STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, DEPARTMENT OF TRANSPORTATION, Petitioner,	)	
vs.	)	CASE NO. 94-5261
ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	

RECOMMENDED ORDER

A hearing was held in this case on May 3, 4 and 5, 1995, in Deland, Florida, and on February 5, 1996, in Tallahassee, Florida, before Suzanne F. Hood, a Hearing Officer with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Francine M. Ffolkes, Esquire
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For Respondent: Nancy B. Barnard, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are: (1) whether the Florida Department of Transportation is entitled to a Management and Storage of Surface Waters permit to authorize the construction and operation of a surface water management system to serve eight bridge replacements on State Road 5 in Volusia County, Florida; (2) whether the Florida Department of Transportation is entitled to a Wetland Resource Management permit for the placement and excavation of fill material in waters of the state in connection with the replacement and widening of said bridges and their approaches; and, if so, (3) what conditions should apply.

PRELIMINARY STATEMENT

On July 14, 1994, Respondent St. Johns River Water Management District (Respondent) issued a Notice of Agency Action denying Petitioner Department of Transportation's (Petitioner) applications for a Management and Storage of Surface Water (MSSW) permit (Permit Application No. 4-127-0253AG) and a Wetland

Resource Management (WRM) permit (Permit Application No. 12-127-0112AG). Petitioner filed a Petition for Administrative Hearing with Respondent on or about July 28, 1994. Respondent referred this matter to the Division of Administrative Hearings on September 22, 1994.

On October 13, 1994, Hearing Officer David M. Maloney issued a Notice of Hearing setting this matter for formal hearing on May 1-5, 1995. Hearing Officer Suzanne Hood issued an Amended Notice of Hearing dated April 20, 1995, changing the hearing dates to May 3-5, 1995.

Respondent filed a Motion for Continuance on April 24, 1995. After hearing oral argument, Hearing Officer Hood issued an Order dated April 25, 1995, denying Respondent's request for continuance.

The parties filed a Joint Prehearing Stipulation on April 28, 1995.

During the hearing in May of 1995, Petitioner presented the testimony of six expert witnesses and offered fifty-two exhibits all of which were accepted into evidence without objection. Respondent presented the testimony of four expert witnesses and offered six exhibits all of which were accepted into evidence without objection.

A public hearing was held on the evening of May 4, 1995. Hearing Officer Hood heard the testimony of six Volusia County residents and accepted three exhibits into the record.

As the hearing ended on May 5, 1995, the parties requested that the record remain open for submission of evidence relating to an engineering report being prepared by Marshall, Provost and Associates for the county of Volusia. By order dated May 9, 1995, Hearing Officer Hood directed the parties to file a status report on or before June 30, 1995, setting forth a proposed schedule for filing the engineering report.

Subsequently, the parties filed three joint status reports on June 27, 1995, July 28, 1995, and September 13, 1995, respectively. Hearing Officer Hood issued an Amended Notice of Hearing on September 18, 1995, setting this matter for additional formal proceedings on December 4, 1995.

On November 20, 1995, Petitioner filed an Unopposed Motion for Continuance. Hearing Officer Hood issued an order rescheduling the case for hearing on February 5, 1996, in Tallahassee, Florida. During a telephone conference on February 2, 1996, Hearing Officer Hood denied Respondent's ore tenus motion to exclude the testimony of Petitioner's final expert witness or, in the alternative, for a continuance.

On the final day of hearing, Respondent offered the testimony of one expert witness and offered two additional exhibits which were accepted into evidence without objection. Petitioner presented the testimony of one expert witness and offered its fifty-third exhibit which was accepted into evidence.

On February 21, 1996, Petitioner filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders. Hearing Officer Hood entered an order extending the time for filing proposed recommended orders to March 8, 1996.

Transcripts of the proceeding were filed with the Division of Administrative Hearings on May 18 and 22, 1995, and February 22, 1996. Respondent timely filed its proposed findings of facts and conclusions of law on March 8, 1996.

On March 15, 1996, Petitioner filed a proposed recommended order. Respondent filed a Motion to Strike Petitioner's Proposed Recommended Order on March 18, 1996. Finding that Respondent suffers no prejudice by the late filing of Petitioner's proposed recommended order, Respondent's motion to strike is hereby denied. The Appendix to this Recommended Order contains specific rulings on each of the parties' proposed findings of fact.

In a telephone conference on May 21, 1996, the undersigned requested that the parties submit briefs as to the applicability of Section 62-4.242, Florida Administrative Code, in this case. Respondent filed said memorandum on May 28, 1996. Petitioner filed said memorandum on June 3, 1996.

FINDINGS OF FACTS

I. THE APPLICATIONS

1. Petitioner applied to Respondent for a MSSW permit to authorize the construction and operation of a surface water management system (system) for four dual bridge replacements and the required approach reconstruction for State Road 5 (U.S. 1) in Volusia County, Florida. The project requires a MSSW permit because it traverses a flowing system which has an upstream drainage area that is greater than five square miles.

2. Petitioner also applied for a WRM (dredge and fill) permit to authorize the placement of fill material in and excavation of material from waters of the state or the replacement and widening of the same bridges addressed in the MSSW permit application. The original application requested permission to dredge 0.076 acres and fill 0.104 acres in jurisdictional waters of the state.

3. The project site is located south of Port Orange, Florida, north of New Smyrna Beach, Florida, and adjacent to the Halifax River in Volusia County, Florida.

4. The project limits include the four dual bridges and their approaches which are approximately 350 feet north and south of each structure.

5. The four dual bridges are northbound and southbound pairs for a total of eight bridges. Six bridges are located over Spruce Creek and its north and south relief channels. Two bridges are located over Rose Bay.

6. The proposed project is within the area of Spruce Creek and Rose Bay both of which are designated as an Outstanding Florida Water (OFW) under Rule 62-302.700(9)(i), Florida Administrative Code.

7. Construction of the approach roadways to the proposed bridges will encroach in 0.19 acres of marsh along the causeway side slopes. Currently the 0.19 acres of marsh are disturbed areas that do not provide significant habitat for fish or wildlife. However, these areas do provide some erosion control and serve as a visual screen between the road and wildlife foraging in the open-water area.

8. There will be an additional 0.02 acres of encroachment in open waters for placement of proposed bridge pilings.

II. EXISTING SITE

9. The existing roadway, State Road 5, crosses a wide expanse of wetlands consisting of tidal marsh and creeks associated with Spruce Creek and Rose Bay. It is a major transportation corridor consisting of a four lane, divided highway with a forty-foot grass median and ten-foot grass shoulders.

10. Existing roadway drainage is primarily sheet flow over the grass shoulders to the waterways. Existing medians drain to the north and south sides of the bridges by either catch basins or concrete spillways at ends of the bridges.

11. The distance across Rose Bay on State Road 5 is approximately 900 feet in length. The causeway is 700 feet in length. The Rose Bay bridges span the remaining 200 feet of open water.

12. The causeway side slopes drop off steeply into the salt marsh. A typical salt marsh contains vegetation which is usually a productive area for wildlife. In this case, portions of the causeway side slopes lack vegetative cover and are subject to erosion.

13. Other portions of the side slopes are vegetated with a mixture of marsh species such as sea-oxeye, marsh elders, mangroves and cordgrass. Some areas are densely vegetated by wax myrtle or Brazilian Pepper, a nuisance species.

14. The roadway and the bridges are centered in a 200-foot right-of-way with a fifty-five mile per hour posted speed limit.

15. The Rose Bay causeway has been in place since at least the early 1940s. Aerial photographs of Volusia County dated February 1943 show the existing causeway with a single bridge and the old US 1 causeway. Bridges with causeways have existed at these locations for over 50 years.

16. The current bridges were constructed in 1957 and 1958 of twenty-foot concrete slab spans. At that time the bridges were designed for a normal life expectancy of fifty years. They met all design and safety standards when Petitioner constructed them.

17. The bridges vary in length: (a) Rose Bay bridges, 200 feet; (b) Spruce Creek North Relief bridges, 200 feet; (c) Spruce Creek bridges, 360 feet; and (d) Spruce Creek South Relief bridges, 260 feet.

18. Each of the existing bridges have two twelve-foot travel lanes with two-foot inside sidewalks for a total width of twenty-eight feet curb to curb. The bridges do not have shoulders but they do have three-foot outside sidewalks. The bridges currently have a posted speed limit of fifty-five miles per hour but they do not conform with Petitioner's current design criteria.

19. Presently, surface drainage on the bridges is provided by four-inch diameter open scuppers at approximately eight-foot spacing along the gutter lines on both sides of the twin bridges, with the exception of the Spruce Creek north and south relief structures which drain to the low side of their super-elevation. Concrete spillways exist at bridge corners to handle overflow.

20. Scuppers are holes in the bridge through which storm-water runs off directly into the open water below without any treatment. The project site currently provides no treatment for stormwater runoff.

21. The existing bridges show severe deterioration. The two Rose Bay bridges and the two Spruce Creek South Relief bridges are in especially poor condition.

22. The bridges are only five or six feet above salt water which is very corrosive. This environment has accelerated the deterioration of the bridges.

