and maintenance of the proposed project will not adversely affect the water quality standards in waters of the state.

67. Additionally, the Applicant has established that the proposed project will not, on balance, adversely affect the wetlands onsite and has shown that the wetland functions will be enhanced by the wetlands to be created on the subject site. It is anticipated that the wetland to be created will function more effectively than those areas to be disrupted.

68. The conditions proposed by the District, as set forth in District exhibits numbered 4, 8, and 9, are intended to assure all aspects of the proposed project function as proposed by its design.

RECOMMENDATION

Based upon the foregoing, it is

RECOMMENDED:

That the governing board of the St. Johns River Water Management District enter a final order approving the application for permit number 4-009-0077AM with the conditions outlined within the District's exhibits numbered 4, 8, and 9 and as previously stated in the notice of intent.

DONE and ENTERED this 2 day of July, 1991, in Tallahassee, Leon County, Florida.

Joyous D. Parrish
Hearing Officer
Division of Administrative
Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32301
(904)488-9675

Filed with the Clerk of the
Division of Administrative
Hearings this 2 day of
July, 1991.

APPENDIX TO CASE NO. 90-5247

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE APPLICANT:

1. Paragraphs 1 through 3 are accepted.
2. Paragraph 4 is rejected as irrelevant.
3. Paragraphs 5 and 6 are accepted.
4. The first sentence of paragraph 7 is accepted the remainder is rejected as irrelevant.
5. Paragraph 8 is accepted.
6. Paragraphs 9 through 11 are accepted.
7. Paragraph 12 is rejected as irrelevant.
8 Paragraphs 13 through 21 are accepted.
9. Paragraph 22 is rejected as irrelevant.
10. Paragraphs 23 through 25 are accepted.
11. The last two sentences of paragraph 26 are accepted, the remainder is rejected as irrelevant.
12. Paragraph 27 is accepted.
13. Paragraph 28 is rejected as comment, irrelevant, or unnecessary to the resolution of the issues of this case.
14. Paragraph 29 is accepted.
15. Paragraph 30 is rejected as irrelevant.
16. Paragraph 31 is rejected as argumentative.
17. Paragraphs 32 and 33 are accepted.
18. With regard to paragraph 34 it is accepted that compensating storage was not required. Otherwise, unnecessary, irrelevant, or comment.

19. With regard to paragraph 35, it is accepted the proposed system meets the first 1 inch of runoff requirement otherwise, unnecessary or irrelevant or comment.
20. Paragraph 36 is accepted.
21. Paragraphs 37 through 41 are rejected as irrelevant, argumentative or comment.
22. Paragraphs 42 and 43 are accepted.
23. With the deletion of the last sentence which is irrelevant, paragraph 44 is accepted.
24. Paragraphs 44 through 49 are accepted.
25. The second sentence of paragraph 50 is accepted, the remainder of the paragraph is rejected as irrelevant or contrary to the weight of the evidence.
26. The first sentence of paragraph 51 is accepted, the remainder is rejected as irrelevant or contrary to the weight of the evidence.
27. Paragraphs 52 through 56 are rejected as irrelevant, comment, or recitation of testimony.
28. Paragraph 57 is accepted.
29. Paragraph 58 is accepted.
30. Paragraphs 59 and 60 are rejected as irrelevant, comment, or argumentative.
31. Paragraphs 61 and 62 are accepted.
32. The first sentence of Paragraph 63 is accepted. The remainder of the Paragraph is rejected as contrary to the weight of the evidence. The proposed project will benefit the wetland areas in an unquanitifiable measure due to the enhancements to prior wetlands and the creation of new wetlands.
33. The first sentence of paragraph 64 is accepted. The remainder is rejected as contrary to the weight of the evidence.
34. Paragraph 65 is accepted.
35. Paragraph 66 is rejected as argument or irrelevant.
36. Paragraph 67 is accepted.
37. Paragraphs 68 and 69 are accepted.
38. Paragraph 70 is rejected as irrelevant or contrary to the weight of the evidence.
39. Paragraphs 71 through 73 are accepted.
40. Paragraph 74 is rejected as irrelevant or unnecessary.
41. Paragraphs 75 through 78 are rejected as argument, irrelevant, or unnecessary to the resolution of the issues of this case.
42. Paragraphs 79 through 82 are accepted.
43. Paragraph 83 is rejected as irrelevant.
44. Paragraphs 84 and 85 are rejected as argument or comment. It is accepted that the Corp and DER are aware of the restoration of the dike and that neither has asserted such work was performed contrary to law.
45. Paragraph 86 is rejected as comment on the evidence or irrelevant. It is accepted that the District advised Applicant that he could restore the dike system and that the District was apprised of the completion of that work.
46. With regard to paragraph 87, it is accepted that the restoration of the dike entailed filling the breaches to conform to the dike's original design; otherwise, rejected as irrelevant.
47. Paragraphs 88 and 89 and the first sentence of Paragraph 90 are accepted.
48. The remainder of paragraph 90 and Paragraphs 91 through 93 are rejected as irrelevant, argument, or comment.
49. Paragraph 94 is accepted.

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY THE DISTRICT:

1. Paragraphs 1 through 78 is accepted.
2. Paragraph 79 is rejected as argumentative.
3. Paragraph 80 is accepted.

RULINGS ON THE PROPOSED FINDINGS OF FACT SUBMITTED BY SAVE:

None submitted.

COPIES FURNISHED:

Mary D. Hansen
1600 S. Clyde Morris Boulevard
Suite 300
Daytona Beach, Florida 32119

Brain D.E. Canter
HABEN, CULPEPPER, DUNBAR
& FRENCH, P.A.
306 North Monroe Street
Tallahassee, Florida 32301

Wayne Flowers
Jennifer Burdick
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32178

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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SJRWMD AGENCY FINAL ORDER

==========

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

SAVE THE ST. JOHNS RIVER,	)	
	)	
Petitioners,	)	
	)	
v.	)	DOAH CASE NO. 90-5247
	)	SJRWMD FILE OF RECORD
ST. JOHNS RIVER WATER	)	NO. 90-939
MANAGEMENT DISTRICT,	)	
DAVID A. SMITH, Trustee,	)	
and TRUSTCORP OF FLORIDA, N.A.,	)	
	)	
Respondents.	)	
_____	)	

FINAL ORDER

On July 2, 1991, a hearing officer from the Division of administrative hearings submitted to the Executive Director and all parties her recommended order, a copy of which is attached as Exhibit A. On July 22, 1991, Petitioner, through its attorney submitted exceptions to the recommended order, a copy of which is attached as exhibit B. One of Petitioner's members also submitted exceptions to the recommended order, however these have not been accepted and ruled upon for reasons set out below. The matter thereafter came before the Governing Board for final agency action.

BACKGROUND

This matter was initiated by the timely filing of a petition for Administrative Hearing on July 16, 1990, by SAVE the St. Johns River (SAVE). The petition sought review of the Board's issuance of a permit to David A. Smith (applicant) for construction of a surface water management system to serve a 720-acre development to be known as Sabal Hammocks. The issue in this case is whether the application for a surface water management permit (no. 4-009-0077AM) filed by Respondent, David A. Smith (Applicant), should be approved. The District has proposed to issue the permit with specified conditions more particularly described in its recommended conditions which are part of the technical staff report for Application No. 4-009-0077AM, July 1990. Save the St. Johns River challenge the issuance of this permit based on an alleged failure of the applicant to provide reasonable assurances as required by Chapter 40C-4, F.A.C. and other applicable laws.

RULINGS ON PETITIONER SAVE THE ST. JOHNS RIVER'S EXCEPTIONS

A. Exceptions to Findings of Fact Exception No. 1:

Petitioner takes exception to finding of fact #10, specifically wherein the hearing officer found that "the dike has not failed to impede water movement," and that "the original dike remained intact and uncompromised by the breaches."

Petitioner also complains that the hearing officer failed to specify that the dike under discussion was the "perimeter" dike. As grounds for these exceptions Petitioner cites portions of the transcript which contain testimony which conflicts with the findings made by the hearing officer.

Section 120.57(1)(b)10., F.S., prohibits the Governing Board from rejecting or modifying a hearing officer's finding of fact unless, from reviewing the entire record, there is no competent, substantial evidence to support the finding. Ferris v. Austin, 487 So2d 1163 (Fla. 5th D.C.A. 1986); National Industries, Inc. v. Commission on Human Relations, 527 So2d 894 (Fla. 5th D.C.A. 1988); Freeze vs. Department of Business Regulation, 556 So2d 1204 (Fla. 5th D.C.A. 1990).

The Governing Board is not authorized to weigh conflicting evidence, judge credibility of witnesses or otherwise interpret the evidence to fit its desired ultimate conclusion. Heifetz vs. Department of Business Regulation, 475 So2d 1277 (Fla. 1st D.C.A. 1985). Accord, Smith vs. Department of Health and Rehabilitative Services, 555 So2d 1254 (Fla. 3d D.C.A. 1989); Howard Johnson, Co. vs. Kilpatrick, 501 So2d 59, 60 (Fla. 1st D.C.A. 1987).

