

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

CITIZENS FOR SMART GROWTH,
KATHIE SMITH AND ODIAS SMITH,

Petitioners,
v.

CASE NOs. 10-3316
10-3317
10-3318

DEPARTMENT OF TRANSPORTATION,
MARTIN COUNTY BOARD OF COUNTY
COMMISSIONERS, AND SOUTH FLORIDA
WATER MANAGEMENT DISTRICT,

ALJ: Donald R. Alexander

Respondents.

**SOUTH FLORIDA WATER MANAGEMENT DISTRICT'S
PROPOSED RECOMMENDED ORDER**

On October 25, 26, and 27, 2010, a final administrative hearing was held in this case in Stuart, Florida, before Donald R. Alexander, Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH), pursuant to Sections 120.569 and 120.57, Florida Statutes (Fla. Stat.) (2009).

APPEARANCES

For Petitioners: Jeffrey W. Appel, Esquire
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For Respondent: Bruce R. Conroy, Esquire
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For Respondent: David A. Acton, Esquire
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For Respondent: John J. Fumero, Esquire
(Applicant – County) Rose Sundstrom & Bentley, LLP
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For Respondent:
(Agency)

Keith L. Williams, Esquire
South Florida Water Management District
3301 Gun Club Road, Mail Stop Code 1410
West Palm Beach, Florida 33406

STATEMENT OF THE ISSUES

1. This proceeding involves a consolidated set of challenges by Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith, (Petitioners) to the South Florida Water Management District's (SFWMD and/or District) proposed issuance, on May 18, 2010, of an Environmental Resource Permit (ERP or Permit) to the Florida Department of Transportation (FDOT) and the Martin County Board of County Commissioners (County), (collectively referred to as Applicants). The ERP authorizes the construction and operation of a surface water management system (SWMS) to serve 62.06 acres of roadway bridge development and includes authorization to use 12.45 acres of sovereign submerged lands for a project known as the Indian Street Bridge (Proposed Project) ERP No. 43-02393-P, Application No. 091021-8 (Permit 1). This proceeding also involves challenges by Petitioners to a modification to Permit No. 43-00785-S/Application No. 100316-7 (Permit 2), authorizing roadway and drainage modifications to the Kanner Highway/Indian Street Intersection, and a modification to Permit No. 43-1229-P/Application No. 100316-6 (Permit 3), authorizing roadway and drainage modifications to Indian Street between the intersections of Kanner Highway and Willoughby Boulevard, both issued to FDOT on May 21, 2010. All three ERP challenges and their authorizations to use sovereign submerged lands were consolidated.

2. The issues before the ALJ, in this hearing, are: 1) whether the permit Applicants have provided reasonable assurance that the ERPs will comply with the District's water quantity, water quality, and environmental criteria contained in the District's ERP regulations set forth in Part IV, Chapter 373, Fl. Stat., Chapter 40E-4, Florida Administrative Code (Fla. Admin. Code), and the Basis of Review for ERP Applications (BOR) (collectively referred to as the ERP

criteria); and, 2) whether the permit Applicants have provided reasonable assurance that the Proposed Project will comply with applicable sovereign submerged lands easement criteria contained in Chapter 253, Fla. Stat., and Chapter 18-21, Fla. Admin. Code.¹

PROCEDURAL SUMMARY

3. On October 21, 2009, the Applicants submitted Application No. 091021-8 for an ERP with the District. On March 16, 2010, the Applicants submitted Application Nos. 100316-7 and 100316-6, requesting Letter Modifications to existing ERPs. The proposed agency action (Staff Report) for Application No. 091021-8 was approved by the District on May 18, 2010. (Ex. J10, Staff Report).

4. On May 18, 2010, the District issued Environmental Resource Permit No. 43-02393-P to the FDOT and the County.

5. On May 21, 2010, the District issued Letter Modifications to Permit Nos. 43-00785-S and 43-01229-P.

6. On June 1, 2010, Petitioners, Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith, timely filed a Petition for Administrative Hearing (Petition 1) challenging the issuance of Permit No. 43-02393-P.

7. On June 4, 2010, Petitioners timely filed Petitions for Administrative Hearing, objecting to the issuance of the Letter Modifications to Permit Nos. 43-00785-S and 43-01229-P (Petition 2) and (Petition 3), respectively.

8. On June 16, 2010, the District submitted the three Petitions to DOAH for assignment of an ALJ. DOAH Case Nos. 10-3316, 10-3317, and 10-3318 were assigned.

9. On June 16, 2010, FDOT and County filed Motions to Dismiss and FDOT filed a Motion to Strike Petitions.

¹ References to the transcript of the hearing will be by witness, page number, and line(s) (e.g. Carter, p. 6, ln. 1). References to admitted exhibits will be by party initial and exhibit number (e.g. C-1).

10. On June 18, 2010, by Order of the ALJ, the cases were consolidated.
11. On June 29, 2010, the ALJ issued an Order on the Motions and the Petitions were dismissed without prejudice to Petitioners filing amended Petitions.
12. On July 14, 2010, three Amended Petitions for Administrative Hearing (Amended Petitions) were timely filed with DOAH regarding Application Nos. 091021-8, 100316-7, and 100316-6, respectively.
13. On July 23, 2010, a Motion to Dismiss Amended Petitions was filed by FDOT and Motions to Strike Pleadings and Limit the Issues were filed by the District for each of the three Amended Petitions.
14. On August 9, 2010, the ALJ issued a Second Order on the Motions regarding the Motion to Dismiss and Motions to Strike and Limit the Issues. The District's Motions to Strike Pleadings and Limit the Issues were granted. Allegations concerning noise abatement, management of traffic, analysis of other alternatives, and NEPA issues, contained within specified paragraphs of the three Amended Petitions, were stricken as being immaterial and beyond the District's regulatory authority and jurisdiction.
15. On September 14, 2010, a pre-hearing conference was held and on September 20, 2010, the ALJ issued an Order on the case management conference, approving discovery deadlines submitted by Respondents and requiring, among other things, that expert witnesses shall have formulated their opinions by the time of their depositions.
16. On September 22, 2010, Petitioners filed three Second Amended Petitions for Administrative Hearing (Second Amended Petitions) regarding Application Nos. 091021-8, 100316-7, and 100316-6, respectively.
17. On September 27, 2010, Petitioners filed a Third Amended Petition for Administrative Hearing (Third Amended Petition) regarding Application No. 091021-8.

18. On October 11, 2010, the ALJ took official recognition of the applicable District statutes and rules.² The ALJ also took official recognition of Chapter 18-21, Fla. Admin. Code (2009); and Chapters 62-302, Fla. Admin. Code (2010); and Chapter 62-345, Fla. Admin. Code (2007).

19. On October 20, 2010, the District filed a Notice of Corrections to ERP Staff Report for Application No. 091021-8/Permit No. 43-02393-P, including Attached Exhibit A: Corrections to Staff Report. The referenced corrections were made as a result of the discovery of inadvertent administrative and typographical errors in the staff report dated May 18, 2010.

20. On October 21, 2010, the parties filed a Joint Prehearing Stipulation (PHS). The parties stipulated that the following conditions for issuance are not at issue: Rules 40E-4.301(1)(a), 40E-4.301(1)(b), 40E-4.301(1)(g), 40E-4.301(1)(h), and 40E-4.301(1)(k), Florida Administrative Code (Fla. Admin. Code). The parties also stipulated that the following additional conditions for issuance are not at issue: Rules 40E-4.302(1)(a)3, and 40E-4.302(1)(a)6, Fla. Admin. Code.

21. The final administrative hearing was held on October 25, 26, and 27, 2010, in Stuart, Florida.

22. The County called the following expert witness: 1) Don Donaldson, Martin County Engineer.

23. FDOT called the following expert witnesses: 1) Ann Broadwell, Environmental Administrator, Florida Department of Transportation, qualified as an expert in the areas of environmental biology, with emphasis on marine estuarine environments; 2) Gordon Mullen, AWB, Senior Planner II, PBS&J, qualified as an expert in the areas of wildlife biology; wetland ecology; and environmental impact mitigation; and 3) Christian Jackson, P.E., LEED AP,

² Part I, Chapter 373, Fla. Stat. (2009); Part IV, Chapter 373, Fla. Stat. (2009); Chapter 40E-4, Fla. Admin. Code (July 22, 2007); The District's Basis of Review or "BOR" (November 11, 2009). All references to the District's ERP criteria in this PRO shall be to the versions officially recognized by the ALJ.

Reynolds, Smith & Hills, Inc., qualified as an expert in engineering drainage and environmental Permitting.

