BEFORE THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT

CITIZENS FOR SMART GROWTH, INC., KATHIE SMITH, and ODIAS SMITH,
Petitioners,
vs.

DEPARTMENT OF TRANSPORTATION, MARTIN COUNTY, and SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
Respondents.

SFWMD Order No. 2011-012 FOF-ERP
DOAH Case Nos. 10-3316, 3317,3318

FINAL ORDER

On December 28, 2010, D.R. Alexander, the Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), issued a Recommended Order ("RO") to the South Florida Water Management District ("District") in these consolidated cases. A copy of the RO is attached hereto as Exhibit A. After review of the RO, exceptions and corrections thereto, and the record of the proceeding before DOAH, this matter is now before the Executive Director of the District for final agency action.

STANDARD OF REVIEW FOR RECOMMENDED ORDERS

Section 120.57(1)(l), Fla. Stat., prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." §120.57(1)(l), Fla. Stat. (2010); *Charlotte County v. IMC Phosphates Co.*, 18 So. 3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So. 2d 61 (Fla. 1st DCA

2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. *See e.g., Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

A reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health,* 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.,* 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands County Sch. Bd.,* 652 So. 2d 894 (Fla. 2d. DCA 1995). These evidentiary-related matters are within the province of the ALJ, as the "fact-finder" in these administrative proceedings. *See e.g., Tedder v. Fla. Parole Comm'n,* 842 So. 2d 1022, 1025 (Fla. 1st DCA 2003); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See So. Fla. Cargo Carriers Ass'n, Inc. v. Dept. of Bus. Kand Prof'l Regulation*, 738 So. 2d 391 (Fla. 3d DCA 1999); *Martuccio v. Dep't of Prof'l Regulation*, 622 So. 2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997).

Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See Martuccio,* 622 So. 2d at 609.

Also, the ALJ's decision to accept the testimony of one expert witness over that of another expert is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent substantial evidence of record supporting this decision. *See e.g., Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.,* 18 So. 3d 1079, 1088 (Fla. 2d DCA 2009); *Collier Med. Ctr. v. State, Dep't of HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985); *Fla. Chapter of Sierra Club v. Orlando Utils. Comm'n*, 436 So. 2d 383, 389 (Fla. 5th DCA 1983). An agency has no authority to make independent or supplemental findings of fact. *See, e.g., N. Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Fla. Stat., authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *See Barfield v. Dep't of Health,* 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001). An agency's review of legal conclusions in a recommended order is restricted to those that concern matters within the agency's field of expertise. *See, e.g., Charlotte County v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009); G.E.L. Corp. v. Dep't of Envtl. Prot.*, 875 So. 2d 1257, 1264 (Fla. 5th DCA 2004).

If an ALJ improperly labels a conclusion of law as a finding of fact, the label should be disregarded and the item treated as though it were actually a conclusion of law. *See, e.g., Battaglia Props. v. Fla. Land and Water Adjudicatory Comm'n*, 629 So.

2d 161, 168 (Fla. 5th DCA 1993). However, neither should the agency label what is essentially an ultimate factual determination as a "conclusion of law" in order to modify or overturn what it may view as an unfavorable finding of fact. *See, e.g., Stokes v. State, Bd. of Prof'l Eng'rs*, 952 So. 2d 1224 (Fla. 1st DCA 2007).

An agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. *See, e.g., Pub. Employees Relations Comm'n v. Dade County Police Benevolent Ass'n*, 467 So. 2d 987, 989 (Fla. 1985); *Fla. Public Employee Council 79 v. Daniels*, 646 So. 2d 813, 816 (Fla. 1st DCA 1994). Considerable deference should be accorded to these agency interpretations of statutes and rules within their regulatory jurisdiction, and such agency interpretations should not be overturned unless "clearly erroneous." *See, e.g., Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n*, 993 So. 2d 69 (Fla. 2d DCA 2008); *Falk v. Beard*, 614 So. 2d 1086, 1089 (Fla. 1993); *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). Furthermore, agency interpretations of statutes and rules within their regulatory jurisdiction do not have to be the only reasonable interpretations. It is enough if such agency interpretations are "permissible" ones. *See, e.g., Suddath Van Lines, Inc. v. Dep't of Envtl. Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

Based on Chapter 373, Fla. Stat., and Title 40E of the Fla. Admin. Code, the Executive Director of the District has the administrative authority and substantive expertise to exercise regulatory jurisdiction over the administration and enforcement of Environmental Resource Permit ("ERP") Criteria. Therefore, the Executive Director has

substantive jurisdiction over the ALJ's conclusions of law and interpretations of administrative rules, and is authorized to reject or modify the ALJ's conclusions or interpretations if he or she determines that its conclusions or interpretations are "as or more reasonable" than the conclusions or interpretations made by the ALJ.

The case law of Florida holds that parties to formal administrative proceedings must alert reviewing agencies to any perceived defects in DOAH hearing procedures or in the findings of fact of ALJs by filing exceptions to DOAH recommended orders. *See, e.g., Comm'n on Ethics v. Barker,* 677 So. 2d 254, 256 (Fla. 1996); *Henderson v. Dep't of Health, Bd. of Nursing,* 954 So. 2d 77, 81 (Fla. 5th DCA 2007); *Fla. Dep't of Corrs. v. Bradley*, 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987). Having filed no exceptions to certain findings of fact, the party "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coal. of Fla., Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991); *see also Colonnade Medical Ctr., Inc. v. State of Fla., Agency for Health Care Admin.,* 847 So. 2d 540, 542 (Fla. 4th DCA 2003).

In reviewing a recommended order and any written exceptions, the agency's final order "shall include an explicit ruling on each exception." *See* §120.57(1)(k), Fla. Stat. (2010). However, the agency need not rule on an exception that "does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." *Id.*

Petitioners' Exceptions

The Petitioners' exceptions and corrections to the RO were not received during normal business hours on the final day for their filing to be considered timely under Section 120.57(1)(i), Fla. Stat. However, statutes and administrative rules establishing timeframes for filing exceptions to the RO and responses are directory and not mandatory. *See Hamilton County Comm'rs v. Dep't of Envtl. Regulation, 587 So. 2d 1378, 1390 (Fla. 1st DCA 1991).* The District has the discretion to review untimely exceptions to the RO absent any evidence that a party will be prejudiced by its review. Therefore, the District reviewed and ruled as follows on the Petitioners' exceptions and corrections:

Petitioners' Exception No. 1 to Conclusions of Law Nos. 58-61

Petitioners take exception to Conclusions Law Nos. 58-60, which concludes that Petitioner, Citizens for Smart Growth ("CSG") did not prove the elements of associational standing; specifically, that CSG failed to prove, that a substantial number of its members will be affected by the Project. Petitioners' Exception 1 also takes exception to Conclusion of Law No. 61, which characterizes the evidence presented by Petitioners, Kathie and Odias Smith ("Smiths") as "albeit minimal" concerning the standing issue.

Conclusions of Law Nos. 58-60 are supported by Finding of Fact No. 1 of the RO. Petitioners' did not take exception to Finding of Fact No., which found that there was insufficient evidence to substantiate the number of members of CSG who could be considered substantially affected by the project. Instead, the Petitioners argue that the

ALJ erred in interpreting the law of associational standing with respect to the number of members needing to be affected by the Project in order for an organization to have standing.

Conclusion of Law No. 61 is supported by Finding of Fact No. 2 of the RO. Petitioners' did not take exception to Finding of Fact No. 2 where the ALJ found that there was no credible evidence that would prevent the Petitioners from engaging in their current activities after the bridge and other improvements are constructed. The ALJ also found in Finding of Fact No. 2 that there was no evidence showing that the ERP modifications will cause the Petitioners to suffer any adverse impacts.

Having filed no exceptions to Findings of Fact Nos. 1 or 2, the Petitioners have expressed agreement with, or at least waived, any objection thereto. Where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

In addition, the District may only reject or modify an ALJ's conclusion of law if it has substantive jurisdiction over the law. In some instances, the District may have authority to reject conclusions of law regarding standing; for instance, when standing turns on an interpretation of the District's regulatory jurisdiction. However, in this case the substantial numbers criteria for determining associational standing is not related to any environmental or policy matter on which the District has a special knowledge or expertise; therefore, the District does not have substantive jurisdiction that would allow modification or rejection of the ALJ's Conclusions of Law Nos. 58-61.

Therefore, Petitioners' Exception No. 1 is rejected.

Petitioners' Exception No. 2 to Conclusions of Law Nos. 57, 62, 63

Petitioners Exception No. 2 takes exception to the ALJ's Conclusion of Law No. 57 wherein the ALJ stated the applicable burden of proof standard and concluded that Applicants, Florida Department of Transportation ("DOT") and Martin County ("County"), had to meet that burden.

