

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL AUDUBON SOCIETY, INC.;	)	
COLLIER COUNTY AUDUBON SOCIETY,	)	
INC.; FLORIDA WILDLIFE	)	
FEDERATION; CONSERVANCY OF	)	
SOUTHWEST FLORIDA; and	)	
FRANKLIN ADAMS,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 06-4157
	)	
SOUTH FLORIDA WATER MANAGEMENT	)	
DISTRICT and I.M. COLLIER, J.V.,	)	
	)	
Respondents.	)	
	)	

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RECOMMENDED ORDER

Pursuant to notice, this matter was heard before the  
Division of Administrative Hearings by its assigned  
Administrative Law Judge, Donald R. Alexander, on April 24-27  
and May 1 and 2, 2007, in Naples, Florida.

APPEARANCES

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#### ISSUE

The issue is whether to approve an application by Respondent, I.M. Collier, J.V. (Collier), to modify its Environmental Resource Permit (ERP) No. 11-02031P (2002 Permit) by changing the surface water management system (SWMS) for a proposed residential and golf course development in Collier County (County), Florida, known as Mirasol.

#### BACKGROUND

In February 2002, Respondent, South Florida Water Management District (District), issued the 2002 Permit authorizing Collier to construct and operate a SWMS for a project known as Mirasol. Among other things, that ERP contained a flow-way and conveyance channel along the northern

and western development boundaries and associated control structures. In May 2006, Collier filed an application to modify the 2002 Permit by removing the flow-way and associated control structures and proposing an alternative SWMS. It also proposed to revise the wetland preservation, wetlands impacts, and wetland mitigation areas contained within the internal preserve areas of the development site and to modify the proposal for the flow-way within the external preserve site. On October 12, 2006, the District's Governing Board issued its notice of intent to grant the application.

On October 20, 2006, Petitioners, National Audubon Society, Inc., Collier County Audubon Society, Inc., Florida Wildlife Federation, Conservancy of Southwest Florida, and Franklin Adams, filed their Petition for Hearing (Petition) challenging the District's proposed agency action on numerous grounds.

The Petition was forwarded by the District to the Division of Administrative Hearings on October 26, 2006, with a request that an administrative law judge be assigned to conduct a hearing.

By Notice of Hearing dated November 14, 2006, the matter was scheduled for final hearing on February 13-16 and February 26-March 2, 2007, in Fort Myers, Florida. At the request of the parties, venue was changed to Collier County and the hearing was continued to April 24-27, May 1-4, and May 8-11,

2007, in Naples, Florida. However, the hearing was completed on May 2, 2007.

By Order dated December 26, 2006, the undersigned granted in part Collier's Motion to Strike and/or Motion to Dismiss (supported in part by the District), which struck the following paragraphs in the Petition: 36(C) and (D), which sought to invalidate a statute and rule on constitutional grounds; those portions of paragraphs 1, 3, 20, 23, 26-30, 32, 35A.5, 36A and E, and 37, which were based on the application of federal law; paragraphs 35A(7) and 36K, which sought to use this proceeding as a means of revoking the 2002 Permit; and those portions of paragraphs 4B, 5B, 6B, 7B, and 8B, in which reference to Section 403.412(7), Florida Statutes (2006)<sup>1</sup>, was made. By Order dated April 10, 2007, Petitioners were authorized to file an Amended Petition asserting an "as applied" challenge to the constitutionality of the public interest balancing test in Section 373.414(1)(a), Florida Statutes, and a related standard (Section 4.2.3) found in the Basis of Review for Environmental Applications Within the South Florida Water Management District (BOR).

By Order dated April 19, 2007, Collier's Motion for a View was denied. In addition, other procedural rulings are found in various preliminary Orders entered prior to the hearing.

At the final hearing, Petitioners presented the testimony of Jason Lauritsen, a science coordinator with the National Audubon Society and accepted as an expert; Robert B. Boler, project manager/ecologist with the United States National Park Service and accepted as an expert; Dr. Thomas Van Lent, a senior scientist with the Everglades Foundation and accepted as an expert; and Dr. Thomas L. Crisman, a professor of environment at the University of South Florida and accepted as an expert. Also, they offered Petitioners' Exhibits 1-4, 7, 10-18, 30-32, 34, 37-41, 44, 46, 47, 55, 60, 62, 63, 69, and 72, and 73. All were received except Exhibits 30, 31, 34, 37-41, 44, 60, 62, and 63, which were proffered by Petitioners. In addition, Exhibits 11-18 were conditionally received subject to a relevancy objection by Respondents. To the extent they are relevant, they have been considered. Finally, Petitioners' Exhibits 6A-O and Q-U (a power point presentation by witness Lauritsen) were marked for identification purposes but were never formally moved in evidence. However, to the extent his testimony concerning those documents is relevant, that testimony has been considered. The District presented the testimony of Anthony M. Waterhouse, Director of the District's Surface Water Management Division and accepted as an expert, and Anita R. Bain, Director of the District's Natural Resource Management Division and accepted as an expert. Also, it offered District Exhibits 6 and 7, which

were received in evidence. Collier presented the testimony of Frederick T. Barber, III, a professional engineer and accepted as an expert; Richard S. Tomasello, a professional engineer and accepted as an expert; Timothy C. Hall, an environmental consultant and accepted as an expert; Dr. Harvey H. Harper, III, a professional engineer and accepted as an expert; and Dr. Mark A. Ross, a professor with the University of South Florida and accepted as an expert. Also, it offered Collier's Exhibits 1-9, 12, 19, 22-27, and 38; all were received in evidence except Exhibit 38, upon which a ruling was reserved. That exhibit is received in evidence. In addition, the District and Collier offered Respondents' Joint Exhibits 1-3, 5, 7, 8, 10, 11, and 13, which were received in evidence. Finally, at the request of the District, the undersigned took official recognition of portions of Parts I and IV, Chapter 373, Florida Statutes; Florida Administrative Code Rule Chapters 40E-1 and 40E-4; and the BOR.

The Transcript of the hearing (six volumes) was filed on May 10, 2007. By agreement of the parties, Proposed Findings of Fact and Conclusions of Law were filed by Petitioners, the District, and Collier on June 11, 2007, 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. National Audubon Society, Inc. is a not-for-profit corporation (incorporated outside the State of Florida) while Collier County Audubon Society, Inc., Florida Wildlife Federation, and Conservancy of Southwest Florida are Florida not-for-profit corporations. All are environmental organizations. Franklin Adams is a resident of the County and a member of each of the above organizations. Respondents have not contested Petitioners' standing based upon the stipulated facts set forth in the parties' Pre-Hearing Stipulation.

2. The District is a water management district with the power and duty to exercise regulatory jurisdiction over the administration and enforcement of ERP criteria pursuant to Chapter 373, Florida Statutes, and Florida Administrative Code Title 40E.

