STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioner,

DOAH CASE NO. 15-4107
OGC CASE NO. 15-0094

vs.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondents.
_____/

DEPARTMENT OF ENVIRONMENTAL PROTECTION'S
MOTION IN LIMINE AND MOTION TO RELINQUISH JURISDICTION

State of Florida Department of Environmental Protection (DEP) moves this tribunal to enter an order in limine, prohibiting Petitioner, Environmental Confederation of Southwest Florida (ECOSWF), from presenting evidence on whether the proposed borrow pit referred to in the proposed permit is a wetland, and to relinquish jurisdiction based on the absence of any remaining issues of fact, and as grounds states:

1. On November 20, 2015, ECOSWF filed an unopposed motion seeking permission to file a Third Amended Petition, attached as Exhibit A to the motion, in this matter. This tribunal granted the unopposed motion on the same date.

2. The Third Amended Petition abandons ECOSWF's challenges to the proposed project except with respect to whether the proposed borrow pit, one of the potential sources for fill for the project, is a wetland and whether mining fill from the borrow pit, which it alleges is on conservation easement lands, is contrary to the public interest.

3. The borrow area under consideration in this administrative proceeding is exactly the same as the borrow area considered in DOAH Case No. 12-3427. Compare excerpt from Joint Exhibit 1 in DOAH Case No. 12-3427 (the previous case), attached as Exhibit A, and excerpt from proposed permit in this case, attached as Exhibit B.

4. ECOSWF, DEP, and the Florida Fish and Wildlife Conservation Commission (FWCC) were all parties to the previous administrative proceeding, and to this proceeding.

5. The issue of whether the borrow area is in a wetland was actually litigated in the previous proceeding. See paragraph 57 and 92 of ECOSWF's Substitute Amended Petition in the previous case, attached as Exhibit C.

6. The issue of whether the construction of a borrow pit on conservation easement lands would be contrary to the public interest was also an issue raised in the previous case. See paragraphs 23-24, 58-61, 91-96 of Exhibit C.

7. ECOSWF actually presented expert testimony in the previous case on the issue of whether the area in which the borrow pit was to be constructed was a wetland. FWCC also presented testimony on this issue. See excerpts of the transcripts of the previous case, attached as Exhibit D.

8. The parties also established the existence of the conservation easement in the previous case. See Exhibit D.

9. In the previous case, this tribunal found that the proposed borrow pit is an upland. See Recommended Order, DOAH Case No. 12-3427, attached as Exhibit E to this motion. Specifically, Finding of Fact 48 states that "The sand for the backfilling would be excavated from a "borrow" area located about a mile away. Petitioners contend that the borrow area is in

wetlands, but the more persuasive evidence is that it is in uplands." The Final Order in OGC Case No. 12-1547, attached as Exhibit F, adopted this finding of fact.

10. Although litigated, this tribunal did not make any conclusion about whether the construction of the borrow pit was contrary to the public interest. Presumably, this was because the Recommended Order found that the site of the borrow pit was an upland, not a wetland. Florida Administrative Code Rule 18-21.004 applies to sovereignty submerged lands, not uplands.

11. The doctrine of collateral estoppel (also known as issue preclusion or estoppel by judgment) applies in administrative proceedings. *Doheny v. Grove Isle, Ltd.*, 442 So. 2d 966, 975-976 (Fla. 1st DCA 1983) (Where first application was denied based on, inter alia, a failure to demonstrate that the permit was clearly in the public interest, second application must be denied unless it demonstrates that some change or modification in the project would cause it to meet the public interest criteria.); *Cook v. State*, 921 So. 2d 631, 634 (Fla. 2d DCA 2005) (Collateral estoppel bars re-litigation of the same issues between the same parties in connection with a different cause of action, and applies in administrative cases.); *Deep Lagoon Boat Club, Ltd. V. Sheridan*, 784 So. 2d 1140, 1141 n. 4 (Fla. 2d DCA 2001) (Collateral estoppel did not apply to bar challenge to permit where law regulating activity had become more stringent between first permit challenge and second); *Paul Still v Dep't of Envtl. Prot.*, DOAH Case No. 14-5658RP, 14-1632RP (Summary Final Order, dated February 13, 2015) (Collateral estoppel bars re-litigation of factual and legal claims decided in a previous rule challenge proceeding); *Jacqueline Lane v. International Paper Company*, DOAH Case No. 08-3922, 08-3923 (Recommended Order, dated January 27, 2010) (Where parties are identical and a particular issue was fully

litigated in a previous proceeding that resulted in a final decision, parties could not re-litigate those issues, including opinions previously offered on the issues, in a subsequent proceeding.)

