STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOSEPH SMITH, LENA SMITH, EUGENE COLWELL, ANNA COLWELL, JERRY HARRIS and BRENDA HARRIS,	)	
Petitioners,	)	
vs.	)	CASE NO. 94-0544
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,	)	
Respondent,	)	
and	)	
SIERRA CLUB, INC., and DEFENDERS OF THE ENVIRONMENT, INC.,	)	
Intervenors.	)	

RECOMMENDED ORDER PURSUANT TO
SECTION 120.54(17), FLORIDA STATUTES

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on February 24 and 25, 1994, in Palatka, Florida, and March 11, 1994, in Gainesville, Florida.

APPEARANCES

For Petitioners:	John F. McKeever, Esquire Post Office Box 1450 Ocala, Florida 32678
For Respondent:	Wayne E. Flowers, Esquire Anthony J. Cotter, Esquire Post Office Box 1429 Palatka, Florida 32178-1429
For Intervenors, Sierra Club, Inc. and Florida Defenders of Environment, Inc.:	Peter Belmont, Esquire 511 31st Avenue North St. Petersburg, Florida 33704

PRELIMINARY STATEMENT

On November 26, 1993, the Respondent caused a Notice of Intent to be published in the Florida Administrative Weekly announcing the Respondent's intent to adopt proposed Rule 40C-2.302, Florida Administrative Code, and to amend Rule 40C-2.052(6), Florida Administrative Code. On December 17, 1993, the Petitioners filed a Petition for Administrative Determination of Invalidity of

Proposed Rules challenging the proposed rule and and the proposed amendment. The petition was assigned case number 93-7109.

On December 27, 1993, case number 93-7109 was assigned to the undersigned by Order of Assignment. The requirement of Section 120.54(4)(c), Florida Statutes, that a final hearing be held within thirty days of the assignment was waived by the Petitioners and Respondent. The final hearing was scheduled for February 24 and 25, 1994, by Notice of Hearing entered January 18, 1994.

On December 17, 1993, the Petitioners filed a Request for Public Hearing and For Proceeding Under Section 120.57, Florida Statutes, with the Respondent. Pursuant to this request, the Petitioners sought a "drawout" proceeding concerning the challenged rules pursuant to Section 120.54(17), Florida Statutes.

The request for drawout proceeding was filed by the Respondent with the Division of Administrative Hearings on January 31, 1994. The matter was designated case number 94-0544 and was assigned to the undersigned. That request is the subject of this Recommended Order.

On January 31, 1994, the Respondent filed a Motion to Consolidate. The motion was granted by Order entered February 3, 1994. A separate order is being entered in case number 93-7109RP simultaneously with this Recommended Order.

A petition to intervene in this case was filed by the Sierra Club, Inc. and the Florida Defenders of the Environment, Inc. The petition to intervene was granted. The Intervenors in this case, the Sierra Club, Inc. and the Florida Defenders of the Environment, Inc. intervened in case number 93-7109RP.

The Petitioners presented the testimony of O. Charles Swallows. Five exhibits were offered by the Petitioners and were accepted into evidence.

The Respondent presented the testimony of Charles Price Robinson, Greenville Berkeley Hall, James Edwin Weimer and Jeffrey Craig Elledge. Fifteen exhibits offered by the Respondent were accepted into evidence.

The Intervenors did not call any witnesses or offer any exhibits.

A transcript of the final hearing was filed April 4, 1994. All of the parties involved in this case filed a proposed recommended order. All of the proposed orders contain proposed findings of fact. Most of those findings of fact in this case are identical to the proposed findings of fact in the proposed final orders filed by the parties in case number 93-7109RP.

Almost all of the findings of fact made in case 93-7109RP have some pertinence to this case. Therefore, the findings of fact contained in the Final Order in case number 93-7109RP have been adopted as the appropriate findings of fact in this case.

A ruling on each proposed finding of fact contained in the proposed orders filed by the parties has been made either directly or indirectly in this Recommended Order, or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

FINDINGS OF FACT

A. The Parties.

1. The Petitioners, Joseph and Lena Smith, Eugene and Anna Colwell, and Jerry and Brenda Harris, are littoral owners and operators of sports fishing facilities on Orange Lake, a freshwater body of approximately 7,000 acres of open water and 15,000 acres of associated wetlands, whose southern margin constitutes the boundary between Alachua and Marion Counties in north central Florida.

2. Respondent, the St. Johns River Water Management District (hereinafter referred to as the "District"), is a special taxing district created by Chapter 373, Florida Statutes, charged with the statutory responsibility for the management of water and related land resources; the promotion of conservation, development, and proper utilization of surface and ground water; and the preservation of natural resources, fish and wildlife, pursuant to Chapter 373, Florida Statutes.

3. Intervenor, the Sierra Club, Inc. (hereinafter referred to as "Sierra"), is a not-for-profit California corporation registered to do business within the State of Florida. Sierra is an international corporation whose purpose is to explore, enjoy and protect the natural resources of the earth.

4. Intervenor, Florida Defenders of the Environment, Inc. (hereinafter referred to as "Florida Defenders"), is a not-for-profit Florida corporation whose purpose is to preserve and restore Florida's natural resources.

5. Intervenor, the Florida Department of Environmental Protection (hereinafter referred to as "DEP"), is an agency of the State of Florida charged with the responsibility of controlling and prohibiting pollution of the air and water of the State of Florida. See Chapter 403, Florida Statutes. DEP is also charged with responsibility for management of the Paynes Prairie State Preserve. Section 373.026, Florida Statutes.

6. Intervenor, the Attorney General of the State of Florida (hereinafter referred to as the "Attorney General"), sits as a Trustee of the sovereignty submerged lands of the State and as one of the legal owners of the State's property including the Paynes Prairie State Preserve.

B. The Challenged Rules.

7. The District issued an order on November 7, 1993, authorizing the publication of a notice of intent to amend Chapter 40C-2, Florida Administrative Code, by adopting proposed Rule 40C-2.302, Florida Administrative Code, and amending Rule 40C-2.051(6), Florida Administrative Code (hereinafter jointly referred to as the "Challenged Rules").

8. Proposed Rule 40C-2.302, Florida Administrative Code (hereinafter individually referred to as the "Reservation Rule"), provides:

> 40C-2.302 Reservation of Water From Use.
> The Governing Board finds that reserving a certain portion of the surface water flow through Prairie Creek and Camps Canal south of Newnans Lake in Alachua County, Florida, is necessary in order to protect the fish and wildlife which utilize the Paynes

> Prairie State Preserve, in Alachua County, Florida. The Board therefore reserves from use by permit applicants that portion of surface water flow in Prairie Creek and Camps Canal that drains by gravity through an existing multiple culvert structure into Paynes Prairie. this reservation is for an average flow of [35] cubic fee per second (23 million gallons per day_ representing approximately forty five per cent (45 percent) of the calculated historic flow of surface water through Prairie Creek and Camps Canal.

9. The specific authority for the Reservation Rule is Sections 373.044, 373.113, 373.171, 373.216 and 373.219, Florida Statutes.

10. The law implemented by the Reservation Rule is Sections 373.219 and 373.223, Florida Statutes.

11. The proposed amendment to Rule 40C-2.051, Florida Administrative Code (hereinafter individually referred to as the "Exemption Rule"), provides, in pertinent part:

> 40C-5.2.051 Exemptions. No permit shall be required under the provisions of this rule for the following water uses:
> (1) through (5) No change
> (6) Water, whether withdrawn or diverted, when used for purposes of protection of fish and wildlife or the public health and safety when and where the Governing Board has, by regulation, reserved said water from use by permit applicant pursuant to Subsection 373.223(3), F.S.

12. The specific authority for the Exemption rule is Sections 373.044, 373.113 and 373.171, Florida Statutes.

13. The law implemented by the Exemption Rule is Sections 373.103, 373.171, 373.216, 373.219, 403.501 et seq. and 288.501 et seq., Florida Statutes.

C. Orange Creek Basin.

14. Orange Creek Basin is the name given to the hydrological features of approximately 400 square miles of Alachua, Putnam and Marion Counties, Florida.

15. Orange Creek Basin is a major sub-basin of the Lower Ocklawaha River Basin.

16. Surface water in the Orange Creek Basin flows generally in a north to south direction

17. Orange Creek Basin is made up of several sub-basins, including Newnans Lake, Paynes Prairie, Orange Lake and Lochloosa Lake sub-basins.

18. Surface water within the approximately 100 square miles of Newnans Lake sub-basin drains into Newnans Lake. When sufficiently high, water in Newnans Lake discharges over a weir structure from the southern end of the lake into Prairie Creek.

19. The weir structure at the southern end of Newnans Lake may be adjusted to control the amount of water flowing into Prairie Creek. The weir was installed in 1966. It was adjusted by the Florida Game and Freshwater Fish Commission in 1976.