23. The structural supports of the Rose Bay and Spruce Creek South Relief bridges are in such bad shape that Petitioner inspects them every six months instead of every two years.

24. In 1993, Petitioner made emergency repairs to the southbound Rose Bay bridge and to the northbound Spruce Creek South Relief bridge. These repairs consisted of encasing eleven pilings in concrete jackets. The concrete pile jackets will only last five to seven years because they will not arrest the deterioration of the steel inside the piling. Petitioner has not included further repairs to the bridges in its work program pending resolution of this case.

25. Sufficiency ratings for bridges are based on the condition of their structural elements. A bridge with a sufficiency rating below fifty is structurally deficient and qualifies for federal bridge replacement funding. A sufficiency rating between fifty and eighty qualifies a bridge for replacement using only state funds. Bridges with sufficiency ratings over eighty meet all safety and structural load carrying requirements. A bridge is structurally deficient if one or more structural elements have deteriorated to such an extent that they impact the serviceable life of the bridge.

26. The most recent bridge inspection reports for the existing bridges show sufficiency ratings from 42.9 and 45 for the two Rose Bay bridges to 68.7 for the northbound Spruce Creek North Relief bridge.

27. The existing bridges are functionally obsolete. They do not meet current design and safety standards because they are too narrow. The bridges also have low load capacity ratings (H20-S66-44). Their pile bents are in poor condition and cracking is evident in several pile caps. Reinforcing steel is exposed in some areas due to concrete spalling. Additionally, their safety barriers are inadequate.

28. Petitioner initially placed this project into its work plan in 1989. In 1991 Petitioner gave replacement of the bridges a higher priority. Petitioner subsequently added construction dollars for the project to its work program. At that time, Petitioner expected construction to take place in 1995 and 1996. However, in 1993 and 1994, other bridges were given a higher priority.

29. Petitioner rescheduled the proposed construction in its current work program for 1998 and 1999 with construction dollars budgeted at $9,700,000.

30. If the construction of the project does not begin as scheduled in 1998, the bridges will require major repairs and rehabilitation within two years

at a cost of approximately $750,000. They will also require load and weight limitations resulting in trucks making a ten-mile detour.

III. PROPOSED PROJECT

31. Petitioner intends to replace the bridges on their existing alignment within the existing right-of-way. The roadway sections will have two twelve-foot travel lanes, eight-foot median shoulders, ten-foot outside shoulders (four-feet paved), and a forty-foot median.

32. Construction will be phased so that the public can use one roadway while the bridges on the opposite roadway are being replaced. Phased construction will eliminate the need for temporary fill in adjacent wetlands.

33. The existing bridges will be replaced with wider structures for safety reasons. The proposed bridges will have two twelve-foot travel lanes, six-foot wide inside shoulders and ten-foot wide outside shoulders for a total width of forty feet curb to curb.

34. The new bridges will have fewer pilings. Currently there is a row of four 14-inch square pilings for every twenty feet of bridge span. The proposed construction will place a row of four 24-inch square pilings for every thirty feet of bridge span. The number of pile bents for each set of bridges will be reduced as follows: (a) Spruce Creek South Relief bridges from fourteen to ten; (b) Spruce Creek bridges from nineteen to fourteen; (c) Spruce Creek North Relief bridges from eleven to eight; and (d) Rose Bay bridges from eleven to eight. Petitioner will reduce impacts to the creek and bay by using fewer pile bents and by using pile bents instead of piers.

35. Petitioner does not propose to increase the length of the bridges or the number of travel lanes. The new bridges will have increased weight and load capacity (HS20-44) and a design speed of seventy miles per hour.

36. Petitioner proposes to raise the vertical alignment of the bridges over Spruce Creek North Relief, Spruce Creek South Relief and Rose Bay by one and one half to two feet to accommodate the fifty-year flood and allow for small boat passage under the structures. There will be no change in the vertical clearance for the Spruce Creek bridges. Petitioner expects to raise the roadway approaches to the proposed grade of the new bridges.

37. The project will not cause a change in land use. Highway capacity and pollutant loading will not increase. Petitioner does not propose to reduce the length of the causeway or provide openings in it. However, the project is not a simple in-kind bridge replacement because of the necessary construction to widen the bridges and roadways, raise the bridge approachments, and recontour the causeway's side slopes.

38. Petitioner designed the project's stormwater management system to maximize stormwater quality treatment. The wetlands along the project corridor limit Petitioner's alternatives in this regard. Petitioner's own regulations relative to roadway base clearance limit the use of swales and retention basin storage. Additionally, seasonal high water table elevations limit the efficient use of exfiltration systems.

39. Shoulder gutters and inlets will collect all runoff from the proposed bridges and route it to median exfiltration systems prior to discharge. Runoff from super-elevated pavement areas will flow to median exfiltration trenches and

roadside swales. Where practical, Petitioner intends to route the remaining runoff to the median exfiltration trenches, roadside swales and dry retention basins for some water quality treatment prior to discharge.

40. Runoff from portions of the project will sheet-flow into the bay. In these areas, Petitioner will plant supplemental vegetation along the embankment. Because the existing vegetation is sparse, the post-development planting will stabilize the berms, reduce erosion, and provide some water quality treatment that currently is nonexistent.

41. The total planting area will include 0.7 acres. Prior to planting, Petitioner will remove all Brazillian Pepper from the planting area. Petitioner will subsequently control all nuisance vegetation by approved methods so that it constitutes no more than ten percent of the cover in each stratum.

42. The proposed planting plan is necessary to mitigate the loss of the fringe marsh along the causeway. Petitioner's mitigation plan includes recontouring the steep side slopes of the causeway to lessen the grade and prevent erosion.

43. After analyzing alternative best management practices for efficacy and cost, Petitioner correctly determined that an exfiltration trench system is the most appropriate stormwater treatment for the proposed project. Wet ponds are not feasible because there is not enough land area within the project site and Petitioner's right-of-way to meet pond width and depth criteria. Space requirements and potential for significant wetland impacts limit the use of dry ponds. Petitioner proposes to use roadside swales in only two areas.

44. The exfiltration trenches or "French drains" run the entire length of the proposed project. This type of drain is a pipe with holes in it which is surrounded by rocks and filter fabric. The pipe and the spaces between the rocks provide storage for water as they fill up. The system recovers as the water percolates into the ground water.

45. The exfiltration trench system will decrease the peak runoff rate for the site because it will eliminate the direct discharge of runoff from the new impervious area (3.25 acres). However, the project will result in treatment of only fifty-six percent of the runoff from the project site. The proposed treatment system will collect more water than it is designed to assimilate.

46. Petitioner plans to control erosion and turbidity problems directly related to the construction phase by using hay bales, silt fences, turbidity barriers and other appropriate sediment control measures.

47. Respondent cannot use construction barges to replace the bridges at Rose Bay, Spruce Creek North Relief, or Spruce Creek South Relief because the water at those locations are too shallow. However, the Spruce Creek bridges have enough clearance to allow the use of a sectional barge provided it is off-loaded from the existing road.

48. The project meets the 100-year and 10-year floodplain criteria because of the increased elevations of the bridges and their approaches.

49. The parties have agreed to permit conditions which ensure protection of manatees in the project vicinity during construction. The long term maintenance and operation of the project will not harm endangered or threatened

species. The project's impact on the conservation of other fish and wildlife and their habitats is discussed below.

50. The public currently uses the surrounding waterways for navigational and recreational purposes. The proposed project will allow greater access for navigation because the vertical clearance of some of the bridges will be higher. Leisure activities such as fishing have never been very good in Rose Bay. The proposed project will not cause significant additional restrictions on recreational opportunities.

51. The proposed project does not raise concerns about the preservation of any significant archeological or historical resources.

52. The proposed bridges will have a life span of 75 years. Accordingly, the project is permanent in nature.

IV. PROBLEMS WITH ROSE BAY

53. Rose Bay is a relatively small, shallow embayment. Like most estuaries, its depth averages a meter to a meter and one half. The bay is microtidal in that the tide heights vary only by one foot.

54. Rose Bay is related to the adjacent southern, eastern, and northwestern marshes. The southern marsh is a high-marsh. These marshes produce the detritus and all the plants and animals that a healthy estuarine system needs.

55. Historically, the marshes and their small creeks have served as drainage areas for the surrounding watershed. They have always been important as flood storage areas. Before urban development of the watershed, the marshes and creeks gradually released freshwater into the saline waters of Rose Bay.

56. During normal tides, these marshes are connected. When the tide is extremely high, the marshes and the bay become a single sheet of water from the causeway (located between the east and west lobes of the bay) to the railroad (located on the western shore of the bay's west lobe) and extending south to Strickland Bay (located west and south of the Spruce Creek bridges.)

57. Ponce Inlet opens to the Atlantic Ocean. It is located approximately three and one half miles to the south and east of Rose Bay.

58. The Halifax River is part of the Intercoastal Waterway to the east of Rose Bay. It flows south between the ocean and the bay.

59. Spruce Creek merges with the Halifax River and wanders down to Ponce Inlet. The flow continues south where it becomes the Indian River.

60. Rose Bay's fish and wildlife habitat is currently degraded and biologically inactive. Its diversity of wildlife is more limited than other estuaries with more healthy ecosystems.