3. Collier is the holder of the 2002 Permit authorizing the construction of a SWMS to serve the Mirasol project, a large development located in the County. The parties have stipulated that Collier has the administrative, legal, and financial capabilities to undertake the proposed activity. Fla. Admin. Code R. 40E-4.301(1)(j).

## II. The Project Site

4. The Mirasol project consists of approximately 1,713.45 acres located on the north side of Immokalee Road and the Cocohatchee Canal (Canal) in the northern half of the County, approximately three miles east of the intersection with Interstate 75. The property spans three sections of land, the northern third of the property encompassing Section 10, the middle third encompassing Section 15, and the southern third encompassing most of Section 22. The site also includes a peninsula of land extending east of Section 10, encompassing the northernmost quarter of Section 11.

5. The site is bounded on the south by the Canal and Immokalee Road and on the east by an existing residential development known as Heritage Bay, which was previously a rock-mining quarry. To the west of the site, running north to south, are two other proposed residential developments known as Parklands Collier and Terafina/Saturnia Falls and an existing residential and golf course community known as Olde Cypress. There are other existing and proposed residential developments and farm fields to the north of the site.

6. The site is located southwest of the Corkscrew Swamp Sanctuary (Corkscrew Swamp), which is owned by the National Audubon Society, Inc., and appears to stretch from Immokalee (in the northeastern part of the County) south and southwestward



through parts of the County. Corkscrew Swamp sits roughly at the center of a 315-mile watershed, much of which is comprised of short hydroperiod wetlands which dry down completely during the late winter and spring and become inundated again in the late summer and fall during the wet season. This water gradually sheet flows down a very slight downhill gradient toward the south and west. A portion of the sheet flow travels southwest in the vicinity of the site.

7. The region has experienced occasional floods, the most severe of which occurred in 1995. At the direction of the District, the cause of the flooding was investigated in the South Lee County Watershed Study (Study), which concluded that the watershed discharges through a variety of outfalls, but that historic connections to downstream conveyances like the Canal were severed by the construction. While downstream conveyances exist, the Study concluded that connections between upstream flows and downstream conveyances should be enhanced or restored.

8. In the late 1990s, the Canal was improved to increase its conveyance capacity. A berm was constructed by the Big Cypress Basin Board (Basin Board), a legislatively-created entity which manages water resources in the County, on the northern bank in the vicinity of, and across from, the Mirasol site. This berm prevented historic wet season sheet flow from reaching the Canal through the project site, except for a few

culverts located along that water body. The Basin Board also built a 1,000-foot-long hardened concrete weir on the north side of the Canal a few thousand yards west of the project site. This weir provides the primary outlet for sheet flow in and around the Mirasol site.

9. Currently, upstream drainage flows in a southwesterly direction across Section 10. As the water moves south to the Canal, the flow becomes constricted down to a 580-foot wide gap between the Olde Cypress residential development and commercial developments along Immokalee Road to the east. This constricted area further narrows to a 270-foot wide opening before the sheet flow reaches the 1,000-foot weir and discharges into the Canal.

10. During a 3-day, 25-year storm event, a combined peak flow of 553 cubic feet per second (cfs) of water is discharged into the Canal through the 1,000-foot weir, but the Mirasol property only conveys a small portion of this water (around 20 cfs) through culverts in the Canal berm. Most of the water flows to the west of Mirasol where it passes through the narrow gap and over the 1,000-foot weir.

11. Around 1,431 acres of the 1,714-acre site are jurisdictional wetlands. However, these wetlands are in poor condition due to existing impediments to sheet flow, artificially high water levels during the wet season, and heavy infestation of exotic species, principally melaleuca.

### III. Permit History

12. In February 2002, the District issued the 2002 Permit approving the construction of a SWMS to serve two 18-hole golf courses, a single-family residential community, a golf course clubhouse and parking area, golf course maintenance facilities, sales facility, and parking area. The issuance of the 2002 Permit was not challenged.

13. The SWMS included a 36.5-acre flow-way (Flow-Way) that encircled the northern boundary of the development in Section 15 and extended off-site and across adjacent properties to the west. (If constructed, the Flow-Way would be a 200-foot wide, 4-foot deep, 89-acre channel, more than half of which would have been located on the Saturnia Falls/Terafina and Olde Cypress properties.) Besides providing a conveyance function for the Mirasol site, the Flow-Way also enhanced flood protection for other properties by accelerating conveyance of floodwaters to the Canal and reducing peak flood stages by 0.4 feet during a three-day, 25-year storm event. The District included Special Condition 26 in the 2002 Permit, which required construction of the Flow-Way before the remainder of the project could be constructed.

14. The 2002 Permit authorized Collier to directly impact (fill or excavate) 568.66 acres of wetlands within the footprint of the development. Additionally, 39.5 acres of wetlands, which

were isolated remnant strips along the golf courses within the development, were considered secondarily impacted and assessed a thirty-three percent reduction in functional value.

15. Mitigation for the project consisted of preservation and enhancement of wetlands and uplands on site. Enhancement of the preserve areas was primarily credited to the eradication of malaleuca and other exotic species and replanting with appropriate native vegetation. Permit conditions required management of the preserve areas to prevent a recurrence of exotic species.

16. The preserve areas included an 846.95-acre external preserve area to the north and northeast of the area to be developed. It was anticipated that this northern preserve area would ultimately be donated to an existing mitigation area known as the Corkscrew Regional Ecosystem Watershed, along with an interest-bearing fund to ensure perpetual management.

17. In December 2005, the United States Army Corps of Engineers (Corps) denied Collier's federal wetlands permit application for the project and the Flow-Way.

18. Because of this denial, in May 2006 Collier submitted an ERP application with the District seeking to modify the 2002 Permit by revising the SWMS and removing the Flow-Way.

19. On October 12, 2006, the District Governing Board approved a modification to the 2002 Permit, which authorized an

alternate SWMS to serve the golf course and residential development (2006 Permit). Petitioners' challenge to the proposed modification followed.

#### IV. The 2006 Modification

20. Because of the Corps' denial of its application, Collier was required to remove the Flow-Way and redesign the project's SWMS. The most substantial change in the project was the removal of the Flow-Way and associated control structures and its replacement with a series of interconnected lakes running from north to south through the property allowing for the pass-through of surface waters from the area north of the development site into the Canal.

21. The modification does not alter the boundaries and location of the development. However, the revised SWMS includes: five controlled basins with a total area of 718.43 acres, each of which provides treatment of stormwater prior to discharging into the pass-through system; 45.16 acres of interconnected lakes serving as a pass-through for surface waters from the north; 2.12 acres of perimeter berm backslope/buffers/spreader swales; and 7.27 acres along the Canal for the existing 100-foot wide canal easement and proposed canal contouring.