24. The District called the following expert witnesses: 1) Hugo A. Carter, P.E., qualified as an expert in ERP permitting and surface water engineering; 2) Melinda S. Parrott, qualified as an expert in ERP Permitting; biology; natural resource impacts assessment, which includes mitigation; and sovereign submerged proprietary authorization; and 3) Anita Bain, qualified as an expert in wetland ecology; ERP Permitting; and mitigation banking.

25. The Petitioner called the following witnesses: 1) Kathie Smith; 2) Odias Smith; and 3) Greg Braun, Executive Director, Audubon of Martin County, whose qualification as an expert witness was limited to wetlands ecology only.

26. Petitioners stipulated, and the witness admitted that the expert witness, Greg Braun, was not qualified to provide expert opinion testimony on the subjects of ERP permitting criteria, surface water engineering, water quality, drainage, ERP Permitting rules and regulations, including UMAM assessment or sovereign submerged lands criteria. (T., p. 14, lns. 8-12; Braun, p. 906, lns. 4-20; p. 926, ln. 25; p. 927, lns. 1-5; p. 933, lns. 10-12; p. 937, lns 21-24; p. 938, lns 6-22); (ALJ, p. 936, lns. 8-24).

27. Joint Exhibits J-1 through J-19 were received without objection. Martin County's Exhibits C-1, C-15, C-16, C-17, and C-19 were received without objection. The County's Exhibits C-5, C-6, C-7, C-8, C-9 and C-10 were received over objection. FDOT's Exhibits FDOT-8, FDOT-9, FDOT-10 were received without objection. FDOT's Exhibit FDOT-11 was received over objection. The District's Exhibits D-2 and D-3 were received without objection. The District's Exhibits D-1 and D-4 were received over objection. Petitioners' Exhibits P-27, P-39, and P-54 were received without objection. Petitioners' Exhibits P-24, P-28, and P-30 were admitted for limited purposes or conditionally received. Petitioners' Exhibit P-33 was received

over objection. At the hearing, ruling was reserved on Petitioners' Exhibit P-53, the deposition transcript of Kathie Smith.

28. The hearing transcript was filed on December 2, 2010.

29. The parties did not waive the 10-day deadline for filing post-hearing submissions pursuant to 28-106.216(2), Fla. Admin. Code, making Proposed Recommended Orders (PROs) due 10 days after the filing of the final hearing transcript.

30. Petitioners moved for an extension of time to file the PRO. The Motion was not granted.

FINDINGS OF FACT

I. PARTIES

31. Petitioner Citizens for Smart Growth, Inc., is a Florida 501(c)(3) non-profit corporation. Its business address is: 3330 S.W. St. Lucie Shores Drive, Palm City, Florida 34990. The Registered Agent for the Corporation is Odias Smith. The Directors of the Corporation are Odias Smith, Kathie Smith, and Craig Smith. (Florida Department of State, Division of Corporations).

32. Petitioner, Kathie Smith, is an individual property owner. Her address is: 3330 S.W. St. Lucie Shores Drive, Palm City, Florida 34990.

33. Petitioner, Odias Smith, is an individual property owner. His address is: 3330 S.W. St. Lucie Shores Drive, Palm City, Florida 34990.

34. The District is a public corporation in the State of Florida existing by virtue of Chapter 25270, Laws of Florida 1949, and operating pursuant to Chapter 373, Fla. Stat. and Title 40E, Fla. Admin. Code, as a multi-purpose water management district, with its principal office located at: 3301 Gun Club Road, West Palm Beach, Florida.

35. FDOT is a state agency created pursuant to Section 20.23, Fla. Stat.

36. The County is a political subdivision of the State of Florida.

II. PROJECT DESCRIPTION and BACKGROUND

37. The Proposed Project involves the construction and operation of a surface water management system to serve 62.06 acres of roadway development and also includes authorization to use 12.45 acres of Sovereign Submerged Lands for a total project area of 74.51 acres. (J-10, Staff Report, p. 1 of 30); (Mullen, p. 236, lns. 9-25; p. 237, lns. 1-15). The Proposed Project site is located in Martin County along existing roads (CR-714, SW 36th Street, and Indian Street) and includes a new bridge crossing of the South Fork of the St. Lucie River. (J-10, Staff Report, p. 2 of 30). The proposed surface water management system will serve the road and bridge project from approximately 1,300 feet west of Mapp Road on CR-714 to approximately 1,400 feet east of Kanner Highway on Indian Street. (J-10, Staff Report, p. 3 of 30). The total length of the Proposed Project is approximately 1.96 miles (1.38 miles of roadway and 0.58 mile of bridge) and the total area is approximately 74.51 acres. (*Id.*). This area includes work on Indian Street, Kanner Highway and sovereign submerged lands. (*Id.*). The proposed stormwater management system discharges to the tidal South Fork of the St. Lucie River. (*Id.*).

38. The existing drainage system along CR-714, between the beginning of the Proposed Project and Mapp Road, consists of ditches and swales with discharge to a freshwater wetland located along the south side of the road (between Whispering Sound residential community and Danforth Park). (J-10, Staff Report, p. 2 of 30); (Jackson, p. 427, lns. 1-7). This wetland, which also receives stormwater runoff from the Publix site (Permit 43-01535-P) via an existing 30" cross-drain, overflows to the All-American Ditch, which ultimately discharges to the South Fork of the St. Lucie River. (*Id.*). The cross-drain will be maintained in the post-development condition. (Jackson, p. 422, lns. 14-17; p. 532, ln. 7).

39. From the beginning of the Proposed Project construction to Mapp Road (approximately 1300 ft. along CR-714), the project includes transition and

widening/reconstruction of the 2-lane rural roadway to a 4-lane divided urban roadway. (J10, Staff Report, p. 4 of 30). From Mapp Road to the beginning of the bridge, the Proposed Project includes the widening/reconstruction of the 2-lane rural roadway (SW 36 th Street) to a 4-lane divided urban roadway with wide roadside swales. (*Id.*). The bridge approach occurs west of St. Lucie Shores Drive to allow for the re-alignment of St. Lucie Shores Drive beneath the proposed bridge. (*Id.*).

40. From the west of St. Lucie Shores Drive to west of Kanner Highway, the proposed new high level bridge crossing spans the South Fork of the St. Lucie River and the Okeechobee Waterway. The bridge transitions from 4 to 6 lanes east of the Okeechobee Waterway to allow for expansion of the Kanner Highway intersection. The bridge will require a 55 ft. vertical clearance and 200 ft. horizontal clearance between the fender systems at the Okeechobee Waterway. The 6-lane bridge transitions to the existing grade just west of the Kanner Highway intersection. (J-10, Staff Report, p. 4 of 30).

41. From Kanner Highway to the east end of the Proposed Project (approximately 1400 ft. along Indian Street), the Proposed Project includes the transition and widening/reconstruction of the 4 lane divided urban roadway to a 6 lane divided urban roadway. (J-10, Staff Report, p. 4 of 30).

42. The primary surface waters associated with the Proposed Project consist of the South Fork of the St. Lucie River and the Okeechobee Waterway, Class III waters. (J-10, Staff Report, p. 3 of 30); (D-4).

III. ERP PERMITTING CRITERIA

43. In order to obtain an ERP, an applicant must satisfy the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302, Fla. Admin. Code. The Conditions for Issuance primarily focus on: a) water quantity; b) environmental impacts; and c) water quality and form the basis of the District's ERP permitting criteria.

44. The parties stipulated that the Proposed Project either complies with the following rule provisions or they are not applicable: Rules 40E-4.301(1)(a),(b),(g),(h), and (k), and 40E-4.302(1)(a)3, and 6, Fla. Admin. Code. (PHS, p. 18). Therefore, the only Rules at issue are: 40E-4.301(1)(c),(d),(e),(f),(i), and (j), and 40E-4.302(1)(a)1, 2, 4, 5 and 7, Fla. Admin. Code.

45. Petitioners' expert witness did not provide any expert opinion testimony on ERP permitting criteria to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD. (Braun, p. 927, ln. 5).

IV. SURFACE WATER MANAGEMENT CRITERIA

A. Water Quantity (Rule 40E-4.301(1)(a), Fla. Admin. Code)

46. Post-development discharge is slightly less than pre-development discharge. (Carter, p. 529, lns. 13-15).

47. The Proposed Project will have beneficial impact in some areas that had historic flooding issues in the Old Palm City neighborhood. (Carter, p. 530, lns. 17-25).

B. Storage and Conveyance (Rule 40E-4.301(1)(c), Fla. Admin. Code)

48. The Applicants considered the capability of adjacent properties to both store and convey stormwater runoff from their developments and addressed the criteria applicable to this rule through the Drainage and Environmental Documentation Report, among other documents submitted with their permit applications. (J-5).