Petitioners argue that the Applicants failed to perform an analysis and evaluation as required by the District's Basis of Review for Environmental Resource Permit Applications within the South Florida Water Management District ("BOR"); specifically, for impacts to fish and wildlife; whether the Project is in the public interest; secondary impacts, including recreational use and fishery and marine productivity; cumulative impacts; and the "submerged sovereign land process." However, each of the areas in the District's BOR were addressed by the ALJ in his Findings of Fact; but, in the context of the applicable provision of Rule 40E-4.01 and 40E-4.302, Fla. Admin. Code. In, Finding of Fact No. 12, the ALJ stated that "Besides these rules [40E-4.301 and 40E-4.302], certain related BOR provisions which implement the rules must also be considered." All of the provisions of the corresponding provisions of the BOR, cumulative impacts and the submerge sovereign land process, were addressed in Findings of Fact Nos. 17-20, 38-44, 29-31, 45-46 and 51-53. Petitioners did not take exception to Findings of Fact Nos. 12, 13, 17, 29, 31, 38-39, 51-52. Having filed no exceptions, the Petitioners have expressed agreement with, or at least waived, any objection thereto. With respect to the remaining Findings of Fact, there is evidence to

support these findings. *See T. 57, 78, 142, 174-175, 273-274, 276 296-297,424-425, 601-602, 607,610,642,673-675, 733-736, 743-746, 759.* As noted above, where there is competent substantial evidence to support a finding of fact, the District may not disturb that finding. The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

Petitioners take exception to Conclusion of Law Nos. 62 and 63 where the ALJ stated the applicable principles of law, which requires that the evidence presented by the Applicants must provide reasonable assurances, not an absolute guarantee. In addition, the ALJ concluded that the Applicants have provided such reasonable assurances, thereby establishing their entitlement to the requested new ERP and modifications of existing ERPs. Petitioner argues that the ALJ conclusions are not supported by the evidence, groundless and erroneous. The ALJ made specific Findings of Fact that support these Conclusions of Law. *See* Findings of Fact Nos. 16, 20, 24, 28, 31-33, 37-43. As noted above, the District may not modify or reject Conclusions of Law unless it finds that the substituted conclusion is "as or more reasonable than that which was rejected or modified." The District is without authority to modify or reject conclusions of law where there is support by underlying findings of fact.

Based on the foregoing, Petitioners' Exception No. 2 to Conclusions of Law Nos. 57, 62 and 63 is rejected.

Petitioners' Exception to Findings of Fact Nos. 18, 19, and 20

Petitioners take exception to Findings of Fact 18, 19 and 20 wherein the ALJ makes findings regarding whether the Applicants have provided reasonable assurances

that the Project will not adversely impact the value of functions provided to fish, wildlife, and species by wetlands. Petitioners contend that the record does not contain competent substantial evidence in support of the ALJ's Finding of Fact No. 18 and the evidence presented in support of Findings of Fact Nos. 19 and 20 does not constitute competent substantial evidence.

Competent substantial evidence does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence (quantity) as to each essential element and as to its admissibility under legal rules of evidence. The District has no authority to reweigh the evidence where the ALJ's findings are reasonable interpretations of and/or inferences drawn by the ALJ. In addition, the ALJ's evaluation of the evidence on this matter is reflected in Finding of Fact No. 28 where the ALJ found that the preponderance of the evidence supports a finding that the Applicants provided reasonable assurances that the Project will not cause adverse impacts to fish, wildlife, or listed species and Finding of Fact No. 35 wherein the ALJ found that the Applicants took extensive efforts to eliminate and reduce wetland and other surface water impacts of the Project. Petitioners have not taken exception to Findings of Fact Nos. 28 or 35.

Petitioners' exceptions to Findings of Fact Nos. 18-20 are rejected.

Petitioners' Exception to Findings of Fact Nos. 23 and 24

Petitioners take exception to Findings of Fact Nos. 23 and 24 wherein the ALJ found that the Applicants have provided reasonable assurances that the Project will not adversely affect water quality standards. The Petitioners do not contend that the

evidence does not exist in the record to support the ALJ's finding, but that the evidence is not competent substantial evidence. This argument would require the District to re-evaluate the evidence considered by the ALJ. As noted above, the District is without authority to do so.

Petitioners' Exception to Findings of Fact Nos. 23 and 24 are rejected.

Petitioners' Exception to Finding of Fact No. 27

Petitioners take exception to Finding of Fact No. 27 wherein the ALJ made findings concerning the assessments made of the impacts to wetlands caused by the Project. The Petitioners in this exception contend that there is no evidence in the record to support ALJ's findings. However, the ALJ in Finding of Fact No. 26 found that each of the delineated wetlands depicted in the District's staff report had a detailed UMAM assessment of its values and condition. Petitioners did not take exception to Finding of Fact No. 26. Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners' Exception to Finding of Fact No. 27 is rejected.

Petitioners' Exception to Findings of Fact Nos. 30-31

Petitioners take exception to Findings of Fact Nos. 30 and 31 wherein the ALJ found that the requirement of Rule 40E-4.301(1)(f) and BOR Sections 4.1.1(f) and 4.2.7 concerning "secondary impacts to water resources will not be violated by the Project."

Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners' Exception to Findings of Fact Nos. 30-31 is rejected.

Petitioners' Exception to Findings of Fact Nos. 40-44

Petitioners take exception to Findings of Fact Nos. 40-44 wherein the ALJ found that the Applicants had provided reasonable assurances that the Project satisfied the contested factors among the seven that comprise the so-called "public interest test." Petitioners' argument essentially criticizes the ALJ's use of the evidence presented by the Applicants. It appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do. Furthermore, there is evidence in the record to support the challenged findings. *See,* Transcript at 731-738; Exh. J-10. The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

Petitioners' Exception to Findings of Fact Nos. 40-44 is rejected.

Petitioners' Exception to Findings of Fact Nos. 45-46

Petitioners take exception to Findings of Fact Nos. 45 and 46 wherein the ALJ explicitly rejects Petitioners contention that Basis of Review Figure 4.4.1 is inaccurate or not representative of the basin in which the Project is located and that the Basin Map

prepared by the District was unacceptable. Again, Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do. The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

Petitioners' Exception to Findings of Fact Nos. 45-46 is rejected.

Petitioners' Exception to Finding of Fact No. 49

Petitioners take exception to Finding of Fact No. 49 wherein the ALJ found that off-site mitigation of the adverse impacts to wetlands caused by the Project will offset the majority of such impacts and that both sites selected for mitigation projects meet the District's criteria for offsetting impacts caused by the Project. Much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners Exception to Finding of Fact No. 49 is rejected.

Petitioners Exception to Findings of Fact Nos. 51 and 53

Petitioners take exception to Findings of Fact Nos. 51 and 53 wherein the ALJ made findings concerning issues raised by Petitioners regarding the use of sovereign submerged lands and whether the application should have been treated as one of "heightened public concern." Again, much of Petitioners' argument asks the District to re-evaluate the evidence presented to the ALJ. Therefore, it appears that the

Petitioners are asking the District to re-weigh the evidence presented to the ALJ or make additional findings of fact in order to accept their argument, neither of which the District is permitted to do.

Petitioners Exception to Findings of Fact Nos. 51 and 53 is rejected.

Rulings on DOT's Exceptions and Corrections to the Recommended Order

DOT's Exception No. 1

DOT's Exception 1 argues that on page 3 of the RO, the last sentence of the first paragraph incorrectly states that the "Revised Staff Report" made minor changes to the "first application". DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, the District's "Notice of Corrections to ERP Staff Report" clearly reflects that the changes made were to the staff report issued by the District on May 18, 2010, covering the Applicants initial Application No. 091021/Permit 43-002393-P. See Exhibits J10 and D4. DOT's Exception No. 1 is essentially of a scrivener's error and the minor correction shall be incorporated in the Final Order as follows: "A Revised Staff Report containing minor changes to the staff report issued by the District on May 18, 2010 covering the Applicants initial Application No. 091021/Permit 43-002393 was issued on October 2010."

DOT's Exception No. 2

DOT's Exception No. 2 argues that on page 3 of the RO, the first sentence of the second paragraph should be amended to include the date "June 4, 2010." DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, the Parties' Pre-hearing Stipulation filed in this case reflects that the June 4, 2010 date should be inserted. DOT's Exception No. 2 is essentially a scrivener's error and the minor correction shall be incorporated into the Final Order as set forth in the response herein to the County's Corrections A-G.