22. These changes also required elimination of the 39.5 acres of remnant wetlands inside the development that had

previously been assessed as secondarily impacted. Also, there were 0.68 acres of additional impacts resulting from slight changes in the internal site design due to the SWMS. To partially offset these impacts, the internal wetland preserves were enlarged by 13.32 acres. The remaining impacts were mitigated with mitigation credits from the Panther Island Mitigation Bank (PIMB). (The PIMB holds a mitigation bank permit issued by the District for a wetland restoration project in Southwest Florida.)

23. The main preserve was left unchanged, except that 36.5 acres previously dedicated to construction of the Flow-Way will be added to the main preserve and similarly enhanced and preserved.

24. In summary, as modified under the 2006 Permit, the total onsite mitigation consists of the preservation and enhancement of 830.89 acres of wetlands, preservation of 109.58 acres of uplands, and the purchase of a total of 5.68 credits from the PIMB. At hearing, Collier also agreed to purchase from the PIMB an additional 5.68 credits within the Basin for a total of 11.36 credits.

#### V. The ERP Permitting Criteria

25. To obtain an ERP, an applicant must satisfy the conditions in Florida Administrative Code Rules 40E-4.301 and 40E-4.302. The first rule focuses primarily on water quantity,

environmental impacts, and water quality, while the second rule generally requires that a public interest balancing test be made, that cumulative impacts, if any, be considered, and that the District consider past violations, if any, by the applicant of District or Department of Environmental Protection (DEP) rules. (The parties have cited no prior violations by the applicant that should be considered.) Besides these two rules, a number of BOR provisions which implement the rule criteria must also be taken into account.

26. If an applicant proposes to modify an existing ERP, as it does here, Florida Administrative Code Rule 40E-4.331(2)(a) comes into play and requires that the District review the application to modify the ERP "using the same criteria as new applications for those portions of the project proposed for, or affected by, the modification." Under this rule, those portions of the project altered or affected by the modification are reviewed under the current ERP criteria, but otherwise the 2002 Permit is not the subject of review in this case. Therefore, the District's review includes only that portion of the existing permit that is proposed to be modified or affected by the modification. In this case, the 2006 design is very similar to the 2002 design, and the project's footprint, control elevations, roadway network, southern outfall, and main preserve are unchanged. However, as pointed out below, since most of the

engineering-related components of the SWMS were affected by the Flow-Way's removal, the District reassessed the hydrologic components of the internal water management system and the pass-through lake system for levels of flood protection and water quality treatment.

27. Because most of the engineering-related components of the SWMS for the project were modified as a result of the removal of the Flow-Way, the District staff reassessed the project's hydrologic calculations associated with levels of flood protection and reassessed the project's water quality treatment volumes applying the currently existing ERP criteria. As to wetland impacts and mitigation, review of the wetland impacts for the 2006 Permit was limited to an analysis of additional wetlands impacts associated with the modification. This was primarily the elimination of the previously permitted, secondarily impacted wetlands. Thus, only the additional wetlands impacts due to the revised SWMS are considered under the currently existing ERP criteria.

28. The 2006 Permit made only slight changes to the project's wetland impacts and mitigation components authorized under the 2002 Permit. The project's footprint was not changed and the main mitigation area (the Northern Preserve) was unaffected by the changes except that 36.50 acres were actually added to that preserve as a result of the removal of the Flow-



Way. Collier did not receive any credit in its mitigation analysis for the additional acreage that will become part of the preserve due to the removal of the Flow-Way.

A. Surface Water Management Criteria

29. As noted above, the ERP criteria in Florida Administrative Code Rule 40E-4.301 focus primarily on three areas of concern: water quantity, environmental impacts, and water quality. Related BOR provisions must also be considered. These areas of concern are discussed below.

a. Water Quantity

30. Florida Administrative Code Rule 40E-4.301(1)(a) requires that an applicant provide reasonable assurance that the construction of a SWMS "[w]ill not cause adverse water quantity impacts to receiving waters and adjacent lands." BOR Section 6.2 implements that provision and requires that a project be designed so that it is consistent with the downstream carrying capacity of the receiving waters. In other words, it must not exceed the capacity of downstream receiving waters, which in this case is the Canal. In making this determination, Section 6.3 of the BOR requires that the 25-year, 3-day design storm event be used.

31. Collier complied with this requirement through an extensive hydrologic study conducted by its expert, Richard S. Tomasello, a former District employee. Applying a hydrologic

model simulation known as S2DMM, the witness determined the appropriate amount of upstream sheet flow that would need to be routed through the project to avoid adverse water quantity and flooding impacts and calculated the correct dimensions of the intake weir to admit that flow into the project's pass-through system. The S2DMM model is a combination of other accepted models including the Sheet 2d, Massmod, and MBR models, which were developed by Mr. Tomasello, and they have been evaluated and used by the District on numerous occasions. In addition, the S2DMM model has been used for other flood studies in Collier and Lee Counties, and it will be used on a restoration project in Martin County.

32. Based upon Mr. Tomasello's analysis, Collier incorporated a 100-foot-long intake weir with a crest elevation of 14.95 NGVD (National Geodetic Vertical Datum) along the northern boundary of the project to maintain existing upstream water elevations. Collier also complied with BOR Section 6.3, which requires the use of a 25-year, 3-day storm event to be used when computing the discharge rate for the project.

33. The modified intake weir on the northern boundary includes two 3.5-foot wide rectangular notches set at an elevation of 14.00 NGVD, which will provide a "base flow" of up to 20 cfs into the pass-through lakes to mimic the current flow through the property. The determination of this base flow was

made through an analysis of the existing culverts at the southern end of the property.

34. While not required by the ERP criteria, Collier also performed a long-term analysis (using a four-year period of record) of the SWMS's effect upon water levels. This analysis demonstrated that the modified system would leave water levels in the wetland areas upstream of the project unchanged during normal rainfall and low-flow periods. This analysis provides additional assurances that the modifications to the SWMS will not affect the Northern Preserve.

35. While Petitioners questioned the accuracy and reliability of the hydrologic study, and its specific application to this project, the criticisms are considered to be vague and unsubstantiated. As noted above, the model has been previously accepted for use in South Florida, and Petitioners' expert conceded he did not have enough information to determine the model's accuracy. The more persuasive evidence established that the hydrologic study submitted by Collier included the relevant available data and was prepared by competent professionals knowledgeable in the field. The claim of Petitioners' experts that they lacked sufficient information to form an opinion on the accuracy of the modeling is not a sufficient basis to overcome the evidence submitted by Collier to meet this criterion.