61. As an estuary, Rose Bay should serve as a nursery for fish and a habitat for benthic organisms. It should also serve as a food source for higher organisms such as egrets, herons, ospreys, and other wading birds. At present, Rose Bay's ability to perform these functions is very limited.

62. The water in Rose Bay is turbid. Sunlight cannot penetrate it. A shallow estuary like Rose Bay should have sunlight and oxygen for the aquatic plants that live at the bottom.

V. SOLUTIONS

63. The ongoing degradation of Rose Bay is attributable to two major problems: (a) the input of freshwater carrying pollutants and sediments from the developed upland areas; and (b) the accumulated volume of unconsolidated sediment. As discussed below, man-made obstructions to circulation are not causing significant problems in the bay.

64. Unless the first two problems are corrected, Rose Bay will continue to deteriorate. In that event, the degradation will spread to the surrounding populations of wildlife further reducing diversity.

65. Freshwater has always drained into Rose Bay through surface runoff and subsurface flow. However, in its undeveloped state, the watershed did not discharge enough freshwater to disturb the salinity regime in the bay.

66. Public and private development of Volusia County has altered the natural landscape. Since the turn of the century, Rose Bay's watershed areas have become highly urbanized. The urban areas are major sources of untreated stormwater runoff and associated pollution. The freshwater inputs have altered the natural conditions of the bay's salinity regime.

67. The developments use drainage canals to funnel runoff directly into Rose Bay. The canals are open ditch systems which have no stormwater controls at their outfalls. When the water table elevation is high, the canals discharge fresh groundwater into the bay. They convey sediment as suspended material into Rose Bay.

68. Several tributaries are responsible for the input of freshwater to Rose Bay. The largest contributors of freshwater are: (a) the Nova Canal System at the Halifax Canal outfall which drains part of Daytona Beach and Port Orange to the north; (b) the Cambridge Canal which drains part of Port Orange; and (c) and the Harbor Oaks Canal which drains the residential subdivision on the bay's northern shore between the existing causeway and the old highway island.

A. Freshwater Inputs: Volume and Sediment Loading

69. The first and most important step in the restoration of Rose Bay is to control the volume of freshwater inputs and reduce the sediment loading of runoff through these canals. There is not enough energy in Rose Bay's currents, with or without the causeway, to wash out the incoming material at the rate the surrounding watersheds are presently discharging it.

70. If Petitioner removes the causeway and old highway island before the sediment loading of freshwater inputs is reduced, muck will still accumulate in the bay. There is no persuasive evidence that removal of the causeway alone will reduce the net sediment deposition in Rose Bay. More likely than not, causeway removal will result only in localized variations of sediment accumulation. To the extent that the causeway currently impedes the downstream movement of sediment, its removal presents a potential danger to the Halifax River and other downstream ecosystems.

71. Reducing the sediment loading from the runoff of the surrounding watersheds will require a cooperative effort by federal, state and local governmental entities. These entities include, without limitation, Respondent, Volusia County, and municipalities such as the City of Port Orange.

72. The record contains some evidence that the City of Port Orange is planning to make retrofit improvements for the treatment of stormwater in the Cambridge Canal basin with construction to begin in 1997. Volusia County is in the planning and budgeting stage for a stormwater box which will remove silt from the Harbor Oaks canal. Volusia County also has a conceptual plan and cost estimate for a detention facility in two places along the Nova Canal.

73. There is no persuasive evidence that the entities involved in restoring Rose Bay will successfully accomplish their goals. The time frame in which they might achieve their objective of reducing the sediment inputs is entirely speculative and beyond Petitioner's control.

B. Existing Sediment

74. The second step in restoring Rose Bay requires the removal of the accumulated muck, cohesive materials that flocculate and settle out. This will ameliorate the damage done by decades of excessive freshwater input. It will also eliminate any danger that existing muck will travel downstream to the Halifax River if and when Petitioner agrees to remove the causeway and/or the old highway islands.

75. Freshwater slows down when it enters the broader area of the bay allowing sediment to settle on the bottom. The muck in Rose Bay is high in organics and metal concentrations. Over the years, this silt or muck has accumulated to a greater degree in some areas than others.

76. There is no accumulation of sediment in areas where the flow of water is constricted causing the current to have an increased rate of velocity. For instance, the bottom is firm where water flows under the railroad trestle bridge on the western side of the bay. The bottom is also firm where the water flows under the Rose Bay bridges. The tidal flow sours these areas.

77. There is a minimal amount of muck on the seaward side of the causeway to the southeast of the spoil islands or old US 1 causeway. There is no impediment to tidal flushing in this area.

78. The sediment ranges from 3.78 to 6.4 feet deep on the western side of the causeway and south of the Rose Bay bridges.

79. The dredge hole for the new causeway is now level with silt to a depth of about two and half to three feet.

80. In some areas of the central bay at low tide, there is a foot and a half of water over the muck. Below the water, the muck ranges between three and six feet deep.

81. Areas along the northern shore of the bay's west lobe have hard bottoms where there is good circulation. On the other hand, muck in areas along the southern shore of the west lobe extends above the water level at low tide.

82. In the middle of the bay's west lobe, at the midpoint between the causeway and the railroad trestle, the mud is four to five feet deep with less than a foot of water at mean-low tide.

83. On the northwestern side of the bay near the isthmus, sediment has accumulated to the mean-water level. Therefore, mud is exposed at any tide below the mean high.

84. In the eastern lobe of Rose Bay, the elevation of the water over the mud is almost three feet at mean-low tide and over four feet at mean-high tide. The muck in the middle of the eastern lobe is 8.79 feet deep. Sediment has accumulated to a depth of over six feet in places along the northern shore of the east lobe.

85. Natural ecosystems generally have firm bottoms which allow animals like oysters and other shellfish to build communities. In their free swimming larvae stage, shellfish seek and anchor on hard bottoms so that they will not be washed away by tidal currents as they begin their life. They also need relatively silt-free tidal water to provide them with a plankton component because they are filter feeders.

86. Other animals that depend on firm bottoms are marine worms, mussels and crown snails that move around on hard bottoms. Clams need a firm bottom so they can burrow into it and put up their siphon tube to get food. The bottom of Rose Bay is too soft for these types of animals to find attachment points or to support themselves.

87. The accumulated silt in Rose Bay reduces the habitat for shrimp and crabs that move along the bottom. Crabs can move across softer substrates but the muck inhibits the growth of oysters on which the crabs can feed.

88. One would expect to find redfish in parts of Rose Bay where the flow is constricted. However, the muck reduces the feeding habitat of the redfish.

89. Live oysters and clams are only found in areas of the bay which have no sediment accumulation. Oysters have not been commercially harvested from Rose Bay since the 1960s. At that time, water quality tests showed high bacteriological counts which resulted in closure of the bay for purposes of commercial shellfishing.

90. The accumulated silt in Rose Bay could be removed hydraulically or by traditional dredging. The muck is high in organics but contains no industrial wastes or hazardous material. Therefore, the material could be disposed of in a landfill or used for some beneficial purpose.

91. The sediments can also be removed by bioremediation which injects nutrients and oxygen into the muck. Bioremediation would cause the muck to oxidize in place.

92. Removal of the muck is a reasonable engineering alternative after its source is reduced. Once the demucking process begins, removal of the muck could take from five to ten years depending on the method used.

93. The City of Port Orange has identified city property adjacent to Rose Bay as a location for a staging facility to remove the muck. The record contains no evidence of a commitment by the City of Port Orange or any other

governmental entity to study the effects of removing sediment buildup much less to actually implement a plan to demuck the bay.

C. Impediments to Flow

94. Rose Bay's tidal force is naturally restricted by the distance it must travel from the ocean. It is hydraulically connected to the Halifax River which runs parallel to the coast east of the bay. In order to reach Rose Bay, the tide meanders through shallow creeks and around mangrove islands between Rose Bay and the main channel of the Halifax River.

95. The tide's velocity and amplitude is already attenuated by the time it reaches the causeway. Even with no obstructions to flow, Rose Bay is too shallow and wide to cause a balanced flushing action. The greater weight of the evidence indicates that Rose Bay did not really "flush" in its undeveloped state.

96. The causeway acts like a dam to some extent. It constricts the uniform flow of water in and out of the western lobe of Rose Bay. The only opening in the causeway is the 200 foot span of the Rose Bay bridges. The narrow opening causes the velocity of the current to increase dramatically as it passes under the bridge. However, there is no persuasive evidence that the causeway actually reduces the quantity of water that passes under the bridge.

97. The old highway island in the bay's eastern lobe also redirects the flow of water. The narrow openings on either side of the island increase the velocity of water as it passes through those areas creating circular flow patterns in the eastern lobe.

98. During the application review process, Petitioner proposed a memorandum of understanding in which it agreed to consider removal of the old highway island and the man-made spoil islands at the mouth of Rose Bay for inclusion in an mitigation bank as credits for Petitioner's other projects. The parties were unsuccessful in concluding their negotiations regarding these matters. The record contains no other evidence as to what entity owns and controls the old highway island. Therefore, it is highly speculative whether Petitioner or any other entity will be able to remove this obstacle, and if so, when such a task might be completed.