DOT's Exception No. 3 to Finding of Fact No. 2

DOT's Exception No. 3 takes exception to Finding of Fact No. 2. DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected.

However, DOT's exception is essentially a scrivener's error and the minor error shall be incorporated into the Final Order as set forth in the response herein to the County's Corrections A-G.

DOT's Exceptions No. 4 to Finding of Fact No. 30

DOT's Exception No. 4 takes exception to Findings of Fact No. 30 wherein the ALJ found that the Applicants have established extensive secondary impact zones and "buffers." DOT suggests that second sentence of Finding of Fact Nos. 30 be changed to delete "established extensive" to "fully mitigated" and to delete the term "buffer" and

add the following: ". . . extending 250 feet to the north and south edge of the right of way." However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. With respect to the use of the term "buffers," this has been addressed in the response herein to the District's Exceptions Nos. 1 and 2.

DOT's Exception No. 4 is rejected.

DOT'S Exception No. 5 to Finding of Fact No. 49

DOT's Exception No. 5 takes exception to Finding of Fact No. 49 (last line on page 26). However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception. Therefore, DOT's Exception 1 must be rejected. Nevertheless, the County also takes exception to Finding of Fact 49; therefore this exception is addressed in the response in herein to the County's Exception No. 2.

DOT's Exception No. 5 is rejected accepted.

DOT's Exception No. 6 to Finding of Fact No. 53

DOT's Exception No. 6 takes exception to the ALJ's Finding of Fact No. 53. However, DOT does not identify the legal basis for the exception or include appropriate and specific citations to the record in support of its exception.

DOT's Exception No. 6 is rejected.

Rulings on the County's Exceptions and Corrections to the Recommended Order

County's Exceptions Nos. 1 and 3 to Findings of Fact Nos. 3, 4, and Conclusion of Law No. 63.

The County's Exceptions Nos. 1 and 3 take exception to Findings of Fact Nos. 3, 4 and Conclusion of Law No. 63 and states that the findings should be amended to reflect that the County "was a joint-applicant for a new permit and filed one of the applications for a permit modification" and that "DOT and the County have established their entitlement to modification of two existing ERPs . . ." Exhibits J-10, J-11, and J-14 support this proposed change. The County's Exceptions Nos. 1 and 3 are essentially scrivener's errors and the minor corrections shall be incorporated in the Final Order as follows:

> 3. The County is a political subdivision of the State. It was a co-applicant for the new permit and filed one of the applications for a permit modification at issue in this proceeding.
>
> 4. DOT is an agency of the State and ~~filed the three applications being contested~~. It was a co-applicant for the new permit and filed one of the applications for a permit modification at issue in this proceeding.
>
> 63. For the reasons stated in the Findings of Fact, by a preponderance of the evidence, DOT and the County have established their entitlement to the requested new ERP, and DOT ~~has~~ and the County have established ~~its~~ their entitlement to modification of two existing ERPs. . . . .
>
> County's Exceptions. Nos. 1 and 3 are accepted.

County's Exception No. 2 to Finding of Fact No. 49

The County's Exception No. 2 takes exception to Finding of Fact No. 49 and states that this finding incorrectly ascribes management responsibility for the Dupuis State Reserve to the County whereas the Reserve is managed by the District. The

District's Staff Report (Exhibit J10) and hearing testimony (T. 179) support the proposed change. Therefore, the following change to Finding of Fact No. 49 shall be incorporated in the Final Order as follows:

> Because no single on-site or off-site location within the basin was available to provide mitigation necessary to offset all of the Project's impacts, DOT proposed off-site mitigation at two established and functioning mitigation areas known as Dupuis State Reserve (Dupuis), which is managed by the ~~County~~ District and for which DOT has available mitigation credits, and the County's Estuarine Mitigation Site, a/k/a Florida Oceanographic Society (FOS) located on Hutchinson Island."

County's Corrections A-G

The Executive Director takes note (with the exception of paragraph B, see Joint Pre-hearing Stipulation, Page 2) of the corrections set forth in paragraphs A-G of the County's Exceptions and Corrections to the RO which are essentially scrivener's errors and the minor corrections shall be incorporated into the Final Order as follows:

> A. Under the heading "Statement of the Issues" on page 2 of the RO, the third issue should be corrected to read: "(c) issue DOT and the County a letter of modification of ERP 43-01229-P authorizing roadway and drainage modifications ... (etc.)."
>
> C. Under the heading "Background," on page 3 of the RO, the fourth sentence of the first paragraph should be corrected to read: "Finally, on the same date, it gave notice of intent to approve Application No. 100316-6 filed by DOT and the County to modify existing ERP No. 43-01229-P authorizing ... (etc.)."
>
> D. Under the heading "Background," on page 3 of the RO, the first sentence of the second paragraph should be corrected to read: "On June 1 and 4, 2010, Petitioners, Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith, filed three Petitions for Administrative Hearings (Petitions) with the District challenging each of the above proposed actions."

E. Under the heading "Findings of Fact," subheading "I. The Parties," the third sentence of Finding No. 1 (on page 6) should be corrected to read: "The original directors were Kathie Smith, Odias Smith, and Craig Smith, who is ~~the Smiths~~' Mr. Smith's son."

F. Under the heading "Findings of Fact," subheading "I. The Parties," the first sentence of Finding No. 2 (on page 8) should be corrected to read: "Petitioners Odias Smith and Cathie Kathie Smith reside in Palm City ..."

G. Under the heading "Findings of Fact," subheading "III. The ERP Permitting Criteria," and the sub-subheading "D. Wetland Delineation and Impacts," the end of the second sentence of Finding No. 27 (on page 18) should be corrected to read: "However, they provide to fish, wildlife, and listed species." *See* Rule 40E-4.301(1)(d), quoted on page 13 of RO.

Rulings on the District's Exceptions and Corrections to the Recommended Order

District's Exceptions Nos. 1 and 2 to Findings of Fact 30 and 31.

The District's Exceptions Nos. 1 and 2 takes exception to Findings of Fact Nos. 30 and 31 wherein the ALJ found that the Applicants have established extensive secondary impact zones and "buffers." The District argues that the word "buffer" is utilized incorrectly by the ALJ. A buffer implies that a secondary impact will not occur; the correct language should be "secondary impact zones." There is evidence in the record to support these exceptions (See T. 749 -750; 964); therefore, the proposed corrections shall be incorporated into the Final Order as follows:

"30. . . . To address these secondary impacts, the Applicants have established extensive secondary impact zones ~~and buffers~~ along the Project alignment, which were based in part on District experience with other road projects and another nearby proposed bridge project in an area where a State Preserve is located."

"31. ... While Petitioners' expert contended that a 250-foot ~~buffer~~ secondary impact zone on both sides of the roadway's 200-foot right-of-way was insufficient to address secondary impacts to birds (who the expert opines may fly into the bridge or moving vehicles), the greater

weight of evidence shows that bird mortality can be avoided and mitigated through various measures incorporated into the Project. ..."

District's Exceptions 1 and 2 are accepted.

District's Exception No. 3 to Finding of Fact No. 34

The District's Exception No. 3 takes exception to Finding of Fact No. 34 wherein the ALJ found that there were unavoidable cumulative impacts of the Project. The District argues that the Rule 40E-4.301(3), Fla. Admin. Code, does not include or discuss cumulative impacts; however, the rule states that the standards and criteria shall determine whether the reasonable assurances required by Subsection 40E-4.301(1) and Rule 40E-4.302 Fla. Admin. Code, have been provided; wherein subsection 40E-4.302 (1)(b) provides that in addition to the conditions set forth in 40E-4.301, an applicant must provide reasonable assurances that the project will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in the BOR. (See Appendix 1 of District's Motion to Take Official Recognition granted by the ALJ)

District's Exception No. 3 is rejected.

District's Exception No. 4 to Finding of Fact No. 40

District's Exception No. 4 takes exception to ALJ's Finding of Fact No. 40 wherein the ALJ stated mitigation project will "improve the abundance and diversity of fish and wildlife on Kiplinger Island. However, there is evidence in the record to support the challenged finding. (See T. 734) The weight to be given

to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 4 is rejected.

District's Exception No. 5 to Finding of Fact No. 41

District's Exception No. 5 takes exception to ALJ's Finding of Fact No. 41 wherein the ALJ stated that the bridge is expected to be a destination for boating, kayaking, fishing, and bird watching. However, there is evidence in the record to support the challenged finding. (See T. 734) The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 5 is rejected.