36. The project's discharge rate in 2006 will not exceed what was permitted in the 2002 Permit. During the 25-year, 3-day storm event, the existing discharge from the project site and the natural area west of the project site into the Canal is 553 cfs. Based on modeling of the modified SWMS, the total discharge from the pass-through system will be 529 cfs, or 24 cfs less than the project's existing pre-development discharge. The discharges resulting from the project as modified in 2006 will not exceed the capacity of the Canal as required by Section 6.3 of the BOR. Accordingly, Collier has provided reasonable assurance that the discharge rate allowed for its project would not be exceeded, as required in Section 6.2 of the BOR.

37. Section 6.8 of the BOR requires that a project allow the passage of drainage from offsite areas to downstream areas, which is necessary to demonstrate that off-site receiving water bodies are not being adversely affected. Collier complied with this provision by conducting the hydrologic analysis using the 25-year, 3-day design storm event, which demonstrated that the discharge rate would be directed to the southern discharge point allowing for the passage of drainage from offsite areas to the downstream areas. The evidence also shows that the current predominant sheetflow from areas outside the project passes through a narrowly constricted area west of the project and

discharges into the Canal over an existing concrete weir. See Finding of Fact 9, supra. Only a small portion of the upstream waters currently discharge through the Mirasol site.

Petitioners' allegation that the construction of the project will further constrict the sheetflow area is rejected, as the constriction of sheetflow will continue to exist whether the project is built or not. The evidence also shows that the project will not further constrict the flow because it will allow for the pass-through of water from outside the project area.

38. Under the 2002 Permit, the Flow-Way was designed to aid in the diversion of upstream flows around the project. Under the 2006 modifications, the pass-through lake system will convey up to forty percent of the upstream flow through the development which complies with the provisions of Section 6.8 of the BOR. As indicated above, during periods of lower water levels, the notches in the weir along the northern boundary will allow for the flow to pass onto the project site consistent with existing conditions. During major storm events, water will pass over the weir into the pass-through lake system to be conveyed to the Canal. Therefore, Collier has provided reasonable assurance that the criteria in Section 6.8 have been met.

39. Section 6.10 of the BOR requires that the project be designed to conserve water and site environmental values and not

lower the water table or groundwater or over-drain wetlands. Section 6.11 of the BOR provides that the control and detention elevations for the project must be established at elevations to accomplish the objectives of Section 6.10. The latter section is adhered to when the control elevations proposed for a project are established consistent with the onsite wetland conditions. In this case, the control elevations for the wetlands and surface water management lakes are essentially the same as the design in the 2002 Permit. Collier has set the control elevations above the average wet season water table (WSWT) for the area, thereby ensuring that the SWMS will not over-drain and will conserve fresh water.

40. Section 6.11 of the BOR addresses Detention and Control Elevations which are intended to assist in complying with the provisions of Section 6.10. The SWMS design control elevation maintains the detention component and the control (wetland protection) elevations in the previously approved SWMS.

41. The control elevations were set by the design engineers in consultation with Collier's wetland ecologist taking into account the ground elevations and biological indicators. The control elevation for the pass-through system and internal drainage basins work in conjunction with the control elevation along the northern boundary of the project and the control elevation for the discharge point along the southern

boundary to ensure that the project does not overdrain the wetlands and to preserve the project site's environmental values. By setting the control elevation above the WSWT, the design ensures that the wetlands will not be drawn down below the average WSWT and the SWMS will not over-drain them.

42. Section 6.10 also requires that a project not lower water tables so that the existing rights of others would be adversely affected. Again, based on the control elevations, the water table is not expected to be lowered so there should be no effect on the existing rights of others.

43. Collier must further demonstrate that the site's groundwater recharge characteristics will be preserved through the design of the SWMS. Collier complied with this requirement by setting the control elevations above the average WSWT, allowing standing water in the wetland preserves to recharge the groundwater. The ability of the SWMS to accept flows from the Northern Preserve conserves freshwater by preventing that water from being discharged downstream.

44. The SWMS leaves water elevations in the Northern Preserve unchanged. Consequently, water will remain in the wetlands for the same duration and elevations as in the existing conditions, thereby preserving groundwater recharge characteristics.

45. Section 6.12 of the BOR prohibits lake designs that create an adverse gradient between the control elevations of the lakes and the adjacent wetlands. To satisfy this requirement, Collier set all control elevations at 13.4 - 13.5 NGVD while controlling the internal wetland preserves at a slightly higher elevation. Consequently, there is no adverse gradient and no potential for an adverse effect upon the internal preserves from adjacent lakes.

46. Petitioners argued that the pass-through system would quickly lower water levels in the internal wetland preserves. However, the internal wetlands are still protected from drawdown because there are control structures set at or above the wet season elevation between the pass-through lakes and internal wetlands. They also argued that the internal wetlands would be overdrained during the dry season by the deep lakes. However, no witness presented any real analysis to back up this contention. Indeed, the pass-through lakes are only twelve feet deep, and the wetlands are separated from all the lakes by protective berms to avoid any drawdown.

47. In summary, Collier has provided reasonable assurances that the proposed modification in the 2006 Permit will not cause adverse water quantity impacts to receiving waters or adjacent lands and will not exceed the capacity of the downstream receiving waters (the Canal).



b. Flooding

48. Florida Administrative Code Rule 40E-4.301(1)(b) requires Collier to demonstrate that the project "[w]ill not cause adverse flooding to on-site or off-site property." BOR Section 6.4 sets forth criteria and standards for implementing this requirement and provides that building floors be designed to be protected from a 100-year, 3-day storm event. BOR Section 6.5 provides criteria and standards for flood protection for the project's roads and parking lots. Collier complied with these provisions by providing construction plans demonstrating that the building floors and roads will be built higher than the 100-year, 3-day storm event.

49. BOR Section 6.6 provides that a project may not result in any net encroachment into the 100-year floodplain. Collier was also required to comply with the historic basin provision in Section 6.7 of the BOR, which requires the project to replace or otherwise mitigate the loss of historic basin storage provided by the site. The level of encroachment into the 100-year flood plain and loss of historic basin storage attributed to the project are essentially unchanged from the 2002 design. The only difference between the 2002 Permit and the 2006 Permit is how the conveyance of flood water is provided. In 2002, the Flow-Way served this function, while the pass-through system provides it in the 2006 Permit.

50. Collier's flood simulations demonstrated that the project will not alter flood stages during the 25-year and 100-year design storms, while the testimony of witnesses Tomasello and Waterhouse established that the project will not have adverse flooding impacts on adjacent properties, either alone or in conjunction with neighboring developments.

c. Storage and Conveyance

51. Florida Administrative Code Rule 40E-4.301(1)(c) requires that an applicant demonstrate that the proposed development "[w]ill not cause adverse impacts to existing surface water storage and conveyance capabilities." This criterion is closely related to paragraph (1)(b) of the same rule, which prohibits adverse flooding to onsite or offsite property.