In any given adversarial proceeding, conflicting evidence will be presented. The duty of the hearing officer is to take all the evidence before her, sift and weigh it, and reach a conclusion regarding what is established by a preponderance of that evidence. Even if the factual conclusion reached conflicts with a portion of the testimony regarding integrity of the dike, there is other competent, substantial evidence in the record which supports the hearing officer's finding. Failure to specify that the dike under discussion is the perimeter dike, if relevant, is harmless error. The Board rejects this exception (T. Vol. II, 135, 143-144).

Exception No. 2:

Petitioner takes exception to the hearing officer's failure to make a finding that "the breaches in the dike allowed for marsh vegetation to develop landward of the dike affecting an unknown amount of acreage.

The testimony refers to a temporary condition of the property which may have existed after 1983 and before 1986. This exception is in the nature of a proposed finding of fact, rather than an exception. Petitioner did not submit proposed findings of fact to the hearing officer and here Petitioner does not explain what factual issue this would tend to show or what legal conclusion it would support. It is the hearing officer's duty to evaluate and weigh the evidence presented and make definite findings of fact based on competent substantial evidence. Taking Mr. Cox's testimony as a whole regarding the dike, the breaches and relative value of fisheries habitat, she apparently concluded that this fact was not necessary to her decision regarding whether the permit under review should be issued.

Further, it has long been this Governing Board's policy and practice to consider the predevelopment condition of a proposed project to be the condition of the property as it existed when the District's Management and Storage of Surface Waters rule was adopted for that area of the District, which in this case was 1977. (T., Vol. 1, pp. 154, 156, 164-165). Thus the testimony regarding temporary conditions which may have existed over a small area of the site does not tend to prove anything relevant to whether this permit should be issued or denied. Petitioner is asking the Board to re-evaluate the overall

testimony and substitute its judgment regarding credibility and weight of the evidence, for that of the hearing officer. This the Governing Board is not authorized to do. Heifetz, supra. Therefore, this exception is rejected.

Exception No. 3:

Petitioner takes exception to finding of fact #11, because the hearing officer failed to specify that District staff's advice that restoring breaches did not require a permit, had not been in writing. In this exception, Petitioner is attempting to reargue the facts and have the Governing Board reweigh the evidence.

The hearing officer concluded from the testimony that Smith asked and the District answered whether a permit would be required to restore the breaches in the dike.

The finding of fact, as is, is supported by the competent substantial evidence, therefore the exception is rejected. (T., Vol. II, pp. 147, 148; T. Vol. III, pp. 27-29).

Exception No.4:

Petitioner takes exception to finding of fact #13, stating that it is irrelevant and unnecessary to the conclusions of law. The Hearing Officer heard the testimony and found that in her judgment this finding was necessary to support her conclusions. Again Petitioner is seeking to have the Governing Board reweigh the evidence. This the Board cannot do. Heifetz, supra. Therefore this exception is rejected.

Exception No. 5:

Petitioner takes exception to finding of fact #14 because of its "aggregation." This is not a proper basis for rejecting a finding of fact. Section 120.57(1)(b)10., F.S. provides in relevant part,

". . . The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretations of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law."

Merely because the finding summarizes certain factual findings or "aggregates" them does not render the finding objectionable, erroneous or not based on competent substantial evidence. Petitioner essentially seeks to have the Governing Board substitute its wording for that of the hearing officer. This the Board cannot do, because the finding, as is, is supported by competent substantial evidence. Therefore this exception is rejected.

EXCEPTIONS TO CONCLUSIONS OF LAW

Exception No. 6:

Petitioner takes exception to Conclusion of Law #10, regarding the validity of the explanation by District Staff and the Applicant concerning the applicability of the maintenance exemption. This exception is based on the contention that no original design specifications were provided for the District to consider, and that the statement regarding the applicability of the exception was not in writing.

The maintenance exemption located at Section 403.813(2)(g), Fla. Stat. reads in relevant part:

"(2) No permit . . . shall be required for activities associated with the following types of projects. . .:

(g) The maintenance of existing insect control structures, 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 spoil material into waters of the state. . . . In all cases, no more dredging is to be performed than is necessary to restore the dike on irrigation or drainage ditch to its original design specifications."

There is no requirement that an agency provide acknowledgment to a person who desires to undertake some activity pursuant to an exemption. This is a statutory exemption and requires no action by the Department or notification to the Department or by the person intending to use the exemption.

Even if the District had acknowledged this applicant's right to use the exemption in writing, it would not have become final agency action for which a point of entry would have been available. See Saltiel v. Leon County and FDER, 6 F.A.L.R. 6894, 6896 (Nov. 28, 1984) (mere letter stating exemption applies is not final agency action and provides no point of entry); cf. Friends of the Hatchineha v. FDER, 580 So2d 267 (Fla. 1st D.C.A. 1991) (when agency initially sent warning notice regarding activity, subsequent letter of exemption regarding same activity deemed final agency action.) Additionally, if SAVE were seeking a point of entry to review the District's determination of exemption, it would be improper to attempt such in this proceeding five years after the fact.

And finally, through testimony, the District explained its position and reasoning for finding that repair of the breaches in the dike was an exempt activity. Petitioners had ample opportunity to present evidence supporting its position. The hearing officer evaluated the evidence presented and made her findings. She found that the requirements for the maintenance exemption had been met. There was competent substantial evidence to support that finding, consequently, the applicable law has been correctly applied. (T., Vol. II, pp. 138-140, 147-149; Vol. III, pp. 25-27). Therefore this exception is rejected.

Exceptions filed by B. Dennis Auth

"SAVE" also attempted to file Exceptions to the Recommended Order through its "agent" B. Dennis Auth. These exceptions, even though timely filed, have not been considered and ruled upon for two reasons.

First, up to the deadline for filing exceptions (July 22, 1991) "SAVE" was represented by counsel. No indication was given to the District that "SAVE" had released its attorney from representation such as by her request for leave to withdraw pursuant to Rule 221-6.007, F.A.C., or that it had authorized another agent in its behalf. Further, Mr. Auth, individually, was not a party to this proceeding nor was he designated by the hearing officer under Rule 28-5.1055, F.A.C., as an Other Qualified Representative (OQR). Subsection (2)(a) of that rule provides "that if a person is not represented by counsel or does not appear on his own behalf, but desires to be represented by a qualified representative, the Hearing Officer . . . shall make diligent inquiry of the representative during a non-adversary proceeding, under oath and on the record to assure that the prospective representative is qualified to appear . . . and capable of representing the rights and interests of the person."

Even though Mr. Auth may have initiated this proceeding, he has never been qualified as required by the DOAH Rule as an OQR, in this record to represent "SAVE." After some of the initial pleadings were filed, Ms. Hansen filed her notice of appearance as counsel on behalf of "SAVE." Thus, the need, if any, for an OQR was rendered moot at that time. Auth cannot now claim to represent "SAVE" in this proceeding because he does not comply with the relevant requirements, that is, he is not an individual party to this proceeding, not counsel for SAVE, nor a designated OQR pursuant to Rule 28-5.1055, F.A.C. (See Section 40C-1.5l2, F.A.C.)

Second, pursuant to the District's procedural rule, exceptions to a recommended order must be accompanied by a transcript if based upon facts not found to be established by the presiding officer. Moreover, specific reference must be made to those portions of the transcript which support the exception for the exception to be considered. The exceptions to Recommended Order filed by Mr. Auth did not comply with either of these two requirements. (Section 40C-1.564(2), and (3), F.A.C.)

In his letter dated July 26, 1991, Auth claims that the District has no statutory authority to place requirements on the filing of exceptions. If Mr. Auth wishes to challenge the validity of the rule, that must be done in another proceeding on another day.

For the above-stated reasons, the Exceptions filed by Mr. Auth as "agent" for SAVE are neither accepted for consideration nor are they ruled upon.

ORDER

WHEREFORE, having considered the Recommended Order submitted by the hearing officer, the Exceptions thereto filed by Petitioner, its counsel and having further reviewed the transcript and record of this proceeding, and being otherwise fully advised, it is hereby

ORDERED that the Hearing Officer's Recommended Order dated July 2, 1991, attached hereto as Exhibit A, is adopted in its entirety as the final action of the Governing Board of the St. Johns River Water Management District, and it is further

ORDERED that David A. Smith's application for a Management and Storage of Surface Waters permit is hereby granted under the terms and conditions as provided herein, and it is further

ORDERED that the petition of SAVE the St. Johns River, Inc., be dismissed.

DONE AND ORDERED this 13th day of August, 1991.

_____
ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT
8/13/91 SAUNDRA GRAY, Chairman
(Date)

RENDERED this 15th day of August, 1991.