12. Res judicata does not entirely bar the current proceeding because the design of the proposed restoration activity has changed. However, the parties are identical, the issue of whether the proposed source of fill material is a wetland is identical, and the issue was finally determined in the previous DOAH proceeding. Nothing related to the issue of whether the proposed source of fill from impacted conservation lands has changed, so the doctrine of collateral estoppel does bar re-litigation of the issue of whether the proposed site is a wetland. The specified location is exactly the same, and the rules regarding how a wetland determination is to be made are the same. See, §§ 373.421 and 373.4211, Fla Stat.; Fla. Admin. Code Chapter 62-340.

13. The Third Amended Petition alleges no facts or law that provides ECOSWF with a basis to re-litigate the issue of whether the proposed source of the fill to be used in the project is a wetland.

14. The Third Amended Petition alleges no facts or law that provides ECOSWF with a basis to re-litigate the issue of whether use of the conservation easement lands as a proposed source of the fill to be used in the project, which is not in a wetland, is contrary to any statute or rule.

15. The Third Amended Petition lists as an issue of material fact "18. Whether new evidence since the 2012-2013 proceedings . . . indicates that the proposed sand mine for FWC's fill project is located in wetlands."

16. This allegation is insufficient to defeat the application of collateral estoppel. Allowing a party to re-litigate a previous determination of an issue simply by alleging it would

present “new evidence” subverts the principal of administrative finality. In considering a similar issue -- granting relief from judgment in a civil case based on allegations of “new evidence”-- the courts have declined to grant the requested relief. *Phenion Development Group, Inc. v. Love*, 940 So. 2d 1179, 1183-1184 (Fla. 5th DCA 2006), citing *Viking Gen. Corp. v. Diversified Mortgage Investors*, 387 So. 2d 983, 985 (Fla. 2d DCA 1980) (rev. denied, 394 So. 2d 1154 (Fla. 1981) (“As explained in *Viking General:* ‘The necessary finality of litigation prohibits us from giving parties a second chance at proof they had available in the first instance, but overlooked or chose not to use.’ *Id.* at 986; *see also, Gulisano,* 722 So. 2d at 218 (‘No party should be forced to bear the burden of re-litigating a matter due to the opponent's failure to take the necessary steps to protect his or her interests, particularly when, as here, this could have easily been done.’); *Randle-Eastern Ambulance Serv. v. Vasta,* 360 So. 2d 68, 69 (Fla.1978) (‘[I]t has never been the role of the trial courts of this state to relieve attorneys of their tactical mistakes. The rules of civil procedure were never designed for that purpose, and nothing in rule 1.540(b) suggests otherwise.’)”). *See also Hooks v. Quantaince*, 71 So. 3d 908, 911 (Fla. 1st DCA 2011) (In suit to disestablish paternity, paternity test was not newly discovered evidence. Newly discovered evidence is evidence that by due diligence could not have been discovered in time to move for a trial or rehearing.)

17. ECOSWF has previously fully litigated the issue of whether the conservation easement site is a wetland. It is barred from re-litigating that issue. Thus, the tribunal should enter an order in limine prohibiting ECOSWF from re-litigating that issue.

18. Further, since ECOSWF has failed to allege any fact or law governing the issue of whether use of the previously impacted conservation easement over an upland as a source for fill is contrary to the public interest, there is no issue of fact for this tribunal to determine.

19. Based on the foregoing, the Department requests this tribunal to enter an order granting this Motion in Limine, and relinquishing jurisdiction to the Department pursuant to section 120.57(1)(i), Florida Statutes, for entry of a Final Order granting the proposed permit.

Pursuant to Florida Administrative Code Rule 28-106.204(3), undersigned counsel has conferred with counsel for ECOSWF, who objects to this Motion and will file a written opposition. Undersigned counsel has attempted to contact counsel for the Florida Fish and Wildlife Conservation Commission, but has been unable to reach him. Undersigned counsel attempted to contact counsel for FWCC on December 21, 2015 by email to ascertain his position on the Motion. Undersigned counsel also attempted to contact him by telephone to both his office and to his cell phone today. His assistant has informed undersigned counsel that FWCC's counsel is out of the office and will not return to the office until December 29, 2015.