20. Water flows south into Prairie Creek, the south and southwest through Prairie Creek to two man-made structures. The first is a gated culvert structure consisting of 3 Culverts (the "Camps Canal Culverts"), through which some of the Prairie Creek water enters Paynes Prairie.

21. The second man-made feature is a levee and a canal named Camps Canal. The levee diverts water in Prairie Creek, which does not flow into Paynes Prairie by gravity, through Camps Canal to the south to the River Styx, which flows into Orange Lake.

22. If the elevation of surface water in Prairie Creek exceeds 58.91 feet National Geodetic Vertical Datum (hereinafter referred to as "NGVD"), a portion of the volume of Prairie Creek will flow, by gravity, into Paynes Prairie through the Camps Canal Culverts.

23. The Paynes Prairie sub-basin covers an area of approximately 49 square miles. Surface water in this sub-basin drains into a natural geological feature known as Alachua Sink.

24. Surface water in the approximately 56 square mile Orange Lake sub-basin flows into Orange Lake.

25. Surface water flows out of Orange Lake through Orange Creek. Outflow is controlled by Orange Lake Dam. The Orange Lake Dam has a fixed crest elevation of 58 feet NGVD. Water levels in Orange Lake must exceed 58 feet NGVD before there is surface water outflow from Orange Lake.

26. Surface water within the approximately 75 square mile Lochloosa Lake sub-basin drains into Lochloosa Lake.

27. Lochloosa Lake has two outlets: Lochloosa Slough in the east and Cross Creek in the south. Cross Creek connects Lochloosa Lake to Orange Lake.

D. Paynes Prairie State Preserve.

28. Prior to the construction of the weir at the outlet from Newnans Lake to Prairie Creek, all surface water from Newnans Lake flowed from Newnans Lake to Prairie Creek unimpeded.

29. Prior to 1927 all surface water in Prairie Creek flowed south into an area known as Paynes Prairie.

30. Paynes Prairie is located in Alachua County.

31. All water in Prairie Creek entered Paynes Prairie and flowed across Paynes Prairie to Alachua Sink.

32. Alachua Sink is a natural geological feature located in the north-central portion of Paynes Prairie.

33. At Alachua Sink surface water enters the Florida aquifer.

34. In 1927 a levee was constructed around the eastern boundary of Paynes Prairie, and Camps Canal was excavated in order to divert water from Paynes Prairie. Due to the levee, water in Prairie Creek was diverted into Camps Canal beginning in approximately 1927. The water flowed into the River Styx and then into Orange Lake.

35. Canals and levees were also constructed within Paynes Prairie to convey surface water in Paynes Prairie into Alachua Sink and Camps Canal.

36. The modifications to Paynes Prairie made in 1927 were intended to drain Paynes Prairie so that the land could be utilized for agricultural purposes, including the raising of cattle. Paynes Prairie continued to be used primarily for the raising of cattle between 1927 and early 1970.

37. In 1970, the State of Florida began acquiring parts of Paynes Prairie. Property acquired by the State was used to create the Paynes Prairie State Preserve (hereinafter referred to as the "Preserve"). Land is still being acquired by the State.

38. The Preserve currently consists of approximately 20,600 acres. Approximately 18,000 acres of the Preserve were acquired within the first 4 years after acquisitions by the State began.

39. Approximately 12,000 acres are considered wetlands.

40. Two major highways, U.S. Highway 441 and Interstate 75 run north-south across the middle and western portion of Paynes Prairie. U.S. 441 was constructed in 1927 and I-75 was constructed in 1964.

41. In 1975 the State of Florida's Department of Natural Resources (which is now DEP) breached the levee at Camps Canal in order to restore part of the water flow from Prairie Creek to the Preserve.

42. In 1979 flashboard riser Culverts were placed in the breach in the Camps Canal levee.

43. In 1988 the Camps Canal Culverts were constructed.

44. The Preserve, a unique land feature, was designated a National Natural Landmark in 1974 by the United States Department of the Interior.

45. No consumptive use permit concerning water that flows into Paynes Prairie or the Preserve has been issued by the District. No consumptive use permits have been issued by the District for surface water withdrawals from Newnans Lake, Prairie Creek or Orange Creek.

E. The Current General Hydrologic Condition of the Preserve.

46. The Preserve is one of the largest continuous wetland systems in Florida and the Southeastern United States.

47. The Preserve and Paynes Prairie constitute one of the largest wetland areas formed by the collapse of a sinkhole, Alachua Sink.

48. Since 1975, at least some water has flowed into the Preserve from Prairie Creek through the Camps Canal Culverts and its predecessors.

49. The "inverts" of the Prairie Creek-Camps Canal Culverts are above the creek-canal bottom. This means that if water in Prairie Creek does not reach a certain level, no water will flow through the Camps Canal Culverts into the Preserve. Under these conditions, all water in Prairie Creek will flow through Camps Canal and eventually to Orange Lake.

50. The amount of water flowing through the Camps Canal Culverts is also limited to a maximum amount due to the size of the Culverts.

51. The exact amount of water that may flow through the Camps Canal Culverts into the Preserve depends on the amount of water in Prairie Creek coming from Newnans Lake and the capacity of the Culverts to move the water.

52. Water flowing into the Preserve through the Camps Canal Culverts constitutes approximately 50 percent of the surface water entering the Preserve.

53. After water flows into the Preserve through the Camps Canal Culverts it flows in a broad, shallow path, referred to as "sheetflow," over the eastern portion of the Preserve.

54. The sheetflow from Camps Canal Culverts creates approximately 550 to 600 acres of shallow marsh community.

55. The water eventually flows into an area known as Alachua Lake in the central portion of the Preserve.

56. Water discharging from Alachua Lake flows through a water control structure consisting of four gated Culverts, known as the Main Structure, into Alachua Sink.

57. Water also enters the Preserve from the north through a tributary known as Sweetwater Branch. Water flows through Sweetwater Branch into Alachua Sink. Sweetwater Branch is channelized over its entire length, preventing water from reaching into the Preserve or Alachua Lake.

F. The District's Purpose in Adopting, and the District's Interpretation of, the Challenged Rules.

58. The District's intent in adopting the Challenge Rules was to reserve water which the District had concluded is required for the protection of fish and wildlife in Paynes Prairie.

59. The District is attempting to carry out its intent by providing in the Reservation Rule that whatever amount of water that may flow through the Camps Canal Culverts by gravity into the Preserve may not be used for other purposes.

60. The District is further attempting to carry out its intent by providing in the Exemption Rule that any amount of water that has been reserved by the District because it is required for the protection of fish and wildlife pursuant to Section 373.223(3), Florida Statutes, exempt from the consumptive use permit process.

61. The Reservation Rule is not intended to reserve a specific quantity of water for the Preserve. Rather, the Reservation Rule reserves only that amount of water that flows through the Camps Canal Culverts by force of gravity. The intent is allow the natural existing hydrologic regime of the Preserve to continue.

62. The quantity of the water reserved by the Reservation Rule is identified, in part, as follows:

> The Governing Board finds that reserving a certain portion of the surface water flow through Prairie Creek and Camps Canal south of Newnans Lake in Alachua County, Florida, is necessary in order to protect the fish and wildlife which utilize the Paynes Prairie State Preserve, in Alachua County, Florida. The Board therefore reserves from use by permit applicants that portion of surface water flow in Prairie Creek and Camps Canal that drains by gravity through an existing multiple culvert structure into Paynes Prairie. . . . [Emphasis added].

63. The last sentence of the Reservation Rule goes on to proved:

> This reservation is for an average flow of [35] cubic feet per second (23 million gallons per day) representing approximately forty five per cent (45 percent) of the calculated historic flow of surface water through Prairie Creek and Camps Canal.

64. This portion of the Reservation Rule was not included by the District to establish a minimum and/or maximum quantity of water that is being reserved for the protection of fish and wildlife in the Preserve. This portion of the Reservation Rule represents a very condensed summary of the historical hydrologic data relied upon by the District in deciding to reserve water for the Preserve's fish and wildlife.

65. The Exemption Rule was intended to make clear that anytime the District reserves water which it determines is required to protect fish and wildlife or the public safety, that no consumptive use permit is necessary.

G. The District's Determination that Water is Necessary for the Protection of Fish and Wildlife in Paynes Prairie.

66. In reaching its decision that the quantity of water flowing through the Camps Canal Culverts by force of gravity into the Preserve is required for the protection of the fish and wildlife of the Preserve, the District relied upon a study of the Orange Creek Basin which District staff had begun in the 1980s.