99. The railroad trestle on the bay's western shore is another constriction to flow. However, it is not a major obstruction because it has little or no causeway.

100. Together, the causeway and old highway island alter the circulation patterns in the bay to some extent. They create circulation dead zones. Silt accumulates in their shadow. Removal of the causeway will eliminate some of the dead zones. Removal of the causeway and the old highway island will restore the bay's natural flow pattern and allow dispersion of the sediment over a larger area. Nevertheless, the causeway alone is not making a significant contribution to the process which is slowly changing the bay from an estuarine system to a freshwater system.

101. The most significant factor that affects circulation in Rose Bay is related to the large volume of freshwater that is discharged into the bay from the drainage ditches. Tidal flows, with or without the causeway, are much less important than the freshwater flows in determining the bay's circulation regime.

102. This flow of freshwater has created two-layer flow. With two layers of flow, one layer is isolated from the other and vertical mixing between the two does not occur. Mixing of the layers is important for the exchange of dissolved oxygen to the bottom layers. Without oxygen, the sediments at the bottom become anaerobic.

103. Two-layered flow is common for an estuary with strong freshwater inputs and minor tidal forces. The influence of the freshwater flow in Rose Bay is so strong that, even after the removal of the obstacles, the direction of the residual current will be downstream in the top layer and upstream in the more saline bottom layer. The net direction for the residual velocity will always be downstream unless the freshwater inputs are reduced to the level that eliminates two-layer flow.

104. It will be impossible to reduce all freshwater inflows to the bay; therefore, it will be necessary to reduce the suspended solids in the freshwater inputs substantially and to remove existing accumulations of muck before making any improvements that return the circulation regime to its natural condition. Otherwise, the downstream flow will transport the incoming sediment and the existing muck into the Halifax River.

105. The circulation dead zones and places with circular flow patterns correspond to areas of accumulated sediment. Removal of both flow impediments will change the directional flow patterns in the eastern and western lobes of the bay to some extent--more in the former than the latter. However, there is no persuasive evidence that the change in flow patterns for either of the lobes will cause a significant reduction in the sediment accumulation except in localized areas.

106. Installing a thirty foot opening or two ten by six foot culverts in the causeway will not create a significant improvement in the circulation of Rose Bay. Any thing less than complete removal of the causeway and the old highway island will not provide a noticeable change in the bay's circulation patterns.

107. Wind is an important factor in the circulation of Rose Bay. The causeway impedes wind-driven flow. There have been no studies to document the impact of wind on the circulation regime in the bay with or without the causeway.

108. Sediment accumulation will continue as long as the watersheds discharge suspended solids into the bay. Estuaries are depositional environments by nature; they naturally accumulate silt to some degree. Rose Bay is typical in this regard.

109. As an open water system, Rose Bay and the mangrove detrital system in the marsh adjacent to the bay may be able to assimilate a higher level of sediment input than normal and still support a healthy estuarine system. However, the record does not document what the normal level of sediment absorption is or what higher level of sediment input the mangrove swamp might have to absorb to retain a healthy estuarine system after removal of the causeway. Evidence indicating that removal of the causeway alone will result in the slow, safe resuspension and assimilation of the muck over fifty years is not persuasive.

110. Replacement of the causeway with a bridge span would add two and a half million dollars to the cost of the proposed project in bridge construction

costs alone. That figure does not include the costs associated with: (a) redesign of the project; (b) causeway removal; (c) removal of the old highway island; and (d) all related activities. Redesign of the project to accommodate causeway removal will take two and a half years.

111. The long term operation and maintenance of the Rose Bay bridges and causeway will not cause significant adverse impacts in the bay. The existing causeway is a minor hydraulic restriction. The greater weight of the evidence indicates that removal of the causeway will have no beneficial effect on the restoration of the bay without: (a) a substantial reduction in the freshwater inputs and sediment loading; (b) removal of the existing muck; and (c) removal of the old highway island.

VI. MITIGATION

112. Petitioner initially proposed to install two ten by six foot side-by-side box culverts in the causeway as mitigation for the project's 0.2 acre of wetland impacts at an additional cost of approximately one hundred thousand dollars. Petitioner subsequently withdrew its proposal to install the culverts because of the difficulty in quantifying the long term effect the culverts would have on the bay, i.e. effects on water quality, downstream erosion, and flushing of accumulated sediments. The record now contains persuasive evidence that construction of the culverts alone will not benefit Rose Bay.

113. Petitioner submitted a revised mitigation plan to reestablish a vegetated buffer of marsh species in those areas that will be disturbed and for areas which are unvegetated and susceptible to erosion. The total area of marsh plantings will be 0.7 acres along eleven shoreline lengths. Additionally, Petitioner plans to plant shrubs along upland portions of the causeway to further buffer the wetlands from the roadway. Respondent found this planting scheme insufficient to offset adverse impacts of the project.

114. Respondent took the position that the impacts and effects of the proposed project extend beyond the immediate project vicinity. Respondent suggested that Petitioner consider removal of the causeway and construction of a bridge across Rose Bay. Petitioner did not find this alternative acceptable.

115. The parties also considered development of a mitigation bank in which Petitioner could earn credits for other projects in exchange for performing mitigation in Rose Bay. These negotiations between the parties were unsuccessful.

VII. FACTUAL CONCLUSIONS

116. Petitioner has provided reasonable assurances that the construction, maintenance and operation of the project will not adversely impact: (a) the quality of receiving waters; (b) navigation; (c) recreational opportunities; (d) conservation of fish and wildlife and their habitats; (e) wetland functions; (f) existing surface water storage and conveyance capacity; and (g) Respondent's overall objectives for the district. Instead, the project will provide a net improvement to these factors over existing conditions.

117. Concerns related to the project's discharge of untreated stormwater, constrictions which alter the bay's circulation patterns, and accumulation of sediment in the causeway's shadow are negligible when compared to the damage currently being caused by freshwater inputs loaded with sediment and total

sediment accumulation. There is no persuasive evidence that the project will exacerbate the ongoing degradation of Rose Bay.

118. The project's proposed design and best management practices are appropriate for the existing site specific conditions. The probable efficacy and costs of alternative plans, such as removal of the causeway and the old highway island, are not reasonable until such time as the freshwater inputs, sediment loading, and accumulated muck can be reduced and/or eliminated. Additionally, it is not reasonable to require Petitioner to make further expensive repairs to the existing causeway and bridges pending correction of the primary problems which may or may not ever occur.

119. Even though the project is permanent in nature, it is, on balance, clearly in the public interest to proceed with the project as designed at this time. The project provides a net improvement to the current condition and relative value of functions being performed by areas affected by the proposed activity. The increased elevation of the bridges will enhance navigational and recreational opportunities for many years to come. The new bridges will have fewer pilings thereby reducing adverse impacts to Spruce Creek and Rose Bay. Treatment of stormwater where none currently exists will improve the quality of water that the existing site is discharging, untreated, directly into the bay. The revised mitigation plan will be especially effective in offsetting the project's wetland impacts and reducing the potential for soil erosion in the immediate project vicinity.

120. The totality of the record indicates that the current ambient water quality in Rose Bay is severely degraded and slowly continuing to deteriorate. This degradation is primarily due to factors not related to the existing causeway and bridges. The project will discharge some untreated stormwater due to unavoidable site limitations. However, this discharge of untreated stormwater will not significantly lower the existing ambient water quality or result in significant violations of water quality standards. To the contrary, the proposed project will result in a net improvement to the quality of the bay's receiving waters over time.

121. The project provides for enhanced public use of Rose Bay. It facilitates the maintenance of a major transportation corridor that existed prior to the effective date of Rose Bay's designation as an OFW. Petitioner's design implements appropriate management practices and suitable technology for site specific conditions. There is no record evidence of a viable alternative to the proposed activity, including complete causeway removal or undertaking no change, except at an unreasonably higher cost.

122. Nothing short of complete removal of the causeway and the old highway island will restore the bay's natural flow patterns or prevent the accumulation of sediment in their shadow. Petitioner has removed parts of causeways on other projects permitted by Respondent. Removal of the impediments to flow may at some point in the future be necessary to help balance tidal forces with freshwater inputs after the latter has been reduced and accumulated muck is eliminated. In the mean time, Petitioner is entitled to MSSW and WRM permits

CONCLUSIONS OF LAW

123. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

124. Petitioner has the burden of establishing its entitlement to the requested permits. Capeletti Brothers v. Department of General Services, 432 So. 2d 1359 (Fla. 1st DCA 1983).

125. Sections 373.069(2)(c), 373.413 and 373.416, Florida Statutes, and Rule 40C-4, Florida Administrative Code, authorize Respondent to issue individual MSSW permits upon an applicant's demonstration that the project meets the requirements of applicable statutes and rules.

126. The Florida Department of Environmental Protection delegated the responsibility to Respondent to issue WRM (dredge and fill) permits pursuant to Section 403.918, Florida Statutes (Supp. 1992), and Rules 62-312 and 62-4, Florida Administrative Code, when the applicant provides reasonable assurance that the project will not violate water quality standards and that a project involving an OFW is clearly in the public interest.