49. The design plans call for drainage swales and curbs and gutters that assist in drainage by collecting and channelizing flow to where it ultimately needs to be conveyed, in the case of this project, swales and eventually ponds. (Jackson, p. 421, lns. 12-16).

50. The drainage swales provide both collection and conveyance, but also stormwater treatment and attenuation. (Jackson, p. 422, lns. 8-10). Attenuation is the storage of the additional runoff that's created from the developed project. Basically, the SFWMD requirements

stipulate that pre versus post discharge must be maintained; this will be done with attenuation. (Jackson, p. 422, lns. 12-16).

51. Currently, in the pre-development condition, flooding has occurred in some of the Proposed Project area due to poor conveyance, low storage volume, and a high tailwater condition that result from high tides. (J-10, Staff Report, p. 2 of 30); (Donaldson, p. 58, lns. 17-22).

52. From the beginning of the project limits to Mapp Road, today the two-lane roadway section currently sheet flows straight into swales which discharge into wetlands, there is currently no treatment. There's also no storage and no raised weir elevation. (Jackson, p. 426, lns. 21-25).

53. There are problems with the existing conditions on the west side of the river; the existing issue is flooding. There are no stormwater management facilities to accommodate the runoff from the residential areas. (Jackson, p. 427, lns. 22-25; p. 428, lns. 1-2).

54. There are also issues with the existing conditions on the east side of the river; it is in the Old Palm City area where there are significant existing drainage issues. (Jackson, p. 428, lns. 16-20).

55. FDOT will handle all the drainage, provide water quality treatment and attenuation through a system of dry swales which are all interconnected to wet ponds, which then overflow into the South Fork of the St. Lucie River. (Jackson, p. 429, lns. 2-5). The design plans provide for removal of the runoff which today directly sheet flows into the wetlands without treatment. (Jackson, p. 429, lns. 10-12).

56. Runoff and sheet flow will be handled through flumes or openings in the curbs in the proposed roadway sections and all the swales are going to be controlled by a weir structure or control structure which provides a certain amount of dry pretreatment retention. After the dry pretreatment retention, they will overflow and go into the wet detention facility, which at that

time will eventually discharge into the South Fork of the St. Lucie River. (Jackson, p. 429, Ins. 13-21).

57. FDOT provided reasonable assurance, through its proposed drainage facilities, that the Proposed Project would not adversely impact existing surface water storage and conveyance capabilities. (Jackson, p. 432, Ins. 7-8).

C. Engineering Principles (Rule 40E-4.301(1)(i), Fla. Admin. Code)

58. The Proposed Project meets generally accepted engineering and scientific principles. (Carter, p. 527, Ins. 1-6). The Applicant provided the District with reasonable assurance that the project will be capable, based on generally accepted engineering and scientific principles, of being performed and functioning as proposed. (Carter, p. 527, Ins. 10-12).

59. No engineering principles were identified that would prevent the Applicant from implementing the project as proposed. (Carter, p. 528, Ins. 8-12).

60. Petitioners' expert witness did not provide any expert opinion testimony on surface water management criteria to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD.

V. WATER QUALITY (Rule 40E-4.301(1)(e), Fla. Admin. Code)

61. The Proposed Project meets and exceeds water quality criteria set forth in the District rules. (Jackson, p. 432, Ins. 4-6; Carter, p. 524, Ins. 21-25; p. 531, Ins. 7-8). The Applicant conducted a nutrient analysis and demonstrated that the Proposed Project will provide 150% treatment post project; it will provide net improvement to the discharge into the St. Lucie River. (Jackson, p. 435, Ins. 2, 4, & 6; Carter, p. 536, Ins. 6-9). The nutrient loading analysis was done correctly and conformed to the rules. (Carter, p. 534, Ins. 3-7). The St. Lucie River is an impaired Class III water body nutrients and dissolved oxygen. (J-10); (Jackson, p. 433, Ins. 21-25; p. 434, Ins. 1-12).

62. The Proposed Project will create a net improvement for water quality because now a portion of the local runoff will be treated before discharging into the river. (Jackson, p. 435, lns. 10-11; Carter, p. 531, lns. 7-8; p. 537, lns. 1-4).

63. The proposed surface water management system will not cause adverse impacts to surface water storage and conveyance capabilities. (Carter, p. 536, lns. 23-24).

64. Petitioners' expert witness did not provide any expert opinion testimony on water quality to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD.

VI. ELIMINATION AND REDUCTION

65. Before establishing a mitigation plan, FDOT attempted to avoid or minimize the impact of the Proposed Project to wetlands and other surface waters. (J-6); (Mullen, p. 250, lns. 16-18; p. 251, lns. 3-13). The width of the bridge was reduced and the eastern terminus of the bridge at the intersection of Indian Street and Kanner Highway was moved north in an attempt to eliminate and reduce the impact of the project to wetlands and other surface waters before determining what mitigation was necessary. *Id.*

66. The placement of the bridge pier on Kiplinger Island was selected to reduce the effect of scouring. (J-6); (Mullen, p. 251, lns. 3-15).

67. Construction methodology allows the Applicants to reduce their impacts to wetlands and other surface waters. (Parrott, p. 586, lns. 6-8). The construction staging areas and the temporary trestle used to construct the bridge were selected to minimize the impact of the project on Wetlands 29, 30a, and 30b. (J-6); (Mullen, p. 253, lns. 1-8).

68. Petitioners' expert witness has not analyzed elimination and reduction in the manner set forth in the ERP permitting criteria. (Braun, p. 1015, lns. 23-25; p. 1017, lns. 1-6).

VII. WETLAND IMPACTS

69. The Applicants propose 3.83 acres of direct wetland impacts and 14.70 acres of secondary impacts. (J-10, Staff Report, p. 10 of 30; J-10, Ex. 3).

70. In their review of the applications for the Proposed Project, District staff first compared the plans to the wetland locations and verified the extent of wetlands within and adjacent to the project area. (Parrott, p. 580, lns. 4-6). District staff identified the following wetlands within and adjacent to the project area: Wetlands 19a, 19b, 22, 25, 26, 27, 28, 29, 30a, 30b, 30c, 2A and an un-numbered wetland at the corner of Indian Street and Kanner Highway, and assessed the impacts from the Proposed Project. (J-10, Staff Report, pp. 9-11 of 30; J-10, Ex. 3); (J-6, J-10, FDOT-8, and FDOT-10); (Parrott, p. 583, lns. 6-24; p. 584, lns. 1-7; Broadwell, p. 142, lns. 17-20).

71. Wetlands 19a, 19b, and 22 are located on 36th Street, west of Mapp Road. (Mullen, p. 238, lns. 19-20; FDOT-10). Wetland 25, on the north side of 36th Street, east of Mapp Road, is a low value wetland that is overgrown with Brazilian pepper, an exotic plant species. Wetland 26, on the south side of 36th Street, east of Mapp Road, is a remnant freshwater hardwood forest with more exotic vegetation than natural vegetation and is bisected by a berm. Wetland 27, on the north side of 36th Street, east of Wetland 26, is also overgrown with Brazilian pepper. (J-10, FDOT-8); (Mullen, p. 239, lns. 4-10, 12-14).

72. Both Wetlands 25 and 27 are low value wetlands surrounded by residential development in Old Palm City. (FDOT-8); (Mullen, p. 239, lns. 14-18). Septic tank leachate creates a strong fecal odor within the wetlands. (Mullen, p. 239, lns. 14-18).

73. Wetland 28 is the mangrove fringe within the project footprint along the west shore of the South Fork of the St. Lucie River at the intersection of 36th Street and Indian Shores Drive. (FDOT-8); (Mullen, p. 240, lns. 1-3; p. 242, lns. 22-24). Wetland 29 is on Kiplinger Island, located between the South Fork of the St. Lucie River and the Okeechobee Waterway under the proposed bridge and is considered to have a permanent direct impact from the Proposed Project. (FDOT-8); (Mullen, p. 243, lns. 23-25; p. 244, lns. 1-10).

74. Wetland 30a is a tidally influenced estuarine wetland located on the east shore of the Okeechobee Waterway portion of the South Fork of the St. Lucie River west of the intersection of Indian Street and Kanner Highway. (FDOT-8); (Mullen, p. 244, Ins. 24-25; p. 245, Ins. 1-3). Wetland 30b is a freshwater forested wetland hardwood system located west of the intersection of Indian Street and Kanner Highway, but east of Wetland 30a and 30c. (FDOT-8); (Mullen, p. 245, Ins. 3-7). Wetland 30c is a tidally influenced estuarine wetland located on the east shore of the Okeechobee Waterway portion of the South Fork of the St. Lucie River, west of the intersection of Indian Street and Kanner Highway. (FDOT-8); (Mullen, p. 244, Ins. 24-25; p. 245, Ins. 1-3).