District's Exception No. 6 to Finding of Fact No. 43

District's Exception No. 6 takes exception to the ALJ's Finding of Fact No. 43 wherein the ALJ found that there was "no recreational use" on Kiplinger Island. However, there is evidence in the record to support the challenged findings. (See T. 1023-1024) The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 6 is rejected.

District's Exception No. 7 to Finding of Fact No. 46

The District's Exception No. 7 takes exception to Finding of Fact No. 46 wherein the ALJ found that the District's analysis found that the wetlands to be mitigated were of

poor quality and provided minimal wildlife and water quality functions. The District argues that this finding should be clarified that a cumulative impact analysis is only done when wetlands will be mitigated outside of the basin. However, there is evidence in the record to support the challenged findings. (*See, Exhibit J10, BOR, 4.2.8.)* The weight to be given to evidence and the credibility of witnesses is a matter solely within the purview of the ALJ.

District's Exception No. 7 is rejected.

District Corrections Nos. 8 and 9

The Executive Director takes note of the corrections identified in the District's Exceptions and Corrections to RO. The corrections set forth in paragraphs 8 and 9 are essentially scrivener's errors and the minor corrections shall be incorporated in the Final Order as follows:

> Paragraph 8 shall be corrected as set forth in the response to the County's Exception No. 2.
>
> Under the heading "Conservation of Fish and Wildlife" on page 23, Finding of Fact No. 40 of the RO, the cited rule shall read: "See Fla. Admin. Code R. 40E-4.302(1)(a)2."

CONCLUSION

Having reviewed the Recommended Order, the exceptions and responses thereto, and considered the applicable law and being otherwise duly advised, it is ORDERED that for the reason as set forth herein:

A. Petitioner's exceptions are rejected.

B. DOT's Exceptions are rejected.

C. County's Exceptions and Corrections A, C-G are accepted and Correction B is rejected.

D. District's Exceptions Nos. 1, 2 and Corrections 8 and 9 are accepted. District's Exceptions 3-7 are rejected.

E. The Recommended Order (Exhibit A) is adopted as modified and incorporated herein by reference.

F. A Notice of Rights is attached as Exhibit B.

The District's Governing Board delegated the authority to the Executive Director to take final action on permit applications under part IV of Chapter 373, Florida Statutes. *District's Policies and Procedures, Subsection 101-41(a).*

DONE and SO ORDERED, this 10th day of February, 2011 in West Palm Beach, Florida.

GOVERNING BOARD OF SOUTH FLORIDA WATER MANAGEMENT DISTRICT • STATE OF FLORIDA SEAL Established 1949

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,
BY ITS EXECUTIVE DIRECTOR

Carol Ann Wehle

ATTEST:

BY: _____

DATE: 2/10/2011

LEGAL FORM APPROVED:

BY _____

DATE: 02/10/2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order has been furnished this 10th day of February, 2011, by U.S. Regular Mail to the following distribution list:

Jeffrey W. Appel, Esquire
Ray Quinney & Nebeker, P.C.
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Salt Lake City, UT 84111

Kathleen P. Toolan, Esquire
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South Florida Water Management District
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Sarah Nall

Sarah Nall, Deputy General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CITIZENS FOR SMART GROWTH, INC., KATHIE SMITH, AND ODIAS SMITH, Petitioners, vs. DEPARTMENT OF TRANSPORTATION, MARTIN COUNTY, AND SOUTH FLORIDA WATER MANAGEMENT DISTRICT, Respondents.	)	Case Nos. 10-3316 10-3317 10-3318

RECOMMENDED ORDER

Pursuant to notice, these matters were heard before the Division of Administrative Hearings (DOAH) by its assigned Administrative Law Judge, D. R. Alexander, on October 25-27, 2010, in Stuart, Florida.

APPEARANCES

For Petitioners: Jeffrey W. Appel, Esquire
Ray Quinney & Nebeker, P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84111-1451

For Respondent: (DOT) Bruce R. Conroy, Esquire
Kathleen P. Toolan, Esquire
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605 Suwannee Street
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Exhibit A

For Respondent: (District)	Keith L. Williams, Esquire South Florida Water Management District 3301 Gun Club Road Mail Stop 1410 West Palm Beach, Florida 33406-3007
For Respondent: (County)	David A. Acton, Esquire Senior Assistant County Attorney Martin County Administrative Center 2401 Southeast Monterey Road Stuart, Florida 34996-3322
	John J. Fumero, Esquire Rose Sundstrom & Bentley, LLP 950 Peninsula Corporate Circle Suite 2020 Boca Raton, Florida 33487-1389

STATEMENT OF THE ISSUES

The issues are whether to (a) issue an Environmental Resource Permit (ERP) to the Department of Transportation (DOT) and Martin County (County) authorizing construction and operation of a surface water management system to serve a project known as the Indian Street Bridge; (b) issue DOT a letter of modification of ERP No. 43-00785-S authorizing roadway and drainage modifications to the Kanner Highway/Indian Street intersection; and (c) issue DOT a letter of modification of ERP No. 43-01229-P authorizing roadway and drainage modifications to Indian Street between the intersections of Kanner Highway and Willoughby Boulevard.

BACKGROUND

On May 18, 2010, Respondent, South Florida Water Management District (District), by a Staff Report, provided notice of its

intent to approve Application No. 091021-8 filed by DOT and the County (Applicants) and to issue ERP No. 43-02393-P authorizing the construction and operation of a surface water management system to serve 62.06 acres of roadway bridge development; it also authorized an easement for the use of 12.45 acres of sovereign submerged lands. Both authorizations related to a project known as the Indian Street Bridge. On May 21, 2010, the District gave notice of intent to approve Application No. 100316-7 filed by DOT to modify existing ERP No. 43-00785-S authorizing roadway and drainage modifications to the Kanner Highway/Indian Street intersections. Finally, on the same date, it gave notice of intent to approve Application No. 100316-6 filed by DOT to modify existing ERP No. 43-01229-P authorizing roadway and drainage modifications to Indian Street between the intersections of Kanner Highway and Willoughby Boulevard. A Revised Staff Report containing minor changes to the first application was issued on October 20, 2010.

On June 1, 2010, Petitioners, Citizens for Smart Growth, Inc., Kathie Smith, and Odias Smith, filed three Petitions for Administrative Hearings (Petitions) with the District challenging each of the above proposed actions. After dismissing certain allegations in the Petitions on the ground they raised issues beyond the District's jurisdiction, the Petitions were forwarded by the District to DOAH on June 16,

2010, with a request that an administrative law judge be assigned to conduct a hearing. The three Petitions were assigned Case Nos. 10-3316, 10-3317, and 10-3318, respectively, and were consolidated by Order dated June 18, 2010. That Order also authorized Petitioners' out-of-state counsel to appear as a qualified representative. The District's dismissal of certain allegations was reaffirmed by Order dated August 9, 2010. After the initial Petitions were dismissed, without prejudice, for various infirmities, Second Petitions for Administrative Hearing were filed by Petitioners on September 22, 2010. A Third Petition for Administrative Hearing directed to the ERP application in Case No. 10-3316 was filed on September 27, 2010.

By Notice of Hearing dated June 25, 2010, a final hearing was scheduled on October 25-27, 2010, in Stuart, Florida. After a case management conference was conducted, an Order prescribing discovery timelines and other procedural matters was issued on September 20, 2010. A Joint Prehearing Stipulation (Stipulation) was filed by the parties on October 21, 2010.

At the final hearing, Petitioners Odias and Kathie Smith testified on their own behalf and Petitioners jointly presented the testimony of David Gregory Braun, an environmental consultant, Executive Director of Audubon of Martin County, and accepted as an expert. Also, they offered Petitioners Exhibits 24, 27, 28, 30, 33-35, 39, 42, 53, and 54. Exhibit 54 is the

deposition of Mr. Braun. A ruling on Exhibit 53, the deposition of Kathie Smith, was reserved, while all others were received in evidence except 34, 35, and 42. The objection to Exhibit 53 is overruled. DOT presented the testimony of Ann L. Broadwell, DOT District 4 Environmental Administrator and accepted as an expert; Christian B. Jackson, a professional engineer with Reynolds, Smith & Hills, Inc., and accepted as an expert; and Gordon Mullen, a Senior Planner II with Post, Buckley, Schuh & Jernigan and accepted as an expert. Also, it offered DOT Exhibits 8-11, which were received in evidence. The County presented the testimony of Don G. Donaldson, Jr., County Engineer and accepted as an expert. Also, it offered County Exhibits 1, 5-10, 15-17, and 19, which were received in evidence. Exhibit 19 is the deposition of Odias Smith. The District presented the testimony of Hugo A. Carter, Senior Supervising Engineer of the Surface Water Management Division and accepted as an expert; Melinda S. Parrott, Science Supervisor-Environmental Analyst in the Natural Resource Management Division and accepted as an expert; and Anita R. Bain, Division Director of Environmental Resource Regulation and accepted as an expert. Also, it offered District Exhibits 1-4, which were received in evidence. Finally, Joint Exhibits 1-19 were received in evidence.