67. There were three objectives for the Orange Creek Basin study: (a) the first objective of the study was to develop a predictive hydrologic model that could be used to predict water levels throughout the basin and the water courses that connect the various major lakes and prairie systems; (b) the second

objective of the Orange Creek Basin study was to develop environmental and hydrologic criteria that could be used to evaluate the environmental impacts of different water management alternatives in the basin; and (c) the third objective was to look at alternatives for management of water within the District.

68. Substantial evidence concerning the manner in which the Orange Creek Basin study was conducted, the results of the study and the rationale for the District's conclusion that the quantity of water flowing through the Camps Canal Culverts by force of gravity is required to protect the fish and wildlife of the Preserve was presented during the final hearing of this case by the District.

69. The evidence presented by the District to support a finding that the quantity of water flowing through the Camps Canal Culverts by force of gravity is required to protect the fish and wildlife of the Preserve was not rebutted by competent subs by the Petitioners. The only witness called by the Petitioners was an expert in hydrology. The Petitioners' expert only suggested that he had questions about the District's hydrologic study. He was unable, however, to testify that the hydrologic study relied on by the District was unreasonable or inaccurate.

70. The Petitioners also offered no evidence to counter the testimony of the District's expert on the environment of Paynes Prairie. The testimony of the District's expert proved that, even without the results of the hydrologic study conducted by the District, the evidence concerning the Preserve's environment supports a finding that the water reserved by the Reservation Rule is required for the protection of fish and wildlife.

71. Generally, the evidence proved that, if the water being reserved is not continued to allow to flow naturally into the Preserve, the range of water fluctuations and the resulting natural impact of the environment of the Preserve will not be achieved.

72. There exist in the Preserve currently, a range of plant communities and fish and wildlife. The nature of those communities, fish and wildlife depends on the amount of water in the communities. The communities range from those existing in of upland areas, which have the lowest levels of water, down to deep marshes, where water levels are the greatest. In between are emergent marsh (also called "shallow marsh"), cypress swamps, mixed scrub-shrub wetland, wet prairie, old filed, hudric forest, mesic forest and xeric community.

73. The various types of communities are is a state of fluctuation depending on the levels of water flowing into the Preserve. The evidence presented by the District, and was uncontroverted by the Petitioners, proved that these fluctuations are environmentally desirable; that natural fluctuations of water levels in the Preserve are required for the protection of fish and wildlife. It is for this reason, therefore, that the District decided to reserve the amount of water flowing by gravity through the Camps Canal Culverts, and not some specified volume.

H. The Rationale for the District's Finding that Water is Required for the Protection of Fish and Wildlife.

74. Although the District and some of the Intervenors have prosed several findings of fact that support the ultimate finding of fact that the water reserved by the Reservation Rule is required to protect fish and wildlife. Those findings of fact are subordinate to the ultimate relevant fact in this

case. Therefore, rather than rewrite all of those subordinate facts, the District's subordinate findings of fact (which cover those subordinate findings suggested by the Intervenors) will be quoted and adopted in this Final Order.

75. The findings of fact of the District quoted and adopted herein which relate to the hydrologic portion of the are as follows. The findings have been modified to reflect terms used throughout this Final Order. The findings of the District adopted are District findings of fact 44 through 74:

> 44. Surface water hydrologic models are a tool used by water resource professionals to enable them to simulate or calculate certain characteristics of a hydrologic system from data that relates to or is collected from within that system. T. 65, 66, 90, 91, 779.
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> 45. In this basin, the staff of the District developed a surface water model in order to calculate anticipated water levels and discharge volumes at various points throughout the basin expected to be associated with several alternative water management strategies. T. 90, 91, SJ Ex 1 p 27.
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> 46. The specific model used by the District is the Streamflow Synthesis and Reservoir Regulation (SSARR) mathematical model, developed by the U.S. Army Corps of Engineers. This particular model is generally accepted and used in the field of hydrology for the purposes for which it was used here by the District staff. T. 90, 91, SJ Ex 1 p 27.
>
> 47. The model combines two types of data, the first of which are "fixed basin parameters" such as drainage area, soil moisture run-off relationships, and storage capacity of the water bodies in the basin. Fixed basin parameters do not change over time. T. 98, 99, SJ Ex 1 pp 32-37.
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> 48. The second type of data used by the model is "time series" data such as rainfall, evaporation, lake elevations and discharges at several points throughout the basin. Time series data does change over time. T. 98, 99, SJ Ex 1 pp 38-40.
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> 49. Rainfall data for the basin is the most important input element for the model because rainfall drives the system from a hydrologic perspective. T. 95.
>
> 50. Rainfall data from 5 recording stations scattered over the basin were utilized, with one station located at the University of Florida in Gainesville yielding data for more

than 50 years, although only data for the 50 year period from 1942-1991 was used in the model. T. 96, 97, SJ Ex 1 pp 38, 39, 62, 175.

51. The other 4 rainfall recording stations used in the model have recorded rainfall for periods ranging from 11 years to 37 years. SJ Ex 1 p 39.

52. In a basin the size of the Orange Creek Basin, day to day rainfall amounts may vary from one recording station to another, however, on an annualized basis, rainfall amounts are relatively consistent between the rainfall recording stations utilized in the District's model. T. 97, 98, 184, 727.

53. Both the number and location of rainfall recording stations used for the model are adequate to characterize rainfall for the basin. T. 97, 98, 184.

54. Fifty years of hydrologic data were utilized by the District in the model, because corresponding records existed for rainfall, lake levels, and discharge for this period of time. In addition, a 50 year period is more likely to exhibit a full range of hydrologic conditions, such as droughts and floods, than a shorter increment of time would. T. 104.

55. The model utilizes both the fixed basin parameters and the time series data to calculate an associated lake level for any of the lakes in the basin or a discharge measurement at one of several points in the basin for any particular day during the 50 year period represented by the hydrologic data on which the model is based. T. 98-100.

56. The model was initially run to calculate several hydrologic values with existing conditions in place. Existing conditions, for purposes of comparison with other alternatives, assumes the Newnans Lake weir to be in place, the gates to the Camps Canal Culverts to be in an open position and the gates to the main structure Culverts in the Preserve to be in an open position. T. 99, SJ Ex 1 p 83.

57. For all scenarios examined, the model assumes existing land uses to be in place, in all years simulated, in order to allow consistent comparisons of hydrologic conditions over the 50 years for which data was available. T. 134, 135.

58. In the "existing conditions" scenario the model calculates the volume of water discharging from Newnans Lake southward into Prairie Creek for each day during the 50 year period from 1942-1991. T. 100.

59. Discharge measurements were made by District staff at the downstream end of the Camps Canal Culverts from which a rating curve was developed for the structure. T. 101, 102, SJ Ex 1 pp 33, 36.

60. A rating curve is a means by which the flow capacity of a water control structure such as a culvert may be calculated. T. 101, 102.

61. Using the rating curve developed by District staff for the Camps Canal Culverts, the model, having calculated the volume of water moving from Newnans Lake into Prairie Creek, can then calculate the volume of water passing through the Culverts at the Camps Canal Culverts into the Preserve versus the volume moving on southward through Camps Canal to Orange Lake for each day or year during the 50 year period from 1942-1991. T. 101, 102, SJ Ex 1 p 84, Appendix Table E-45.

62. Having calculated the annual volume of surface water entering the Preserve and the annual volume moving into and through Camps Canal to Orange Lake for each of the 50 years between 1942- 1991, District staff then divided the 50 year totals for each by 50 to arrive at a yearly average volume of water going to the Preserve versus a yearly average volume going through Camps Canal to Orange Lake, under existing conditions. T. 101-104, SJ Ex 1 p 84, Appendix Table E-45.

63. Based on the volumes calculated for the 50 year period between 1942-1991, on average, 45 percent of Prairie Creek flow enters Preserve through the Camps Canal Culverts under existing conditions. This equates to 35 cubic feet per second (cfs), or 23 million gallons per day (mgd). T. 103, 605, 606, SJ Ex 1 p 84, Appendix Table E-45.

64. Also based on the volumes calculated for the 50 year period between 1942-1991, on average, 55 percent of Prairie Creek flow goes into Camps Canal and moves on southward to the River Styx and then to Orange Lake under existing conditions. T. 103, SJ Ex 1 Appendix Table E-45.

65. Making a calculation of flow based on 50 years of historic hydrologic data does not guarantee that the next 50 years will be identical to the period during which the calculation was developed, however, it is reasonable to assume that the next 50 years will be statistically similar to the previous 50 years and that hydrologic conditions, on average, will be the same. T. 104, 143.

66. Both the general methodology and the specific model used by the District to

quantify the average volume of flow entering the Preserve under existing conditions, which also represents the volume of flow which the rule would reserve for fish and wildlife which use the Preserve, are based on logic and accepted scientific principles. T. 90, 91, 97, 102, 128, 729.