75. Wetland 32 (2A) is a small freshwater herbaceous wetland located on the north side of Indian Street approximately 280 feet east of the intersection of Indian Street and Kanner Highway and within the subdivision of Indian Run. (FDOT-10); (Mullen, p. 246, Ins. 22-25).

76. In order to assess the impacts to the wetlands at the Proposed Project site, pursuant to Chapter 62-345, Fla. Admin. Code, the District conducted an analysis of the Proposed Project site using the Uniform Mitigation Assessment Method (UMAM).³

77. After careful consideration, District staff determined that Wetlands 19a, 19b, 22, 27, and the un-numbered wetland at the corner of Indian Street and Kanner Highway will not be affected by the Proposed Project. (Parrott, p. 583, Ins. 6-8, ln. 14; p. 584, Ins. 1-5).

A. Primary / Direct Impacts

78. The Applicants propose 3.83 acres of direct wetland impacts. Direct wetland impacts include all wetland areas impacted by construction of the Proposed Project, including widening of the roadway, temporary construction areas to build the bridge, and all areas underneath the bridge structure. That includes all dredge, fill, and shading wetland impacts by

³ UMAM provides a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions are reduced by a proposed impact, and the amount of mitigation necessary to offset that loss. See Rule 62-345.100(2), Fla. Admin. Code.

the Proposed Project. (J-10, Staff Report, p. 10 of 30); (Parrott, p. 583, Ins. 10-22; p. 584, Ins. 5-7; Broadwell, p. 127, Ins. 9-11).

79. District staff counted everything under the bridge structure as a direct impact due to shading, even though typically only dredge and fill impacts are considered direct impacts. The actual dredge and fill impacts occur in areas where pilings are placed along the bridge, and in the areas proposed to be used for the creation of the swales. (Parrott, p. 586, Ins. 23-25; p. 587, Ins. 1-3).

80. The direct impact zone is within the 200-foot wide footprint of the Proposed Project. (Mullen, p. 301, ln. 25; p. 302, ln. 1; Broadwell, p. 172, Ins. 1-3).

81. The wetland areas within the right-of-way (ROW), which is the direct impact zone, include Wetland 25 (0.37 acre), Wetland 26 (0.91 acre), Wetland 28 (0.10 acre), Wetland 29 (0.91 acre), Wetland 30a/b/c (1.88 acres), and Wetland 2A (0.03 acre). (J-10, Staff Report, p. 3 of 30). Impacts to Wetland 25 will not be included in this Proposed Project because they were accounted for in the Old Palm City Phase 3 Project (District Permit 43-02326-P). (*Id.*). The total area of wetland located within the ROW is 3.83 acres, all of which will be directly impacted by the Proposed Project. (*Id.*).

82. Portions of Wetlands 25 and 27 are within the ROW, and Wetland 26 is entirely within this direct impact zone. (FDOT-8); (Mullen, p. 240, Ins. 7-16). All of Wetland 28 is considered to be within the direct impact zone and will be permanently impacted even though its area extends beyond the 200-foot ROW area of direct impact. (FDOT-8); (Mullen, p. 243, Ins. 1-6).

83. Wetland 29 is under the bridge within the Proposed Project's ROW and the area of direct impact includes permanent bridge piers and temporary pilings used to erect the temporary trestle during construction. (FDOT-8); (Mullen, p. 244, Ins. 1-10; p. 303, Ins. 19-22).

84. Wetlands 30a, b, and c are within the direct impact zone/Project ROW. (FDOT-8); (Mullen, p. 245, lns. 1-7).

B. Secondary Impacts (Rule 40E-4.301(1)(f), Fla. Admin. Code)

85. The Proposed Project will have secondary impacts. (J-10); (Parrott, p. 645, lns. 7-9; Broadwell, p. 171, lns. 12-24).

86. The secondary impact zone for the Proposed Project extends 250 feet from the right-of-way boundary for the Proposed Project. (Broadwell, p. 171, lns. 12-24). It is not a buffer, which would imply that nothing is happening there, but rather it is a zone where there are indirect impacts from the project. (Bain, p. 749, lns. 23-25; p. 750, lns. 7-9).

87. Fifty (50) feet of secondary impact zone is fairly common on roadway projects SFWMD reviews; however, SFWMD staff determined that the secondary impact zone for the Indian Street Bridge Project should be 250 feet. (Parrott, p. 589, lns. 5-12; Bain, p. 751, lns. 1-3).

88. The decision to analyze secondary impacts within a 250-foot secondary impact zone beyond the Indian Street Bridge right-of-way footprint was made after determining that the review of the Indian Street Bridge Project would involve the same considerations as other nearby recent major roadway projects that crossed wetland areas more sensitive than the wetland areas impacted by the Indian Street Bridge Project. (Parrott, p. 588, lns. 16-25; p. 589, lns. 1-4; Bain, p. 751, lns. 1-5; p. 752, lns. 15-20; Mullen, p. 248, lns. 6-14; Broadwell, p. 193, lns. 18-24).

89. Wetlands 19a, 19b, and 22 are within the 250-foot secondary impact zone but will be impacted minimally because no road widening will occur at those wetlands. (Mullen, p. 238, lns. 23-25; p. 239, lns. 1-3). Portions of Wetlands 25 and 27 are within the 250-foot secondary impact zone as are portions of Wetland 28, but the portions of 28 are considered to be directly impacted and are mitigated as such. (FDOT-8); (Mullen, p. 240, lns. 1-3; p. 243, lns. 1-6).

90. Portions of Wetlands 29, 30a, 30b, and 30c are within the 250-foot secondary impact zone. (FDOT-8); (Mullen, p. 244, Ins. 1-10; p. 245, Ins. 1-7).

91. The secondary impacts for the Proposed Project were divided into zones; the first zone is from the edge of the structure 50 feet on either side; and that zone will have the most significant impact due to the close proximity of the bridge. Seasonal shading from the bridge will be an issue as it is anticipated to affect vegetation, and light and noise could discourage wildlife next to the bridge. (Parrott, p. 589, Ins. 15, 17-25). The second zone, from 51 to 250 feet, is anticipated to have some habitat fragmentation and a little bit of light and noise-type discouragement for wildlife. (Parrott, p. 590, Ins. 2-5). The primary impact zone is within the first 50 feet and as you move into the second zone, the secondary impacts to the habitat functions of fish and wildlife are lessened. (J-10, Staff Report); (Parrott, p. 590, Ins. 6-8).

92. Wetland impacts were classified by the type of wetland impacted to allow mitigation selected to more closely mimic the resource impacted. (J-6, p. 4); (Mullen, p. 249, Ins. 20-25; p. 250, Ins. 1-4, 10-15).

93. Secondary impacts from the bridge structure that may occur to the Audubon property of Kiplinger Island were assessed during the UMAM review. (Broadwell, p. 208, Ins. 1-7).

C. Impacts to Fish & Wildlife & Listed Species (Rule 40E-4.301(1)(d), Fla. Admin. Code)

i. Bridge Design

94. The trestle to be used in the construction of the bridge is designed to be located on the north side to minimize the temporary impact of shading in the water column. (Broadwell, p. 172, Ins. 19-25; p. 173, Ins. 1-13).

95. Light fixtures are designed to direct light onto the roadway and avoid light wash off of the bridge. (Broadwell, p. 173, Ins. 15-25; p. 174, ln. 1).

96. Trapezoidal railings are proposed to discourage bird roosting. (Broadwell, p. 135, Ins. 11-16).

ii. Surface Water Management System

97. Detention ponds and swales have been designed to attract wildlife, encourage wading birds (such as wood storks), and to address core foraging areas. (Broadwell, p. 174, Ins. 12-13; Ins. 24-25; p. 175, Ins. 1-3).

iii. Florida Panther

98. FDOT was told of a sighting of a Florida Panther on Kiplinger Island and went through the Panther Slopes Process to assess the veracity of that hearsay; FDOT concluded no further panther coordination was necessary. (Broadwell, p. 215, Ins. 3-13).

iv. Benthic Communities

99. Six seagrass surveys were performed in the area of the bridge crossing between 2001 and 2009. (Mullen, p. 293, Ins. 19-25; Parrott, p. 617, Ins. 11-16). No seagrasses were found in the area to be impacted by the bridge crossing. (Mullen, p. 294, Ins. 3-6).

100. No discernable direct or secondary impacts to the open waters of the South Fork of the St. Lucie River or to the Okeechobee Waterway will occur due to the constant flow of water, whether due to tidal influence, releases from Lake Okeechobee or after rain events. (Mullen, p. 296, Ins. 15-22).