Pursuant to the District's request, the undersigned took official recognition of Florida Administrative Code Chapters 18-21, 40E-4, 62-302, and 62-345 and the Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District (BOR).

The Transcript of the hearing (seven volumes) was filed on December 2, 2010. Proposed Recommended Orders were filed by the parties on December 13, 2010, and they have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented by the parties, the following findings of fact are made:

I. The Parties

1. Petitioner Citizens for Smart Growth, Inc., is a Florida 501(c)(3) corporation with its principal place of business in Palm City, Florida. It was formed by Odias Smith in August 2001, who serves as its president. The original directors were Kathie Smith, Odias Smith, and Craig Smith, who is the Smiths' son. The composition of the Board has never changed. According to the original Articles of Incorporation, its objectives are "preserving and enhancing the present advantages of living in Martin County (Quality of Life) for the common good, through public education, and the encouragement of reasonable and considered decision making by full disclosure of

impacts and alternatives for the most appropriate use of land, water and resources." The exact number of members fluctuates from time to time. There are no dues paid by any member. At his deposition, Mr. Smith stated that no membership list exists; however, Kathie Smith stated that she currently has a list of 125 names, consisting of persons who at one time or another have made a contribution, have attended a meeting, or asked to be "kept informed of what's going on or asked to be on a mailing list or a telephone list, so they could be advised when we have meetings." No meetings have been held since 2006. Therefore, the Petitions filed in these cases have never been discussed at any meetings of the members, although Ms. Smith indicated that telephone discussions periodically occur with various individuals. Kathie Smith believes that roughly 25 percent of the members reside in a mobile home park north of the project site on Kanner Highway on the eastern side of the St. Lucie River, she does not know how many members reside on the western side of the St. Lucie River, and she is unaware of any member who resides on the South Fork of the St. Lucie River immediately adjacent to the project. Although the three Petitions allege that "seventy percent of the members . . . reside and/or recreate on the St. Lucie River," and in greater detail they allege how those members use that water body or depend on it for their livelihood, no evidence was submitted to support these

allegations that 70 percent (or any other percentage of members) use or depend on the South Fork of the St. Lucie River for recreational or other activities.

2. Petitioners Odias Smith and Cathie Smith reside in Palm City, an unincorporated community just south of Stuart in Martin County. They have opposed the construction of the new bridge since they moved to Palm City in 2001. It is fair to infer that Mr. Smith formed the corporation primarily for the purpose of opposing the bridge. Their home faces north, overlooking the South Fork of the St. Lucie River, from which it is separated by Saint Lucie Shores Drive and a narrow strip of common-ownership property. A boat dock extends from the common-ownership property into the St. Lucie River, providing 5 slips for use by the Smiths and other co-owners. The home is located three blocks or approximately 1,000 feet from the proposed western landfall of the new bridge. Due to the direction that the house faces (north) and the site of the new bridge, the surface water management system elements associated with the bridge will not be visible from their property. Mr. Smith believes, however, that when looking south through a veranda window on the second floor of his home, he will be able to see at least a part of the new bridge. From the front of their house, they now have an unobstructed view of the existing Palm City Bridge, a large structure that crosses the St. Lucie River approximately six-

tenths of a mile north of their home, and which is similar in size to the new bridge now being proposed by the Applicants. The Smiths' home is more than 500 feet from the Project's right-of-way, and they do not know of any impact on its value caused by the Project. While the Smiths currently engage in walking, boating, running, fishing, and watching wildlife in the neighborhood or the South Fork of the St. Lucie River, there was no credible evidence that the Project would prevent them from doing so after the bridge and other improvements are constructed. Also, there was no evidence showing that the ERP Letter Modifications will cause them to suffer any adverse impacts. In fact, as noted below, by DOT undertaking the Project, the neighborhood will be improved through reduced flooding, improved water quality, and new swales and ponds.

3. The County is a political subdivision of the State. It filed one of the applications at issue in this proceeding.

4. DOT is an agency of the State and filed the three applications being contested.

5. The District has the power and duty to exercise regulatory jurisdiction over the administration and enforcement of ERP criteria pursuant to Part IV, Chapter 373, Florida Statutes, and Title 40E of the Florida Administrative Code. The Department of Environment Protection (DEP) has delegated certain authority to the District, including the authority to authorize

an applicant to use sovereign submerged lands via a public easement within the District's geographic jurisdiction.

II. The Project

6. Construction of a new bridge over the St. Lucie River has been studied extensively by the Applicants for over twenty years. DOT has awarded the contract and nearly all of the right-of-way has been purchased. The Project will begin as soon as the remaining permits are acquired. The Project is fully funded through the American Recovery and Reinvestment Act of 2009 and County funding.

7. The Project is located in the County and includes 62.06 acres of roadway bridge development and 12.45 acres of sovereign submerged lands. The Project begins on the west side of the St. Lucie River on County Road 714, approximately 1,300 feet west of Mapp Road in Palm City and ends on the east side of the St. Lucie River approximately 1,400 feet east of Kanner Highway (State Road 76) on Indian Street. It includes construction and operation of a surface water management system to serve the road and bridge project. The total length of the Project is approximately 1.96 miles (1.38 miles of roadway and 0.58 miles of bridge) while the total area is approximately 74.51 acres. After treatment, surface water runoff will discharge to the tidal South Fork of the St. Lucie River.

8. The Project encompasses a bridge crossing the South Fork of the St. Lucie River and the Okeechobee Waterway. Both are classified as Class III waters. The bridge transitions from 4 to 6 lanes east of the Okeechobee Waterway and will require a 55-foot vertical clearance and a 200-foot horizontal clearance between the fender systems at the Okeechobee Waterway.

9. The bridge will cross over a portion of Kiplinger Island owned and preserved by the County. A part of the island was donated to the County in 1993-1994 by The Kiplinger Washington Editors, Inc., and the Kiplinger Foundation, Inc. Audubon of Martin County owns another part of the island. The transfer of title to the County does not include any restriction on the use of the island for conservation purposes only. Documentation submitted at hearing refers to a "two hundred foot wide road right-of-way" easement that the bridge will cross and allows the County to designate where on the island parcel such an easement would be. Therefore, spanning the bridge over a portion of the island owned by the County is clearly permissible.

10. The Project also includes the roadway transition and widening/reconstruction of (a) County Road 714 from the beginning of the Project to Mapp Road from 2-lane to a 4-lane divided roadway; (b) Southwest 36th Street from Mapp Road to the beginning of the bridge from a 2-lane rural roadway to a 4-lane

divided roadway with wide roadway swales; and (c) Kanner Highway (along Indian Street) from a 4-lane to a 6-lane divided urban roadway. Drainage improvements on both sides of the St. Lucie River are associated with the roadway construction.

11. DOT proposes to provide both on-site and off-site mitigation for wetland and surface waters impacts pursuant to a mitigation plan approved by the District.

III. The ERP Permitting Criteria

12. In order to obtain an ERP, an applicant must satisfy the conditions for issuance set forth in Florida Administrative Code Rules 40E-4.301 and 40E-4.302. Besides these rules, certain related BOR provisions which implement the rules must also be considered. The conditions for issuance primarily focus on water quality, water quantity, and environmental criteria and form the basis of the District's ERP permitting program. The parties have stipulated that the Project either complies with the following rule provisions or they are not applicable: Rules 40E-4.301(1)(a), (b), (g), (g), (h), and (k), and 40E-4.302(1)(a)3. and 6. All other provisions remain at issue. Where conflicting evidence on these issues was submitted, the undersigned has resolved all evidentiary conflicts in favor of the Applicants and District.

13. Based on the parties' Stipulation, the following provisions in Rule 40E-4.301(1) are in dispute and require an

applicant to provide reasonable assurances that the construction, alteration, operation, maintenance, removal, or abandonment of a surface water management system:

> (c) will not cause adverse impacts to existing surface water storage and conveyance capabilities;
>
> (d) will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters;
>
> (e) will not adversely affect the quality of receiving waters such that the water quality standards set forth in chapters 62-4, 62-302, 62-520, 62-522, 62-550, F.A.C., including any anti-degradation provisions of paragraphs 62-4.242(1)(a) and (b), subsections 62-4.242(2) and (3), and rule 62-302.300, F.A.C., and any special standards for Outstanding Florida Waters and Outstanding National Resource Waters set forth in subsections 62-4.242(2) and (3), F.A.C., will be violated;
>
> (f) will not cause adverse secondary impacts to the water resources;
>
> (i) will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed;
>
> (j) will be conducted by an entity with sufficient financial, legal and administrative capability to ensure that the activity will be undertaken in accordance with the terms and conditions of the permit, if issued;

These disputed criteria are discussed separately below.