Respectfully submitted on this 22nd day of December 2015.

STATE OF FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION

/s/ Jack Chisolm
JACK CHISOLM
Senior Assistant General Counsel
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3900 Commonwealth Blvd, MS 35
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Secondary: Logan.Whiddon@dep.state.fl.us
Tertiary: DEP.Defense@dep.state.fl.us

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was sent via ELECTRONIC MAIL ONLY to Alisa Coe, Bradley Marshall, and David Guest, Attorneys for Petitioner, Earthjustice, 111 S. Martin Luther King Jr. Blvd., Tallahassee, Florida 32301 at acoe@earthjustice.org, bmarshall@earthjustice.org and dguest@earthjustice.org and to Bud Vielhauer, General Counsel, and Ryan Osborne, Assistant General Counsel, Florida Fish and Wildlife Conservation Commission, 620 S. Meridian Street, Tallahassee, Florida 32399 at Bud.Vielhauer@MyFWC.com and Ryan.Osborne@MyFWC.com on this 22nd day of December 2015.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

/s/ Jack Chisolm
JACK CHISOLM
Senior Assistant General Counsel

Florida Department of Environmental Protection

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Rick Scott
Governor

Carlos Lopez-Cantera
Lt. Governor

Jonathan P. Steverson
Secretary

DEPARTMENT OF ENVIRONMENTAL PROTECTION
CERTIFICATION OF COPIES

I HEREBY CERTIFY that the attached documents consisting of 241 pages are true and correct copies from the files of the Department of Environmental Protection. The attached documents are identified below:

Exhibit A (pages 1-15)
Environmental Resource Permit/State-Owned Submerged Lands Authorization
Florida Fish and Wildlife Conservation Commission
Fisheating Creek Trail Restoration/Cowbone Marsh Hydrologic Restoration
File No.: 22-0303652-002
Modification of Permit No.: 22-0303652-001
Dated September 11, 2012

Exhibit B (pages 16-32)
Consolidated Notice of Intent to Issue Environmental Resource Permit and Letter of Consent to Use Sovereign Submerged Lands
Florida Fish and Wildlife Conservation Commission
Fisheating Creek Trail Restoration/Cowbone Marsh Hydrologic Restoration
File No.: 22-0303652-003
Modification of Permit No.: 22-0303652-001
Dated February 13, 2015

Exhibit C (pages 33-70)
Save Our Creeks Inc. and Environmental Confederation of Southwest Florida, Inc. vs. Florida Fish and Wildlife Conservation Commission and Department of Environmental Protection
DOAH Case No.: 12-3427
Petitioners' Notice of Filing Substitute Amended Petition
Dated March 8, 2013

Exhibit D (pages 71-168)

Save Our Creeks Inc. and Environmental Confederation of Southwest Florida, Inc. vs. Florida Fish and Wildlife Conservation Commission and Department of Environmental Protection
DOAH Case No.: 12-3427
Excerpts of Transcript of Proceedings
Dated March 4, 7, 8, 11, 14, and 19, 2013

Exhibit E (pages 169-196)

Save Our Creeks Inc. and Environmental Confederation of Southwest Florida, Inc. vs. Florida Fish and Wildlife Conservation Commission and Department of Environmental Protection
DOAH Case No.: 12-3427
Recommended Order
Dated July 3, 2013

Exhibit F (pages 197-241)

Save Our Creeks Inc. and Environmental Confederation of Southwest Florida, Inc. vs. Florida Fish and Wildlife Conservation Commission and Department of Environmental Protection
DOAH Case No.: 12-3427\OGC Case No.: 12-1547
Consolidated Final Order
Dated January 15, 2014

Executed this 21st day of December, 2015.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Lea Crandall

Lea Crandall
Agency Clerk
Office of General Counsel
3900 Commonwealth Boulevard, MS 35
Tallahassee, FL 32399-3000
Telephone: (850) 245-2242
Email: lea.crandall@dep.state.fl.us

Florida Department of
Environmental Protection
South District Office
P.O. Box 2549
Fort Myers, FL 33902-2549

Rick Scott
Governor

Jennifer Carroll
Lt. Governor

Herschel T. Vinyard Jr.
Secretary

Permittee/Authorized Entity:
Florida Fish and Wildlife Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399

Fisheating Creek Trail Restoration
Cowbone Marsh Hydrologic Restoration

Authorized Agent:
Mahmoud S. Madkour, Ph.D., P.E.
Florida Fish and Wildlife Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399
Mahmoud.madkour@myFWC.com