52. Section 6.6 of the BOR implements this provision and specifies the parameters for applying this criterion and prohibits a net encroachment between the WSWT and the 100-year event which will adversely affect the existing rights of others. Collier addressed this criterion through the hydrologic analysis submitted. As previously found, that model is the appropriate model to determine flood stages and to calculate the floodplain.

d. Engineering Design Principles

53. Florida Administrative Code Rule 40E-4.301(1)(i) requires an applicant to provide reasonable assurances that the

SWMS "[w]ill be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed." Section 7.0 of the BOR contains the specific standards and criteria to implement this rule. The evidence demonstrates that the SWMS is based on generally accepted engineering and scientific principles and is capable of performing and functioning as proposed.

54. Section 8.0 of the BOR includes various assumptions and information regarding the design of the SWMS. By incorporating these assumptions into the design, Collier complied with Section 8.0.

e. Water Quality Impacts

55. Florida Administrative Code Rule 40E-4.301(1)(e) requires that the proposed modification "[w]ill not adversely affect the quality of the receiving waters such that the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522 and 62-550, F.A.C., including any antidegradation 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." Stated more plainly, the proposed modifications must not adversely affect the quality of

the Canal's waters such that State water quality standards will be violated.

56. Section 5.2 of the BOR describes the District's standard water quality criteria. This provision, which requires a minimum of one-inch detention of stormwater, is referred to as a "presumptive criteria" because it is presumed that if an applicant provides the required one inch of detention, it meets Class III water quality standards, thereby satisfying the rule. As it did under the 2002 Permit, Collier satisfies the presumptive criteria with the 2006 design by providing the one-inch wet detention in its lake system. In fact, the system is designed to provide one and a half inches of treatment in the lake system thereby providing additional treatment.

57. The receiving body of water for the project is the Canal. When the 2002 Permit was issued, the Canal was classified as a Class III water body. It is now classified by DEP as impaired for iron and dissolved oxygen. Because of this new classification, Collier must now comply with Section 4.2.4.5 of the BOR, which reads as follows:

If the site of the proposed activity currently does not meet water quality standards, the applicant must demonstrate compliance with the water quality standards by meeting the provisions in 4.2.4.1, 4.2.4.2, and 4.2.4.3, as applicable, and for the parameters which do not meet water quality standards, the applicant must demonstrate that the proposed activity will

not contribute to the existing violation.  
If the proposed activity will contribute to  
the existing violation, mitigation may be  
proposed as described in subsection 4.3.1.4.

58. Collier demonstrated that neither short-term (during construction) nor long-term (during operation) water quality impacts will occur. It complied with the short-term requirements by submitting a Construction Pollution Prevention Plan detailing how water quality will be protected during the construction process. As to long-term impacts, the Terrie Bates Water Quality Memorandum (Bates Memo) prepared by District staff on June 11, 2004, provides guidance on the implementation of Section 4.2.4.5 for projects which discharge into an impaired water body. The document sets forth a number of design and operational criteria for the types of additional measures that can be incorporated into a project design to provide the necessary reasonable assurance.

59. The Bates Memo suggests that an additional fifty percent of treatment be incorporated into a SWMS. Collier complied with this suggestion by designing the treatment lakes to provide an additional one-half inch of treatment for the additional fifty percent treatment.

60. In addition to the one and one-half inch treatment, Collier is implementing six of the seven items the Bates Memo lists as potential options to consider. The long-term water

quality requirement is addressed by Collier, in part, through an Urban Stormwater Management Plan, which details various source controls or best management practices to be implemented once the project is built and operating. Best management practices assist in ensuring that pollutants will not enter into the lake system.

61. Collier is also implementing a stormwater pollution prevention plan and will utilize the lake system for additional treatment downstream.

62. Collier has further agreed to planting the littoral zones as part of its design of the treatment lakes to provide additional pollutant removal. The design calls for an amount of littoral zones equal to twenty percent of the surface area of the treatment lakes. Collier has agreed to make a Water Quality Monitoring Plan a permit condition, even though such a condition was not included in the staff report. See Collier Exhibit 25.

63. The Bates Memo includes as an option for meeting the long-term requirement a site-specific water quality evaluation of pre vs. post-development pollutant loadings. Collier has presented several such analyses, all of which indicate the post-development pollutant discharges from the site will be less than the pre-development. Mr. Barber prepared a pre vs. post-analysis using a 2003 methodology developed by Dr. Harper. The 2003 version of the Harper methodology is currently accepted by

the Corps. (Although Petitioners' witness, a former Corps employee, suggested that the Corps' acceptance of the study was a "political" rather than a scientific decision, there is insufficient evidence to support this contention.) Besides his first analysis, at the direction of the District staff, Mr. Barber prepared a second analysis using the 2003 methodology with certain conservative assumptions that limited the pollutant residents time to fifty days and utilized lower starting concentrations for phosphorous and nitrogen than were recorded in the nearby monitoring stations. Based upon those reports, the District's staff concluded that Collier had provided reasonable assurances that the project met the criteria in BOR Sections 5.2 and 4.2.4.5.

64. At the hearing, Mr. Barber presented a third analysis utilizing an updated methodology developed by Dr. Harper in February 2006. The 2006 methodology was developed after Dr. Harper conducted a study of water management district criteria throughout the state for DEP. All three of the analyses prepared by Mr. Barber concluded that the project would discharge less nitrogen and phosphorous into the receiving body in the post-development condition than is currently being discharged in the pre-development condition.

65. In addition to the three water quality submittals from Mr. Barber, Collier provided an additional water quality

analysis specific to the project prepared by Dr. Harper. See Collier Exhibit 26, which is commonly referred to as the Harper Report. The analysis evaluated the project's pre vs. post-development water quality loads and also concluded the project would not contribute to the impairment of the Canal. In preparing his analysis, Dr. Harper relied solely on the lakes for estimating removal of pollutants without accounting for any of the additional treatment expected to occur from the source control best management practices contained in the Urban Stormwater Management Plan, which means his report errs on the conservative side.

66. The Harper Report concluded that iron discharges from the SWMS would be extremely low and substantially less than the Class III standard of 1 mg/L. Petitioners presented no specific evidence to counter these conclusions. Petitioners questioned the Harper Report's use of wetlands as part of the loading calculations and attacked his underlying methodology. However, the evidence is clear that wetlands contribute to the water quality constituents in the pre-development condition. This finding is based on data from monitoring stations located in the middle of Corkscrew Swamp, a statewide study on stormwater treatment and wetlands, and the United States Environmental Protection Agency's (EPA) assignment of nutrient loading rates to wetlands in its regional pollutant loading model. Ignoring



the actual water quality in pre-development conditions would not be a true pre vs. post-development analysis. Finally, Petitioners' contention that the Harper methodology should not be considered as admissible evidence because it constitutes "novel" (and therefore unreliable) scientific evidence under the rationale of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), has been rejected. To begin with, the Frye test has not been accepted in Florida administrative proceedings. Moreover, the methodology is the basis for a new statewide rulemaking effort, has been accepted by the EPA, the Corps, and by the Division of Administrative Hearings in at least two proceedings, and has been subjected to two peer reviews.