A. Surface Water Storage and Conveyance

14. Rule 40E-4.301(1)(c) requires that an applicant provide reasonable assurances that a proposed activity will not cause adverse impacts to existing surface water storage and conveyance capabilities. Through unrefuted evidence, this requirement was shown to be satisfied. The evidence also establishes that the surface water in and around the Project will actually improve if the Project is constructed as permitted. Further, it will create improved and upgraded surface water management and treatment in areas that now lack features such as swales, retention/detention ponds, curbs and gutters, and improve the overall surface water storage and conveyance capabilities of the Project and surrounding areas.

15. In its current pre-development condition, flooding has occurred in certain areas adjacent to and within the Project area due to poor conveyance, low storage volume, and high tailwater conditions that result from high tides. The Project will remedy historic flooding issues in the Old Palm City area which lies adjacent to a portion of the Project alignment.

16. Surface water runoff will be captured, controlled, and treated by a system of swales, weirs, and retention/detention facilities for pretreatment prior to discharging into the South Fork of the St. Lucie River. Reasonable assurances have been

given that existing surface water storage and conveyance capabilities will not be adversely affected.

B. Value of Functions to Fish, Wildlife, and Species

17. Rule 40E-4.301(1)(d) requires that an applicant provide reasonable assurances that a proposed activity will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters. BOR Section 4.2.2 further implements this provision. For the following reasons, the rule and BOR have been satisfied.

18. The evidence shows that the existing functions to fish and wildlife were assessed and analyzed by a number of federal and state fish and wildlife agencies. There were extensive review and site inspections by the District, DOT, United States Fish and Wildlife Service, United States Army Corps of Engineers, and National Marine Fisheries Commission to assess the existence of, and potential impact on, fish and wildlife that may result from the Project. These studies revealed that while portions of the South Fork of the St. Lucie River provide potential habitat for aquatic or wetland-dependent or threatened species of special concern, no nesting or roosting areas within the vicinity of the Project were observed.

19. The evidence further supports a finding that "other surface waters" over and under the Project will not receive unacceptable impacts due to their current condition, the

detrimental influences of Lake Okeechobee discharges, and tidal impacts.

20. Many of the wetlands to be impacted by the Project were shown to have been impacted by historic activities, and they provide diminished functions to fish and wildlife. The wetland functions were assessed through the Uniform Mitigation Assessment Methodology (UMAM). The UMAM is a standardized procedure for assessing the functions provided by wetlands and other surface waters, the amount that those functions would be reduced by a proposed project, and the amount of mitigation necessary to offset that loss. Detailed UMAM assessments were prepared by the Applicants and the District. They demonstrate that while certain functional units will be lost, they will be fully offset by the proposed mitigation. No credible evidence to the contrary was presented.

C. Water Quality of Receiving Waters

21. Rule 40E-4.301(1)(e) requires an applicant to provide reasonable assurances that a project will not adversely affect the quality of receiving waters such that State water quality standards will be violated. BOR Section 4.2.4 implements this rule and requires that "reasonable assurances regarding water quality must be provided for both the short term and long term, addressing the proposed construction, . . . [and] operation of

the system." The receiving water body is the South Fork of the St. Lucie River, which is designated as an impaired water body.

22. The evidence establishes that the Applicants will avoid and minimize potential short-term impacts to water quality by using silt screens and turbidity barriers, and implementing other best management practices to contain turbidity during construction of the Project. They will also use a temporary trestle rather than barges in the shallow portions of the South Fork to avoid stirring up bottom sediments. Finally, a turbidity monitoring plan will be implemented during construction and dewatering activities for all in-water work. All of these construction techniques will minimize potential impacts during construction.

23. The evidence further establishes that water quality standards will not be violated as a result of the Project. In fact, in some cases water quality will be enhanced due to the installation and maintenance of new or upgraded surface water management features in areas where they do not exist or have fallen into disrepair.

24. Over the long term, the Project is expected to have a beneficial effect on water quality. By improving existing surface water management and adding new surface water treatment features, the Project will provide net improvement to water quality.

D. Wetland Delineation and Impacts

25. The Project includes unavoidable impacts to wetlands and other surface waters. A total of 18.53 acres of wetlands and other surface waters within the Project site will be impacted by the Project, including 3.83 acres of wetlands that will be directly impacted and 14.7 acres of wetlands and other surface waters that will be secondarily impacted.

26. The delineated wetlands are depicted in the Staff Report as wetlands 2a, 19a, 19b, 22, 25-29, 30a, 30b, and 30c, with each having a detailed UMAM assessment of its values and condition. (Impacts to wetland 25 are not included in this Project because they were accounted for in a separate permit proceeding.)

27. Using a conservative assessment and set of assumptions, the District determined that, with the exception of wetlands 19a, 19b, 22, and 27, all wetlands would be impacted by the Project. However, the wetlands that would be impacted suffer from varying historical adverse impacts that have compromised the functions and values they provide to fish, wildlife, and species. This is due to their proximity to urban development, vegetative connectivity, size, historic impacts, altered hydroperiod, and invasive plant species. Likewise, even though the wetlands to be impacted on Kiplinger Island provide certain resting and feeding functions for birds, the value of

these functions is comparatively lower than other wetlands due to the presence of invasive species and lack of management.

28. The preponderance of the evidence supports a finding that the Applicants provided reasonable assurances that the Project will not cause adverse impacts to fish, wildlife, or listed species. See Fla. Admin. Code R. 40E-4.301(1)(d).

E. Secondary Impacts

29. Rule 40E-4.301(1)(f) and BOR Sections 4.1.1(f) and 4.2.7. require a demonstration that the proposed activities will not cause adverse secondary impacts to the water resources, both from a wetlands and water quality standpoint. Secondary impacts are those that occur outside the footprint of the project, but which are very closely linked and causally related to the activity to be permitted. De minimis or remotely-related secondary impacts, however, are not considered unacceptable. See § 4.2.7.(a).

30. There will be secondary impacts to 6.83 acres of freshwater wetlands and 7.87 acres of mangroves, or a total of 14.7 acres. To address these secondary impacts, the Applicants have established extensive secondary impact zones and buffers along the Project alignment, which were based in part on District experience with other road projects and another nearby proposed bridge project in an area where a State Preserve is located.

31. While Petitioners' expert contended that a 250-foot buffer on both sides of the roadway's 200-foot right-of-way was insufficient to address secondary impacts to birds (who the expert opines may fly into the bridge or moving vehicles), the greater weight of evidence shows that bird mortality can be avoided and mitigated through various measures incorporated into the Project. Further, the bird mortality studies used by the expert involved significantly different projects and designs, and in some cases involved projects outside the United States with different species concerned.

F. Engineering and Scientific Principles

32. Rule 40E-301(1)(i) requires that an applicant give reasonable assurance that a project "be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed." Unrefuted evidence establishes that the proposed system will function and be maintained as proposed.

G. Financial, Legal and Administrative Capability

33. Rule 40E-4.301(1)(j) requires that an applicant give reasonable assurance that it has the financial, legal, and administrative capability to ensure that the activity will be undertaken in accordance with the terms of the permit. The evidence supports a finding that Applicants have complied with this requirement.

H. Elimination and Reduction of Impacts

34. Before establishing a mitigation plan, Rule 40E-4.301(3) requires that an applicant implement practicable design modifications to eliminate and reduce wetland and other surface water impacts. In this case, there are unavoidable, temporary wetland impacts associated with the construction of the Project, as well as unavoidable wetland impacts for direct (project footprint), secondary, and cumulative impacts of the Project.

35. The record shows that the Applicants have undertaken extensive efforts to eliminate and reduce wetland and other surface water impacts of the Project. For example, DOT examined and assessed several innovative construction techniques and bridge designs to eliminate and avoid wetland impacts. To eliminate and reduce temporary impacts occurring during construction, DOT has reduced the effect of scour on the pier foundation and reduced the depth of the footing to minimize the amount of excavation on the mangrove island. Also, during construction, the contractor is prohibited from using the 200-foot right-of-way on the mangrove island for staging or stockpiling of construction materials or equipment.

36. The majority of the bridge width has been reduced to eliminate and avoid impacts. Also, the Project's alignment was adjusted to the north to avoid impacts to a tidal creek.