Environmental Resource Permit
State-owned Submerged Lands Authorization – Granted

U.S. Army Corps of Engineers Authorization – Separate Corps Authorization Required

File No.: 22-0303652-002
Modification of Permit No.: 22-0303652-001
Lease No.: 4257

Permit Issuance Date: May 6, 2011
Modification Date: September 10, 2012
Permit Construction Phase Expiration Date: May 6, 2016

Exhibit A

Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization

Permittee: Florida Fish and Wildlife Conservation Commission
File No.: 22-0303652-002, modification of Permit No: 22-0303652-001

For the purposes of this modification, additions are shown in underline, and deletions are ~~stricken through~~.

PROJECT LOCATION

The activities authorized by this Permit and state-owned submerged lands authorization are located within Fisheating Creek Wildlife Management Area, and Parcel A27-40-31-A00-0010-0000 Sections 27, 28, 32, and 33, Township 40 South, Range 31 East, Glades County, as shown on attachments.

AUTHORIZATIONS

Fisheating Creek Trail Restoration and Cowbone Marsh Hydrologic Restoration

Project Description

~~The permittee is authorized to install 6 earthen check dams, at equidistant intervals from the existing weir to the cut channel mouth and to remove the existing temporary weir within Fisheating Creek, a Class III Waterbody and to temporarily deposit vegetative debris associated with the ongoing management of the navigation trail within unnamed wetlands, the landward extent of Fisheating Creek.~~ The Permittee was originally authorized to install 6 earthen check dams and to temporarily deposit vegetative debris within Fisheating Creek. This permit is now modified to maintain those authorized activities. Additionally, to complete the restoration of Cowbone Marsh, the permittee is authorized to backfill the channel to match the surrounding grade (+/- 6-inches) with approximately 27,000 cubic yards of material, commencing at the downstream end and working upstream. To accomplish this restoration, this permit also authorizes the construction of a temporary access road, approximately 1.164 miles, through uplands and wetlands, the construction of a 100-foot square staging area in wetlands, within the Fisheating Creek Wildlife Management Area, and the construction of a borrow pit within uplands, approximately 2 acres in size and up to 30 feet deep, on Parcel A27-40-31-A00-0010-0000, owned by a private entity. Authorized activities are depicted on the attached drawings.

The project described above may be conducted only in accordance with the terms, conditions and attachments contained in this permit. The issuance of this permit does not infer, nor guarantee, nor imply that future permits or modifications will be granted by the Department.

The Notice of Appeal must be filed with 30 days from the date this action is filed with the Clerk of the Department.

Executed in Lee County, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Jon M. Iglehart
District Director
South District Office

JMI/mm

Attachments:
Notice of Permit Issuance, 1 page
Project Drawings and Design Specs., ~~4 pages~~ 24 pages
Cowbone Marsh Hydrologic Restoration Plan, ~~49 pages~~ 161 pages
Commencement notice /62-343.900(3)*
Annual status report/62-343.900(4)*
As-built certification/62-343.900(5)*
Inspection certification/62-343.900(6)*
Transfer construction to operation phase/ 62-343.900(7)*
Application for transfer of an ERP permit/62-343.900(8)*
*Can be downloaded at: http://www.dep.state.fl.us/water/wetlands/erp/forms.htm

Copies furnished to:
DEP, Office of General Counsel
U.S. Army Corps of Engineers, File # 2008-4055
FWC, Imperiled Species Management Section
Glades County Property Appraiser
Bureau of Public Land Administration, Lease Agreement No. 4257

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this permit and authorization to use sovereignty submerged lands, including all copies, were mailed before the close of business on **September 11, 2012,** to the above listed persons.

FILING AND ACKNOWLEDGMENT

FILED, on this date, under 120.52(7) of the Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

Clerk

September 11, 2012
Date

INDEX OF PLANS

SHEET NO.	SHEET DESCRIPTION
C1.01	KEY SHEET AND VICINITY MAP
C2.01	TEMPORARY ACCESS ROAD LAYOUT
C2.02	TEMPORARY ACCESS ROAD SHEETS LAYOUT
C2.03–C2.08	TEMPORARY ACCESS ROAD PLAN AND CROSS SECTIONS
C2.09	COMPOSITE MAT DETAILS
C2.10	TEMPORARY ACCESS ROAD ALTERNATIVES TAR-1 & TAR-2
C2.11	TEMPORARY ACCESS ROAD ALTERNATIVES TAR-2 & TAR-3
C3.01	CHANNEL SHEETS LAYOUT
C3.02–C3.10	CHANNEL PLAN VIEW AND CROSS SECTIONS
C4.01–C4.07	EROSION CONTROL DETAILS