67. The rule in issue does not reserve a specific amount of water for the protection of fish and wildlife using the Preserve, rather, it reserves the amount which will flow by gravity through the existing Camps Canal Culverts with the gates in an open position, which will in essence, maintain the existing volume of flow into the Preserve. T. 604, 605, 624.

68. Thirty-five cfs does not necessarily represent the specific volume of water that will flow into Preserve on a given day, rather, the specific volume would be dependent on hydrologic conditions on that given day. T. 105, 106.

69. Nevertheless, 45 percent of flow, or 35 cfs, or 23 mgd, represents a reasonably accurate calculation, based on the data available, of the average volume of Prairie Creek flow which will enter the Preserve by gravity pursuant to the Reservation Rule. T. 101- 104, 638, SJ Ex 1.

70. With the existing conditions hydrologic regime which the Reservation Rule would continue in place, the model calculates that the mean elevation of Orange Lake would be 57.26 feet NGVD. T. 121, 122, SJ Ex 8 (arithmetic mean).

71. If no Prairie Creek flow were allowed to enter the Preserve and all of its flow went to Orange Lake, the model calculates the mean elevation of Orange Lake to be 57.51 feet NGVD. T. 121, 122, SJ Ex 8 (arithmetic mean). Thus, the mean elevation of Orange Lake rises by only 0.25 feet when all of the Prairie Creek flow is diverted to Orange Lake. SJ Ex 8.

72. The impact of a 0.25 feet change in the mean elevation of Orange Lake from a hydrologic perspective is small given the 11 feet fluctuation in elevations that has occurred naturally over time in the lake. T. 125.

73. By contrast, if no Prairie Creek flow were allowed to enter the Preserve and all of its flow went to Orange Lake, the mean elevation of water levels within the Preserve, as calculated by the model, would decline by 0.65 feet. SJ Ex 7.

74. Eliminating all Prairie Creek flow from

the Preserve would decrease the amount of wetted acreage in the central portion of the prairie by up to 2400 acres. T. 203, SJ Ex 1 p 131, SJ Ex 6. In addition, the acreage wetted in the eastern lobe of the Preserve by the sheetflow of Prairie Creek water as it moves from the Camps Canal Culverts to Alachua Lake would also be eliminated. T. 116, SJ Ex 1 p 131.

76. The findings of fact of the District quoted and adopted herein which relate to the environment of, and the alternative course of action considered for, the Preserve are as follows. The findings have been modified to reflect terms used throughout this Final Order. The findings of the District adopted are District findings of fact 79 through 127:

79. The eastern and western lobes of the Preserve are approximately the same elevation and have similar gradients; however, the plant communities within the eastern lobe differ from the plant communities in the western lobe. The plant community within the eastern lobe is predominantly a shallow marsh community while the plant community within the western lobe varies from wet prairie to old field. T. 262, 263; SJ Exs 3, 10B, 10H.

80. For the western lobe of the Preserve, consisting of the area west of U.S. Highway 441, rainfall is the only source of water except when extremely high water levels occur in Alachua Lake. T. 263, 272. When extremely high water levels occur on Alachua Lake water can backflow through the culverts under U.S. Highway 441 and Interstate Highway 75 and inundate the western lobe. T. 272.

81. The eastern lobe of the Preserve is dependent upon sheetflow from Prairie Creek for its source of water. T. 263. Prior to the construction of Cones Levee the sheetflow from Prairie Creek inundated approximately 1,200 acres of the eastern lobe. Today, however, sheetflow inundates directly 600 acres and indirectly another 600 acres in the eastern lobe. T. 264, 265; SJ Ex 10B.

82. Without the Prairie Creek sheetflow, the biological character of the eastern lobe would change to resemble the more terrestrial nature of the western lobe. T. 263, 272, 518.

83. The fish and wildlife inhabiting the Preserve are totally dependent upon its surface water hydrology. T. 276.

84. Of the 21 species of plants living within the Preserve that are listed by the federal government or the State of Florida as endangered, threatened or species of

special concern, four species are wetland species. T. 268, 358, 359, 360.

85. Twenty species of animals living on the Preserve are listed by the federal government or the State of Florida as endangered, threatened or species of special concern. Seventeen of these species are wetland dependent. T. 269.

86. Birds, including a number of species listed as endangered or threatened such as great blue herons, woodstorks, anhingas, limpkins, sandhill cranes and ospreys, use the shrub communities around Alachua Lake, the cypress swamp in the eastern lobe and other areas of the eastern lobe for breeding, nesting, and foraging. T. 269, 270, 271, 277, 364, 365.

87. Several species of migratory ducks overwinter in the central area of the Preserve, particularly in the shrub wetland communities around Alachua Lake. Without the flow of water from Prairie Creek the open water in Alachua Lake would be lost and consequently, the overwintering habitat for the ducks would be lost. T. 240, 270, 518.

88. Immature bald eagles use the eastern lobe wetlands for foraging. T. 270. Additionally, the northern harrier, American kestrel and peragrine falcon use wetlands within the Preserve as foraging habitat. T. 364, 365.

89. Mammals, such as river otters, brown water rat, bobcats, bats and long-tailed weasels, use the wetlands within the Preserve, and the eastern lobe particularly, as breeding, nesting, and/or foraging habitat. Reptiles, such as the American alligator, live in the Preserve. T. 270-271, 375, 377-378; SJ Ex 14.

90. The diversity and abundance of animals living in or using the Preserve is greater in the eastern lobe and central area than the western lobe. T. 273, 274. Different species of birds frequent the western lobe. Typically, species more indicative of a drier terrestrial environment are found in the western lobe. T. 272.

91. If the Prairie Creek flow is diverted from the Preserve, the eastern lobe would be driven towards a drier, terrestrial habitat and the functions of the eastern lobe wetlands would be totally lost. T. 277.

92. The sheetflow across the eastern lobe is a unique feature of the Preserve, and without this sheetflow animals such as the endangered brown water rat would not live there. T. 277.

93. Without the Prairie Creek sheetflow, animals dependent on Alachua Lake and the wetlands, such as the brown water rat and the woodstork, would have to find other areas to live, forage, breed and nest due to the loss of wetlands and open water habitat. T. 277, 518.

94. When the water levels in the Preserve are low and wetlands are lost, the birds that depend on the wetlands for nesting will not nest in the Preserve nor elsewhere. T. 532.

95. The wetland communities within the Preserve require a range of water level fluctuations which includes periods of high water levels, average water levels and low water levels. Wetlands must remain wet long enough to exclude upland plants and to conserve hydric soils, yet sufficiently dry often enough to allow germination of wetland plants and the compaction and oxidation of flocculent sediments. T. 293, 294, 298, 299, 310, 311; SJ Ex 1 pp. 23-25.

96. Periods of high water levels maintain lower swamp and shallow marsh habitats, facilitate the dispersal of the seeds of wetland plants, allow wetland species that normally occur at lower elevations to move up into the forested communities, prevent the encroachment of upland species into the upper wetland area, and advance the transportation of organic matter from uplands to wetlands. Inundation of the floodplain and forested communities provide nesting, spawning, refugia, and foraging habitat for fish and other aquatic organisms. T. 294, 296, 310, 311; SJ Ex 1 pp 23- 25.

97. The frequency, timing and duration of high water levels influence the composition and survival of wetland forests. T. 310, 311; SJ Ex 1 p 23.

98. Periods of average water levels create and maintain organic soils and maintain wetland habitat for wetland dependent wildlife. T. 293, 297; SJ Ex 1 p 25.

99. Periods of low water levels rejuvenate floodplain wetlands by allowing seed germination and growth of wetland plants. Seeds of many wetland plant species require saturated soils without standing water in order to germinate. T. 291, 293, 298, 299; SJ Ex 1 pp 24, 25.

100. Periods of low water levels increase the rate of aerobic microbial breakdown and decomposition of organic sediments, and allows the consolidation and compaction of flocculent organic sediments. The consolidation, compaction and decomposition

of flocculent organic sediments improves substrates for fish nesting and seed germination. T. 298, 299; SJ Ex 1 pp 24-25.

101. Upland animals use the wetlands during periods of low water levels for foraging and breeding. T. 298, 299.

102. Three elevation transects were used by District staff to identify the elevations of plant communities on the Preserve and develop environmental criteria for the Preserve floodplain. T. 302, 305-306; SJ Ex 1 pp 26, 27, 31, 60.

103. Ecological criteria were developed by District staff to accommodate the hydroperiod requirements of lake and wetland biota. The ecological criteria consisted of hydrologic duration, i.e. how long an area is flooded; and recurrence intervals, i.e. how often an area is flooded. T. 304, 309; SJ Ex 1 pp 23, 61.

104. Maintaining appropriate hydrologic durations and recurrence intervals for plant communities enables the plant communities to support populations of fish and wildlife. T. 307, 312.