37. Reasonable assurances have been given that all practicable design and project alternatives to the construction and placement of the Project were assessed with no practicable alternatives.

I. Public Interest Test

38. Besides complying with the requirements of Rule 40E-4.301, an applicant must also address the seven factors in Rule 40E-4.302(1)(a)1.-7., which comprise the so-called "public interest" test. See also § 373.414(1)(a), Fla. Stat. In interpreting the seven factors, the District balances the potential positive and negative effects of a project to determine if it meets the public interest criteria. Because Petitioners agree that factors 3 and 6 of the rule are not at issue, only the remaining five factors will be considered. For the following reasons, the Project is positive when the criteria are weighed and balanced, and therefore the Project is not contrary to the public interest.

a. Public Health, Safety, and Welfare

39. The Applicants have provided reasonable assurance that the Project will not affect public health, safety, and welfare. Specifically, it will benefit the health, safety, and welfare of the citizens by improving traffic conditions and congestion, emergency and hurricane evacuation, and access to medical facilities. In terms of safety, navigation markers are included

as part of the Project for safe boating by the public. See Fla. Admin. Code R. 40E-4.302(1)(a)1.

b. Conservation of Fish and Wildlife

40. The activity will not adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats. The mitigation projects will offset any impacts to fish and wildlife, improve the abundance and diversity of fish and wildlife on Kiplinger Island; create mangrove habitat, and add to the marine productivity in the area by enhancing water quality. See Fla. Admin. Code R. 40E-302(1)(a)2.

c. Fishing or Recreational Values

41. The Project has features that allow for pedestrian and bicycle utilization and observation areas which should enhance recreational values. The Old Palm Bridge, approximately one mile north of the Project, has had no adverse impact on the fishing recreation along the South Fork of the St. Lucie River. Navigation will not be affected due to the height and design of the new bridge. Finally, the bridge is expected to be a destination for boating, kayaking, fishing, and bird watching. See Fla. Admin. Code R. 40E-4.302(1)(a)4.

d. Whether the Activity is of a Permanent Nature

42. The parties have stipulated that the Project is permanent in nature. No future activities or future phases of

the project are contemplated. Temporary and permanent impacts are all being fully mitigated. See Fla. Admin. Code R. 40E-4.302(1)(a)5.

e. Values of Functions Being Performed in Affected Areas

43. Due to historic impacts to the areas affected by the Project, the current condition is degraded and the relative value of functions is minimal. Although Kiplinger Island will have temporary impacts, that island is subject to exotic species and has no recreational use or access by boaters or members of the public. The Applicants propose mitigation which will improve and enhance these wetland functions and values in the areas. See Fla. Admin. Code R. 40E-4.302(1)(a)7.

f. Summary

44. The evidence supports a finding that the Project is positive as to whether it will affect the public health, safety, welfare, or property of others; that the Project is neutral with respect to navigation, erosion and shoaling, and water flow, as well as to historical and archaeological concerns; and that the Project is positive as to conservation of fish, wildlife, recreational values, marine productivity, permanency, and current values and functions. When weighed and balanced, the Project is not contrary to the public interest.

J. Cumulative Impacts

45. Rule 40E-4.302(1)(b) requires that an applicant give reasonable assurance that a project will not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in BOR Sections 4.28 through 4.2.8.2. Cumulative impacts are the summation of unmitigated wetland impacts within a drainage basin. An analysis is geographically based upon the drainage basins described in BOR Figure 4.4.1. Petitioners' contention that Figure 4.4.1 is inaccurate or not representative of the basin in which the Project is located has been rejected. In this case, the North St. Lucie Basin was used.

46. To assess and quantify any potential unacceptable cumulative impacts in the basin, and supplement the analyses performed by the Applicants, the District prepared a Basin Map that depicted all the existing and permitted wetland impacts as well as those wetlands under some form of public ownership and/or subject to conservation restrictions or easements. The District's analysis found that the wetlands to be mitigated were of poor quality and provided minimal wildlife and water quality functions. Cumulative impacts from the Project to wetlands within the basin resulted in approximately a four percent loss basin-wide. This is an acceptable adverse cumulative impact. Therefore, the Project will not result in unacceptable cumulative impacts.

K. Mitigation

47. Adverse impacts to wetlands caused by a proposed activity must be offset by mitigation measures. See § 4.3. These may include on-site mitigation, off-site mitigation, off-site regional mitigation, or the purchase of mitigation credits from mitigation banks. The proposed mitigation must offset direct, secondary, and cumulative impacts to the values and functions of the wetlands impacted by the proposed activity.

48. The ability to provide on-site mitigation for a DOT linear transportation project such as a bridge is limited and in this case consists of the creation of mangrove and other wetlands between the realigned St. Lucie Shores Boulevard and the west shore of the St. Lucie River, north and south of the proposed bridge crossing. BOR Section 4.3.1.2 specifically recognizes this limitation and allows off-site mitigation for linear projects that cannot effectively implement on-site mitigation requirements due to right-of-way constraints.

49. Off-site mitigation will offset the majority of the wetland impacts. Because no single on-site or off-site location within the basin was available to provide mitigation necessary to offset all of the Project's impacts, DOT proposed off-site mitigation at two established and functioning mitigation areas known as Dupuis State Reserve (Dupuis), which is managed by the County and for which DOT has available mitigation credits, and

the County's Estuarine Mitigation Site, a/k/a Florida Oceanographic Society (FOS) located on Hutchinson Island. Dupuis is outside the North St. Lucie Basin and was selected to offset direct and secondary impacts to freshwater wetlands. That site meets the ERP criteria in using it for this project. The FOS is within the North St. Lucie Basin and was selected to offset direct and secondary impacts to estuarine wetlands. Like Dupuis, this site also meets the ERP criteria for the project.

50. The preponderance of the evidence establishes that the on-site and off-site mitigation projects fully offset any and all project impacts, and in most instances before the impacts will actually occur.

IV. Sovereign Submerged Lands and Heightened Public Concern

51. Chapter 18-21 applies to requests for authorization to use sovereign submerged lands. The management policies, standards, and criteria used to determine whether to approve or deny a request are found in Rule 18-21.004. For purposes of granting a public easement to the Applicants, the District determined that the Project is not contrary to the public interest and that all requirements of the rule were satisfied. This determination was not disputed. The only issue raised by Petitioners concerning the use of submerged lands is whether the application should have been treated as one of "heightened

public concern." See Fla. Admin. Code R. 18-21.0051(5). If a project falls within the purview of that rule, the Board of Trustees of the Internal Improvement Trust Fund (Board), rather than the District, must review and approve the application to use submerged lands.

52. Review by the Board is appropriate whenever a proposed activity is reasonably expected to result in a heightened public concern because of its potential effect on the environment, natural resources, or controversial nature or location. Id.

53. In accordance with established protocol, the ERP application was sent by the District to DEP's review panel in Tallahassee (acting as the Board's staff) to determine whether the Project required review by the Board. The panel concluded that the Project did not rise to the level of heightened public concern. Evidence by Petitioners that "many people" attended meetings and workshops concerning the Project over the last 20 years or so is insufficient to trigger the rule. Significantly, except for general project objections lodged by Petitioners and Audubon of Martin County, which did not include an objection to an easement, no adjacent property owner or other member of the public voiced objections to the construction of a new bridge.

V. Revised Staff Report

54. On October 20, 2010, the District issued a Revised Staff Report that merely corrected administrative errors or

information that had been previously submitted to the District. Contrary to Petitioners' assertion, it did not constitute a material change to the earlier agency action either individually or cumulatively. Therefore, it was properly considered in this proceeding.

VI. Letter Modifications

55. The Letter Modifications were used as a mechanism to capture minor alterations made to previously issued permits for Kanner Highway and Indian Street. Neither Letter Modification is significant in terms of water quality, water quantity, or environmental impacts. Both were issued in accordance with District rules and should be approved.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over this matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

57. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Balino v. Dep't of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, DOT and the County have the burden of proving by a preponderance of the evidence that they are entitled to a new ERP and modification of two existing ERPs.

58. The Applicants contend that Petitioners have not demonstrated that their substantial interests are affected by the proposed agency action. The District remains neutral on this issue. To demonstrate standing to participate in an administrative proceeding, the proof required "is proof of the elements of standing, not proof directed to the elements of the case or to the ultimate merits of the case." Peace River/ Manasota Regional Water Supply Authority, et al. v. IMC Phosphates Co., et al., 18 So. 3d 1079, 1084 (Fla. 2nd DCA 2009). Therefore, a third party challenger must only offer evidence that its "interest could reasonably be affected by [the Applicants'] proposed activities." Id.