STATE OF FLORIDA
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

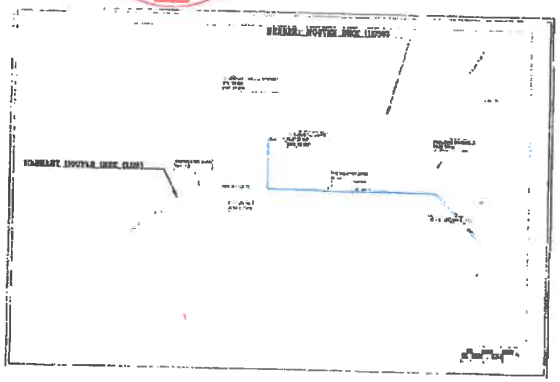
CONSTRUCTION PLANS FOR FISHEATING CREEK WMA COWBONE MARSH TEMPORARY ACCESS ROAD

PROJECT NUMBER FWC 11/12-

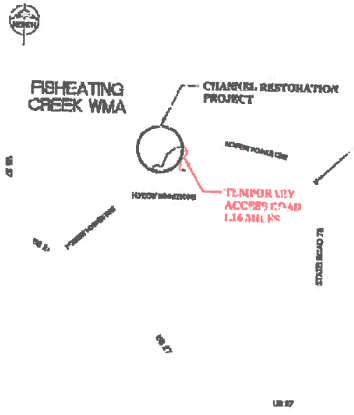
SECTIONS (26-28, 32-34), TOWNSHIP 40 SOUTH, RANGE 31 EAST
SECTIONS (3-8), TOWNSHIP 41 SOUTH, RANGE 31 EAST

JUN 2 8 2012
DEP South District

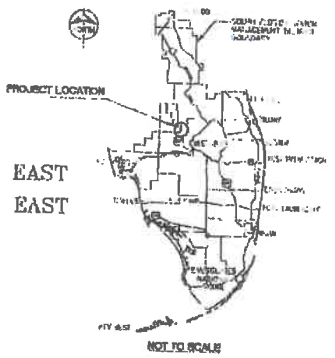
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0303852-002
South District
Fort Myers



LOCATION STREET MAP



LOCATION AERIAL MAP
SCALE: 1" = 10,000'



NATIONAL GEODETIC SURVEY
BENCHMARK W 523
PID AJ6185
SPC FL NAD 83 E, FOOT
NORTH = 952,835.43'
EAST = 616,430.67'
ELEV. = 19.44' NAVD 88

ATTENTION IS DIRECTED TO THE FACT THAT SHEETS [illegible] MAY HAVE BEEN ALTERED IN SIZE BY REPRODUCTION AND MUST BE CHECKED [illegible] USING SCALED DATA

[illegible] SPECIFICATIONS. [illegible] TO BE ISSUED WITH THESE PLANS

REVISIONS:		
DATE	BY	DESCRIPTION

NOTES

HORIZONTAL COORDINATES ARE IN FEET, AND ARE REFERENCED TO THE FLORIDA STATE PLANE COORDINATE SYSTEM, EAST ZONE, NORTH AMERICAN DATUM OF 1983.

VERTICAL INFORMATION DEPICTED HEREON, UNLESS NOTED OTHERWISE, IS BASED ON THE NORTH AMERICAN VERTICAL DATUM (NAVD 88).

Image Information
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

SHEET TITLE
KEY SHEET AND VICINITY MAP

PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION

C1.01

Exhibit A

PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
SHEET TITLE
TEMPORARY ACCESS ROAD
LAYOUT
C2.01
LYKES BROS, INC.
PROPERTY IEA 7
FWC FISHEATING
CREEK WMA
FENCE
5 ACRES AREA BOUNDARY
FOR THE POTENTIAL LOCATION
OF THE PROPOSED BORROW PIT
INTERLOCKING COMPOSITE MAT
TEMPORARY ACCESS ROAD
1.164 MILES LENGTH
EXISTING SANDBAR
CHANNEL TO BE RESTORED
N26° 57' 34.02"
W81° 17' 21.56"
FWC FISHEATING
CREEK WMA
0'
500'
1,000'
1,500'
2,000'
2,500'
NORTH
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0302852-002
South District
Fort Myers
Image Information:
Image Date: October, 2019
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