105. The District identified the following five significant water management levels: infrequent high water level, frequent high water level, minimum average water level, frequent low water level, and infrequent low water level. The water management levels characterize zones along the elevation gradient of the Preserve. T. 307, 308; SJ Ex 1 p 61.

106. The five different recurrence intervals and the associated hydrologic durations became the hydrologic criteria used by District staff for the water management levels. T. 312.

107. The District evaluated six water management alternatives for the Preserve: the "existing conditions" alternative which simulated the current morphometry of the Paynes Prairie sub-basin; the "total restoration" alternative, under which all the Prairie Creek flow is restored to Paynes Prairie; the "50/50 management" alternative, under which the inflow capacity at the Camps Canal Culvert is reduced by 50 percent and the outflow capacity at the main structure at Alachua Lake is reduced by 50 percent; the "elevation threshold" alternative, under which when the water level at Newnans lake is at 66 feet NGVD or above and the water level at Orange Lake is at 56 feet NGVD or below, then the inflow structure at Camps Canal Culvert is reduced by 50 percent while

the outflow capacity at the main structure is maintained at 100 percent; the "Sweetwater Branch" alternative, under which flow from Prairie Creek is replaced by Sweetwater Branch flow; and the "no restoration" alternative, under which the entire flow from Prairie Creek is diverted to Orange Lake. T. 313, 314; SJ Ex 1 p 119.

108. Based upon the hydrologic durations and recurrence intervals defined by the ecologic criteria, the District determined five water management levels for each water management alternative. SJ Ex 1 p 61.

109. The five water management levels and the associated recurrence intervals and hydrologic durations form a fluctuation management regime. The fluctuation management regime for each water management alternative was evaluated with respect to the existing biological features of the aquatic and wetland communities of the Paynes Prairie sub-basin. SJ Ex 1 pp 61, 124, 125.

110. Under the total restoration alternative the water levels on the Preserve would rise thereby improving the hydrologic regime on the prairie, but the possibility of flooding and damaging U.S. Highway 441 would also increase. The minimum average water level of Orange Lake would decrease by 0.67 feet. T. 331, 333; SJ Ex 1 pp 125-130; SJ Ex 8.

111. The no restoration alternative would not satisfy all the hydrologic criteria. The minimum average water level on the Preserve would decrease by 1.01 feet under this alternative. Under this alternative the acreage inundated by the minimum average water level is reduced by approximately 2,400 acres. Additional wetland acres are lost due to the absence of the Prairie Creek sheetflow across the eastern lobe. The minimum average water level in Orange Lake would increase by 0.16 of a foot. T. 324, 334-336; SJ Ex 1 pp 124, 125, 131; SJ Ex 8.

112. Eliminating the flow of Prairie Creek into Paynes Prairie would be detrimental to the current and future biological conditions on the Preserve. SJ Ex 1 p 131.

113. Under the 50/50 management alternative the average flow from Prairie Creek would be reduced from 45 percent to 22.5 percent and the outflow to Alachua Sink would be reduced by 26 percent. T. 337; SJ Ex 1 p 131.

114. The high water levels and the low water levels increase slightly within the Preserve and Orange Lake under the 50/50 management alternative; however, the residence time of water and the concentration of nutrients,

including phosphorous and nitrogen, would increase thereby degrading water quality within the Preserve. T. 338, 340, 341; SJ Ex 1 pp 124, 125, 127, 128, 131, 132; SJ Exs 7 and 8.

115. The reduction of sheetflow from Prairie Creek under the 50/50 management alternative would adversely affect the wetlands in the eastern lobe. SJ Ex 1 p 132.

116. Under the elevation threshold management alternative water levels within the Preserve would decrease. The Preserve would receive less water during some periods of naturally high flows reducing the duration and frequency of inundation in the eastern lobe wetlands and, therefore, negatively impacting wildlife dependent upon seasonal high flows. T. 344; SJ Ex 1 p 133; SJ Ex 7.

117. The flow provided by Sweetwater Branch provides approximately 15 percent of the Preserve's average inflow, whereas Prairie Creek provides approximately 50 percent of the Preserve's average inflow. T. 346.

118. Sweetwater Branch is more or less confined to a channel and discharges into Alachua Sink bypassing the Preserve and its eastern lobe. T. 347.

119. Under the Sweetwater Branch alternative the eastern lobe would be deprived of the sheetflow essential to the maintenance of wetlands and the wildlife in the eastern lobe. The eastern lobe would dry out and the plant communities would change to old field or wet prairie. The functions of the plant communities to wildlife would also change under this alternative. T. 347.

120. The Sweetwater Branch alternative would not support fish and wildlife in the eastern lobe of the Preserve. T. 347.

121. The water quality of Sweetwater Branch is poor. Sweetwater Branch has higher concentrations of nitrogen and phosphorous than Prairie Creek. If the nutrient-rich Sweetwater Branch water was diverted onto the Preserve the types and abundances of vegetative communities would change from native vegetation to monocultures of nuisance vegetation that thrive in nutrient-rich environments. T. 346-349; SJ Ex 1 pp 133-134.

122. The existing conditions alternative provides over the long term an average of approximately 45 percent of the Prairie Creek flow by gravity flow through the Camps Canal Culvert to the Preserve. T. 355, 356; SJ Ex 1 p 121.

123. Under the existing conditions

alternative, the five hydrologic criteria for both the Preserve and Orange Lake are met and the water level elevations meet the desired recurrence intervals and hydrologic durations. T. 324, 350, 351.

124. The fluctuation management regime provided by the existing conditions alternative partially restores sheetflow from Prairie Creek to the Preserve in sufficient, but fluctuating, water quantities necessary to maintain habitat for fish and wildlife within the eastern lobe. T. 350, 351.

125. It is essential for the protection of the fish and wildlife that utilize and depend upon the Preserve to maintain the flow of Prairie Creek into the Preserve. T. 351, 517.

126. The Preserve needs flow from Prairie Creek in volumes reserved by the proposed rule to protect its fish and wildlife. T. 351.

127. The management levels established by the environmental criteria used for each of the water bodies in the basin will continue to be met in Orange Lake with an average of 45 percent of Prairie Creek flow going to the Preserve and 55 percent going to Orange Lake. T. 432, SJ Ex 1 pp 127, 134, 146.

77. Based upon the substantial and uncontroverted evidence in this case, it is concluded that the water reserved by the Reservation Rule is required for the protection of fish and wildlife of the Preserve.

CONCLUSIONS OF LAW

A. Jurisdiction.

78. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.54(17), Florida Statutes.

B. Section 120.54(17), Florida Statutes.

79. Section 120.54(17), Florida Statutes, provides:

> (17) Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely assets that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding

under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

DONE AND ENTERED this 16th day of June, 1994, in Tallahassee, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 1994.

APPENDIX
Case Number 94-0544

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Petitioners' Proposed Findings of Fact

1 Accepted in 20, 23, 29-31, 38-39 and 40

2-4 Accepted in 37 and 42-45. The proposed fact concerning whether a consumptive use permit would be required if the District had not adopted the Reservation Rule is not relevant. Nor is the testimony concerning this suggested fact accepted as a correct interpretation of law. The next to the last sentence of the proposed finding is not supported by the weight of the evidence or relevant. Finally, the last sentence is not relevant to this proceeding.

5 Accepted in 8 and 10. The quotations of law in this proposed finding of fact are correct.

6 Accepted in 11 and 13. The quotations of law in this proposed finding of fact are correct.

7 Although generally a correct summary of some of the testimony, the ultimate conclusion suggested by this paragraph ignores the weight of the evidence presented in this case. See 71-77.

8 Not supported by the weight of the evidence. See 49-51, 59, 61-64 and 75.

9 The ultimate findings suggested by this paragraph is not supported by the weight of the evidence. See 8, 20, 34, 44-43 and 49-51.

10 See 8.

11 Not supported by the weight of the evidence. The suggestion of this paragraph is that DEP is being provided the use of water reserved by the Reservation Rule. This is not technically correct. The water is technically being reserved for fish and wildlife of the Preserve.