101. Because water will be collected from the bridge structure and pipes will convey water to swales and detention areas before release into the open water, the Proposed Project is not expected to have much effect on salinity or temperature gradient. (Mullen, p. 297, Ins. 2-7).

102. SFWMD and National Marine Fisheries agreed that FDOT provided reasonable assurances that the project will not adversely affect the value and functions provided to fish and wildlife and listed species by wetlands and other surface waters. (Parrott, p. 610, Ins. 2-8; Ins. 16-21; Mullen, p. 294, Ins. 20-22). This paragraph supplements findings in paragraphs 94-101.

VIII. MITIGATION

A. Wetland Mitigation Plan

103. Mitigation is when wetlands are preserved, created, restored or enhanced to provide functional value to offset functional loss associated with an impact. (Parrott, p. 591, Ins. 13-15). The mitigation plan is submitted by the Applicant. (Parrott, p. 618, Ins. 18-24). Then the amount of mitigation is determined by a functional assessment or ratio depending on the mitigation proposed. (Parrott, p. 591, Ins. 18-23).

104. FDOT created a Wetland Mitigation Plan to propose the form or forms of mitigation to be used to offset impacts and submitted this plan to the District as part of its permit application for the Indian Street Bridge Project. (J-6); (Mullen, p. 235, Ins. 5-8).

105. The Wetland Mitigation Plan describes the project, describes the impacts associated with the project in terms of direct and secondary impacts and proposes a mitigation plan to offset those impacts. (J-6); (Mullen, p. 235, Ins. 16-20).

106. The Wetland Mitigation Plan provides reasonable assurances of compliance with the District's rules. (J-6); (Mullen, p. 235, ln. 24).

107. The Wetland Mitigation Plan offsets all the direct impacts of the project. (J-6); (Mullen, p. 248, ln. 18).

108. The Wetland Mitigation Plan offsets all the secondary impacts of the project. (J-6); (Mullen, p. 248, Ins. 23-24).

109. The Wetland Mitigation Plan proposes type for type mitigation—freshwater wetlands to mitigate for freshwater wetlands and estuarine wetlands to mitigate for estuarine wetlands. (J-6); (Mullen, p. 250, Ins. 1-4 and Ins. 10-15).

110. Petitioners did not produce any evidence to contradict the appropriateness of the size of the secondary impact zone. (Braun, p. 1045, Ins. 10-25; p. 1046, Ins. 16-24).

111. The SFWMD Basis of Review contains Rule 4.3.1.2 that specifically allows off-site mitigation for linear roadway projects. (Parrott, p. 594, Ins. 6-14; Bain, p. 747, Ins. 4-12). Florida Statutes and Section 4.3.1.2 of the Basis of Review specifically allows off-site mitigation for linear projects that cannot effectively implement on-site mitigation requirements due to right-of-way constraints. (Parrott, p. 594, Ins. 6-14; Bain, p. 747, Ins. 4-12)

112. There is no requirement in Florida that any certain number of options or every option for mitigation must be considered for implementation. (Parrott, p. 618, Ins. 8-11; Bain, p. 743, Ins. 7-11; Mullen, p. 254, Ins. 5-8; Braun, p. 990, Ins. 6-8).

B. On-Site or Off-Site Mitigation

113. Mitigation to offset the wetland impacts includes limited on-site wetland creation, the use of a Regional Offsite Mitigation Area (ROMA) and use of a previously permitted Martin County mitigation site located on Hutchinson Island. (J-10, Staff Report, p. 11 of 30).

i. On-Site Mitigation

114. The on-site mitigation is to be performed within the DOT 200-foot transportation right-of-way. (J-6; J-10); (Mullen, p. 255, Ins. 19-25; p. 256, Ins. 1-4; Broadwell, p. 176, Ins. 12-14).

115. FDOT roadway projects are usually long, linear facilities and typically there is not a large plot of land to do on-site mitigation. (Broadwell, p. 176, Ins. 14-17). FDOT did not do any more on-site mitigation because they did not have any extra right-of-way to turn into a mitigation site. (Broadwell, p. 178, Ins. 4-7).

116. On-site mitigation will consist of replanting of wetland hardwood species and native grasses over 0.55 acres on the western shoreline of the St. Lucie River. (FDOT-8; J-6): (Mullen, p. 256, Ins. 16-21; Broadwell, p. 176, Ins. 24-25; p. 177, Ins. 1-4).

117. One of the permit conditions requires monitoring of the site to ensure success criteria for on-site mitigation is being met and, if not, then FDOT must take corrective action to

fix it. (Broadwell, p. 177, lns. 5-13). On-site mitigation will be monitored and maintained by FDOT and Martin County for five (5) years once constructed. (J-6); (Mullen, p. 256, lns. 23-25; p. 257, lns. 1-2; Broadwell, p. 213, lns. 9-14).

118. Petitioners' expert witness testified that the on-site mitigation is a good, worthwhile mitigation proposal. (Braun, p. 1018, lns. 16-25).

ii. Offsite Mitigation

119. Off-site mitigation is mitigation performed on other property beside the project footprint, but generally in the area with coordination of other property owners. (Broadwell, p. 176, lns. 17-19).

120. FDOT looked at mitigation sites within the St. Lucie Basin as defined in the Basis of Review. (Broadwell, p. 178, lns. 20-24).

121. No single on-site or off-site location within the North St. Lucie Basin was available to provide mitigation necessary to offset all of the impacts caused by this project; therefore, some mitigation was performed on-site within the right-of-way, some mitigation was performed off-site within the North St. Lucie Basin, and the remaining mitigation was performed off-site outside of the North St. Lucie Basin at the Dupuis Reserve site. (J-1, J-6, J-10); (Bain, p. 746, lns. 13-23).

a) Hutchinson Island Florida Oceanographic Society Site

122. The Hutchinson Island Florida Oceanographic Society (FOS) Mitigation Site was selected by FDOT as an off-site mitigation area within the North St. Lucie Basin to offset direct and secondary impacts to estuarine wetlands. (J-6; J-10); (Mullen, p. 278, lns. 12-13).

123. The FOS site is within the North St. Lucie Basin as defined in Rule 4.4.1 of the Basis of Review. (J-6; J-10; J-19); (Mullen, p. 271, lns. 7-11).

124. The FOS site has already met its success criteria for replacement of permanently removed wetlands and has been permitted for use as credits in this Proposed Project. (Mullen, p. 283, lns. 22-25; p. 284, lns 1-2).

125. The FOS site is within a core foraging area for wood storks near the project, based on U.S. Fish and Wildlife charts. (Mullen, p. 273, lns. 1-4 and 4-6).

126. The FOS site is a parcel owned by Martin County that they restored and maintained as a functioning wetland system so that they would have available mitigation credits to be used toward County projects. (Broadwell, p. 180, lns. 13-19).

127. The FOS site met the success criteria for the mitigation projects performed there so it could be used as credits for other projects. (Broadwell, p. 180, ln. 25; p. 181, lns. 1-2).

b) Dupuis State Reserve Mitigation Site

128. Dupuis Reserve was selected by FDOT as an off-site mitigation area to offset direct and secondary impacts to freshwater wetlands. (Bain, p. 747, lns. 16-19; Mullen, p. 275, lns. 12-13).

129. The Reserve is outside of the North St. Lucie Basin as defined in Rule 4.4.1 of the Basis of Review. (J-6; J-10; J-19); (Mullen, p. 271, lns. 6-7).

130. Dupuis Reserve is a large piece of land off State Road 76 that FDOT gave money to SFWMD to restore wetlands on that parcel; in exchange, FDOT was given mitigation credits to be deducted from when they constructed projects in Palm Beach, Martin, St. Lucie, and Okeechobee Counties. (Broadwell, p. 179, lns. 11-18).

131. Due to the hydrologic improvements and ecologically restorative efforts, the Dupuis Reserve has achieved its ecological success criteria and has everything an applicant would want in terms of a proposed off-site mitigation area. (Parrott, p. 596, lns 15-24; Bain, p. 747, lns. 13-15; Mullen, p. 271, lns. 22-25; p. 272, lns. 5-7; Broadwell, p. 179, lns. 22-24).

132. The Dupuis site is based on a ratio of impacts to mitigation. The site was permitted before the adoption of UMAM by agreement between SFWMD and FDOT. There are 5.34 acres credited toward this project. (J-10, Staff Report, pp. 11-12 of 30); (Parrott, p. 592, Ins. 3-5; p. 593, Ins. 9-11).

133. The Dupuis Reserve is within a core foraging area for wood storks near the project, based on U.S. Fish and Wildlife charts. (Mullen, p. 273, Ins. 1-4 and 4-6). The Dupuis site provides replacement for wood stork core foraging habitat. (Mullen, p. 273, Ins. 1-3). This mitigation is intended to offset the impacts to woodstorks. (Mullen, p. 296, Ins. 12-14).