Exhibit A


PROJECT TITLE
RESERVED CREEK MIA
TORRENCE & ANSON
CHANNEL RESTORATION
SHEET TITLE
TEMPORARY ACCESS ROAD
SHEETS 1 & 2 OF 2
JUN 2 3 2021
NORTH
Image Information.
Image Date: October, 2018
Firm Mer: U.S. Department of Agriculture
Aerial Photography Field Office
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0309852-002
Inlet Myrtle

Exhibit A

PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
SHEET TITLE
TEMPORARY ACCESS ROAD
PLAN AND CROSS SECTIONS
C2.03
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
23-0303652-002
230'
400'
SLOPE 4:1
SLOPE 4:1
PROPOSED BORROW PIT
LOCATION
SILT FENCE
0'
100'
200'
300'
400'
500'
MATCHING LINE SHEET C2.04
NORTH
Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

Exhibit A

Cowbone Marsh

Cut Restoration Plan

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0303652-002
South District
Fort Myers



FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

AUGUST 7, 2012

1

Exhibit A

Backfill Implementation

The objective of backfilling is to return the cut to as close to pre-impact conditions as described in the performance measures. The following goals guide the backfilling plan.

1. Minimize preferential flow path in the impacted area to the greatest degree practicable through implementation of this restoration plan.
2. Ground surface elevations and restored soil surface are as close to pre-impact conditions as outlined in the performance measures.
3. Backfill is stabilized so sediment transport from the filled area is minimized.
4. Work does not cause negative impacts to cultural resources and fish and wildlife species.
5. Secondary impacts are eliminated or minimized. Secondary impacts may include sediment transport during backfilling and temporary impacts to wetland vegetation for access and staging and within the marsh.
6. Backfilling will be completed as outlined in the project schedule and contingency plan. Work will be conducted in the dry season, during periods to avoid impacts to wildlife species of concern and preferably within one season to minimize secondary impacts and additional work.

Backfilling will be implemented by transporting fill from either a sand mine located at the western end of the LD-3 levee or from a borrow pit to the downstream end of the cut. Other backfill options evaluated included hydraulic pumping and hauling and backfilling using helicopters. Hauling and backfilling using conventional construction equipment was chosen as the most feasible backfill alternative.



Exhibit A

Route Assessment

Access from both the north and south were evaluated. Site visits of both the LD-50 (north) and LD-3 levees (south) were conducted. An access approach from the southern side of the marsh was chosen since this route offered a shorter distance to the cut from the potential sources of fill (Cemex sand mine or borrow pit on adjacent private land), avoids the necessity of crossing Fisheating Creek as well as potential impacts to known cultural resources, wildlife and plants that exist along the route from the north (Figure 6a).