NOTICE OF RIGHTS

1. Any substantially affected person who claims that final action of the District constitutes an unconstitutional taking of property without just compensation may seek review of the action in circuit court pursuant to Section 373.617, Florida Statutes, and the Florida Rules of Civil Procedures, by filing an action within 90 days of the rendering of the final District action.

2. Pursuant to Section 120.68, Florida Statutes, a party who is adversely affected by final District action may seek review of the action in the district court of appeal by filing a notice of appeal pursuant to Fla.R.App.P. 9.110 within 30 days of the rendering of the final District action.

3. A party to the proceeding who claims that a District order is inconsistent with the provisions and purposes of Chapter 373, Florida Statutes, may seek review of the order pursuant to Section 373.114, Florida Statutes, by the Land and Water Adjudicatory Commission (Commission) by filing a request for review with the Commission and serving a copy on the Department of Environmental Regulation and any person named in the order within 20 days of the rendering of the District order. However, if the order to be reviewed is determined by the Commission within 60 days after receipt of the request for review to be of statewide or regional significance, the Commission may accept a request for review within 30 days of the rendering of the order.

4. A District action or order is considered "rendered" after it is signed by the Chairman of the Governing Board on behalf of the District and is filed by the District Clerk.

5. Failure to observe the relevant time frames for filing a petition for judicial review as described in paragraphs #1 and #2 or for Commission review as described in paragraph #3 will result in waiver of that right to review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

BRAM D. E. CANTER
HABEN, CULPEPPER, DUNBAR & FRENCH
306 N. MONROE ST
TALLAHASSEE, FL 32301

at 4:00 a.m./p.m. this 15 day of August 1991

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, FL 32178-1429
(904) 329-4500

CERTIFIED MAIL
P 847 212 171

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I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

MARY HANSENCANTER
1620 S. CLYDE MORRIS BLVD.
SUITE 300
DAYTONA BEACH FL 32119

at 4:00 a.m./p.m. this 15 day of August 1991

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK
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TALLAHASSEE FL 32301

at 4:00 a.m./p.m. this 15 day of August 1991

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF RIGHTS has been furnished by United States Mail to:

CHARLES LEE
FLORIDA AUDUBON SOCIETY
1101 AUDUBON WAY
MAITLAND FL 32751

at 9:00 a.m./p.m. this 20 day of August 1991

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK
St. Johns River Water
Management District
Post Office Box 1429
Palatka, FL 32178-1429
(904) 329-4500

CERTIFIED MAIL
P 847 212 176

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DAYTONA BEACH FL 32119

at 9:00 a.m./p.m. this 20 day of August 1991

_____
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St. Johns River Water
Management District
Post Office Box 1429
Palatka, FL 32178-1429
(904) 329-4500

CERTIFIED MAIL
P 847 212 175

==========

FLWAC AGENCY FINAL ORDER

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THE FLORIDA LAND AND WATER
ADJUDICATORY COMMISSION

SAVE THE ST. JOHNS RIVER

Petitioner,

CASE NO. RFR-91-002
DOAH CASE NO.: 90-5247

vs.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
DAVID A. SMITH,

Respondents.
_____/

FINAL ORDER

This matter came before the Florida Land and Water Adjudicatory Commission on December 17, 1991, pursuant to Section 373.114, Florida Statutes, for review of the Final Order executed August 13, 1991 and rendered on August 15, 1991 by the Governing Board of the St Johns River Water Management District. Upon review of the Final Order the Commission voted to affirm the final order of the water management district that authorized issuance of a permit for the management and storage of surface waters (the "MSSW" permit) of which review is now sought by Petitioner.

FINDINGS OF FACT

1. On September 3, 1991, proceedings before the Commission were initiated when Petitioner, SAVE 1/ the St. Johns River, filed a Request for Review pursuant to Section 373.114, F.S. The request seeks review of a final order of the St. Johns River Water Management District issued August 13, 1991 following consideration by the district's governing board of a recommended order entered in the case by the Division of Administrative Hearings. The Final Order adopted the recommended order "in its entirety as the final action" of the governing board, granted under certain terms and conditions the application for a Management and Storage of Surface Waters permit of David A. Smith, 2/ and dismissed SAVE's petition opposing issuance of the permit. (Final Order, pgs. 11 and 12, R. 209.)

2. The proceeding before the water management district had commenced when SAVE challenged the district's notice of intent to issue the MSSW permit to Smith by filing a petition with the district on July 16, 1990. The matter was forwarded to the Division of Administrative Hearings on August 21, 1990. The hearing was held in Titusville, Florida on February 11-13, 1991. The hearing officer's recommended order was issued on July 2, 1991.

3. The hearing officer recommended that the district enter a final order approving the application for the permit with the conditions stated in the district's notice of intent and additional conditions not now in dispute.

4. In this proceeding of review SAVE contends that the Commission should rescind the MSSW permit or remand for further proceedings before the district and, if necessary, the Division of Administrative Hearings. Among the bases advanced for rescinding or remand are the following:

> a. the Hearing Officer erred in finding and concluding that the "pre-development condition" of the site is that of a `diked parcel.'" The pre-development condition is crucial to the case because of rules prohibiting post-development rate and volume of discharge from exceeding the pre-development rate and volume. If the pre-development condition of the site is that of an illegally diked parcel then the effect of the dike on site must be disregarded. If the dike is disregarded, it is likely that the post-development rate and volume of discharge exceeds the pre-development rate and volume;
>
> b. the Hearing Officer erred in viewing the dike as a legally-restored dike. It was established that the dike was breached but the Hearing Officer found that the breaches were restored and concluded that the restoration was legal. No permits to restore the breach were issued and filling the breaches were not exempt from permitting requirements, as claimed by Smith, under Section 403.813(2)(g).

1- That section requires that the permitting agency be provided the dike's original design specifications. The Hearing Officer found that the original specifications were unknown thus the exemption is not available.

2- Restoration of the breaches had environmental impacts which were greater than any allowed for the exemption to be operative.

3- The section cannot apply when Section 373.406(2) provides a more restrictive exemption for which Smith does not qualify.

c. The Hearing Officer concluded that Smith legally completed, breached and restored the original dike. There are no findings of fact to support this conclusion. The Hearing Officer found that neither DER nor the district asserted a violation of law. This is a non-finding which simply states the agencies' positions. It is not an affirmative finding of fact. Conclusions of Law must be supported by findings of fact.

d. The finding of the Hearing Officer that the applicant intends to relinquish responsibilities for the stormwater system to Brevard County does not constitute strict compliance by Smith with the district rule listing entities acceptable for meeting the requirements necessary to ensure a facility's operation and maintenance in compliance with other rules.

e. Granting the application is not consistent with the overall objective of the district to maintain the integrity of riverine floodplain.

5. Consistent with the requirements of this Commission's rules in conducting Section 373.114 review, the Department of Environmental Regulation has given a recommendation. It recommends remand on two bases: a.) first, DER contends that the issue of whether the original dike was legally constructed has not been properly adjudicated in the proceeding 3/ so that DER cannot determine whether the District was correct in its assertion that the pre-development condition was that of a diked parcel and b.) second, DER argues that the District has been actively acquiring floodplain in the upper St. Johns River basin but in this case has permitted a surface water/stormwater management project serving a development that lies partially within the floodplain contrary to its objective to acquire and protect floodplain in the area. Thus, contrary to the conclusion of the Hearing Officer, DER asserts the project does not meet the overall objectives of the district.

CONCLUSIONS OF LAW

6. Turning to DER's recommendation first, the recommendation to remand because the District misapprehended the pre-development condition of the property is flawed insofar as it relies on a DER file not of record. See f.n. 3, above. 4/ DER also claims it is not clear that Smith established the pre-development condition of the site, a necessary component of Smith's burden to show entitlement to the permit.

7. The Hearing Officer's Findings of Fact with regard to the legality of the construction of the perimeter dike, completed in 1973, are in Finding of Fact 14:

> 14. Neither the District nor DER has asserted that the work to complete the original dike in the 1970's, nor the breaches completed in the 1980's, nor the restoration of the breaches in 1986 was performed in violation of law. Further, the District had knowledge of the subject activities.

This finding is accurate. The legality of the breaches, the legality of the failure to breach to grade level and the legality of the restoration were litigated by the parties. The legality of the construction of the perimeter dike in 1973, however, was not litigated. Illegality of the construction of the dike was not pled by the petitioner in the petition challenging the district's notice of intent to issue the permit. 5/ And SAVE did not present any evidence that the dike was illegal when constructed. The only reference to illegality of the construction is in SAVE Exhibit No. 2., a document purporting to be a copy of DER permit No. 05-35-4053 issued April 18, 1978 by then DER Secretary Joseph W. Landers with a date stamp of May 3, 1978 showing receipt by the St. Johns River Water Management District. The copy of the permit, in describing the permitted activity states, "The applicant seeks approval for the new work, and after-the-fact approval for the existing work, as described in the subject application." (R. 48). This reference is of no help to DER's recommendation or to SAVE's case in this review proceeding because when SAVE sought to have it introduced at hearing through Jennifer Cope the following transpired:

> MS. HANSEN: Okay. I would like to introduce this as Save's Exhibit number 2, it's the Department of Environmental Regulation permit number 05-35-4053 to John Tiedtke.
>
> MR. CANTER: Objection on the basis of hearsay. All the representations in that permit are not--are hearsay.
>
> MR. FLOWERS: I would join in the objection and state that I think it's entirely inappropriate to use this witness to try to introduce a document generated by the Department of Administration--or Department of Environmental Regulation particularly when presumably it's being offered to--its purporting to support the allegation or the statements in the document.