134. The Dupuis site meets the ERP criteria in using it for this project. (Bain, p. 747, Ins. 20-24).

135. The FOS and Dupuis sites already meet mitigation criteria; by using those sites, there is less UMAM functional loss due to time lag because they mitigate direct and secondary impacts immediately. (Broadwell, p. 182, Ins. 1-3).

136. Petitioners' expert witness did not provide any expert opinion testimony on mitigation to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD.

c) UMAM Assessment

137. UMAM analysis for the Proposed Project was performed in accordance with the requirements of Chapter 62-345, F. A. C.. (J-10); (Parrott, p. 620, Ins. 8-12).

138. Chapter 62-345, F.A.C., requires SFWMD to weigh factors and create a numeric score which represents the relative functional gain or functional loss of wetlands caused by the Proposed Project. (Mullen, p. 265, Ins. 1-3). This score is multiplied by the number of acres to be impacted to get a net outcome, which can be either positive or negative. (Mullen, p. 265, Ins. 3-5). Functional loss is calculated as a numeric value and functional gain is calculated as a numeric value. When both equal out, mitigation is deemed sufficient. (Broadwell, p. 211, Ins. 17-22).

139. Time lag and risk are factors of UMAM scoring. (Mullen, p. 259, Ins. 10-13; Broadwell, p. 224, Ins. 21-23; p. 225, Ins. 9-10). Time lag is defined as the time it takes a restored wetland to function similarly to an existing unaltered wetland. (Mullen, p. 259, Ins. 4-10). Significant time lag will lower a UMAM score for a particular mitigation option. (Mullen, p. 259, Ins. 14-17).

140. Risk is the likelihood that your mitigation will achieve its permitted performance standards. (Parrott, p. 620, Ins 13-18; Mullen, p. 259, Ins. 19-21). Risk that restoration will not be successful will lower a UMAM score for a particular mitigation option. (Mullen, p. 259, Ins. 19).

141. The UMAM assessment process was followed by SFWMD and the Applicants to calculate the amount of mitigation needed to offset adverse impacts. (FDOT-11); (Parrott, p. 593, Ins. 5-11; Mullen, p. 293, Ins. 10-11;).

142. The UMAM assessment process took the previous violation and consent order into consideration when determining the proper amount of mitigation necessary for the project. (Mullen, p. 314, Ins. 4-12).

143. Under the UMAM assessment, the mitigation proposals provide reasonable assurances that adverse impacts will be offset. (J-6, J-10, FDOT-11); (Parrott, p. 604, Ins. 6-11; Mullen, p. 293, Ins. 14-16).

144. Petitioners' expert witness did not provide any expert opinion testimony on UMAM assessment to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD. (Braun, p. 933, Ins. 12; p. 937, Ins. 21-24).

d) Mitigation Considered But Not Selected

145. In their application, the Applicants are not required to provide the District with every option available for mitigation as long as the mitigation options that are presented will

sufficiently offset the impacts from the Proposed Project. (Parrott, p. 618, Ins. 8-11; Bain, p. 747, Ins. 4-12).

146. Other mitigation sites were explored, such as the Mapp Road Parcel; Kiplinger Island Parcel; Delaplane Site; Treasure Coast Mitigation Bank; Bear Point Mitigation Bank; Platt's Creek Mitigation Bank; Bluefield Ranch Mitigation Bank; and RG Reserve Mitigation Bank. (Mullen, p. 273, Ins. 20-23; p. 274, Ins. 4-5). However, these other mitigation areas were not chosen because they did not adequately offset the impacts and either weren't available, were too far away, sold out of credits, did not provide wood stork foraging habitat, had not been constructed, or had compliance issues that prevented the release of further credits. (Mullen, p. 274, Ins. 8-19).

C. Cumulative Impacts

147. Cumulative impacts are the summation of unmitigated wetland impacts within a drainage basin. (Parrott, p. 600, Ins. 21-25) The cumulative impact analysis is geographically based upon the drainage basins described in Figure 4.4-1 of the BOR. (Parrott, p. 598, Ins. 4-8) Section 373.414(8)(a), Fla. Stat., requires the District to consider cumulative impacts upon surface waters within the same drainage basin.

148. In this case, pursuant to Section 373.414 (8)(a), Fla. Stat., Applicants must perform a cumulative impact analysis because some of the mitigation proposed is within a different basin than the basin where the Proposed Project is to be constructed.

149. A cumulative impact analysis was performed by SFWMD and the Applicants (J-6; J-10); (Parrott, p. 601, Ins. 11-17; p. 602, Ins. 7-10; Mullen, p. 276, Ins. 4-8). Cumulative impacts from the Proposed Project to wetlands within the basin resulted in approximately a four percent loss basin-wide. (Parrott, p. 601, Ins. 11-12). This is an acceptable adverse cumulative impact. (Parrott, p. 601, Ins. 14-17). Therefore, this project will not result in unacceptable adverse cumulative impacts. (Parrott, p. 601, Ins. 16-18; Bain, p. 759, p. 18-19).

**IX. FINANCIAL, LEGAL and ADMINISTRATIVE CAPABILITY
(Rule 40E-4.301(1)(j), Fla. Admin. Code)**

150. The County will be the owner and operator of the proposed bridge; they have the funding, through fuel tax revenues, to not only maintain and operate the bridge, but also to maintain and operate the surface water management system, stormwater facilities, and other road projects. (Donaldson, p. 76, lns. 1-3, 8-9 and 18-23).

151. FDOT and Martin County provided the District with reasonable assurance that they have the financial, legal, and administrative capability to ensure that the Proposed Project will be undertaken in accordance with the terms of the permit. (Carter, p. 527, lns. 13-24).

X. PUBLIC INTEREST TEST (Rule 40E-4.302(1)(a), Fla. Admin. Code)

152. The Proposed Project does not have any hazardous elements to it and after consideration of all project impacts, there are no adverse impacts to the public health, safety, or welfare or the property of others. (Bain, p. 732, lns. 16-23).

153. District staff looked at the direct and secondary impacts and the mitigation proposal provided and consulted with the wildlife agencies and determined that the proposed activity would not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. (Bain, p. 733, lns. 10-16).

154. The proposed activity will not impede navigation or the flow of water or cause harmful erosion or shoaling. (Bain, p. 733, lns. 19-23; p. 734, ln. 1).

155. The affect of the Proposed Project on fishing or recreation values or marine productivity will be minimal, but the proposed mitigation will exceed the functions that are currently being offered at the site. (Bain, p. 734, lns. 15-22). Features were built into the design of the Proposed Project that will enhance recreation or recreational access. (Broadwell, p. 174, lns. 5-14). The bridge is being designed to provide recreation areas for pedestrians and cyclists on the roadway portion of the Proposed Project and the bridge will also have an observation deck

creating recreational opportunities where they do not currently exist. (J-1; J-3; J-10); (Jackson, p. 424, lns. 13-14; Mullen, p. 383, lns. 10-13; Broadwell, p. 174, lns. 5-11).

156. The Proposed Project is a permanent project with temporary impacts. (Bain, p. 735, lns. 4-6). District staff balanced those impacts and considered many of the temporary impacts permanent for purposes of calculating mitigation. (Bain, p. 735, lns. 7-11). Any construction activity, temporary or otherwise will be mitigated as if it was a permanent impact. (Bain, p. 735, ln. 14).

157. Overall, there is a net benefit for habitat to the area because new foraging areas are created. (Mullen, p. 273, lns. 1-9).

158. The Proposed Project serves the public interest; the proposed Indian Street Bridge will provide additional service for hurricane and storm evacuation and public health, welfare and safety in Martin County. (Donaldson, p. 78, lns. 3-9).

159. Because the impacts of the project will be offset, the relative value of the functions being performed by areas affected by the proposed activity will be replaced with areas that will provide functions which somewhat exceed the existing functions currently being performed. (Bain, p. 736, lns. 20-21).

160. The Proposed Project, as a whole, is not contrary to the public interest and meets the standard set forth in the rules. (Bain, p. 736, ln. 25; p. 737, ln. 1).

XI. SOVEREIGNTY SUBMERGED LANDS MANAGEMENT CRITERIA

161. For approval, all activities on sovereignty lands (SSLs) must not be contrary to the public interest. (Rule 18-21.004(1)(a), Fla. Admin. Code).

162. For the purposes of the sovereign submerged lands easement, SFWMD determined that the Proposed Project was not contrary to the public interest. (Parrott, p. 694, lns. 14-15). The standard that environmental, social, and economic benefits of the project would

clearly exceed all demonstrable environmental, social, and economic cost of the proposed action is not the standard to be applied nor is it applicable to this project. (Parrott, p. 696, Ins. 13-24).