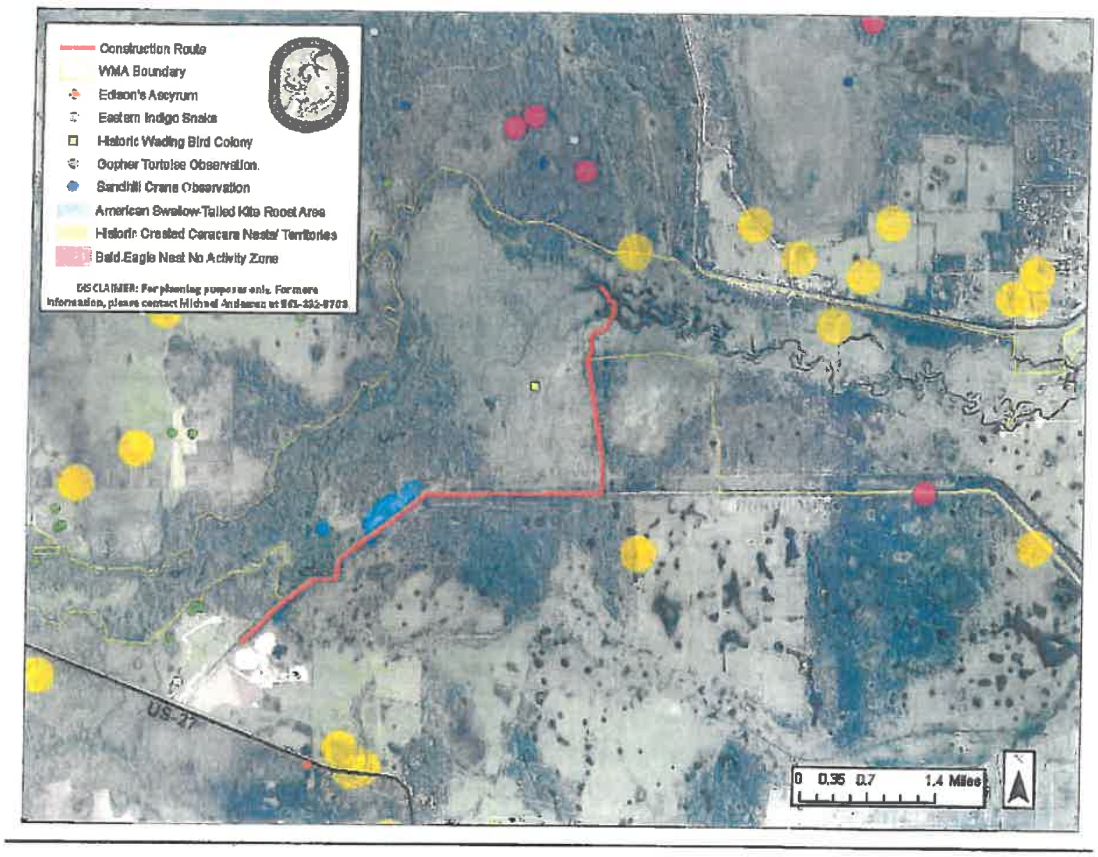


Figure 6a – Wildlife Occurrences and route from LD-3 levee

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0303652-002
South District
Fort Myers

Exhibit A

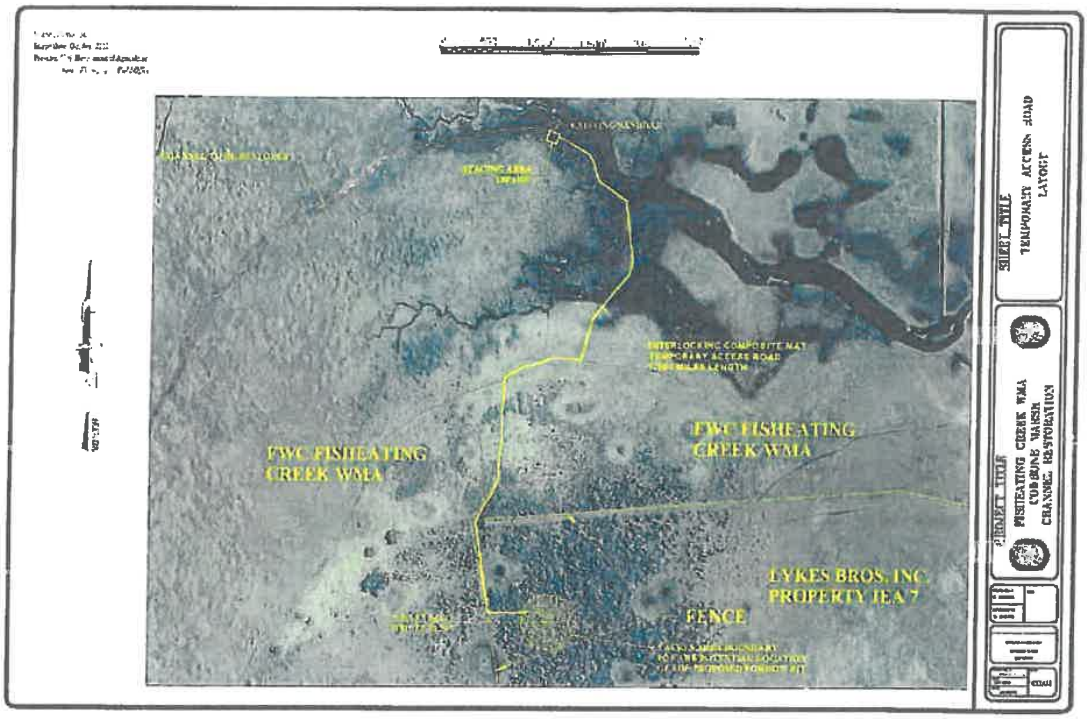


Figure 6b – Alternative 2 Route from Borrow Pit

Access routes proposed for consideration extend from the CEMEX sand mine east 4.85 miles along the LD-3 levee and then exits the levee and turns north following an existing fire line and trails on impacted wetlands for about 1.66 miles. The last portion of the route traverses minimally impacted floodplain over sandy Basinger and Floridana soils for approximately 0.65 miles. The access route from the borrow pit shown in Figure 6b would intersect and then follow the same route to the north.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0303652-002
South District
Fort Myers