> THE HEARING OFFICER: Is it being offered to prove the truth of the matter asserted in the document?
>
> MS. HANSEN: No. It's being offered to prove that the District knew Department of Environmental Regulation requirements on the project at that time, which directly related to condition number 5 of the District's 1982 permit.
>
> THE HEARING OFFICER: If that's the sole purpose of the document, I don't have a problem admitting it. Is there any other objection?
>
> MR. CANTER: I believe it still needs to be tied in so--she says because it's related, and I'm still waiting to see how it is.
>
> THE HEARING OFFICER: As I understand the witness's testimony, she's identified this as what she thinks was in the file. I will admit it for that purpose.
>
> (Transcript of Administrative Hearing before Joyous D. Parrish, Vol. II, pgs. 75-77.)

8. In contrast to SAVE's failure to prove the dike-system to have been constructed contrary to law, 6/ Smith introduced testimony of former Marine Patrol Officer Frank Demsky, who investigated construction of the dike in 1973 when the Marine Patrol was the law enforcement arm for the Trustees of the Internal Improvement Trust Fund. On his first visit to the site Demsky determined that the dike construction did not need a state permit and told the Smith's property manager that if the rest of the construction continued along a line indicated on their drawings that it would not need a permit. Demsky visited the site two more times, two weeks and 3-4 weeks, respectively, after the first visit, and determined that the work was within the confines of the drawings, so that a state permit was not required for the work.

9. In reliance, in part, on the testimony of former Officer Demsky, Smith submitted the following proposed finding of fact in his Proposed Recommended Order:

> 73. When Demsky investigated the construc-tion of the 1973 dike, he determined that the work was above the OHWL of Lake Poinsett and, therefore, did not require a state permit. [Citation omitted.) His determination was based in part on the fact that the soil being excavated to construction (sic) the dike was very dry, white, sandy soil (Id., pp. 37-38) and the construction was not in or adjacent to any wetland. (Id., p.41). Demsky's observations are consistent with the testimony of Smith who stated that the location of the 1973 dike was selected to coincide with "solid ground". [Citation omitted). Smith's testimony, in turn, is consistent with Duke Woodson's

> statement that agricultural dikes were typically built based on the quality of the soil. [Citation omitted).
>
> (R. 117).

This proposed finding of fact was accepted by the Hearing Officer. (See Rulings on the Proposed Findings of Fact Submitted by the Applicant in the Appendix to Case no. 90-5247, appended to the Recommended Order, Ruling No. 39, R. 194). While we think it would have been better practice for the Hearing Officer to have discussed the facts accepted by Ruling No. 39 in the body of the Recommended Order rather than list them in the Appendix in the Rulings on the Applicant's Proposed Findings of Fact, we attribute the Hearing Officer's failure to do so to SAVE's failure to contest the legality of the dike when constructed.

10. At bottom, it is apparent to us that not only did SAVE fail to prove the dike construction to be illegal, the Applicant carried its burden of presenting a prima facie case that the construction was legal. At that point the burden of proving illegality shifted to SAVE, a burden that SAVE neither met nor, as is apparent from the record, attempted to meet.

11. With regard to DER's second point on the inconsistency between the overall objectives of the district and permitting the project, the Hearing Officer concluded that the overall objectives of the district were met by the applicant. This is also another instance of the issue not being litigated. And what party is better able to find that issuance of the permit is not consistent with district objectives than the district's governing board. The board did not so state by its vote to accept the Hearing Officer's recommendation and issue the permit. Moreover, our purpose in conducting this review is to ensure that the order of the district is consistent with the purposes and provisions of Chapter 373, Florida Statutes. DER does not cite to a provision or purpose of Chapter 373 that is violated by the issuance of the permit. (Nor does SAVE in its brief filed in this review proceeding.) Instead, DER states it is unable to recommend to the Commission that the order is consistent without findings concerning the overall objectives of the district with regard to acquiring floodplain in the upper St. Johns River basin and for that reason recommends remand.

12. SAVE argues, largely for the same policy reasons, and on the basis of evidence appended to its brief that is outside the record, 7/ that the permit should be rescinded or the case remanded for findings on the issue of consistency with the district's objective of restoring the upper basin of the St. Johns. As we stated in footnote 3, above, our review is appellate in nature by virtue of Section 373.114, 8/ and our own rules prohibit consideration of evidence outside the record. 9/ As Smith argues in his brief:

> SAVE has not shown in the record, and cannot show, that the Sabal Hammocks project would interfere with any programmed work or acquisition of the Upper St. Johns River Basin Project. SAVE has not shown in the record, and cannot show, that the Sabal Hammocks project reduces floodplain storage in the St. Johns River. SAVE has not shown in the record and cannot show, that the Sabal Hammocks project would destroy wetland resources of the St. Johns River. SAVE has not shown in the record, and cannot show, that the Sabal Hammocks

> project would reduce the water quality to the St. Johns River. There is absolutely no record support for SAVE's claims regarding policy conflicts.
>
> (Smith's Answer Brief, pgs. 18-19).

13. While there is nothing in this record to justify rescinding the permit or remanding the case, the point made by SAVE, DER and the Florida Game and Fish Commission 10/ regarding floodplain policy is one that demands attention. The objective of protecting floodplain in the upper basin of the St. Johns River, and for that matter statewide, should be of the highest priority to the St. Johns River Water Management District, other water management districts, and the Department of Environmental Regulation. We therefore direct the districts and DER to commence the development of floodplain protection policy and request the Secretary of the Department, in conjunction with the Executive Directors of the Districts, to report to us on the status of the development of such policy on a DER agenda within 6 months of the execution of this order, that is, by the May 19, 1992 meeting of the Governor and Cabinet. Furthermore, confined as our review is to the record of this proceeding, we do not regard our affirmance of the Final Order of the district as setting any precedent for development in floodplains.

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.)

15. We also agree with Smith that SAVE's reliance on Challancin v. Florida Land and Water Adjudicatory Commission, 515 So.2d 1288 (Fla. 4th DCA 1987) is misplaced. Among the distinctions presented by Smith none is more telling than that in Challancin there was no formal hearing to resolve the disputed facts about the project. Here, a three-day de novo hearing was held resulting in a recommended order from the Division of Administrative Hearings recommending issuance of the permit, a recommendation accepted by the district's governing board.

16. Finally, an issue has been raised before us as to whether any of the permitted project is on state-owned lands. While the issue is outside the purview of this permitting proceeding based on the state of this record, we cannot ignore that at the same meeting of the Governor and Cabinet at which issuance of this final order was authorized the members of this Commission sat as the Board of Trustees of the Internal Improvement Fund. We therefore direct the Division of State Lands in the Department of Natural Resources as staff to the Board of Trustees to investigate this case and to take appropriate action including, if necessary, the institution of a quiet title suit and any other appropriate judicial remedy to protect the State's ownership of its lands. The

affirmance of the water management district order in this case and the issuance of the MSSW permit under appeal does not in any way prejudice any state claim to ownership of land. 11/

WHEREFORE, there being no inconsistencies on the basis of the record in this case between the district's final order under review and the purposes and provisions of Chapter 373, Florida Statutes, the final order is AFFIRMED; the district, the other water management districts and the Department of Environmental Regulation are directed to develop floodplain protection policy and the Secretary of the Department is requested to report to the Governor and Cabinet no later than May 19, 1992 on the status of that policy; and the Division of State Lands in the Department of Natural Resources is directed to investigate this matter to determine if state lands are involved in the proposed development and, if so, to take appropriate action.

DONE AND ORDERED this 13th day of January 1992.

_____
Douglas M. Cook, Secretary
Florida Land and Water
Adjudicatory Commission

FILED with the Clerk of the Commission
this 13th day of January, 1992.

_____
Clerk, Florida Land & Water
Adjudicatory Commission

ENDNOTES

1/ The acronym for Sportsmen Against Violating the Environment.

2/ David A. Smith is the applicant for the permit and a co-respondent with the St. Johns River Water Management District in the Division of Administrative Hearings proceedings. David A. Smith will be referred to in this order as "Smith" or "applicant." The St. Johns River Water Management District will be referred to as the "district." The petitioner, Save the St. Johns River, will be referred to as "petitioner" or "SAVE."