67. Petitioners also alleged that Collier failed to show that it complied with Florida Administrative Code Rule 62-40.432(2)(a)1., a rule administered by DEP which requires that a new SWMS "[a]chieve at least 80 percent reduction of the average annual load of pollutants that would cause or contribute to violations of state water quality standards." However, this is a broad overstatement of DEP's rule. Also, there is no eighty percent removal efficiency requirement adopted or incorporated into any District rule or BOR criteria. See, e.g., Conservancy of Southwest Florida, Inc. v. G.L. Homes of Naples Associates II, LTD et al., DOAH Case No. 06-4922 (DOAH May 15, 2007, SFWMD July 11, 2007). Instead, the District's "presumptive criteria"

is that one inch of volumetric treatment required in Section 5.2 of the BOR meets the Class III standards. If, as in this case, additional assurances are required, those assurances are met through implementation of the BOR Section 4.2.4.5.

68. Finally, Florida Administrative Code Rule 62-40.110(2) provides that Rule Chapter 62-40 is "intended to provide water resource implementation goals, objectives, and guidance for the development and review of programs, rules, and plans relating to water resources." Also, Florida Administrative Code Rule 62-40.110(4) states that "[t]his chapter, in and of itself, shall not constitute standards or criteria for decisions on individual permits. This chapter also does not constitute legislative authority to the Districts for the adoption of rules if such rules are not otherwise authorized by statute." Even if an eighty percent reduction standard applied, Collier has demonstrated that the project very likely will remove eighty percent or more of pollutants when additional low-impact development techniques, pollutant source reduction practices, and additional uncredited wet and dry detention capacity are considered.

69. Based upon the evidence presented, Section 4.2.8 of the BOR regarding cumulative impacts for water quality is not applicable in this case. Collier's submittals provide reasonable assurances that the project will not be contributing

to the water quality impairment of the Canal or contribute to any other water quality violation. Indeed, the information submitted indicates there will be an incremental improvement in the post-development condition as compared to existing. Since no contribution or impacts to water quality are expected, a cumulative impact analysis is not necessary to assess the extent of the impacts.

70. The combination of all these water quality measures, when taken together, demonstrates that the 2006 Permit will not adversely affect the quality of receiving waters such that state water quality standards will be violated. Therefore, reasonable assurance has been given that Florida Administrative Code Rule 40E-4.301(1)(e) will be satisfied.

f. Wetland Impacts

71. Florida Administrative Code Rule 40E-4.301(1)(d) requires Collier to provide reasonable assurance that the modification of the SWMS "[w]ill not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters." In determining whether this criterion has been satisfied, it is also necessary to determine whether any 2002 permitted impacts should be subject to a second review in this case.

72. Mitigation is a method by which an applicant can propose to impact certain wetlands on the project site in

exchange for providing compensation in the form of preserving, enhancing, restoring, or creating wetlands or uplands to offset those impacts. As noted earlier, there has been no change to the wetland impacts or mitigation proposal as it relates to the Northern Preserve. See Findings of Fact 27 and 28, supra. As a result of the modified SWMS, there has been some additional impact to wetlands within the development area of the project. An additional 40.18 acres will be impacted under the 2006 Permit mostly due to the modified SWMS system. However, 39.5 acres of those wetlands were already considered secondarily impacted under the 2002 Permit. In addition, the preserve areas were expanded by 13.32 acres in the 2006 design. Thus, a portion of the impacts to those wetlands was already factored into the mitigation plan that was developed and approved for the 2002 Permit. As a result, there are 26 acres for which mitigation is necessary under the 2006 Permit.

73. Section 4.3 of the BOR specifies criteria for mitigation proposed as part of an ERP application. Collier has proposed an acceptable mitigation plan for the new wetland impacts that will result from the project due to the proposed modifications incorporated in the 2006 Permit.

74. Except for the mitigation for the additional wetland impacts, the mitigation plan for the 2006 Permit remains essentially unchanged from the 2002 Permit, including the

Grading and Planting Plan, Monitoring Plan, and Mitigation, Monitoring, and Maintenance Plan. The onsite mitigation proposal includes preservation and restoration of wetlands through the removal of melaleuca and other exotic plants and replanting in areas of dense exotic species coverage.

75. Significantly, Collier has not proposed any modifications that would change the effectiveness of the Northern Preserve in providing mitigation for the wetland impacts proposed and approved in the 2002 Permit. While Petitioners claim that the wetlands in the Northern Preserve may be subject to some changes in the level and seasonality of inundation as a result of the SWMS modifications, the evidence does not support those assertions. The revised SWMS will continue to allow water to flow through the Northern Preserve in a manner consistent with existing conditions while providing some flood control protection for extreme rainfall events.

76. Petitioners also suggest that additional analysis regarding the timing and levels of inundation in the wetland preserves is necessary to fully determine the impacts of the modified SWMS on the wetlands. However, the more persuasive testimony indicates that the timing and levels within the wetlands will not be affected by the revised SWMS. The control elevations within the development area have not changed from the

2002 Permit, and these protect the onsite wetlands and ensure that those wetlands will function as expected.

77. With respect to the internal wetlands within the development area, the control elevations have not changed from the 2002 Permit and the evidence establishes that the internal wetlands will continue to function and operate as contemplated in the 2002 Permit. There has been some relocation and reconfiguration of the internal wetland preserve areas that will actually enhance the value of the mitigation by connecting those wetland areas to other preserve areas.

78. Petitioners further suggested that the wetland mitigation within the development area would not function as permitted in the 2002 Permit due to the spill over from the lakes to the wetlands. However, when the water reaches those internal wetland preserves, it has been treated to Class III water quality standards. Therefore, the mitigation values of those wetlands preserves will not be changed or affected due to water quality.

79. Petitioners' objections to the wetland impacts and mitigation were primarily directed at the overall impacts rather than to the 2006 modifications. However, their witness was unaware of the values provided by the additional acres that will be impacted through the 2006 Permit. Therefore, a challenge to

2002 permitted wetlands impacts and mitigation is inappropriate in this proceeding.

g. Functions To Fish and Wildlife and Listed Species

80. Section 4.2.2 of the BOR implements Florida Administrative Code Rule 40E-4.301(1)(d) and provides that an applicant must provide reasonable assurances that a project will not cause adverse impact to the abundance and diversity of fish, wildlife, and listed species or their habitat. With respect to the 586.66 acres of wetland impacts permitted in the 2002 Permit, the 2006 Permit does not modify or affect the values that the wetlands provide to either the abundance or diversity of fish and wildlife. Review of the wetlands criteria as to those acres was finally determined in the 2002 Permit and should not be reopened. By relocating thirteen of the previously impacted acres so they are most closely connected to other wetlands, their value to fish and wildlife will increase.