127. The Florida Department of Environmental Protection delegated this jurisdiction to Respondent based on the Operating Agreement Concerning Management and Storage of Surface Waters Regulation and Wetland Resource Regulation dated August 28, 1992, as amended December 21, 1993 and August 25, 1994. Respondent implements its powers, duties and functions relative to WRM permits in accordance with that agreement and Rules 62-312 and 62-101.040(12)(a)3, Florida Administrative Code.

128. In 1993, the legislature revised Chapters 373 and 403, Florida Statutes, to streamline or combine Respondent's MSSW permitting program with the Department of Environmental Protection's WRM permitting program. At that time, the legislature incorporated portions of Section 403.918, Florida Statutes, in Section 373.414, Florida Statutes.

129. New rules implementing Section 373.414, Florida Statutes, became effective on October 3, 1995. See Rules 40C-1, 40C-4, 40C-40, and 40C-400, Florida Administrative Code. However, Respondent reviews applications pending on June 15, 1994, under the MSSW and WRM rules in place prior to the effective date of the new rules. See Section 373.414(14), Florida Statutes. Petitioner originally filed the subject applications with Respondent in July of 1993. They were still pending on June 15, 1994.

VIII. PUBLIC INTEREST

130. Applicants seeking MSSW and WRM permits for projects involving a body of water which has been designated as an OFW must show that the project is clearly in the public interest. Section 373.414, Additional criteria for activities in surface waters and wetlands, Florida Statutes, states in pertinent part:

> (1) As part of an applicant's demonstration that an activity regulated under this part will not be harmful to the water resources or will not be inconsistent with the overall objectives of the district, the governing board or the department shall require the applicant to provide reasonable assurance that state water quality standards applicable to waters as defined in s. 403.031(13) will not be violated and reasonable assurance that such activity in, on or over surface waters or wet-

lands, as delineated in s. 373.421(1), is not contrary to the public interest. However, if such an activity significantly degrades or is within an Outstanding Florida Water, as provided by department rule, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.

(a) In determining whether an activity, which is in, on, or over surface waters or wetlands, as delineated in s. 373.421(1), and is regulated under this part, is not contrary to the public interest or is clearly in the public interest, the governing board or the department shall consider and balance the following criteria:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;

2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;

3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;

4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;

5. Whether the activity will be of a temporary or permanent nature;

6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and

7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

(b) If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects which may be caused by the regulated activity. If the applicant is unable to meet standards because existing ambient water quality does not meet standards, the governing board or the department shall consider mitigation measures proposed by the applicant that cause net improvement of the water quality in the receiving body of water for those parameters which do not meet standards. If mitigation requirements imposed by a local government for surface water and wetland impacts of an activity regulated under this part cannot be reconciled with mitigation requirements approved

> under a permit for the same activity issued under this part, the mitigation requirements for surface water and wetland impacts shall be controlled by the permit issued under this part.

131. The project is permanent in nature, but the greater weight of the evidence indicates that it will not adversely affect the other factors listed in Section 373.414(1), Florida Statutes. The beneficial aspects of the project outweigh any harmful effects. Petitioner's proposed vigorous planting scheme provides additional mitigation. Accordingly, the project is, on balance, clearly in the public interest.

IX. ANTIDEGRADATION PERMITTING REQUIREMENTS FOR OUTSTANDING FLORIDA WATERS

132. Rule 62-302.700(1), Florida Administrative Code, Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters, provides in pertinent part:

> (1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in Rule 62-4.242(2) and (3), F.A.C., is to be permitted in Outstanding Florida Waters and Outstanding Natural Resource Waters, respectively, notwithstanding any other Department rules that allow water quality lowering.

133. Rule 62-4.242, Florida Administrative Code, Antidegradation Permitting Requirements; Outstanding Florida Waters; Outstanding National Resource Waters; Equitable Abatement, states in pertinent part:

> (2) Standards Applying to Outstanding Florida Waters:
>
> (a) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:
>
> * * *
>
> 2. The proposed activity of discharge is clearly in the public interest, and . . .
>
> * * *
>
> b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction . . . .
>
> (b) The Department recognizes that it may be necessary to permit limited activities or discharges in Outstanding Florida Waters to allow for or enhance public use or to maintain

> facilities that existed prior to the effective date of the Outstanding Florida Water designation, . . . However, such activities or discharges will only be permitted if:
>
> 1. The discharge or activity is in compliance with the provisions specified in subparagraph (2)(a)2. of this section; or,
>
> 2. Management practices and suitable technology approved by the Department are implemented for all stationary installations including those created for drainage, flood control, or by dredging or filling; and
>
> 3. there is no alternative of not undertaking any change, except at an unreasonably higher cost.
>
> (c) For the purpose of this section the term "existing ambient water quality" shall mean (based on the best scientific information available) the better water quality of either (1) that which could reasonably be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application.

134. The water quality of Rose Bay was severely degraded when it was designated an OFW in 1991. The process of degradation will continue until the freshwater inputs and sediment loading are reduced and the existing muck is removed. The greater weight of the evidence indicates that the project will not exacerbate the ongoing degradation of the bay. To the contrary, the project will provide stormwater treatment where none currently exists. The recontouring of the causeways' side slopes and the vigorous planting scheme will provide further mitigation for adverse impacts to the wetlands and additional protection against erosion. It follows that the project will not significantly lower the existing ambient water quality. Instead, it will result in a net improvement to the quality of receiving waters over existing conditions.

135. The project will enhance public use as it improves navigational and recreational opportunities. It will maintain a transportation corridor that existed prior to the effective date of the OFW designation. The project design implements the best management practices and suitable technology within the limitations of the site. There is no alternative, including the alternative of not undertaking any change, except at an unreasonably higher cost. Accordingly, the project meets the requirements of Rule 62-4.242, Florida Administrative Code.

X. MANAGEMENT AND STORAGE OF SURFACE WATERS

136. In order to receive a MSSW permit, Petitioner must meet the requirements of Rule 40C-4 and 40C-42, Florida Administrative Code. Rule 40C-4.301, Florida Administrative Code, Conditions for Issuance of Permits, provides, in pertinent part:

> (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:

1. Adversely affect navigability of rivers and harbors;

2. Adversely affect recreational development or public lands;

3. Endanger life, health, or property;

4. Adversely affect the maintenance of minimum flows and levels established in chapter 40C-8, F.A.C.;

5. Adversely affect the availability of water for reasonable beneficial purposes;

6. Be incapable of being effectively operated;

7. Adversely affect the operation of a Work of the District established in chapter 40C-6, F.A.C.;

8. Adversely affect existing agricultural, commercial, industrial, or residential developments;

9. Cause adverse impacts to the quality of receiving waters;

10. Adversely affect natural resources, fish and wildlife;

11. Induce saltwater or pollution intrusion;

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(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, including the minimum flows and levels established in chapter 40C-8, F.A.C., will not be adversely affected;
3. Existing surface water storage and conveyance capabilities will not be adversely affected;
4. The system must be capable of being effectively operated;
5. The activity must not result in adverse impacts to the operation of Works of the District established in chapter 40C-6, F.A.C.;
6. The quality of receiving waters will not be adversely affected such that the water quality standards set forth in chapters 17-3, 17-4, 17-302, and 17-550, F.A.C., will be exceeded;
7. Wetland functions will not be adversely affected;
8. Otherwise not be harmful to the water resources of the District.

137. Rule 40C-42.023, Florida Administrative Code, Requirements for Issuance, states as follows:

(1) To receive a general or individual permit under this chapter the applicant must provide reasonable assurance based on plans, test results and other information, that the stormwater management system:
(a) will not result in discharges from the system to surface and ground water of the state that cause or contribute to violations of state water quality standards as set forth in chapters 17-302 and 17-550, F.A.C.;
(b) will not adversely affect drainage and flood protection on adjacent or nearby properties not owned or controlled by the applicant;
(c) will be capable of being effectively operated and maintained pursuant to the requirement of this chapter; and
(d) meets any applicable basin criteria contained in chapter 40C-41, F.A.C.

(2)(a) A showing by the applicant that the stormwater management system complies with the applicable criteria in section 40C-42.024, 40C-42.025, 40C-42.026, and 40C-42.0265, F.A.C., shall create a presumption that the applicant provided reasonable assurance that the proposed activity meets the requirements in paragraphs (a), above.
(b) A showing by the applicant that the stormwater management system complies with the criteria of subsection 40C-24.025(8) and (9), F.A.C., shall create a presumption that the

applicant provided reasonable assurance that the proposed activity meets the requirements in paragraph (b), above.

(c) A showing by the applicant that the storm-water management system complies with the applicable criteria of sections 40C-42.027, 40C-42.028, and 40C-42.029, F.A.C., shall create a presumption that the applicant provided reasonable assurance that the pro-posed activity meets the requirements in paragraph (c), above.

138. Rule 40C-42.024, Florida Administrative Code, General and Individual Permits, states in pertinent part as follows:

(3) The following types of stormwater manage-ment systems will be processed as an individual permit according to the administrative proce-dures set forth in chapter 40C-4, F.A.C.:

* * *

(c) Systems which do not meet the applicable criteria of sections 40C-42.025, 40C-42.026, 40C-42.0265, F.A.C. An affirmative showing by the applicant based on plans, test results, calculations, or other information that an alternative design is appropriate for the specific site conditions will create a presump-tion in favor of satisfying the applicable standards in subsection 40C-42.023(1), F.A.C.