163. The County provided satisfactory evidence of sufficient upland interest required for activities on sovereignty submerged lands riparian to uplands through grant award agreements, warranty deeds, and an option agreement for sale and purchase as evidence of sufficient upland interest. (C-5, C6, C-7, C-8, C-9, C-10); (Donaldson, p. 57, Ins. 3-5; pp. 61-70).

164. The County's easement contains terms that protect the sovereignty lands by requiring that structures or activities shall be constructed and used to avoid or minimize adverse impacts to sovereignty submerged lands and resources. (J-10, Staff Report, pp. 29-30 of 30).

165. The sovereign submerged lands easement enhances the public health, safety, and welfare or property of others because the Proposed Project is for a new vehicle and pedestrian bridge to serve as an alternate evacuation route for SR-714 and the Palm City Bridge. (J-10, Staff Report-Ex. 10, p. 2 of 3).

166. The Board of Trustees of the Internal Improvement Trust Fund, pursuant to Section 18-21.0051, Fla. Admin. Code, delegated the authority to review and take final agency action on certain applications to use sovereign submerged lands to the Governing Board of the SFWMD, and SFWMD staff applied the SSL criteria to the proposed Indian Street Bridge Project. (J-10, Staff Report-Ex. 10); (Parrott, p. 613, Ins. 15-24).

167. The Trustees, through their staff, determined that the Proposed Project did not reach a level of heightened public concern. (Parrott, p. 614, Ins. 17-22; p. 681, Ins. 14-16).

168. Petitioners' expert witness did not provide any expert opinion testimony on compliance with sovereign submerged lands criteria in obtaining a public easement and was unable to refute or rebut the testimony placed forth by Martin County, FDOT, or SFWMD. (ALJ, p. 936, Ins. 9-11).

XII. LETTER MODIFICATIONS

169. Neither the Letter Modification of Permit No. 43-00785-S/Application No. 100316-7, authorizing roadway and drainage modifications to the Kanner Hwy/Indian Street Intersection nor Letter Modification of Permit No. 43-01229-P/Application No. 100316-6, authorizing roadway and drainage modifications to Indian Street was significant in terms of water quality, water quantity, or environmental impacts. (Jackson, p. 448, Ins. 20-23).

170. The Letter Modifications were issued in accordance with SFWMD rules. (Carter, p. 539, Ins. 4-8).

171. The Letter Modifications were used as a mechanism to capture minor alterations made to previously issued permits for Kanner Highway and Indian Street. (Carter, p. 539, Ins. 10-19).

CONCLUSIONS OF LAW

I. JURISDICTION

172. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 120.57, Fla. Stat.

II. BURDENS OF PROOF AND PERSUASION

173. A DOAH hearing held pursuant to Sections 120.569 and 120.57(1), Fla. Stat., is a *de novo* proceeding designed to formulate final agency action. Young v. Dep't of Cmty. Affairs, 625 So. 2d 831 (Fla. 1993).

174. The minimum standard of proof in resolving disputed issues of fact in a Section 120.57, Fla. Stat., hearing is a preponderance of evidence, or “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it.” Haines v. Dep't of Children and Families, 983 So. 2d 602, 606 (Fla. 5th DCA 2008), quoting Black's Law Dictionary 1182 (6th Ed. 1990). To meet their respective burdens of proof, the parties in an

administrative proceeding must present a preponderance of competent and substantial evidence. See Section 120.57(1)(j) and (l), Fla. Stat. (2009). For the “substantial” evidence to also constitute “competent” evidence, the evidence relied upon should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Marion County v. Priest, 786 So. 2d 623 (Fla. 5th DCA 2001). Competent and substantial evidence was not provided by the Petitioners to refute the reasonable assurances provided by the Applicants.

175. Once an applicant has carried the burden of presenting a *prima facie* showing of entitlement, the burden shifts to the Petitioners. If the Petitioners fail to present evidence, or fail to carry the burden of proof as to the controverted facts asserted, assuming that the applicant’s preliminary showing before the hearing officer warrants a finding of “reasonable assurances,” then the permit must be approved. Fla. Dep’t of Transp. v. J.W.C. Co. Inc., 396 So. 2d 778, 789 (Fla. 1st DCA 1981). In making this preliminary showing of “reasonable assurances” before the hearing officer, the applicant is required to provide credible and credited evidence of his entitlement to the permit. *Id.* This having been done, the hearing officer would not be authorized to deny the permit unless contrary evidence of equivalent quality is presented by the opponent of the permit. *Id.* Such evidence cannot be merely speculative or involve allegations of what might have occurred. See, Chipola Basin Protective Group, Inc. v. Dep’t of Env’tl. Reg., DOAH Case No. 88-3355, 1988 Fla. ENV LEXIS 4765, at *63 (DOAH Nov. 14, 1988, DEP Dec. 30, 1988).

176. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. Metro. Dade County v. Coscan Fla., Inc., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). However, the reasonable assurance standard does not require an “absolute guarantee” of compliance with environmental standards. See, Save our Suwannee, Inc. v.

Piechocki, DOAH Case Nos. 95-3899 and 95-3900, 1996 Fla. ENV LEXIS 37, at *17-18; 96 ER FALR 39 (DOAH Dec. 22, 1995, DEP Feb. 5, 1996). It does not require absolute guarantees that the applicable conditions for issuance of the permit have been satisfied. See, Crystal Springs Recreational Preserve, Inc. v. Sw. Fla. Water Mgmt. Dist., 782 So. 2d 390 (Fla. 2d DCA 2001), Case No. 2D00-1027, 2001 Fla. ENV LEXIS 1068, at *98; 00 ER FALR 122 (DOAH Jan. 27, 2000, SWFWMD Feb. 23, 2000). Absolute guarantees are not necessary, and a permit applicant is not required to “eliminate all contrary possibilities or address impacts which are only theoretical and ... could not be detected or measured in real life.” Hoffert v. St. Joe Paper Co., DOAH Case Nos. 89-5053, 89-6381, 1990 Fla. ENV LEXIS 194, at *44-45; 90 ER FALR 203 (DOAH Oct. 26, 1990, DEP Dec. 6, 1990).

177. The ultimate question of whether reasonable assurances have been provided is a conclusion of law rather than a finding of fact. Coscan Fla., Inc. v. Dep’t of Env’tl. Reg., DOAH Case No. 87-2610, 1990 Fla. ENV LEXIS 49, at *20-21; 90 ER FALR 54 (DOAH Jan. 1990, DER March 4, 1990); See, 1800 Atlantic Developers v. Fla. Dep’t of Env’tl. Reg., 552 So. 2d 946 (Fla. 1st DCA 1989), rev. denied, 562 So. 2d 345 (Fla. 1990).

178. The Applicants made their *prima facie* case that the permit should be issued. Consequently, the Petitioners were required to rebut that *prima facie* case and support the allegations of their petition challenging the proposed permit. J.W.C. at 789. Unless the Petitioners present “contrary evidence of equivalent equality” to the evidence presented by the Applicants and the District, the permit must be approved. J.W.C. at 789-790. The Petitioners failed to present evidence to rebut the *prima facie* case presented by the Applicants and the District.

III. THE DISTRICT’S PERMITTING AUTHORITY

179. Administrative agencies are creatures of statute and can exercise only those powers conferred by statute. Ocampo v. Dep’t of Health, 806 So. 2d 633, 634 (Fla. 1st DCA

2002). The District possesses no inherent power and can only do what it is authorized to do by the Legislature. State, Bd. of Trustees v. Day Cruise Ass'n, Inc., 794 So. 2d 696, 700 (Fla. 1st DCA 2001).

180. The District is a water management district with regulatory jurisdiction over the administration and enforcement of ERP criteria pursuant to the provisions of Part IV, Chapter 373, Fla. Stat., and Title 40E, Fla. Admin. Code. Sections 373.413 and 373.416, Fla. Stat., authorize the District to require ERP permits and impose such reasonable conditions as are necessary to ensure that the construction, operation or maintenance of any stormwater management system will comply with Part IV, Chapter 373, Fla. Stat., and the rules promulgated thereunder, and will not be harmful to the water resources of the District or inconsistent with the overall objectives of the District.

181. An ERP must be based solely on compliance with the applicable permitting criteria. See, Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d 67 (Fla. 3d DCA 1983). In other words, the District may only determine whether the application has met the requirements imposed by the existing statutes and rules the District is charged with enforcing. See, Save the St. Johns River v. St. Johns River Water Mgmt. Dist., 623 So. 2d 1193, 1198 (Fla. 1st DCA 1993).