81. As explained by the District's witness Bain, if Collier had moved the preserve area and changed its functional value, the District would have been required to reevaluate the mitigation that had been accepted for the wetland impacts in the 2002 permit. In this case, however, because the Northern Preserve area did not change, the District's review is limited to the newly impacted wetlands internal to the development for which mitigation was not provided in the 2002 Permit.

82. Section 4.2.2.3 of the BOR addresses the functional assessment of the values provided by the project's wetlands. The only wetland values assessed in the 2006 Permit were the additional wetland impacts that were not mitigated in the 2002 Permit. The evidence establishes that the current value of the wetlands is low due to the heavy melaleuca infestation, which is greater than fifty percent coverage in most locations and seventy-five percent or more in much of the area. Melaleuca has the effect of draining short hydroperiod wetlands. While Petitioners may disagree with how the wetlands were previously evaluated, nothing in the 2006 modification allows or requires a reassessment of their value.

83. Section 4.2.2.4 of the BOR requires that a regulated activity not adversely impact the hydroperiod (the depth, duration, or frequency of inundation) of wetlands or other surface waters. Subsection (a) of this standard applies if the project is expected to reduce the hydroperiod in any of the project's wetlands. Conversely, subsection (b) applies if the project is expected to increase the hydroperiod through changing the rate or method of discharge of water to wetlands or other surface waters. Subsection (c) requires monitoring of the wetlands to determine the effects of the hydrological changes. Again, there is no basis for the District to reopen and reevaluate the wetlands for which mitigation has already been



permitted. No evidence was presented to indicate that there would be any obstacles or problems to accomplishing the mitigation that was proposed and accepted in 2002. In any event, the engineering and biological testimony demonstrated that no change (neither a reduction nor an increase) in the hydrology on the preserved wetlands or the Northern Preserve will occur from what was permitted in the 2002 Permit. By analyzing the various biological indicators onsite and setting the control elevations within the SWMS and the wetlands (both the Northern Preserve and onsite preserve wetlands) above the WSWT, the project ensures that the appropriate hydrology will be maintained. Though the fish and wildlife are not expected to be adversely affected by the 2006 Permit, Collier will be conducting monitoring of plants and animals on the site as an extra measure of assurance as contemplated under BOR Section 4.2.3.4(c).

84. Focusing on just the changes from 2002 to 2006, Petitioners' two experts conceded that the hydrology in the Northern Preserve and its value to wildlife and listed species (including the wood stork) would be benefited in the 2006 Permit over that contemplated in the 2002 Permit due to the removal of the Flow-Way.

h. Secondary Impacts to Water Resources

85. Florida Administrative Code Rule 40E-4.301(1)(f) requires a demonstration that the proposed activities "[w]ill not cause adverse secondary impacts to the water resources." A similar demonstration is required by Sections 4.1.1(f) and 4.2.7 of the BOR. In this case, the secondary impacts considered by the District were potential impacts due to the relocation and expansion of the buffer preserve areas to the perimeter of the project site. In conducting a secondary impact analysis, BOR Section 4.2.7 requires that the District consider only those future projects or activities which would not occur "but for" the proposed system. Here, the evidence demonstrated that no wetlands or other surface waters will be secondarily impacted by the modifications to the SWMS as part of the 2006 Permit.

86. The undersigned has rejected Petitioners' contention that a proposed extension of County Road 951 through the development site should be considered a secondary impact in evaluating this project. This extension has been proposed for at least fifteen years and its precise configuration is unclear. It is not required to be built as a result of the project and there are no firm plans or contracts in place to construct the road. Although the road is listed on the County's transportation plan, it remains speculative as to if and when it will be built. Additionally, there is no evidence the County

has any ownership interest in property for a road in the area identified by Petitioners. Witness Bain testified that the District examined the Collier County Public Records and an easement had not been granted to the County to build the road.

i. Elimination and Reduction

87. Florida Administrative Code Rule 40E-4.301((3) provides in part that "the provisions for elimination or reduction of impacts contained in the [BOR] shall determine whether the reasonable assurances required by subsection 40E-4.301(1) and Rule 40E-4.302, F.A.C., have been provided." Section 4.2.1.1 of the BOR implements that provision and provides that elimination and reduction of impacts is not required when:

The ecological value of the function provided by the area of wetland or other surface water to be adversely affected is low based on site specific analysis using the factors in subsection 4.2.2.3 and the proposed mitigation will provide greater long term ecological value than the area of wetland or other surface water to be adversely affected; . . .

In accordance with that section, Collier was not required to implement practicable design modifications to reduce or eliminate impacts.

88. The District did a site-specific analysis of the quality of the 39.5 acres of adversely affected wetlands, taking into consideration the condition of the wetlands, hydrologic

connection, uniqueness, location, and fish and wildlife utilization. The un rebutted testimony is that the quality of the 39.5 acres of wetlands to be impacted by the 2006 Permit is low and these wetlands were already previously authorized to be secondarily impacted. The low quality wetlands are melaleuca dominated making them not unique.

89. The mitigation will provide greater long-term ecological value than the impacted wetlands. As noted on page 10 of the Staff Report, there will be a larger, contiguous mitigation area to offset direct impacts to previously preserved, but secondarily impacted wetlands and the preservation/enhancement of the external preserve area.

90. The 2006 Permit provides that 5.68 credits are required to be purchased in the PIMB. Collier has advised the District that 27.68 credits are being purchased pursuant to its Corps permit. Thus, Collier will be purchasing more credits than required by the District. Witness Bain took this additional mitigation into account in determining whether the proposed mitigation will provide greater long term ecological value than the area impacted. While the Corps permit is an entirely separate permit action, Collier has agreed to include an additional 5.68 credits within the Basin beyond what is required in the Staff Report as a condition to this 2006 Permit.

Therefore, the mitigation is clearly of greater long-term ecological value than the area impacted.

B. Additional Requirements

91. Florida Administrative Code Rule 40E-4.302 imposes additional requirements on an ERP applicant, including a cumulative impact assessment, if appropriate, and satisfaction of a public interest test.

a. Cumulative Impacts

92. Florida Administrative Code Rule 40E-4.302(1)(b) requires that an applicant demonstrate the project "[w]ill not cause unacceptable cumulative impacts upon wetlands and other surface waters as set forth in subsections 4.2.8 through 4.2.8.2 of the [BOR]." Cumulative impacts are the summation of unmitigated wetland impacts within a drainage basin, and a cumulative impact analysis is geographically based upon the drainage basins described in Figure 4.2.8-1 of the BOR. See Florida Wildlife Federation et al. v. South Florida Water Management District et al., 2006 Fla. ENV LEXIS 49 at \*49, DOAH Case Nos. 04-3064 and 04-3084 (DOAH Dec. 3, 2006, SFWMD Dec. 8, 2006). Also, Section 373.414(8)(a), Florida Statutes, requires the District to consider the cumulative impacts upon surface water and wetlands within the same drainage basin. Thus, the cumulative impact analysis applies only when mitigation is proposed outside of the drainage basin within which the impacts

are to occur. Broward County v. Weiss et al., 2002 Fla. ENV LEXIS 298 at \*29, DOAH Case No. 01-3373 (DOAH Aug. 27, 2002, SFWMD Nov. 14, 2002).