59. Citizens for Smart Growth, Inc.'s standing is "associational" in nature and derived from the representation of its members. The test for associational standing is set forth in Fla. Home Builders Ass'n, et al. v. Dep't of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982). Under that test, an association must prove that a substantial number of its members, although not necessarily a majority, are substantially affected by the Project; that the subject matter of the Project is within the general scope of the interests and activities for which the organization was created; and the relief requested is of the type appropriate for the organization to receive on behalf of its members. Id. at 352-53.

60. While the organization has demonstrated through its original Articles of Incorporation that the environmental ramifications of the Project are arguably within the general scope of interests and activities for which the organization was formed in 2001, and the relief requested (denial of the permit and permit modifications) is of the type appropriate for the organization to receive on behalf of its members, it failed to prove that a substantial number of its members will be affected by the Project. This conclusion is based on the fact that there is no evidence regarding the actual or even estimated number of members, if any, who regularly or occasionally use, or recreate on, the South Fork of the St. Lucie River or the areas where the drainage improvements will occur, as alleged in the three Petitions. Given this lack of evidence to support the elements of standing, the organization fails to qualify for associational standing. Even so, it was given the opportunity to fully participate as a party and to litigate all issues raised in its three Petitions.

61. The Smiths presented evidence, albeit minimal, on how they could reasonably be expected to be affected by the proposed bridge and drainage improvements. Although these concerns ultimately proved to be without merit, they are sufficient to support the elements of standing. See Peace River at 1084. Therefore, the Smiths have standing to participate.

62. District rules and statutory provisions require that an applicant give reasonable assurance that the conditions for the issuance of a permit have been met. §§ 373.413 and 373.414, Fla. Stat.; Fla. Admin. Code R. 40E-4.301 and 40E-4.302. Reasonable assurance contemplates a substantial likelihood that the project will be successfully implemented. Metropolitan Dade Cty. v. Coscan Fla., Inc., et al., 609 So. 2d 644, 648 (Fla. 3d DCA 1992). However, this does not require an absolute guarantee of compliance with environmental standards. See, e.g., Save Our Suwannee, Inc. v. Dep't of Environmental Protection, et al., 1996 Fla. ENV LEXIS 37 at *17-18, Case Nos. 95-3899 and 95-3900 (DOAH Dec. 22, 1995, DEP Feb. 5, 1996). "A party seeking a regulatory permit from DEP or a water management district is not required to disprove all 'possibilities,' 'theoretical impacts,' or 'worst case scenarios' by a permit challenger in order to be entitled to a permit." Charlotte Cty., et al. v. IMC-Phosphates Co., et al., 2003 Fla. ENV LEXIS 169 at *46, Case No. 02-4134 (DOAH Aug. 1, 2003, DEP Sept. 15, 2003). When these principles are applied to the evidence submitted by the Applicants, it is concluded that reasonable assurances have been given that all criteria have been met, and there is a substantial likelihood that the Project will be successfully implemented.

63. For the reasons stated in the Findings of Fact, by a preponderance of the evidence, DOT and the County have

established their entitlement to the requested new ERP, and DOT has established its entitlement to modification of two existing ERPs. Therefore, the three applications should be approved.

RECOMMENDATION

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

RECOMMENDED that the South Florida Water Management District enter a final order granting Application Nos. 091021-8, 100316-7, and 100316-6.

DONE AND ENTERED this 28th day of December, 2010, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of December, 2010.

COPIES FURNISHED:

Carol Ann Wehle, Executive Director
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33406-3007

NOTICE OF RIGHTS

As required by Sections 120.569(1), and 120.60(3), Fla. Stat., following is notice of the opportunities which may be available for administrative hearing or judicial review when the substantial interests of a party are determined by an agency. Please note that this Notice of Rights is not intended to provide legal advice. Not all the legal proceedings detailed below may be an applicable or appropriate remedy. You may wish to consult an attorney regarding your legal rights.

RIGHT TO REQUEST ADMINISTRATIVE HEARING

A person whose substantial interests are or may be affected by the South Florida Water Management District's (SFWMD or District) action has the right to request an administrative hearing on that action pursuant to Sections 120.569 and 120.57, Fla. Stat. Persons seeking a hearing on a District decision which does or may determine their substantial interests shall file a petition for hearing with the District Clerk within 21 days of receipt of written notice of the decision, unless one of the following shorter time periods apply: 1) within 14 days of the notice of consolidated intent to grant or deny concurrently reviewed applications for environmental resource permits and use of sovereign submerged lands pursuant to Section 373.427, Fla. Stat.; or 2) within 14 days of service of an Administrative Order pursuant to Subsection 373.119(1), Fla. Stat. "Receipt of written notice of agency decision" means receipt of either written notice through mail, or electronic mail, or posting that the District has or intends to take final agency action, or publication of notice that the District has or intends to take final agency action. Any person who receives written notice of a SFWMD decision and fails to file a written request for hearing within the timeframe described above waives the right to request a hearing on that decision.

Filing Instructions

The Petition must be filed with the Office of the District Clerk of the SFWMD. Filings with the District Clerk may be made by mail, hand-delivery or facsimile. **Filings by e-mail will not be accepted.** Any person wishing to receive a clerked copy with the date and time stamped must provide an additional copy. A petition for administrative hearing is deemed filed upon receipt during normal business hours by the District Clerk at SFWMD headquarters in West Palm Beach, Florida. Any document received by the office of the SFWMD Clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Additional filing instructions are as follows:

- Filings by mail must be addressed to the Office of the SFWMD Clerk, P.O. Box 24680, West Palm Beach, Florida 33416.
- Filings by hand-delivery must be delivered to the Office of the SFWMD Clerk. **Delivery of a petition to the SFWMD's security desk does not constitute filing. To ensure proper filing, it will be necessary to request the SFWMD's security officer to contact the Clerk's office**. An employee of the SFWMD's Clerk's office will receive and file the petition.
- Filings by facsimile must be transmitted to the SFWMD Clerk's Office at (561) 682-6010. Pursuant to Subsections 28-106.104(7), (8) and (9), Fla. Admin. Code, a party who files a document by facsimile represents that the original physically signed document will be retained by that party for the duration of that proceeding and of any subsequent appeal or subsequent proceeding in that cause. Any party who elects to file any document by facsimile shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result. The filing date for a document filed by facsimile shall be the date the SFWMD Clerk receives the complete document.

Initiation of an Administrative Hearing

Pursuant to Rules 28-106.201 and 28-106.301, Fla. Admin. Code, initiation of an administrative hearing shall be made by written petition to the SFWMD in legible form and on 8 and 1/2 by 11 inch white paper. All petitions shall contain:

1. Identification of the action being contested, including the permit number, application number, District file number or any other SFWMD identification number, if known.
2. The name, address and telephone number of the petitioner and petitioner's representative, if any.
3. An explanation of how the petitioner's substantial interests will be affected by the agency determination.
4. A statement of when and how the petitioner received notice of the SFWMD's decision.
5. A statement of all disputed issues of material fact. If there are none, the petition must so indicate.
6. A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the SFWMD's proposed action.
7. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the SFWMD's proposed action.
8. If disputed issues of material fact exist, the statement must also include an explanation of how the alleged facts relate to the specific rules or statutes.
9. A statement of the relief sought by the petitioner, stating precisely the action the petitioner wishes the SFWMD to take with respect to the SFWMD's proposed action.

A person may file a request for an extension of time for filing a petition. The SFWMD may, for good cause, grant the request. Requests for extension of time must be filed with the SFWMD prior to the deadline for filing a petition for hearing. Such requests for extension shall contain a certificate that the moving party has consulted with all other parties concerning the extension and that the SFWMD and any other parties agree to or oppose the extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

If the District takes action with substantially different impacts on water resources from the notice of intended agency decision, the persons who may be substantially affected shall have an additional point of entry pursuant to Rule 28-106.111, Fla. Admin. Code, unless otherwise provided by law.

Mediation

The procedures for pursuing mediation are set forth in Section 120.573, Fla. Stat., and Rules 28-106.111 and 28-106.401-.405, Fla. Admin. Code. The SFWMD is not proposing mediation for this agency action under Section 120.573, Fla. Stat., at this time.

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to Sections 120.60(3) and 120.68, Fla. Stat., a party who is adversely affected by final SFWMD action may seek judicial review of the SFWMD's final decision by filing a notice of appeal pursuant to Florida Rule of Appellate Procedure 9.110 in the Fourth District Court of Appeal or in the appellate district where a party resides and filing a second copy of the notice with the SFWMD Clerk within 30 days of rendering of the final SFWMD action.