(4) In otherwise determining whether reason-able assurance has been provided for para-graphs (3)(b) and (c), above, the District shall, where appropriate, consider:

(a) Whether best management practices are proposed, ...

(b) The public interest served by the system;

(c) The probable efficacy and costs of alter-native controls; and

(d) Whether reasonable provisions have been made for the operation and maintenance of the proposed system.

139. Applying the above reference provisions of Chapter 40C, Florida Administrative Code, to the unique facts of this case, Petitioner is entitled to issuance of an MSSW permit. Balancing the specific beneficial and harmful effects of the various individual objectives listed in Rule 40C-4.301, Florida Administrative Code, indicates that the project is not inconsistent with the state's policies set forth in Chapter 17-40, Florida Administrative Code, or Respondent's overall objectives as expressed in its rules and written policies.

140. Respondent alleges that one of its goals is to restore Rose Bay to its natural state. Removal of the causeway might be appropriate at some point in time to restore the bay's natural circulation pattern and eliminate the muck that has accumulated in the causeway's shadow. However, Respondent's plans to reduce freshwater inputs loaded with harmful sediment and to eliminate the

accumulated muck are vague and speculative. Removal of the causeway before Respondent accomplishes these more serious problems is potentially harmful to the downstream ecosystems.

141. The project's proposed stormwater treatment system is appropriate for the specific site conditions. The project incorporates the best management practices and state of the art technology considering the limitations of the project site. The project is clearly in the public interest. There is no evidence that redesigning the project to remove the causeway and to construct a single bridge across Rose Bay at any point in time would be any more efficient than the proposed project in treating the stormwater runoff from the corridor. Requiring Petitioner to make such a change in its proposed design is unreasonably costly under the circumstances.

XI. WETLAND RESOURCE MANAGEMENT

142. The applicable rule criteria for reviewing a WRM permit are found in Rule 62-312 [formerly 17-312], Florida Administrative Code, Dredge and Fill Activities. Rule 62-312.080, Florida Administrative Code, Standards for Issuance or Denial of a Permit, states in pertinent part:

> (1) In accordance with Section 403.918(1), F.S., no permit shall be issued unless the applicant has provided the Department with reasonable assurance based on plans, tests results, or other information that the proposed dredging or filling will not violate water quality standards.
>
> * * *
>
> (3) No permit shall be issued for dredging and filling which significantly degrades or is within an Outstanding Florida Water unless the applicant complies with section 403.918(2), Florida Statutes, and section 62-4.242, F.A.C.

143. Section 403.918, Florida Statutes (1991), sets forth the applicable statutory criteria for granting or denying the instant WRM permit. In 1993, the legislature revised and transferred this section to Section 373.414(1), Florida Statutes, set forth above as the public interest test in paragraph 130. The 1993 revision did not make any substantive changes in the test.

144. Under either version of the test, Petitioner has provided reasonable assurances that the project will be clearly in the public interest. The project's stormwater treatment system will not result in significant violations of water quality standards. Rather, it will result in a net improvement to the quality of receiving waters over time. The supplemental planting scheme will further reduce the adverse impact of existing conditions.

145. Additionally, as discussed above, the project will not violate Rule 62-4.242(2) and (3), Florida Administrative Code. Accordingly, Petitioner has demonstrated entitlement to a WRM permit.

XII. MITIGATION

146. The responsibility of determining whether an applicant's proposed mitigation is sufficient to offset any adverse impacts of a project is the sole province of the permitting agency. 1800 Atlantic Dev. v. Dept. of Env. Reg.,

552 So. 2d 946, 955 (Fla. 1st DCA 1989). However, it is a rare case that cannot be mitigated under any circumstances. Id. at 954. Respondent's notice of agency action denying the subject application gave only two suggestions as mitigation for adverse impacts of the project: (1) the removal of the causeway and construction of a bridge across Rose Bay; and (2) the placement of two ten feet by six feet box culverts side by side in the causeway. Respondent's notice did not address Petitioner's proposed vigorous planting scheme as mitigation for the project.

147. During the formal hearing it became clear that constructing culverts in the causeway would not have any beneficial effect on restoring the bay's circulation patterns and reducing the sediment accumulation. The hearing also revealed that removal of the causeway is impracticable and not advisable, regardless of the expense, until some indefinite time in the future, if ever. On the other hand, proceeding with the project as designed will improve the existing conditions and serve a substantial public need.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore recommended that Respondent enter a final order granting Petitioner a MSSW and a WRM permit for the subject applications in accordance with the terms and conditions as recommended in the technical staff reports presented at hearing.

DONE AND ENTERED this 13th day of June, 1996, in Tallahassee, Leon County, Florida.

SUZANNE F. HOOD, 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 13th day of June, 1996.

APPENDIX

The following constitutes specific rulings pursuant to Section 120.59(2), Florida Statutes, on all of the Proposed Findings of Fact submitted by the parties to this case.

Petitioner's Proposed Findings of Fact

1-4. Accepted in Findings of Fact (FOF) 1-5.
5. Accepted in FOF 18.
6. Accepted in FOF 33.
7-8. Accepted in FOF 35-37.
9. Accepted in FOF 6.
10. Accepted in FOF 9.
11-13. Accepted in FOF 11-13.

14-16. Accepted in FOF 7-8.
17. Accepted in FOF 63, 69, & 74-83.
18. Accepted in FOF 9-10.
19-20. Accepted in FOF 19-20.
21. Accepted in FOF 3 & 5.
22. Accepted in FOF 16-17.
23. Accepted in FOF 18 & 27.
24. Accepted in FOF 14 & 16.
25. Accepted in FOF 21-22.
26. Accepted in FOF 23 & 27.
27. Accepted in FOF 24.
28. Accepted in FOF 26.
29-30. Accepted in FOF 25.
31. Accepted in FOF 27.
32. Accepted in FOF 29 & as restated in FOF 28.
33. Accepted as subordinate to FOF 27-30.
34. Accepted in FOF 30.
35-39. Accepted in FOF 31-37.
40-46. Accepted in FOF 38-45.
47. Accepted in FOF 50.
48. Accepted in FOF 15.
49-53. Accepted in FOF 7, 9, 12-13, & 42.
54-107. For the most part, these proposed findings of facts are repetitious of Petitioner's proposed findings of fact 1-53. To the extent they are not repetitious, the are accepted in part as subordinate to FOF 7-52, 112-115, & 116-122. Specifically reject any proposed finding of fact stating that the project will not result violations of water quality standards or lower the existing ambient water quality. However, any such impacts will not be significant. The project will result in a net improvement to the quality of receiving waters over existing conditions. See FOF 116-122.
108-144. Accepted as subordinate to 53-111, 112-115, & 116-122.
145-154. Accepted as subordinate to 53-122.
155-202. Accepted in part and rejected in part. See FOF 53-122. The hydrodynamic modeling analysis was persuasive evidence that the causeway alters the bays's circulation regime and that sediment accumulates in the shadow of the causeway. It was not persuasive evidence that the causeway restricts the quantity of water flowing in and out of the bay's west lobe. The greater weight of the evidence indicates that the freshwater inputs, loaded with sediment, are primarily responsible for the bay's degraded condition. The causeway is a minor hydraulic restriction.

Respondent's Proposed Findings of Fact

1-30. Accepted as restated in FOF 1-52.
31-58. Accepted in part and rejected in part. See FOF 53-111. Specifically reject proposed findings 34 & 37. The causeway is not a major cause for the lack of circulation and flushing in the bay. The man-made

obstructions to flow are not causing significant problems. Removal of the causeway and the old highway island will eliminate circulation dead zones and prevent the accumulation of sediment in their shadow. However, there is no persuasive evidence that removal of these obstructions to flow will significantly improve the habitat of Rose Bay as a whole. Reject proposed findings 38-40 because there is no persuasive evidence that creating an opening in the causeway would: create more flow; diminish the bay's bacterial problem; reduce the impact of freshwater inputs; or quickly restore the bay's biological system. Reject first sentence of proposed finding of fact 43 because the extent to which the bay can be restored is speculative. Reject the second sentence of proposed finding of fact 43 as not supported by persuasive evidence. Reject proposed findings of fact 45-58 in part because the extent and effect of commitment by Volusia County and the City of Port Orange to restore Rose Bay is vague and speculative. There is no persuasive evidence that either of these entities will ever achieve their alleged goals.

59-96. Accepted in part and rejected in part. See FOF 63-93. Proposed findings of fact 61 is overbroad. The first sentence of proposed findings of fact 84 is over broad. Reject proposed finding of fact 88-95 because no persuasive evidence as to which method should be used to remove accumulated sediment or how long it will take to complete the job after that decision is made. There is no evidence that any entity will be able to secure the necessary permits and funding to remove the sediment. Proposed findings of fact 96 is rejected as contrary to more persuasive evidence.