The District's Proposed Findings of Fact

1 Accepted in 8
2 Accepted in 11
3 Correct statement of law
4 Accepted in 1
5 Accepted in 2
6 Accepted in 3
7 Accepted in 4
8 Accepted in 5
9 Accepted in 6
10 Accepted in 14
11 Accepted in 17
12 Accepted in 18
13 Accepted in 19
14 Accepted in 20-21
15 Accepted in 20 and 22
16 Accepted in 21 and 25
17 Accepted in 25
18 Accepted in 26-27
19 Accepted in 75
20 Accepted in 45
21 Accepted in 75
22 Accepted in 28
23 Accepted in 29
24 Accepted in 31
25 Accepted in 32-33
26 Accepted in 34
27 Accepted in 35
28 Accepted in 36
29 Accepted in 36
30 Accepted in 37-38
31 Accepted in 38
32 Accepted in 40
33 Accepted in 41
34 Accepted in 43
35 Accepted in 48 and 52
36 Accepted in 53
37 Hereby accepted
38 Accepted in 55
39 Accepted in 56
40 Accepted in 47
41-43 Hereby accepted
44-74 Accepted in 75
75 Accepted in 38-39
76 Accepted in 44 and hereby accepted
77 Accepted in 46-47
78 Accepted in 72
79-127 Accepted in 76
128 Accepted in 61-62
129 Accepted in 63-64
130 Accepted in 65

Sierra's and Florida Defenders' Proposed Findings of Fact

1	Accepted in 38-39
2	Accepted in 36-37
3	Accepted in 44 and 46-47
4	Accepted in 47 and hereby accepted
5-17	Accepted in 76
18-20	Accepted in 66-67
21	Accepted in 14, 17-18, 20-21, 25 and 27
22	Accepted in 28-29
23	Accepted in 34
24	Accepted in 41 and 48
25	Accepted in 18 and 20-21
26	Accepted in 52
27	Accepted in 32-33, 49-51, 53 and 55-56
28	Accepted in 49
29	Accepted in 50
30-42	Accepted in 75
43	See 69 and hereby accepted
44-48	Accepted in 76
49	Accepted din 45
50	Accepted in 49-51

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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. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER

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ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

JOSEPH SMITH, LENA SMITH,
EUGENE COLWELL, ANNA COLWELL,
JERRY HARRIS, and BRENDA HARRIS,

Petitioners,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

FOR No. 93-1435
DOAH Case No. 94-0544

Respondent,
and

SIERRA CLUB, INC., and DEFENDERS OF THE ENVIRONMENT, INC.,

Intervenors.
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated hearing officer, Larry J. Sartin, held a formal administrative hearing in the above-styled case on February 24, 25, and March 11, 1994, in Palatka and Gainesville, Florida.

APPEARANCES

For Petitioners: JOHN P. McKEEVER, Esquire
P. O. Pox 1450
Ocala, Florida 34478-1450

For Intervenors: PETER P. PELMONT, Esquire
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For Respondent: WAYNE E. FLOWERS, Esquire
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Highway 100 West
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On June 16, 1994, Mr. Sartin submitted to the St. Johns River Water Management District (District), and all other parties to this proceeding, a Recommended Order on the Drawout Proceeding, a copy of which is attached hereto as Exhibit "A". Petitioners timely filed Exceptions to the Recommended Order. Respondent District filed responses to the Exceptions filed by Petitioners. This matter then came before the Governing Board on July 13, 1994, for final agency action.

I. BACKGROUND

On November 7, 1993, at a regularly scheduled public hearing, the Governing Board of the St. Johns River Water Management District (the "Governing Board") issued an order authorizing publication of certain proposed amendments to Chapter 40C-2, Fla. Admin. Code, specifically, Rules 40C-2.302 and 40C-2.051(6). These rules are referred to as the "Reservation" and the "Exemption" rules, respectively. On December 17, 1993, Petitioners filed a petition with the Division of Administrative Hearings ("DOAH") to determine the invalidity of proposed rules 40C-2.302 and 40C-2.051 (6) [DOAH case no. 93-7109] . Sierra Club, Inc. ("Sierra"), Florida Defenders of the Environment, Inc. ("Defenders") individually filed Petitions to Intervene in both the rule challenge and drawout proceedings. The motions were granted giving each Petitioner status to participate in the proceeding as a full party. The Petition to Determine the Invalidity of Proposed Rules, is the subject of a Final Order issued by the Hearing Officer pursuant to sec. 120.54(4)(d), Fla. Stat., after three days of testimony and presentation of evidence.

On December 17, 1993, pursuant to section 120.54(17), Fla. Stat., Petitioners also filed with Respondent their request for a section 120.57, Fla. Stat., "drawout" proceeding relating to Respondent's further consideration of proposed rules 40C-2.302 and 40C-2.051(6), Fla. Admin. Code. Upon notice by Respondent, the drawout proceeding was transferred to DOAH and assigned DOAH case no. 94-0544. On February 3, 1994, the drawout proceeding was consolidated with the proposed rule challenge proceeding. It is the drawout proceeding which is the subject of this Final Order.

II. SECTION 120.54(17), Fla. Stat.--"DRAWOUT" PROCEEDING

The intent of sec. 120.54(17) is to allow adversely affected persons to convert an otherwise procedurally informal legislative, information-gathering proceeding (rulemaking under sec.120.54 (3), into a more formal adjudicatory-type proceeding with the due process safeguards provided in a sec. 120.57 proceeding. In a drawout proceeding pursuant to sec. 120.54(17), the hearing officer takes evidence, rules on proposed Findings, and makes Findings of Fact and conclusions of law on the policy issues raised in the petition for drawout, in a recommended order. The agency will issue a final order on the matters covered by the drawout petition, and then continue the rulemaking proceeding. Section 120.54(17), Fla. Stat., states:

> Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that his substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect his interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of s. 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

In a Drawout proceeding, the validity of the proposed rule is not at issue. The validity of a rule is authorized to be determined in only three administrative proceedings:

1) a sec. 120.56 rule challenge;
2) a sec. 120.54(4) proposed rule challenge; and
3) a sec. 120.535 non-rule policy challenge.

The drawout provision empowers affected persons to test the policy choice of the agency and forces the agency to justify the factual basis of its proposed rule through the procedural due process mechanisms allowed under sec. 120.57, which is not provided for in the informal sec. 120.54(3) hearing. Thus, an affected party has the opportunity to formally present facts regarding the proposed rule while the normal rulemaking process is suspended. The facts established in the drawout proceeding would enable the agency to decide whether to continue the rulemaking initiative, amend the proposed rule to address the facts determined in the drawout while still within the rulemaking proceeding authorized by sec. 120.54(3), or discontinue the rulemaking entirely.

Paragraph no. 5 of the drawout petition sets forth Petitioners' concerns or objections to the proposed rule. Petitioners assert that

> "the proposed reservation' is based upon nothing more than a calculation of the diversion capacity of existing structures being used to divert water from Prairie Creek and Camps Canal to Paynes Prairie without regard to seasonal variations in available resources or in the water needed for the protection

> of identifiable fish and wildlife in either the Paynes Prairie or Orange Lake ecosystems and without regard to the impact of such proposed diversion upon presently existing legal uses of water."

The law governing this drawout proceeding merely requires the agency to establish the policy or proposed rule by expert testimony, documentary opinions or other appropriate evidence and to explain its proposed action by a record foundation of competent substantial evidence. McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977); Home Builders and Contractors Association of Brevard, Inc. v. Dept. of Community Affairs, 585 So.2d 965 (Fla. 1st DCA 1991); sec. 120.57(1)(b)15, Fla. Stat.

III. PRELIMINARY STATEMENT

Before proceeding further in the adjudication of this matter, it is essential to note the standard of review imposed by law on a agency in reviewing recommended orders submitted by a DOAH hearing officer. The latitude of the Governing Board in reviewing exceptions to Findings of Fact made by a hearing officer in a recommended order is very limited. Subsection 120.57(1)(b)10., Fla. Stat. provides:

> The agency 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 upon competent substantial evidence...

In referring this matter to DOAH, the governing Board elected not to act as hearing officer, therefore it would be improper for the Governing Board to retry the case or to reweigh the evidence. See Tampa Wholesale Liquors, Inc. v. Div. of Alcoholic Beverages and Tobacco, 376 So.2d 1195 (Fla. 2d DCA 1979). The agency head may not reject or modify Findings of Fact made by a Hearing Officer unless a review of the entire record demonstrates that such Findings were not based upon competent substantial evidence, or that the proceedings upon which the Findings were based did not comply with essential requirements of law. Freeze v. Department of Business Regulation, 556 So.2d 1204 (Fla. 5th DCA 1990); Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987). The agency head may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as these are matters within the sole province of the Hearing Officer. Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985). Accordingly, if the record discloses any competent substantial evidence to support a Finding of Fact made by the Hearing Officer, the Board is bound by such Findings. See, e.g., Bradley, supra.

Pursuant to section 120.57(1)(b)10., Fla. Stat., the Board is free, however, to exercise its judgment and reject the Hearing Officer's conclusions of law. See, e.g. Harloff v. Southwest Florida Water Management District, 575 So.2d 1324 (Fla. 2d D.C.A., 1991) rev. den., 583 So.2d (Fla. 1991); MacPherson v. School Bd. of Monroe County, 505 So.2d 682 (Fla. 3rd DCA 1987); Siess v. Dept. of Health and Rehabilitative Services, 268 So.2d 478 (Fla. 2d DCA 1985); Alles v. Dept. of Professional Regulation, 423 So.2d 624 (Fla. 5th DCA 1982).