3/ DER relies, in part, on review of its own file which reflects the department's 1977 position that the dike was illegally constructed. That file is not of evidence in this proceeding and must be disregarded by this Commission. "Review by the Land and Water Adjudicatory Commission is appellate in nature and shall be based on the record below." Section 373.114(1)(b), F.S. To that end our rules prohibit the offering or admission into the record of evidence that does not appear in the record below. Rule 42-2.014(3), F.A.C.

4/ The existence of the file and its absence in the record calls for better communication between the water management districts. Had DER been aware of this proceeding it might have participated in the DOAH hearing and made the Hearing Officer aware of the file and any light it could shed on the issues. We

suggest that the districts, from now on, serve notices of intent to issue permits on DER to enable the Department to exercise its general supervisory authority over the districts. See Section 373.026(7), F.S.

5/ The legality of the dike's construction may have been placed in issue by the Amended Joint Prehearing Statement. See Paragraph 7(a)(5) of the Statement, (R. 9). We need not decide this question since we conclude that the applicant met the burden of proof as to the legality of the construction of the dike.

6/ See Conclusion of Law 10 in the Recommended Order of the Hearing Officer, (R. 188).

7/ Smith's Motion to Strike this evidence from the record is granted. See Rule 42-2.014(3) and f.n. 3, above.

8/ Section 373.114(1)(b), F.S.

9/ Rule 42.2014(3), F.A.C.

10/ See letter from the Game and Fish Commission to Carol Browner, Secretary of DER, dated October 10, 1991, attached to DER's recommendation.

11/ Indeed, Mr. Smith, himself acknowledged before this Commission that the issue of any ownership of the land proposed for development was not resolved. Excerpt from December 17, 1991 Proceedings, The Cabinet Sitting as the Florida Land and Water Adjudicatory Commission (Item 4), p. 13. Furthermore, Mr. Smith's attorney stipulated before the Commission that the issuance of the permit would not be used as a defense against or to prejudice in any way the State's claim to ownership of land. Id. at 33.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered the following parties by U.S. Mail this 13th day of January 1992.

_____

DOUGLAS M. COOK, Secretary
Florida Land and Water
Adjudicatory Commission

Honorable Lawton Chiles
Governor
The Capitol
Tallahassee, Florida 32399

Honorable Jim Smith
Secretary of State
The Capitol
Tallahassee, Florida 32399

Honorable Gerald Lewis
Comptroller
The Capitol
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Honorable Tom Gallagher
Treasurer
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Honorable Bob Butterworth
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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

SAVE THE ST. JOHNS RIVER,

Appellant,

v.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and DAVID A. SMITH,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 92-305
DOAH CASE NO. 90-5247

Opinion filed August 23, 1993.

An appeal from a final order of the Florida Land and Water Adjudicatory Commission. Douglas M. Cook, Secretary.

Thomas G. Tomasello of Oertel, Hoffman, Fernandez & Cole, P.A, Tallahassee, for Appellant.

Wayne E. Flowers, General Counsel, St. Johns River Water Management District, Palatka, for Appellee St. Johns River Water Management District.

Bram D. E. Canter and Darren A. Schwartz of Haben, Culpepper, Dunbar & French, P.A., Tallahassee, for Appellee David A. Smith.

ZEHMER, C.J.

We review by appeal, pursuant to section 120.68, Florida Statutes (1991), a final order of the Florida Land and Water Adjudicatory Commission. The Commission, consisting of the Governor and Cabinet exercising their powers of appellate review pursuant to section 373.114, Florida Statutes (1991), affirmed the final order of the St. Johns River Water Management District granting David A. Smith's application for a management and storage of surface waters (MSSW) permit in connection with a proposed residential and golf development situated adjacent to Lake Poinsett. Appellant, SAVE The St. Johns River Association, Inc., 1/ challenged the District's notice of intent to issue the MSSW permit in a timely filed petition. The matter was referred to the Division of Administrative Hearings, a formal evidentiary hearing was held, and the hearing officer recommended approval of the permit application on specified conditions (these conditions are not disputed on appeal). The District's final order adopted the hearing officer's recommended order in its entirety, granted the permit on the conditions stated therein, and dismissed SAVE's petition. The Commission affirmed the District's decision on a closely divided vote, concluding that on the record made before the hearing officer and the District

there were no inconsistencies between the District's final order and the purposes, objectives, and provisions of chapter 373, Florida Statutes. The Commission rejected each of the contentions made by SAVE in a thorough and well reasoned order, which we now affirm.

I.

The District is empowered by law to review applications and to issue MSSW permits for projects within its boundaries. 2/ Smith applied for an MSSW permit to construct a stormwater management system to serve a proposed residential and golf development to be known as Sabal Hammocks. The proposed project is to be located on land that has been used since the 1950's for agricultural purposes that included cattle grazing and cultivation of crops such as rye and oats. The proposed site is adjacent to Lake Poinsett and related marsh land, and lies within the St. Johns River Water Management District. The receiving waters for stormwater discharge from the proposed development will be Lake Poinsett and its adjacent marshes.

Currently, a dike system exists along the southern boundary of the proposed development property and separates the internal grazing lands from the lower marsh and flood areas external to the dike. The dike system has been in place since it was originally constructed in 1973. A series of ditches cross the parcel and drain the areas within the dike system. Pursuant to a consent order previously approved by the District, two agricultural discharge pumps currently are in use at the site and discharge waters into the marshes adjacent to Lake Poinsett. When the dike was constructed in 1973, employees of the Department of Natural Resources and the Florida Marine Patrol inspected the construction for the specific purpose of determining whether it was being constructed in accordance with the requirements of existing law. They informed Smith that the construction did not require a permit from the state agency. At that time, the District did not have permissive permitting authority over the construction of this dike system. Although detailed specifications for the original construction are not shown by the record, it was established that the majority of the dike structure has remained in place over the ensuing period and was sufficient to indicate the original dimensions of the dike system.

In 1978, the Department of Environmental Regulation (DER) issued Smith a permit to construct a new dike landward of the 1973 dike and authorized 21 breaches to be made in the old dike. Only 12 breaches were actually cut in the old dike, and none of these were brought down to ground level (the record indicates they remained some 3 to 4 feet higher than the ground on which the dike was constructed). Construction of the new dike was later abandoned and never completed. The 1973 dike remained intact throughout its entire length and continued to impede water movement from the marsh into the agricultural areas. In 1986, Smith informed the District, DER, and the U.S. Army Corps of Engineers that he had abandoned construction of the new dike and planned to restore the old dike to its original condition and dimensions by filling in the 12 breaches. All three agencies allowed this work to be completed without objection and did not require Smith to obtain a permit for this restorative work. Although no written engineering plans existed for the 1973 dike system, it was established that the dike had been constructed to an elevation of 22 feet and a width of 10-12 feet at the top. As the construction of the 12 breaches left the majority of the original dike in place, written design specifications were not required for the District to determine that the restorative work did not extend beyond the original construction specifications of the dike system.

The stormwater management and treatment system authorized under the MSSW permit will treat stormwater from the site prior to any discharge off-site in a manner that sufficiently meets or exceeds all state water quality standards. Wetland impacts associated with the proposed project are minor and will be offset by the plan for creation and enhancement of wetlands on site. The two existing agricultural pumps will be replaced by a single pump station having a total pump capacity no greater than the two existing pumps. After development, the peak rate of discharge from the site will not exceed the pre-development rate, and the volume of discharge from the site will be less after development than before development.

The District accepted the recommended findings of fact and conclusions of law in the hearing officer's recommended order and directed that the permit be issued on the recommended conditions. SAVE then appealed to the Commission, urging that the matter be remanded to the District or the hearing officer for further findings on the legality of the original dike construction and the restorative work. SAVE argued that the record failed to contain competent, substantial evidence to support a finding that the land involved should be excluded from the St. Johns River floodplain, as the District had done by recognizing the presence of the dike system as the pre-development condition of the property. DER gave the Commission its recommendation on this matter pursuant to section 373.114, Florida Statutes (1991). It urged that the matter be remanded for further findings because: 1) whether the original dike was legally constructed had not been properly adjudicated in this proceeding, and this prevented DER from accurately determining whether the District was correct in its assertion that the pre-development condition was that of a diked parcel; and 2) the District has been actively acquiring floodplain in the upper St. Johns River basin, but in this case had permitted a surface/stormwater management project serving a development that lies partially within the floodplain, contrary to its general objective to acquire and protect floodplain in the area. For these reasons, DER asserted, the project does not meet the overall objectives of the District. The Commission rejected SAVE's contentions and DER's recommendations and concluded that the record supports the findings of fact on which the District's decision was predicated. It noted that DER's recommendations were based on matters within its own records that had not been made part of the record in this case, and these matters could not be considered as a basis for reversal because the Commission's power of review "is appellate in nature and shall be based on the record below," as specified in subsection 373.114(1)(b), Florida Statutes (1991).

II.

Although SAVE raises three specific points on this appeal, according to the summary of argument in its initial brief, these points present essentially two arguments.