97-152. Accepted in part and rejected in part. See FOF 94-111. Reject any proposed finding that the causeway restricts the quantity of water flowing in and out of the bay's west lobe as contrary to more persuasive evidence. Proposed findings of fact 103-104 rejected as contrary to more persuasive evidence. Rose Bay does not and never did really "flush." Removing the causeway and the old highway island would restore a natural circulation pattern but would not cause the bay to flush. Proposed findings of fact 110-144 accepted but subordinate to FOF 94-111. Reject proposed findings of fact 145 because Rose Bay will always be a depositional environment. Reject proposed findings of fact 146 as overbroad and not supported by persuasive evidence. Proposed findings of fact 147 is misleading because removal of the causeway will have only a localized effect on sediment accumulation. Proposed finding of fact 152 is rejected as not supported by persuasive evidence.

153. Not a finding of fact.

154-176. Accepted in part as subordinate to FOF 31-52, 112-115, 116-122.

177-178. Not findings of fact.
179. Rejected as overbroad and not supported by persuasive evidence.
180-181. Not findings of fact.
182. Rejected as not supported by persuasive evidence.
183. Not a finding of fact.
184-205. Rejected to the extent of any conflict with more persuasive evidence in support of FOF 116-122.
206-219. Accepted as subordinate to 112-115.

COPIES FURNISHED:

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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

==========

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

Petitioner,

vs. DOAH CASE NO. 94-5261
SJRWMD F.O.R. 94-1501

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Respondent
_____/

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings (DOAH), by its duly designated hearing officer, the Honorable Suzanne F. Hood,, held a formal administrative hearing in the above- styled case on May 3, 4, and 5, 1995, in Deland, Florida, and on February 5, 1996, in Tallahassee, Florida.

A. APPEARANCES

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On June 13, 1996, Ms. Hood submitted to the St. Johns River Water Management District (District), and all other parties to this proceeding, a Recommended Order, a copy of which is attached hereto as Exhibit A. The District staff timely filed Exceptions to the Recommended Order as well as a Suggestion for Remand. Petitioner timely filed a Response to the Respondent's Exceptions to Recommended Order and Suggestion of Remand. This matter then came before the Governing Board on July 10, 1996, formal agency action.

B. STATEMENT OF THE ISSUES

The issues in this case are: (1) whether the Florida Department of Transportation, (DOT) is entitled to a Management and Storage of Surface Waters (MSSW) permit to authorize the construction and operation of a surface water

management system to serve eight bridge replacements on State Road 5 in Volusia County, Florida; (2) whether the Florida Department of Transportation is entitled to a Wetland Resource Management (WRM) permit for the placement and excavation of fill material in waters of the state in connection with the replacement and widening of said bridges and their approaches; and, if so, (3) what conditions should apply.

C. APPLICABLE STATUTES AND RULES

In 1993 the Florida Legislature enacted Chapter 93-213, Laws of Florida, (the Florida Environmental Reorganization Act) which, among other things, repealed Sections 403.91-403.929, Florida Statutes (F.S.)(1991), and substantially revised Section 373.414, F.S., adding to that section a public interest test nearly identical to the language formerly found in Section 403.918, F.S. (1991). 30 and 45, Chapter 93-213, Fla. Laws, respectively. The Department of Environmental Protection and the water management districts were directed to adopt rules implementing the revised Section 373.414, F.S. Section 373.414(9), F.S.; See Fla. Electric Coordinating Group, et. al. v. Suwannee River Water Management District. et. al. 17 FALR 3242 (DOAH Final Order 7/24/1995) aff'd, 674 So.2d 141 (Fla. 4th DCA 1996). These rules became effective October 3, 1995. See history notes to Rule 40C-4.302, Florida Administrative Code (F.A.C.) After the effective date of these rules, permits issued pursuant to Part IV of Chapter 373, F.S., were to be know as Environmental Resource Permits 14, Chapter 93-213, Fla. Laws.

In 1994, the Legislature enacted Chapter 94-122, Laws of Florida, adding Subsection 14 to Section 373.414, F.S. Subsection 373.414(14), F.S., provides that applications for permits pursuant to Sections 403.91-403.929, F.S., (1991) and Part IV of Chapter 373, F.S., which are submitted and complete prior to the effective date of rules adopted pursuant to Subsection 373.414(9), F.S., (October 3, 1995) shall be reviewed under the rules adopted pursuant to Sections 403.91-403.929, F.S., (1991) and part IV of Chapter 373, F.S., in existence prior to the effective date of the rules adopted pursuant to Subsection 373.414(9), F.S. (October 3, 1995). The WRM permit application which is the subject of this proceeding was submitted pursuant to the authority under Sections 403.91-403.929, F.S., (1991) and was submitted and complete prior to October 3, 1995. The MSSW permit application which is the subject of this proceeding was submitted pursuant to the authority under Part IV of Chapter 373, F.S., and was submitted and complete prior to October 3, 1995. Thus, the Petitioner is entitled to have these two applications reviewed under the relevant rules as they existed before October 3, 1995.

Subsection 373.414(1), F.S., as amended by Chapter 93-213, Laws of Florida, was not self executing. This subsection did not become effective until the rules adopted pursuant to Subsection 373.414(9), F.S., became effective. Thus, the MSSW permit application which is the subject of this proceeding is to be reviewed under the statutory language of Part IV of Chapter 373, F.S., it existed before Chapter 93-213, Laws of Florida. Specifically, this review does not include the public interest test that now exists in Subsection 373.414(1), F.S. In Conclusion of Law 130, the Hearing Officer reviews the MSSW permit application which is the subject of this proceeding under the public interest test of Subsection 373.414(1). The Governing Board may reject conclusions of law which have been proposed by a hearing officer. Harloff v. City of Sarasota, 575 So.2d 1324 (Fla. 2nd DCA 1991) rev. den., 583 So.2d 1035 (Fla. 1991). For the reasons stated above, this review is incorrect, and Conclusion of Law 130 is rejected to this extent.

The WRM permit application which is the subject of this proceeding is governed by Chapter 62-312, F.A.C., as such rule existed before October 3, 1995. Chapter 62-312, F.A.C., existing before October 3, 1995, implemented Sections 403.91-403.929; F.S. (1991), including Section 403.918, F.S. (1991). Thus, any WRM permit application reviewed under Chapter 62-312, F.A.C., existing before October 3,1995, must also be reviewed under Section 403.918, F.S.(1991). Section 373.414(1), F.S. (1995), does not apply to such application.

In Conclusions of Law 130, 131, 143, and 143, the Hearing Officer reviews the WRM permit application which is the subject of this proceeding under the public interest test of Section 373.414(1), F.S. For the reasons stated above, the Hearing Officer's review of this WRM permit application under Section 373.414(1), F.S., is incorrect and is rejected. Harloff, supra This WRM permit application is reviewed under Section 403.918, F.S. (1991).

D. HARM TO THE WATER RESOURCES AND OBJECTIVES OF THE DISTRICT

In its Exception No. 3, the District argues that, in Conclusion of Law 139, the Hearing Officer has incorrectly combined the harm to the water resources permitting criteria of 40C-4.301(2)(a) with the objectives of the District permitting criteria of 40C-4.301(1)(a). The District asserts that the harm to the water resources permitting criteria of 40C-4.301(2)(a) are not susceptible to balancing one criteria against another to determine whether overall the activity will not result in harm to the water resources of the District. But rather, reasonable assurance must be provided by D.O.T. for each criteria. Thus, the District argues, that in Conclusion of Law 139, the Hearing Officer incorrectly balances all of the criteria 40C-4.301(2)(a) and 40C-4.301(1)(a) to determine that this project satisfies the all of the requirements of 40C-4.301 without making specific determinations as to whether the individual requirements of 40C- 4.301(2)(a) are met. This exception is accepted in part.

As a background reference, Section 373.413, F.S., provides that the District may permit activities regulated under Part IV of Chapter 373, F.S., to ensure that such activities will not be harmful to the water resources of the district. Section 373.416, F.S., allows the District to permit the operation and maintenance of activities regulated under Part IV of Chapter 373, F.S., to ensure that these activities will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

The criteria which must be met to ensure that an activity requiring a permit under Part IV of Chapter 373, F.S., is not inconsistent with the overall objectives of the district are set forth in former Rule 40C-4.301(1)(a), F.A.C. (See 9.0 Applicant's Handbook: Management and Storage of Surface Waters effective 11/22/94.) Former Rule 40C-301(1)(a), F.A.C., provided:

> (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:
>
> 1. Adversely affect navigability of rivers and harbors;
> 2. Adversely affect recreational development or public lands;
> 3. Endanger life, health, or property;

4. Adversely affect the maintenance of minimum flows and levels established in chapter 40C-8, F.A.C.;
5. Adversely affect the availability of waters for reasonable beneficial purposes;
6. Be incapable of being effectively operated;
7. Adversely affect the operation of a Work of the District established in chapter 40C-6; F.A.C.;
8. Adversely affect existing agricultural, commercial, industrial, or residential developments;
9. Cause adverse impacts to the quality of receiving waters;
10. Adversely affect natural resources, fish and wildlife;
11. Induce saltwater or pollution intrusion;
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.