Here, the entire case was based upon the testimony and opinions of expert witnesses. The decision to believe one expert over another is left to the hearing officer, and that decision cannot be altered absent a complete lack of evidence from which the finding could be reasonably inferred. If a hearing

officer's finding is supported by any competent substantial evidence from which the finding could reasonably be inferred, then it cannot be disturbed. Berry v. Dept. of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988); Schumacher v. Dept. of Professional Regulation, 611 So.2d 75 (Fla. 4th DCA 1992); Fla. Chapter of Sierra Club v. Orlando Utility Commission, 436 So.2d 383, 389 (Fla. 5th DCA 1983).

IV. RULINGS ON EXCEPTIONS

Petitioners have filed ten exceptions including two composite exceptions to the Hearing Officer's Findings of Fact contained in the Recommended Order on the Drawout. The Board is mindful that the purpose of the Drawout Proceeding allows the agency to establish the proposed rule by expert testimony, documentary opinions or other appropriate evidence and to explain its proposed action by a record foundation of competent substantial evidence. The Board also recognizes, as stated above, that its ability to modify Findings of Fact made by a hearing officer is very circumscribed. Finally, upon virtually these same Findings of Fact, the hearing officer has already concluded that the District's proposed rule is not invalid, pursuant to sec. 120.54(4), Fla. Stat.

Petitioners' Exception no. 1

Petitioners take exception to the Hearing Officer's Finding of Fact no. 52. That finding states that the water flowing into the (Paynes Prairie) Preserved through the Camps Canal culverts constitutes approximately 50 percent of the surface water entering the preserve. Petitioners dispute the derivation of the Hearing Officers "approximately 50 percent" figure, and set forth their argument for this finding being misleading. This view of the evidence was during the hearing, and it was not accepted by the hearing officer. A review of the record as a whole reveals competent substantial evidence to support this finding (See Transcript pp. 276, 346, 518, and 520; and St. Johns ex. no. 1.), thus it cannot be disturbed. Sec. 120.57(1)(b)10., Fla. Stat.; Berry v. Dept. of Environmental Regulation, 530 So.2d 1019 (Fla. 4th DCA 1988). Petitioners' Exception no. 1 is therefore rejected.

Petitioners' Exception no. 2

Petitioners take exception to the hearing officer's characterization of the gravity flow of water through the Camps Canal Culverts as "natural". It is apparent from a review of the record that in the context of the testimony relating to the flow of water into the Prairie from the Camps Canal culverts, the word "natural" modifies "existing" to indicate that no manipulation of the flow by pumping or other means is contemplated. There is competent, substantial evidence in the record from which this finding can be reasonably inferred. (E. g., Transcript p. 99, and St. Johns Ex. no. 1) See Sec. 120.57(1)(b)10., Fla. Stat., and Berry, supra. This exception is rejected.

Petitioners' Exception no. 3

Petitioners take exception to Finding of Fact no. 64, second sentence. This refers to the following sentence in the reservation rule:

> "This reservation is for an average flow of 35 cubic fee per second (23 million gallons per day) representing approximately forty-five per cent (45 percent) of the calculated historic flow of surface water through Prairie Creek and Camps Canal."

In his Finding of Fact no. 64, the hearing officer states that this (sic) portion of the Reservation rule represents a very condensed summary of the historical hydrologic data relied upon by the District in deciding to reserve water for the Preserve's fish and wildlife. Petitioners read into this sentence more than is meant by the hearing officer. The use of the word "data" in this sentence refers to all the historical hydrologic information collected by the District and relied upon to calculate volumes of water flowing into the Prairie from the culverts in Prairie Creek. It does not, as Petitioners suggest, purport to represent the historic volume of flow of surface water through Prairie Creek and Camps Canal prior to 1978. The record indicates, both throughout Mr. Robison's testimony and comments made by Mr. Elledge relating to the intent of the Reservation Rule, that they understood the historic hydrologic data to refer to the information collected and relied upon to calculate flow volumes through the Camps Canal culverts. This finding may be reasonably inferred from evidence in the record. Sec. 120.57(1)(b)10., Fla. Stat., and Berry, supra. This exception is rejected.

Petitioners' Exception no. 4

Petitioners object to Finding of Fact no. 69, to the extent it appears to imply an obligation on their part to rebut competent evidence presented by the District to support a finding that the quantity of water flowing through the Camps Canal culverts by force of gravity is required to protect fish and wildlife of the Preserve. Petitioners state that this is only necessary when such evidence is introduced.

According to the District's procedural rules, the burden of proof in all proceedings is upon the party asserting the affirmative of the issue. Fla. Admin. Code Rule 40C-1.545. There were two witnesses for the District who testified that the reserved water was required to protect fish and wildlife. Petitioners did not put on their own equivalent evidence on this point but merely cross-examined the District's witnesses. The hearing officer found that Petitioners had not carried their burden to prove that the reservation of water was not necessary, by stating that they had failed to "rebut" evidence presented by the District. There is competent, substantial evidence in the record to support the Finding of Fact complained of. (Transcript pp. 351-356, 517-519) Berry, supra. See also, Fla. Debt. of Transportation v. J.W.C. Co., Inc. and FDER, 396 So.2d 778 (Fla. 1st D.C.A. 1981)(Contrary evidence of equivalent quality must be presented by opponent of agency action.) This exception is rejected.

Petitioners' Exception no. 5

Petitioners take exception to Finding of Fact no. 70, which concludes that even without the results of the hydrologic study conducted by the District, the evidence concerning the Preserve's environment supports a finding that the water reserved by the Reservation rule is required for the protection of fish and wildlife. Petitioners point to the inability of the witnesses presented by the District to pinpoint specific amounts of water necessary for protection of wildlife in general or particular species.

This exception is without merit. As indicated above, there was ample evidence in the record that the water that flows through the Camps Canal culvert into the Prairie is necessary for the protection of fish and wildlife. Petitioners did not put on any equivalent evidence to the contrary. Thus this Finding of Fact should not be disturbed. Berry, supra. See also, J.W.C. Co.,

Inc., supra (Contrary evidence of equivalent quality must be presented by opponent of agency action.) This exception is rejected.

Petitioners' Exception no. 6

Petitioners take exception to Finding of Fact no. 71, specifically to the hearing officer's use of the words "natural" and "naturally" to describe the range of flow reserved by the rule. This is objectionable to Petitioners because they claim that the water flowing through three culverts through a heavily vegetated area is not a natural occurrence. Again, as stated in the ruling on Petitioners' exception no. 2, it is clear from the context of the finding that the Hearing officer uses the word natural to refer to gravity flow rather than flow manipulated by pumping or some other method. Further, there is ample evidence in the record relating to the range of water level fluctuation within the Prairie, and the desirability of replicating that, as closely as possible, to mirror the hydrologic cycle that would exist under natural conditions. There is competent substantial evidence in the record to support this finding. (Transcript pp. 324, 350, 351.) Sec. 120.57(1)(b)10., Fla. Stat., and Berry, supra. This exception is rejected.

Petitioners' Exception no. 7

Petitioners take exception to Finding of Fact no. 73. In this finding, the hearing officer states that the various types of communities are in a state of fluctuation depending on the levels of water flowing into the preserve. He further found that these fluctuations are desirable and are required for the protection of fish and wildlife, based on the evidence presented. He concluded that for this reason the District decided to reserve for the prairie, that amount of water flowing by gravity through the Camps Canal culverts, and not some specified volume.

Petitioners argue that for the reservation to be valid, there must be a specific amount of water reserved because simply "validating the status quo" could be easily and with equal validity applied had there been two culverts, or four, or none. They also contend that the statute requires "cerebration," or some rational allocation of a precious resource between competing applicants for its use. This objection ignores the extensive evidence reflected in the record, including evaluation of several management options considered by District staff before choosing the one incorporated into the Reservation rule. (St. Johns Ex. no. 1.) There is competent substantial evidence in the record to support the finding. Berry, supra. Therefore, this exception is rejected.

Petitioners' Exception no. 8

Petitioners take exception to portions of Finding of Fact no. 75. This Finding of Fact is a composite Finding of Fact. The hearing officer used this procedural shortcut to avoid reciting all the proposed Findings by Intervenors and the District, which support the ultimate Finding of Fact that the water reserved by the Reservation rule is required to protect fish and wildlife. This Finding consists of thirty-one Findings of Fact proposed by the District, relating to the hydrologic portion of the District's study of the basin, in support of the Reservation rule. Petitioners' exceptions are to Findings numbered 58, 61, 62, 63, 64, 69, 71, 72, 73, and 74. Except for Findings of Fact numbered 58, 72 and 74, Petitioners fail to state with particularity citations to the record as required by Rule 40C-1.564, F.A.C., in support of their attack on the Findings listed above. Consequently, the Board will provide specific rulings on those exceptions, only.