The first argument urges that the District used the wrong "pre-development" condition in its review and assessment of Smith's MSSW permit application, and has two components. One, if the extensive dike constructed in the early 1970's was illegally constructed, then the District incorrectly determined the "pre-development" condition of the site to be a diked parcel that is separate from the floodplain of the St. Johns River. Two, if the cuts made in the dike in the early 1980's were illegally filled, the District incorrectly determined that the pre-development condition of the site was the original dike system. SAVE furthers argues that the findings of fact and conclusions of law in the hearing officer's recommended order and the District's final order fail to contain sufficient reference to these illegality issues, and that the Commission erred

in refusing to grant SAVE's request that the case be remanded to the District to make adequate findings on the legality of the original dike construction and the restoration construction.

SAVE's second argument contends that approval of the MSSW permit is inconsistent with the District's overall objective of restoring the floodplain of the St. Johns River. Urging that MSSW permits must be consistent with this objective, it points out that no findings of consistency with this objective were made by the hearing officer or the District, and that Appellees did not provide any evidence to prove this essential finding at the section 120.57 hearing. Thus, SAVE argues, the Commission erred in not granting its request that the case be remanded for findings on whether the MSSW permit is consistent with the District's floodplain restoration objectives.

A.

SAVE's first argument basically asserts that the original dike and the restoration of the breaches in the original dike were constructed in violation of law and cannot legally serve to separate the proposed project site from the St. Johns River floodplain, and for this reason the District should have treated the land in issue as part of the floodplain. Since the legality of the dike system, both in its original state and as restored, is critical to the proper review of this permit application, SAVE argues, this legality issue should have been, but was not, the subject of adequate specific findings in the District's final order. We reject these contentions and agree with the Commission that the District used the correct pre-development condition of the land in reaching its permitting decision.

In reaching its decision, the District treated the pre-development condition of the land covered by Smith's MSSW permit application as a diked impoundment separated from Lake Poinsett and the St. Johns River floodplain by the existing dike system. As shown by the record, it has been and is the District's practice to define pre-development conditions to mean those conditions that were existing on the date the permit program in chapter 40C-4, Florida Administrative Code, was first implemented. Since the program for the Upper St. Johns River where the property in dispute is located was first implemented in 1977, see rule 40C-4.031(1)(a), Fla. Admin. Code. (1992), the District concluded that the perimeter dike was a pre-development condition because the dike system existed in 1977.

We also agree with the Commission that any illegality in the construction or restoration of the dike was not a relevant issue in this permitting proceeding. 3/ The legality of the original construction of the dike was not relevant to this proceeding because compliance or noncompliance with another agency's permitting program should not be litigated in this administrative permitting proceeding that must be conducted under statutes and rules relating solely to the District's permitting authority. We agree that it is inappropriate for the District to determine in this proceeding whether a permit was required by another agency for past construction under statutes and rules being enforced by that other agency. The District was required in this proceeding to determine only whether Smith's application met the requirements imposed by the existing statutes and rules the District is charged with enforcing at this time. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So.2d 67 (Fla. 3d DCA 1983). In their Amended Joint Prehearing Statement, the parties agreed that, "[O]nly the permitting criteria in Chapters 40C-4, 40C-41 and 40C-42, Florida Administrative Code, apply to this application." SAVE has not identified any permitting rule or other law

requiring a determination of the legality of the original construction of the dike system prior to the issuance of the MSSW permit at issue. SAVE has not identified any applicable rule, law, or requirement governing the issuance of an MSSW permit that Smith has failed to satisfy. Also, none of the rules cited by the parties as governing the issuance of the MSSW permit requires that a determination of the legality of the dike at time of construction be made prior to the issuance of the permit. See rules 40C-4.041, 40C-4.091, 4/ 40C-4.301, 40C-41.063, Fla. Admin. Code. See also rules 40C-42.041 [repealed September 25, 1991], 40C-42.061, Fla. Admin. Code; Subsection 403.813(2)(g), Fla. Stat. (1991).

B.

However, even if we assume that the legality of the original dike construction and the filling of the subsequently cut breaks or notches in the dike could be a relevant consideration, that issue was fully litigated in this proceeding and the record amply supports the conclusion that no such illegality has been shown. The record contains competent, substantial evidence to support the ruling by the District, as recommended by the hearing officer, that the original dike was constructed in accordance with all lawful requirements existing at that time. The hearing officer found as a fact that:

> 14. Neither the District nor DER has asserted that the work to complete the original dike in the 1970s, nor the breaches completed in the 1980s, nor the restoration of the breaches in 1986 was performed in violation of the law. Further, the District had knowledge of the subject activities.

She recommended in the conclusions of law that:

> 10. . . . Save has not established that the dike system currently in existence was constructed or approved contrary to law.

The Commission's order upheld these findings and conclusion, noting that, inter alia:

> 7. . . . The legality of the breaches, the legality of the failure to breach to grade level and the legality of the restoration were litigated by the parties. The legality of the construction of the perimeter of the dike in 1973, however, was not litigated. Illegality of the construction of the dike was not pled by the petitioner in the petition challenging the district's notice of intent to issue the permit. 5/

5/ The legality of the dike's construction may have been placed in issue by the Amended Joint Prehearing Statement. See Paragraph 7(a)(5) of the Statement, (R.9). We need not decide this question since we conclude that

the applicant met the burden of proof as to the legality of the construction of the dike.

And SAVE did not present any evidence that the dike was illegal when constructed. The only reference to illegality of the construction is in SAVE Exhibit No. 2; a document purporting to be a copy of DER permit No. 05-35-4053 issued April 18, 1978 by then DER Secretary Joseph W. Landers with a date stamp of May 3, 1978 showing receipt by the St. Johns River Water Management District. The copy of the permit, in describing the permitted activity states, "The applicant seeks approval for the new work, and after-the-fact approval for the existing work, as described in the subject application." (R. 48). This reference is of no help to DER's recommendation or to SAVE's case in this review proceeding because when SAVE sought to have it introduced at the hearing through Jennifer Cope the following transpired: [The document was allowed to be introduced for the limited purpose of showing that the District had knowledge of it based on the representation by SAVE's attorney that it was not being offered to prove the truth of the matter asserted in the document]. * * *

8. In contrast to SAVE's failure to prove the dike system to have been constructed contrary to law. 6/

6/ See Conclusion of Law 10 in the Recommended Order of the Hearing officer, (R. 188).

Smith introduced the testimony of former Marine Patrol Officer Frank Demsky, who investigated the construction of the dike in 1973 when the Marine Patrol was the law enforcement arm for the Trustees of the Internal Improvement Trust Fund. On his first visit to the site Demsky determined that the dike construction did not need a state permit and told the Smith's property manager that if the rest of the construction continued along a line indicated on their drawings that it would not need a permit. Demsky visited the site two more times, two weeks and 3-4 weeks, respectively, after the first visit,

> and determined that the work was within the confines of the drawings, so that a state permit was not required for the work.
>
> 9. In reliance, in part, on testimony of the former Officer Demsky, Smith submitted the following proposed finding of fact in his Proposed Recommended Order:
>
> > 73. When Demsky investigated the construction of the 1973 dike, he determined that the work was above the OHWL of Lake Poinsett and, therefore, did not require a state permit. [Citation omitted.] His determination was based in part on the fact that the soil was being excavated to construction (sic) the dike was very dry, white, sandy soil (Id., pp. 37-38) and the construction was not in or adjacent to any wetland. (Id., p.41). Demsky's observations are consistent with the testimony of Smith who stated that the location of the 1973 dike was selected to coincide with "solid ground." [Citation omitted]. (sic) Smith's testimony, in turn, is consistent with Duke Woodson's statement that agricultural dikes were typically built based on the quality of the soil. [Citation omitted]. (sic) (R. 117).
>
> This proposed finding of fact was accepted by the Hearing Officer. . . .
>
> 10. At bottom, it is apparent to us that not only did SAVE fail to prove the dike construction to be illegal, the Applicant carried its burden of presenting a prima facie case that the construction was legal. At that point the burden of proving illegality shifted to SAVE, a burden that SAVE neither met nor, as is apparent from the record, attempted to meet.