In determining whether an activity meets the overall requirements of former Rule 40C-4.301(1)(a), F.A.C., each of the specific requirements of 40C-4.301(1)(a)1.14 must be evaluated. See e.g. Florida Wildlife Federation v. Admiral Corporation, DOAH No. 86-3272, SJRWMD FOR 86-471 (SJRWMD Final Order February 12, 1987). Where this evaluation indicates that the activity may result in both beneficial and harmful effects, the District may consider a balancing of specific effects to show that the activity is not inconsistent with the overall objectives of the District. Former Rule 40C-4.301(1)(b), F.A.C.

The criteria which must be met to ensure that an activity requiring a permit under Part IV of Chapter 373, F.S., will not be harmful to the water resources of the district, are set forth in former Rule 40C-4.301(2)(a), F.A.C. (See 10.0 Applicant's Handbook: Management and Storage of Surface Waters effective 11/22/94) Former Rule 40C-4.301(2)(a) provides:

(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, including the minimum flows and levels established in chapter 40C-8, F.A.C., will not be adversely affected;
3. Existing surface water storage and conveyance capabilities will not be adversely affected;
4. The system must be capable of being effectively operated
5. The activity must not result in adverse impacts to the operation of Works of the District established in chapter 40C-6,F.A.C.;
6. The quality of receiving waters will not be adversely affected such that the water quality standards set forth in chapters 17-2, 17-4,17-302, and 17-550, F.A.C., will be exceeded;
7. Wetland functions will not be adversely affected;
8. Otherwise not be harmful to the water resources of the District.

In determining whether an activity meets the overall requirements of former Rule 40C-4.301(2)(a), each of the specific requirements of 40C-4.301(2)(a)1.- 8. must be met. There is no balancing of the specific requirements of 40C-4.301(2)(a) 1. though 8. as there is for the specific requirements of 40C-4.301(1)(a)1.-14.

In this case, ,the Hearing Officer correctly lists the applicable permitting criteria of former Rule 40C-4.301, F.A.C., in Conclusions of Law 136. However, in Conclusion of Law 139, the Hearing Officer summarily balances these criteria as a unit to determine that the Petitioner is entitled to the permit. As stated above, there is no balancing of the criteria of 4OC-4.301(2)(a), and a balancing of the criteria 40C-4.301(1)(a) only occurs after an evaluation of the individual criteria of 40C-4.301(1)(a)1.-14. indicates that the activity may result in both beneficial and harmful effects. The Hearing Officer also states that some of these criteria are met in paragraph 116 of the Recommended Order under the title Factual Conclusions, but these statements are conclusions of law that these criteria are met with no analysis of how the facts found demonstrate that the enumerated criteria are satisfied. Thus the Hearing Officer has failed to correctly evaluate this activity under the individual criteria of former Rules 40C-4.301(1)(a) and 40C- 4.301(2)(a). The Governing Board may reject an erroneous legal interpretation of an administrative rule. Section 120.57(1)(6)(10), F.S.; Alles, supra. The Hearing Officer's Conclusions of Law 116 and 139 are rejected.

E. CLEARLY IN THE PUBLIC INTEREST, INCONSISTENT WITH THE OBJECTIVES OF THE DISTRICT, AND HARMFUL TO THE WATER RESOURCES OF THE DISTRICT.

This project is located within Spruce Creek and Rose Bay. (Finding of Fact 6) Spruce Creek and Rose Bay are designated Outstanding Florida Waters (OFW) under Rule 62-302.700(9)(i), F.A.C. Since this project is located within OFWs, the project must be clearly in the public interest for the Petitioner to receive its WRM permit. Section 403.918, F.S. (1991).

In Finding of Fact 100, the Hearing Officer states that removal of the causeway will restore Rose Bay's natural flow pattern, and allow dispersion of the bay's sediment over a larger area. Finding of Fact 122 provides that nothing short of complete removal of the causeway will restore Rose Bay's natural flow patters or prevent accumulation of sediments in the causeway's shadow. In this same finding of fact, the Hearing Officer declares that removal of the impediments to-tidal flow in Rose Bay will be necessary in the future to balance tidal forces with freshwater inputs after the freshwater discharges have been reduced and the accumulated muck eliminated. In Finding of Fact 52, the Hearing Officer states that this bridge will last for 75 years which is, in essence, permanent.

The essence of the Hearing Officer's reasoning in the Conclusions of Law is that other activities are also contributing to the degradation of Rose Bay, and that it is more important to correct these activities than to remove the causeway. Thus, the Hearing Officer found the project to be clearly in the public interest, even though it will permanently restrict the natural tidal flow into Rose Bay. We disagree. While neither party has filed exceptions on this point, the Governing Board's authority to modi the Recommended Order is not dependent on the filing of exceptions. Westchester General Hospital v. DHRS, 419 So.2d 705 (Fla. 1st DCA 1982).

The OFW clearly in the public interest test is more stringent that the contrary to the public interest test for a non-OFW. Florida Keys Citizen Coalition v. 1800 Atlantic Developers, 8 F.A.L.R. 5564, 5572 (DER Final Order 1986), rev'd on other grounds, 552 So 2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So 2d 345 (Fla. 1990). The weight to be accorded to the factors in Section 403.918(2), F.S. (1991) in determining compliance with the clearly in the public interest test are questions of law and policy reserved to this agency, not the hearing officer. 1800 Atlantic Developers v. DER, 552 So.2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So.2d 345 (Fla. 1990); Fla. Power Corp. v. Fla. DER, 14 FALR 4156, 4163 (DER Final Order 1996), aff'd, 638 So.2d 545 (Fla. 1994). If the dredge and fill permit is issued, there will be no foreseeable opportunity to correct the tidal restriction created by the causeway. The bridge and causeway will remain a permanent obstruction to the natural tidal flow into Rose Bay, and thus a permanent barrier to the complete restoration of Rose Bay. See 403.918(2)-(a)3. and 403.918(2)(a)5, F.S. (1991). Addressing the other activities contributing to the degradation of Rose Bay will never result in its complete restoration because the facts establish that the causeway will permanently prevent natural tidal flow. Petitioner has failed to show that other public interest considerations of Section 403.918(2), F.S. clearly outweigh the permanent loss of the natural flow patterns of Rose Bay. Thus, while we fully recognize that other activities are contributing to the degradation of Rose Bay, we hold that it is not clearly in the public interest to permanently prevent the natural tidal flow of Rose Bay, an OFW. Any conclusions of law in the Recommended Order to the contrary are rejected. Harloff, supra.

For the same reasoning we hold that the Petitioner has not provided reasonable assurance that this project is not inconsistent with the objectives of the District and not otherwise harmful to the water resources of the District. See Rules 40C-4.301(1)(a)14. and 40C-4.301(2)(a)8., F.A.C. Because Rose Bay is an OFW, it is not consistent with the objectives of the District to authorize a permanent project that will prevent the complete restoration of Rose Bay even after the other activities contributing to the Bay's degradation are addressed. Similarly, approving this project will otherwise harm the water resources of the District in violation of Rule 40C-4.301(2)(a)8, because it will permanently forgo the opportunity restore the natural tidal flow to a degraded OFW waterbody, although we recognize that other forces are contributing to that waterbody's degradation. Any conclusions of law in the Recommended Order to the contrary are rejected. Harloff, supra.

F. RULINGS ON THE DISTRICT'S EXCEPTIONS

The District's Exception No. 1 is not necessary to the final determination of this proceeding because we conclude that this project is not clearly in the public interest. The District's Exceptions Nos. 2 and 5 are accepted in that the Hearing Officer's determination that the proposed project will not cause significant degradation to Rose Bay is not sufficient to satisfy the requirements of Rule 62-4.242(2)(a)2.b., F.A.C. However, this project also does not meet the requirements of Rule 62-4.242(2)(a)2.b., F.A.C., because it is not clearly in the public interest. The District's Exception No. 3 is accepted to the extent described above. However, the suggestion of remand contained within Exception No. 3 is rejected. The District's Exception No. 4 is accepted to the extent described in provisions above regarding applicable rules and statutes.

ORDER OF DENIAL

WHEREFORE, based upon the foregoing, the MSSW and WRM permit applications which are the subject of this proceeding are hereby DENIED. To receive approval, the Petitioner must submit new permit applications which contain a plan for removal of the causeway through Rose Bay sufficient enough to restore natural tidal flow.

DONE AND ORDERED this 10th day of July 1996, in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY:_____
WILLIAM SEGAL
CHAIRMAN

RENDERED this 6th day of August 1996.

BY:_____
PATRICIA C. SCHULTZ
DISTRICT CLERK

ENDNOTE

1/ We note that the Department of Environmental Protection (DEP) has taken varying and somewhat inconsistent positions on this issue. For example, in Dibbs v. Dept. of Envl. Protection, 17 F.A.L.R. 1531 (Fla. DEP Final Order April 4, 1995), DEP applied the public interest test of Section 373.414(1), F.S., to a WRM permit application reviewed under Chapter 62-312, F.A.C., as such rule existed before October 3, 1995. Whereas, in Robert E. VanWagoner and Save Anna Maria, Inc. v. Dept. of Transportation and Dept. of Envtl. Protection, DOAH Case Nos. 95-3621, 95-3622; DEP Case Nos. 95-1073, 95-1094 (Fla. DEP Final Order May 14,1996), DEP applied Section 403.918, F.S. (1991), to this type of WRM permit application.

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