IV. DEFERENCE

182. An agency's interpretation of its own statutes and rules is entitled to great deference, and shall not be overturned unless clearly erroneous or otherwise unsupported by substantial, competent evidence. Fla. Dep't of Revenue v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001); See, Florida Dep't of Env'tl. Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1st DCA 1986); Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n, 467 So. 2d 987, 989 (Fla. 1985). Under that doctrine, if the agency's interpretations is

one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives. Doyle v. Dep't of Bus. Reg., 794 So. 2d 686, 690 (Fla. 1st DCA 2001).

V. CONSIDERATION OF THE CRITERIA

183. In order to provide reasonable assurances that a project will not be harmful to the water resources of the District, the applicant must satisfy the conditions for issuance set forth in Rules 40E-4.301 and 40E-4.302, Fla. Admin. Code, and the BOR, which is incorporated by reference in Rule 40E-4.091, Fla. Admin. Code.

184. For approval, all activities on sovereignty lands must comply with the policies, standards, and criteria as set forth in Chapter 18-21, Fla. Admin. Code.

185. The essential issues during review of an ERP application are water quality, water quantity, and environmental protection. The parties have stipulated that water quantity, maintenance of surface or ground water levels or surface water flows, and impacts to works of the District are not at issue and that there is no special basin or geographic area involved. (PHS, p. 18).

Water Quantity (Rule 40E-4.301(1)(a), Fla. Admin. Code)

186. Rule 40E-4.301(1)(a), Fla. Admin. Code, addresses adverse water quantity impacts to receiving water bodies. Based on the evidence discussed in paragraphs 46 and 47, the Applicants have provided reasonable assurance that the Proposed Project will not cause adverse water quantity impacts to receiving waters and adjacent lands.

Storage and Conveyance (Rule 40E-4.301(1)(c), Fla. Admin. Code)

187. Rule 40E-4.301(1)(c), Fla. Admin. Code, requires that an applicant demonstrate that the Proposed Project will not adversely impact existing surface water storage and conveyance capabilities. Based on the evidence discussed in paragraphs 48-57, the Applicants

have provided reasonable assurance that the Proposed Project will not adversely impact existing surface water storage and conveyance capabilities.

Engineering Principles (Rule 40E-4.301(1)(i), Fla. Admin. Code)

188. As required by Rule 40E-4.301(1)(i), Fla. Admin. Code, and based on the evidence discussed in paragraphs 58-60, the Applicants have provided reasonable assurance that the Proposed Project will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed.

Water Quality (Rule 40E-4.301(1)(e), Fla. Admin. Code)

189. As required by Rule 40E-4.301(1)(e), Fla. Admin. Code, and based on the evidence discussed in paragraphs 61-64, the Applicants have provided reasonable assurance that the Proposed Project will not adversely affect the quality of receiving waters such that water quality standards will be violated.

Wetland Impacts (Rule 40E-4.301(1)(d), Fla. Admin. Code)

190. As required by Rule 40E-4.301(1)(d), Fla. Admin. Code, and based on the evidence discussed in paragraphs 69-84, and paragraphs 65-68, the Applicants have provided reasonable assurance that the Proposed Project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

Secondary Impacts (Rule 40E-4.301(1)(f), Fla. Admin. Code)

191. As required by Rule 40E-4.301(1)(f), Fla. Admin. Code, and based on the evidence discussed in paragraphs 85-93, the Applicants have provided reasonable assurance that the Proposed Project will not cause adverse secondary impacts to the water resources.

Impacts to Fish and Wildlife and Listed Species (Rule 40E-4.301(1)(d), Fla. Admin. Code)

192. As required by Rule 40E-4.301(1)(d), Fla. Admin. Code, and based on the evidence discussed in paragraphs 94-102, the Applicants have provided reasonable assurance that the Proposed Project will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters.

Mitigation

193. Pursuant to Section 4.2.1 of the Basis is Review, any adverse impacts remaining after design modifications have been implemented may be offset by mitigation. The Applicants have proposed mitigation to offset adverse impacts caused by regulated activities as identified in Sections 4.2 – 4.2.8.2 of the BOR and provided for in Sections 4.3 – 4.3.8 of the BOR. Based on the evidence discussed in paragraphs 103-146, the District has reasonable assurances that the mitigation proposed by the Applicant will adequately offset the direct and secondary impacts of the Proposed Project.

Cumulative Impacts

194. Cumulative impacts are those created by the cumulative effects of similar future projects. Caloosa Property Owners' Ass'n, Inc. v. Dep't of Env'tl. Reg., 462 So. 2d 523, 526 (Fla. 1st DCA 1985).

195. The Applicants are proposing both onsite and offsite mitigation. As required by Rule 40E-4.302(1)(b), Fla. Admin. Code, and Section 4.2.8 of the BOR, the Applicants have analyzed the impact from the Proposed Project and determined that the Proposed Project will not cause unacceptable cumulative impacts to the North St. Lucie Basin. Although the proposed mitigation is not located within the same drainage basin as the impacts, based on the evidence discussed in paragraphs 147-149, the Applicants have provided reasonable assurances that the

Proposed Project will not result in unacceptable cumulative impacts to water quality or the functions of wetlands and other surface waters.

Financial, Legal , and Administrative Capabilities (Rule 40E-4.301(1)(j), Fla. Admin. Code)

196. As required by Rule 40E-4.301(1)(j), Fla. Admin. Code, and based on the evidence discussed in paragraphs 150-151, the Applicants have provided reasonable assurance that the Proposed Project will be conducted by an entity with sufficient financial, legal, and administrative capabilities to ensure that the Proposed Project will be undertaken in accordance with the terms and conditions of the permit.

Public Interest Test (Rule 40E-4.302(1)(a), Fla. Admin. Code)

197. Based on the evidence discussed in paragraph 152, SFWMD has reasonable assurance that the regulated activity will not adversely affect the public health, safety, or welfare or the property of others as required by 40E-4.302(1)(a)1, Fla. Admin. Code.

198. Based on the evidence discussed in paragraph 153, SFWMD has reasonable assurance that the regulated activity will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats as required by 40E-4.302(1)(a)2, Fla. Admin. Code.

199. Based on the evidence discussed in paragraph 154, SFWMD has reasonable assurance that the regulated activity will not adversely affect navigation or the flow of water or cause harmful erosion or shoaling as required by 40E-4.302(1)(a)3, Fla. Admin. Code.

200. Based on the evidence discussed in paragraph 155, SFWMD has reasonable assurance that the regulated activity will not adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity as required by 40E-4.302(1)(a)4, Fla. Admin. Code.

201. Based on the evidence discussed in paragraph 156, SFWMD has reasonable assurance that the regulated activity is of a permanent nature as required by 40E-4.302(1)(a)5, Fla. Admin. Code.

202. Based on the evidence discussed in paragraph 159, SFWMD has reasonable assurance that the regulated activity will not adversely affect the current condition and relative value of functions being performed by areas affected by the proposed regulated activity as required by 40E-4.302(1)(a)7, Fla. Admin. Code.

203. Therefore, based on the evidence discussed in paragraph 160, SFWMD has reasonable assurance that the regulated activity is not contrary to the public interest.

Letter Modifications of Permit Nos. 43-00785-S and 43-01229-P

204. Based on the evidence discussed in paragraphs 169-171, SFWMD has reasonable assurance that the letter modifications of the above-mentioned permits were issued in accordance with SFWMD rules and criteria.

Sovereignty Submerged Lands Management Criteria (Chapter 18-21, Fla. Admin. Code)

205. As required by Chapter 18-21, Fla. Admin. Code, the Applicants submitted the required information to obtain authorization for a public easement, which is a form of sovereign submerged lands easement. Based on the evidence discussed in paragraphs 161-168, the Applicants have met the criteria set forth in Rules 18-21.004 and 18-21.009, Fla. Admin. Code, to obtain a public easement over sovereign submerged lands.

Conclusion

206. The Applicants have provided reasonable assurances to satisfy all statutory and rule criteria.

PROPOSED RECOMMENDED ORDER

The Applicants have provided reasonable assurances that the ERPs will meet all applicable ERP permitting criteria and submerged lands criteria, will not be harmful to the water resources of the District, and will not be contrary to the public interest. Therefore, based on the foregoing Findings of Facts and Conclusions of Law, it is recommended that the District issue the Permit and Letter Modifications to the Applicants with the conditions contained in the Staff Reports.

DONE AND ENTERED this 13th day of December 2010, in Tallahassee, Leon County, Florida.

HONORABLE DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
This _____ day of _____ 2010.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically this 13th day of December, 2010, with The Honorable D. R. Alexander, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; and true and correct copies of the foregoing have been furnished by electronic mail to:

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