There is competent, substantial evidence in the record to sustain the findings of fact in the recommended order adopted by the District. Contrary to SAVE's argument, there is no error in the Commission's ruling that the testimony of Florida Marine Patrol Officer Frank Demsky constitutes a prima facie showing of legality of the construction of the dike in 1973. SAVE's argument, that this testimony cannot constitute competent evidence to support the finding that the dike was legally constructed because Officer Demsky was not qualified as an expert to express an opinion on the location of the ordinary high water line, misconceives the purpose and probative value of Officer Demsky's testimony. Demsky investigated the construction of the dike in 1973 when the Marine Patrol

was the law enforcement arm for the Board of Trustees of the Internal Improvement Trust Fund, which at that time had permitting authority over this area pursuant to chapter 253, Florida Statutes. 5/ The District had no permitting requirements applicable to the construction of the dike in 1973. Demsky's testimony established that Smith had constructed the dike without obtaining any permit because the state agency then responsible for such permitting had led Smith to believe that the dike was entirely proper and needed no permit for its construction as long as the dike followed the line indicated to Demsky; and thereafter Demsky inspected the project to see that the dike did so. Smith was entitled to rely and acted on the representations of the permitting agency's representative, and no objection to the legality of the original construction of the dike was ever raised by the District or DER. Hence, the Commission correctly concluded that Smith made a prima facie showing of the apparent legality of the original dike construction, thereby shifting the burden to SAVE to present evidence to the contrary. Florida Dept. of Transp. v. J. W. C. Co., Inc., 396 So.2d 778 (Fla. 1981). For Demsky to testify on these matters, it was not necessary that he be qualified as an expert to express an opinion on the ordinary high water line, as this testimony related primarily to matters of fact, not expert opinion.

SAVE further argues that it carried its burden of showing the illegality of the original construction by introducing the permit from DER that showed the new dike to be constructed by Smith was waterward of the ordinary high water line, and that the Commission erred in not considering that document as proof of these facts. The Commission correctly ruled, however, that this permit was hearsay evidence admitted in evidence for the sole, limited purpose of showing that the District had knowledge of the DER permit authorizing another dike (that Smith never constructed) and the matters stated therein; that document was not received as competent proof of the truth of the matters set forth in the document because SAVE's attorney so stipulated when the permit was admitted. Neither the Commission nor this court, in the exercise of its appellate review authority, is authorized by law to give that document probative value that is greater than the limited purpose for which it was admitted. SAVE offered no other evidence of illegality of the original construction.

C.

SAVE next argues that, irrespective of the legality of the original construction of the dike, the District erred in reviewing the application as if the original dike were intact and functioning because Smith's filling in the breaks was itself illegal. SAVE argues that these breaks had been cut in the dike pursuant to a DER permit issued on April 18, 1981, authorizing 21 breaks in the dike, eight to be 100 feet wide and 13 to be 50 feet wide. SAVE further asserts that, "[t]he breaks were to be cut to marsh level, as a requirement by DER to resolve a violation associated with construction of the original dike." Essentially, SAVE argues that the authorized breaks should have taken the dike down to marsh level (whether or not this was actually done), thereby permitting the impoundment area to connect to the level of the river floodplain; thus, Smith could not lawfully fill in these breaks without obtaining a further permit from DER.

The record shows that the breaks in the dike were never taken down to the floodplain level when the cuts were made in 1983. Smith restored the dikes to their original configuration in 1986 by filling the breaks only after conferring with the District. Smith met with the District's Director of Resource Management and with the District General Counsel, who told Smith that he could

fill the breaks without a District permit pursuant to the exemption in subsection 403.813(2)(g), Florida Statutes. That section provides an exemption from any chapter 373 or chapter 403 permit requirement to perform:

> [t]he maintenance of existing insect control structures, dikes, and irrigation and drainage ditches, provided . . . [that in] all cases, no more dredging is to be performed than is necessary to restore the dike or irrigation or drainage ditch to its original design specifications.

The 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.)

SAVE makes several challenges to the Commission's ruling on this issue. Among other things, it argues, first, that the finding that the dike was functional with the breaks cut in the dike is not supported by competent, substantial evidence and conflicts with the hearing officer's findings that boats could navigate through the breaks, a fact that conclusively indicates that the dike was not functioning as it should. Second, it argues that Smith had no written authorization to conduct the filling activities. Third, it argues that the filling and closure of the breaks did not qualify for the exemption in subsection 403.813(2)(g). None of these contentions withstands close scrutiny. 6/

1.

As to SAVE's first contention regarding the lack of competent, substantial evidence, the evidence established that the dike was functional even with the breaks in place, and that it did not fail to impede the movement of water to Smith's property under normal conditions. SAVE's argument that it did not

because the hearing officer found that the breaks or notches were "cut to a sufficient width and depth to allow boats to navigate through the dike" misconstrues the hearing officer's findings. The hearing officer specifically found that:

> 10. Sometime in the 1980s, several openings or breaches were cut in the dike system. Those breaches were opened pursuant to permits issued by the District and the Department of Environmental Regulation (DER). The breaches were cut to a sufficient width and depth to allow boats to navigate through to anterior areas of the subject property during those times when the water levels outside the dike would allow such entrance. The breaches were not cut to ground level and the original dike remained intact and uncompromised by the breaches. That is, the dike has not failed to impede water movement and the integrity of the dike was not weakened by the breaches. The original outline, dimensions of the dike, remained visible despite the breaches.

(Emphasis added.) These findings are supported by competent, substantial evidence in the record and do not indicate that boats could pass through the dike under ordinary conditions; rather, they indicate that boats could pass only when the water level outside the dike was sufficiently high during abnormal conditions such as a flood. Smith testified at the administrative hearing that 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 marsh level. Instead the cuts stopped three to four feet above the land on which the dike had been constructed. Smith testified that the notches were such "that you could have taken a boat through If the water was up, yeah" (emphasis added); but, he also testified that after the notches were cut, he continued his agricultural activities on the property and continued to use his pumps to control the water level in the canal. SAVE has directed us to nothing in the record indicating that the water outside the dike ever rose to a level high enough to allow boats to pass through the notches, or that any boats ever passed through the breaches before the breaks or notches were filled.

2.

.

As to the second contention, SAVE has not cited any authority that supports the proposition that Smith was required to obtain "written authorization" to conduct the filling activities, nor has it identified what type or form of "written authorization" should have been obtained. We note that no written authorization to proceed under this exemption is required by subsection 403.813(2)(g).

3.

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 breaks from the scope of the exemption. Subsection 403.813(2)(g) requires only that the dike be restored to "its original design specifications." The record indicates that the District assured Smith that the restoration activity qualified for this exemption. The District's former director (Woodson 1982-87) testified that during a meeting between Smith, the District's general counsel, and Woodson, Smith was told that the filling of the notches was exempted from permitting under the "Dike Maintenance Exemption," and he expected smith to rely on that representation since he had the authority to make permitting decisions for the District. Woodson later instructed a field inspector (Carr) to be on the site to monitor Smith's filling activity. The District's current director of permitting (Elledge) also testified that the section "403 exemption" was applied to Smith's restoration of the dike, and that the filling of the breaches "would have been considered a maintenance activity" under the exemption. Elledge's testimony also indicated that the District was aware of the original design specifications of the original dike and its condition after the notches were made because there were plans in the District's files showing where the notches were located and to what dimension they were constructed, and the field inspector was instructed to go out to the site and inspect the filling activities to make sure that the activities were limited to filling of these notches.

As a general rule, the administrative construction of a statute by the agency responsible for its administration is entitled to great weight when it involves a matter of agency expertise, and its construction should not be overturned unless clearly erroneous. See Department of Admin. v. Moore, 524 So.2d 704 (Fla. 1st DCA 1988). Whether or not the District's interpretation of the language of subsection 403.813(2)(g) is infused with agency expertise, its construction in this instance is not clearly erroneous. The last sentence in subsection (g) suggests that activities involving "restoring" a dike to its original design specification are exempted, and the ordinary meaning of restore would cover his 1986 filling of the breaks cut in the dike, since "restore" means " 1. To bring back into existence or use; reestablish: restore law and order. 2. To bring back to a previous, normal condition: restore a building. . . . ." The American Heritage Dictionary of the English Language 1108 (new college ed. 1979).

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. 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 403.8l3(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 now before us, the dike never ceased to function as intended even with the breaks or notches cut in it; it kept water off of 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.

D.

In view of the foregoing discussion, we reject without further explanation SAVE's argument that remand of the case to the District is necessary for further and more adequate findings on the legality of the original dike construction and the filling of the breaks or notches. The numerous findings made on this issue render this argument patently frivolous.

E.

SAVE's second major argument contends that the Commission's final order should be reversed because there is no competent, substantial evidence in the record showing that Appellees demonstrated that the MSSW system covered by the permit is consistent with all of the overall objectives of the District. Citing rule 40C-4.301(1)(a)14, Florida Administrative Code, SAVE argues that applicants are obligated to provide reasonable assurances that their systems are consistent with the overall objectives of the District. Asserting that "for the past twenty-five years, the District has been cooperating with the federal government on a basin project to restore and maintain the floodplain of the upper St. Johns River, to be accomplished primarily through the acquisition and regulation of the floodplain in the basin," SAVE argues that the "Recommended Order did not make a specific finding that the loss of additional floodplain that will be caused by this project is consistent with the District's objective to restore the Upper St. Johns River Basin. Urging that MSSW permits must be consistent with this objective, SAVE points out that no findings of consistency with this objective were made by the hearing officer or the District, nor did Appellees provide any evidence to prove this essential finding at the section 120.57 hearing. Thus, SAVE argues, the Commission erred in not granting its request that the case be remanded for findings on whether the MSSW permit is consistent with the District's floodplain restoration objectives. SAVE urges that, as in Matter of Surface Water Permit No. 50-01420-S, Challancin v. Florida Land and Water Adjudicatory Comm'n, 515 So.2d 1288 (Fla. 4th DCA 1987), where the proposed development was ruled to be inconsistent with established state policy to restore and protect Lake Okeechobee and adjacent lands, we should do the same in this case.