Petitioners object to Subordinate Finding No. 58 because they contend that it does not accurately reflect the evidence, in that it implies an historic basis that does not exist. The model referred to calculates a volume of discharge from Newnans Lake based on measured hydrologic data collected for the period from 1942-1991, assuming existing land uses are in place. Measured historic data was used to make the calculations. There is an historic basis for the values calculated, they are not merely "implied." Transcript, p. 100. There is competent substantial evidence in the record to support the inferred finding. Berry, supra. This exception is rejected.

Petitioners assert, with regard to Subordinate Finding no. 72, that the finding misstates the testimony relied on for the finding. The testimonial evidence cited does support the Finding of Fact. The witness did not "reject" the comparison, he extended his explanation further and stated that considering the maximum difference in elevation associated with the amount of water proposed to be reserved for the Preserve, the difference is still relatively small in comparison to the overall fluctuation range of Orange Lake. Thus, there is competent substantial evidence in the record. Berry, supra. This exception is rejected.

Finally, Petitioners specifically object to Subordinate Finding number 74 regarding the reduced acreage that would be wetted if the Prairie Creek flow were eliminated from the Preserve. This finding is taken almost verbatim from the both testimonial and documentary evidence in the record. Transcript pp. 116 and 203; St. Johns Exs. No. 1, p. 131; and No. 6. This finding, too, is supported in the record by competent substantial evidence. Berry, supra. This exception is rejected.

The remaining Subordinate Findings of Fact incorporated in Finding of Fact no. 75, are also supported by evidence in the record. As stated above, the Board may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, for these are matters within the sole province of the Hearing Officer. Heifetz, supra. Accordingly, if the record discloses any competent substantial evidence to support a Finding of Fact made by the Hearing Officer, the Board is bound by such Findings. Berry, supra. This exception, including all exceptions to the Subordinate Findings, is rejected.

Petitioners' Exception no. 9

Petitioners take exception to Finding of Fact no. 76. This finding, like Finding of Fact no. 75, above, is a composite finding which adopts several Findings of Fact proposed by the District. Here again, the Hearing Officer used this procedural shortcut to avoid setting forth all the proposed Findings of Fact submitted by Intervenors and the District relating to the environment of and alternative courses of action considered for the Preserve. This Finding adopts the District's proposed Findings of Fact numbered 79 through 127, or forty-nine findings. Petitioners specifically object to these Subordinate Findings numbered 87, 91, 92, 93, 94, 106, 109, 111, 112, 114, 116, 117, 118, 123, 125, and 126.

Petitioners again complain that these Findings of Fact are irrelevant, incorrect, without foundation in the record, are substantially misleading, inappropriate, do not accurately reflect the evidence, and are slender reeds upon which to bottom the conclusions proposed in the Recommended Order. In their exceptions to Findings of Fact numbered 87, 91, 92, 93, 94, 114, 116, 125, and 126, Petitioners have provided citations to the record as required by Rule

40C-1.564, F.A.C., in support of their attack on the Subordinate Findings listed above. Consequently, the Board will provide specific rulings only on those exceptions.

Petitioners object to the portion of Subordinate Finding no. 87 which finds there will be a loss of habitat for migratory ducks without the flow from Prairie Creek. Petitioners argue that because the witness who gave this testimony could not quantify a precise amount of flow below the 45 percent reserved by the proposed rule which would still maintain the same migratory duck habitat, that no. 87 is not supported by the record. This argument is yet another version of a recurrent theme throughout Petitioners' exceptions. Contrary to the argument, however, there is competent evidence in the record to adequately address the need issue. Transcript, p. 518. See Berry, and J.W.C. Co., Inc., supra. This exception to Finding of Fact no. 87 is rejected.

Petitioners' arguments against Subordinate Finding no. 91 reiterate earlier arguments that the finding compares present conditions with what would occur if no Prairie Creek flow went to the Preserve. It is, as the hearing officer found, appropriate to evaluate the possibility of no flow going to the Preserve because it is due only to the Reservation rule that 45 percent of Prairie Creek flow will be authorized to go to the Preserve. Without the rule, no flow is authorized. It is not the prerogative of the Governing Board to reweigh the evidence. Heifetz, supra. Therefore this exception is rejected.

Petitioners take exception to Subordinate Findings numbered 92 and 93, because there is no specific quantification of the amount of water below which water rats and wood storks would be forced to seek breeding and nesting habitat elsewhere. These two Findings are supported by evidence in the record. Transcript, pp. 277 and 518. Berry, supra. This exception is therefore rejected.

Petitioners again complain that Subordinate Finding no. 94 is "substantially misleading." The record evidence indicates that the Finding is consistent with the testimony cited to support it. Transcript, pp. 532 and 533. Since the Finding is supported by competent substantial evidence, this exception is also rejected.

Petitioners contest Subordinate Finding no. 114, which they argue implies that the witness had no basis to offer the opinion that nutrient levels would be increased if the residence time of water on the Preserve were increased. The witness was explaining that the data is equivocal regarding the relationship between phosphorus and nitrogen. The evidence clearly shows that the phosphorus data gave a good indication of what happens with nutrients on the Preserve, that is that they increase with residence time. Transcript, pp. 338, 340, 341, 466-468; St. Johns Exs. 1, pp. 124, 125, 127, 128, 131, 132; 7 and 8. There is competent substantial evidence in the record to support the finding. Berry, supra. This exception is rejected.

Petitioners object to the Subordinate Finding no. 116 which states that under the elevation threshold management alternative water levels within the Preserve would decrease, and that this would have a negative impact upon wildlife dependent upon seasonal high flows. A review of the record reveals that there is competent evidence to support the finding. Transcript, p.344; St. Johns Exs. no. 1 and 6. Berry, and J.W.C. Co., Inc., supra. This exception is therefore rejected.

Petitioner is correct with regard to the inconsistency between Subordinate Findings of Fact numbered 117 and 118. Counsel for the District concedes this. Finding of Fact no. 118 is therefore modified so that the last sentence reads as follows:

> 118. Sweetwater Branch is more or less confined to a channel and discharges into Alachua Sink bypassing the eastern lobe of the Preserve.

Petitioners take exception to Subordinate Findings of Fact numbered 125 and 126. In this exception, they argue with the expert testimony that to protect the fish and wildlife in the preserve, the flow into the Preserve from Prairie Creek at the level reserved in the rule must be maintained. There is competent substantial evidence in the record to support these Findings. Transcript, pp. 276, 351 and 517. Berry, and J.W.C. Co., Inc., supra. This exception is also rejected.

The remaining Subordinate Findings of Fact incorporated in Finding of Fact no. 76, are also supported by evidence in the record. As stated above, the Board may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, for these are matters within the sole province of the Hearing Officer. Heifetz, supra. Again, if the record discloses any competent substantial evidence to support a Finding of Fact made by the Hearing Officer, the Board is bound by such Findings. Berry, supra. This exception, including all exceptions to the Subordinate Findings, is rejected.

Petitioners' Exception no. 10

Petitioners take exception to Finding of Fact no. 77, which states that the water reserved by the District's reservation rule is required for the protection of the fish and wildlife of the Paynes Prairie Preserve. This Finding of Fact sums up all the previous Findings made by the Hearing Officer. As set forth above, there is competent substantial evidence in the record before this Board to support this summary finding. The Board may not reject or modify Findings of Fact made by a Hearing Officer unless a review of the entire record demonstrates that such Findings were not based upon competent substantial evidence. Sec. 120.57(1)(b)10., Fla. Stat.; and Freeze, supra. The Board may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as these are matters within the sole discretion of the Hearing Officer. Tampa Wholesale Liquors, Inc., and Heifetz, supra. If the record discloses any competent substantial evidence to support a Finding of Fact made by the Hearing Officer, the Board is bound by such Findings. See, e.g., Bradley, supra. The decision to believe one expert over another is left to the hearing officer, and that decision cannot be altered absent a complete lack of evidence from which the finding could be reasonably inferred. Berry, Schumacher v. D.P.R., Sierra Club v. O.U.C., supra. Therefore, this exception is rejected.

Accordingly, the Findings of Fact as modified, and the Conclusions of Law set forth in the Recommended Order are hereby adopted and incorporated in their entirety, and it is ORDERED that:

> The Recommended Order dated June 16, 1994, attached hereto as Exhibit A, is adopted in its entirety, as modified by the final action of the Governing Board (Ruling on Petitioners' Exception no. 9 (118)).

DONE AND ORDERED this 13th day of July 1994, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

By:_____
PATRICIA T. HARDEN
CHAIR

RENDERED this 14th day of July 1994.

By:_____
PATRICIA C. SCHULTZ
DISTRICT CLERK

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