93. In this case, all of the proposed mitigation associated with the 2006 Permit modifications is located within the West Collier Basin. The evidence shows that the mitigation will offset the impacts to wetlands proposed in the 2006 Permit. Therefore, since the mitigation will be performed in the same Basin as the impacts and will offset the adverse impacts, the District must "consider the regulated activity to meet the cumulative impact requirements" of Section 373.414(8)(a), Florida Statutes.

94. A new cumulative impacts analysis based on removal of the Flow-Way is not necessary because the modification does not change the cumulative impacts analysis conducted in the 2002 Permit. Since the Flow-Way was not considered a wetland impact or contributing to the mitigation in the 2002 Permit, its removal does not affect the adequacy of the previously conducted cumulative impacts analysis or the mitigation. Accordingly, there is no need for a new cumulative impact analysis with regards to the Northern Preserve. Finally, contrary to Petitioners' assertion, there is no rule or BOR provision which requires Collier to mitigate for the alleged prior impacts of other projects.

b. Public Interest Test

95. In addition to complying with the above criteria, because the project is located in, on, or over wetlands or other surface waters, Collier must also address the criteria contained in the Public Interest Test in Florida Administrative Code Rule 40E-4.302(1) and Section 4.2.3 of the BOR by demonstrating that the project is not contrary to the public interest. See also § 373.414(1)(a), Fla. Stat. Since the project does not discharge into an OFW or significantly degrade an OFW, the higher standard of "clearly in the public interest" does not apply.

96. In determining compliance with the test, Florida Administrative Code Rule 40E-4.302(1)(a) requires that the District do so by "balancing the [seven] criteria [in the rule]." Findings with respect to each of the seven criteria are set out below. (Except for pointing out that the District does not have an adopted rule which provides more specific detail on how to perform the balancing test than is now found in paragraph (1)(a), and a contention that witness Bain's testimony was insufficient to explain how the staff balanced those factors, Petitioners did not present any evidence at hearing or argument in their Proposed Recommended Order in support of their contention that the above rule, BOR section, or the associated

statute have been applied by the District in an unconstitutional manner.)

(i) Whether the regulated activity will adversely affect the public health, safety, or welfare or the property of others (40E-4.302(1)(a)1.)

97. Collier provided reasonable assurances that the project will not cause any onsite or offsite flooding nor cause any adverse impacts to adjacent lands because the SWMS is designed in accordance with District criteria. Also, the post-development peak rate of discharge does not exceed the allowable discharge rate. Further, the project will not cause any environmental hazards affecting public health, safety, or welfare. The project is considered neutral as to this factor.

(ii) Whether the regulated activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats (40E-4.302(1)(a)2.)

98. For the direct wetland impacts under the 2006 Permit, Collier proposes mitigation which has not changed from the 2002 Permit. The mitigation proposed was previously determined to offset potential impacts to fish and wildlife and particularly wood stork habitats. The evidence indicates that the mitigation plan for the Northern Preserve will improve wood stork habitat from its current melaleuca infested condition. For the additional 40.18 acres of wetland impacts authorized in 2006, the mitigation is of greater long-term value. Thus, the project should be considered positive as to this factor.



(iii) Whether the regulated activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling (40E-4.302(1)(a)3.)

99. The parties have stipulated that the project will not adversely affect navigation. In addition, no evidence was introduced to suggest that the project's construction would result in harmful erosion or shoaling.

(iv) Whether the regulated activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity (40E-4.302(1)(a)4.)

100. The project does not provide any fishing, recreational values, or marine productivity. Therefore, the project is neutral as to this factor.

(v) Whether the regulated activity will be of a temporary or permanent nature (40E-4.302(1)(a)5.)

101. It is undisputed that the project is permanent in nature. Even though the project is permanent, it is considered neutral as to this factor because mitigation will offset the permanent wetland impacts.

(vi) Whether the regulated activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of Section 267.061, F.S. (40E-4.302(1)(a)6.)

102. The parties have stipulated that no significant archeological or historical resources have been identified on this site. Therefore, the project is considered neutral as to this factor.

(vii) The current condition and relative value of functions being performed by areas affected by the proposed regulated activity (40E-4.302(1)(a)7.)

103. The current condition and relative value of functions being performed by the areas affected by the project is low due to the melaleuca infestation. Project mitigation will restore 940 acres of poor quality wetlands and uplands, greatly enhancing their function and value. Therefore, the project should be considered positive as to this factor because the implementation of the mitigation offsets the wetland impacts and improves the current value.

(viii) Summary of Public Interest Factors

104. Overall, the project is no worse than neutral measured against any one of the criteria individually. Therefore, the project is not contrary to the public interest.

#### CONCLUSIONS OF LAW

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

106. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal. Balino v. Department of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977). Therefore, Collier has the burden of proving by a preponderance of the evidence that it is entitled to the proposed modification of its 2002 Permit.

107. By stipulation of the parties, Petitioners have standing to file their Amended Petition.

108. 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 County v. Coscan Florida, 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. Department of Environmental Protection et al., 1996 Fla. ENV LEXIS 37 at \*17-18, DOAH Case Nos. 95-3899 and 95-3900 (DOAH Dec. 22, 1995, DEP Feb. 5, 1996). Indeed, "[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 County et al. v. IMC-Phosphates Company et al., 2003 Fla. ENV LEXIS 169 at \*46, DOAH Case No. 02-4134 (DOAH Aug. 1, 2003, DEP Sept. 15, 2003).

109. By a preponderance of the evidence, Collier has established its entitlement to the requested modification. While there is conflicting evidence regarding many of the

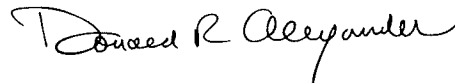
findings which support this conclusion, the more credible and persuasive evidence has been accepted in favor of the applicant. Therefore, the application to modify the 2002 Permit should be approved.

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 the application of I. M. Collier, J.V. for a modification to Environmental Resource Permit No. 11-02031P.

DONE AND ENTERED this 24th day of July, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of July, 2007.

ENDNOTE

1/ All references are to the 2006 version of the Florida Statutes.

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NOTICE OF RIGHT TO FILE EXCEPTIONS

All parties have the right to submit written exceptions within 15 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.