We find this argument unsupported by the record and the law cited by SAVE. The hearing officer's recommended order contains several pages of findings of fact relating to the factors required to be established by an applicant seeking an MSSW permit, as set forth in section 403.813(2)(g) and rules 40C-4.091, 40C-4.301, 40C-41.063, 40C-42.041 and 40C-42.061. These findings of fact support the recommended conclusion of law that:

> 12. As to each of the engineering, water quality, and environmental criteria applicable as outlined above, the Applicant has established and has provided reasonable assurance, that the construction, operation, and maintenance of the proposed project will not adversely affect the water quality standards in waters of the state.
>
> 13. Additionally, the Applicant has established that the proposed project will not, on balance, adversely affect the wetlands on-site and has shown that the wetland functions will be enhanced by the

> wetlands to be created on the subject site. It is anticipated that the wetland to be created will function more effectively than those areas to be disrupted.

These recommendations and the supporting findings of fact were adopted in the District's final order.

> The Commission's order, in ruling on this issue, states:
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> 11. With regard to DER's second point on the inconsistency between the overall objectives of the district and the permitting project, the Hearing Officer concluded that the overall objectives of the district were met by the applicant. This is also another instance of the issue not being litigated. And what party is better able to find that the issuance of the permit is not consistent with the district objectives than the district's governing board. The board did not so state by its vote to accept the Hearing Officer's recommendation and issue the permit. Moreover, our purpose in conducting this review is to ensure that the order of the district is consistent with the purposes and provisions of Chapter 373, Florida Statutes. DER does not cite a provision or purpose of Chapter 373 that is violated by the issuance of the permit. (Nor does SAVE in its brief filed in this review proceeding.) Instead, DER states it is unable to recommend to the Commission that the order is consistent without findings concerning the overall objectives of the district with regard to acquiring floodplain in the upper St. Johns River basis and for that reason recommends remand.
>
> 12. SAVE argues, largely for the same policy reasons, and on the basis of evidence appended to its brief that is outside the record. 7/
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> ---
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> 7/ Smith's Motion to Strike this evidence from the record is granted. See Rule 42-2.014(3) and f.n. 3, above.
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> ---
>
> that the permit should be rescinded or the case remanded for findings on the issue of consistency with the district's objective of restoring the upper basin of the St. Johns.

As we state in footnote 3, above, our review is appellate in nature by virtue of Section 373.114, 8/

8/ Section 373.114(1)(b) , F.S.

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and our own rules prohibit consideration of evidence outside the record. 9/

9/ Rule 42.2014(3), F.A.C.

As Smith argues in his brief:

> SAVE has not shown in the record, and cannot show, that the Sabal Hammocks project would interfere with any programmed work or acquisition of the Upper St. Johns River Basin Project. SAVE has not shown in the record, and cannot show, that the Sabal Hammocks project reduces floodplain storage in the St. Johns River. SAVE has not shown in the record and cannot show, that the Sabal Hammocks project would destroy wetland resources of the St. Johns River. SAVE has not shown in the record, and cannot show, that the Sabal Hammocks project would reduce water quality to the St. Johns River. There is absolutely no record support for SAVE's claims regarding policy conflicts . . .
>
> (Smith's Answer Brief, pgs. 18-19).

13. While there is nothing in this record to justify rescinding the permit or remanding the case, the point made by SAVE, DER and the Florida Game and Fish Commission 10/

10/ See letter from the Game and Fish Commission to Carol Browner, Secretary of DER, dated October 10, 1991, attached to DER's recommendation.

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regarding floodplain policy is one that demands attention. The objective of pro-

> tecting floodplain in the upper basin of the St. Johns River, and for that matter statewide, should be of the highest priority to the St. Johns River Water Management District, other water management districts, and the Department of Environmental Regulation. We therefore direct the districts and DER to commence the development of floodplain protection policy and request the Secretary of the Department, in conjunction with the Executive Directors of the Districts, to report to us on the status of the development of such policy on a DER agenda within 6 months of the execution of this order, that is by the May 19, 1992 meeting of the Government and Cabinet. Furthermore, confined as our review is to the record of this proceeding, we do not regard our affirmance of the Final Order of the district as setting any precedent for development in floodplains.

(Emphasis added.)

SAVE does not dispute the hearing officer's findings of fact in support of these conclusions. Rather, its argument focuses entirely on the failure of the recommended order, the District's final order, and the Commission's order to require further findings on whether the project covered by the application is consistent with the objective of the District to restore the historic floodplain of the upper St. Johns River basin. However, this specific objective is not referred to in any of the cited rules and, as the Commission ruled, this specific objective was not the subject of any proof of non-rule policy presented at the section 120.57 hearing. Hence, SAVE failed to establish on this record that there was any such objective or policy in effect at the time this application was being processed. Finding an absence of any such policy or objective, the Commission directed that the appropriate state agencies establish such policy and report back within six months. The Commission committed no error In ruling that it could not remand for further proceedings for the purpose of showing compliance vel non with an unproven and unestablished policy. For this reason, SAVE's reliance on Matter of Surface Water Permit No. 50-01420-5, 515 So.2d 1288, is entirely misplaced, as there was ample evidence in that case establishing the stated policy and objective regarding the protection of Lake Okeechobee.

In its argument to this court, SAVE erroneously attempts to rely on what it characterizes as "record evidence" establishing the District's objective of restoring the historic floodplain. This "record evidence" consists primarily of the statements of Commission members made at the Commission's meeting and statements made in the Commission's final order. Obviously, these matters do not constitute matters of evidence that have been properly admitted in the record. The transcript of the Commission hearing indicates that none of the individuals named in SAVE's argument (Attorney General Butterworth, Insurance Commissioner Gallagher, and Education Commissioner Castor) gave sworn testimony intended to be evidence in the case. Indeed, the Commission's order properly notes the limitation imposed by its appellate function and that its decision in this case must be confined to the evidence made in the record at the section 120.57 hearing.

SAVE has not directed us to an applicable permitting rule or to a portion of the record that establishes the existence of an enforceable "objective" that the District failed to consider, and has not challenged the findings that the applicant has met all other applicable permitting requirements. Therefore, we find no error in the Commission's ruling on this issue.

The Commission's order is AFFIRMED.

ERVIN and ALLEN, JJ., CONCUR.

ENDNOTES

1/ SAVE is the acronym for Sportsmen Against Violating the Environment. It is an organization of individual persons and representatives from groups who use the waters of Lake Poinsett and its surrounding areas for recreational and business purposes. No issue is made regarding SAVE's standing to litigate the issues raised in this case.

2/ The District's statutory authority to require and process permits for the construction or alteration of any stormwater management system is set forth in section 373.413, Florida Statutes (1991). Subparagraph (1) of that section permissively authorizes the governing board of the District to require permits and impose reasonable conditions to assure that such construction or alteration "will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district." The Department of Environmental Regulation is given concurrent authority to excercise such permitting authority; "however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district." Subsection 373.016(3), Fla. Stat. (1991).

3/ The Commission ruled that the legality of the perimeter of the original dike was not litigated because this issue was not pleaded in SAVE's initial pleading and SAVE did not offer any proof in support of this contention. SAVE contends this ruling is manifest error because the hearing officer "made specific findings of fact and conclusions of law regarding the legality of the original dike as well as closure of the breaches." We need not be concerned with the correctness of this specific ruling, however, because the Commission further concluded, on the basis of the record before it, that the applicant Smith made a prima facie showing that the dike was legally constructed, and thereby shifted the burden to SAVE to dispute this showing by the presentation of contradictory evidence, a burden which the Commission found SAVE failed to carry.

4/ This rule and the parties refer to the "Applicant Handbook" as providing additional information regarding the permitting requirements. We note, however, that the handbook is not part of the rule, and it was not included in this record, even though a portion of it was quoted in the hearing officer's recommended order. In any event, it is not necessary to review the handbook's contents to decide this appeal.

5/ This permitting authority under chapter 253 was later transferred to DER.

6/ We also take note of SAVE's argument that subsection 403.813(2)(g) conflicts with subsection 373.406(2)(which does not require an MSSW permit to alter the topography of the land if agricultural activity is involved) because subsection

403.813(2)(g) exempts activities not exempted under section 373.406, and the only way to avoid the conflict is to give greater weight to section 373.406 because it applies specifically to MSSW permits and does not apply to the activity In the present case that impounds or obstructs surface water. We decline to consider this argument because the record indicates that it was neither raised below nor ruled on by the hearing officer, the District, or the Commission.