Exhibit A

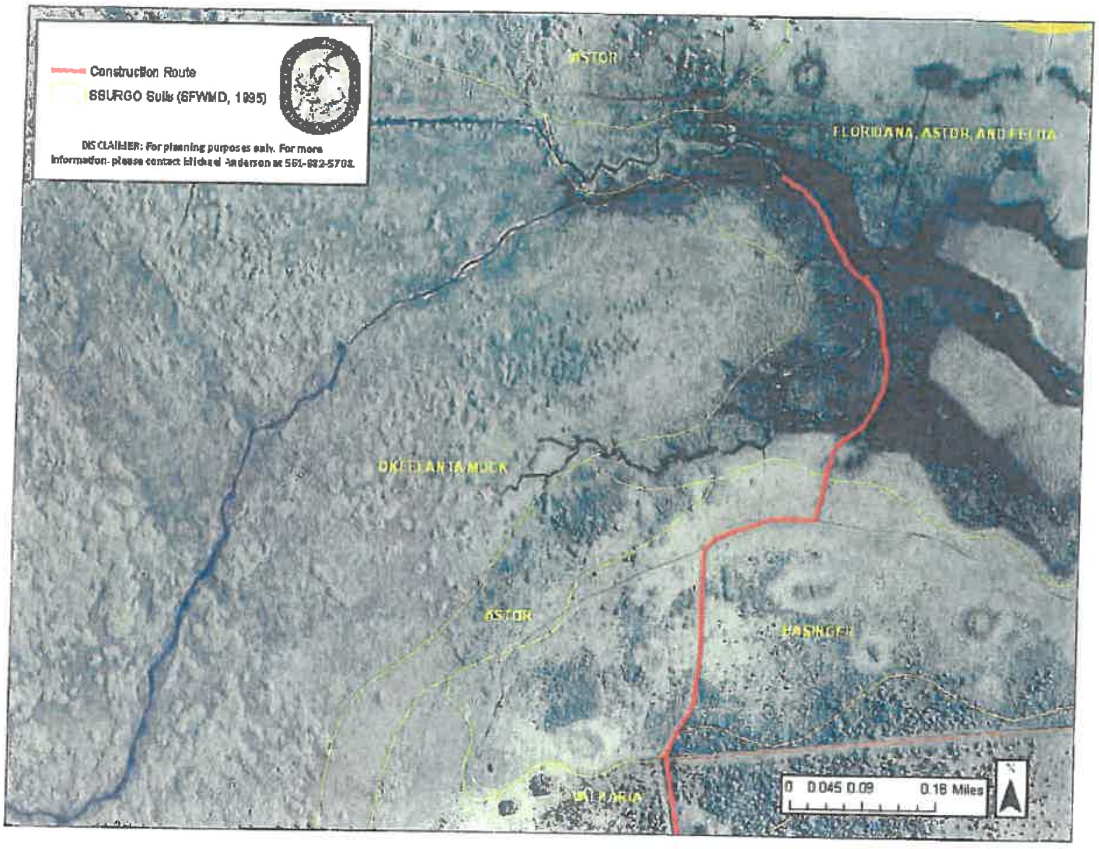


Figure 7a – Soils

The soil types within the floodplain are *Floridana*, *Astor*, and *Felda soils, frequently flooded*. These soils are very poorly drained with a fine sand surface and sub-surface layer. The final access route from the south was chosen to minimize impacts to the peat soils (*Okeelanta muck, depressional* soil type) of the marsh itself (See Figures 7a and 7b).

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Permit Number
22-0303652-002
South District
Fort Myers

Exhibit A

SHEET TITLE
TEMPORARY ACCESS ROAD
LAYOUT
PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
10.23
LYKES BROS. INC.
PROPERTY IEA 7
FENCE
FWC FISHEATING
CREEK WMA
FWC FISHEATING
CREEK WMA
INTERLOCKING COMPOSITE MAT
TEMPORARY ACCESS ROAD
EXISTING SANDBAR
STAGING AREA
CHANNEL TO BE RESTORED
0'
500'
1,000'
1,500'
2,000'
2,500'
NORTH
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

Exhibit A

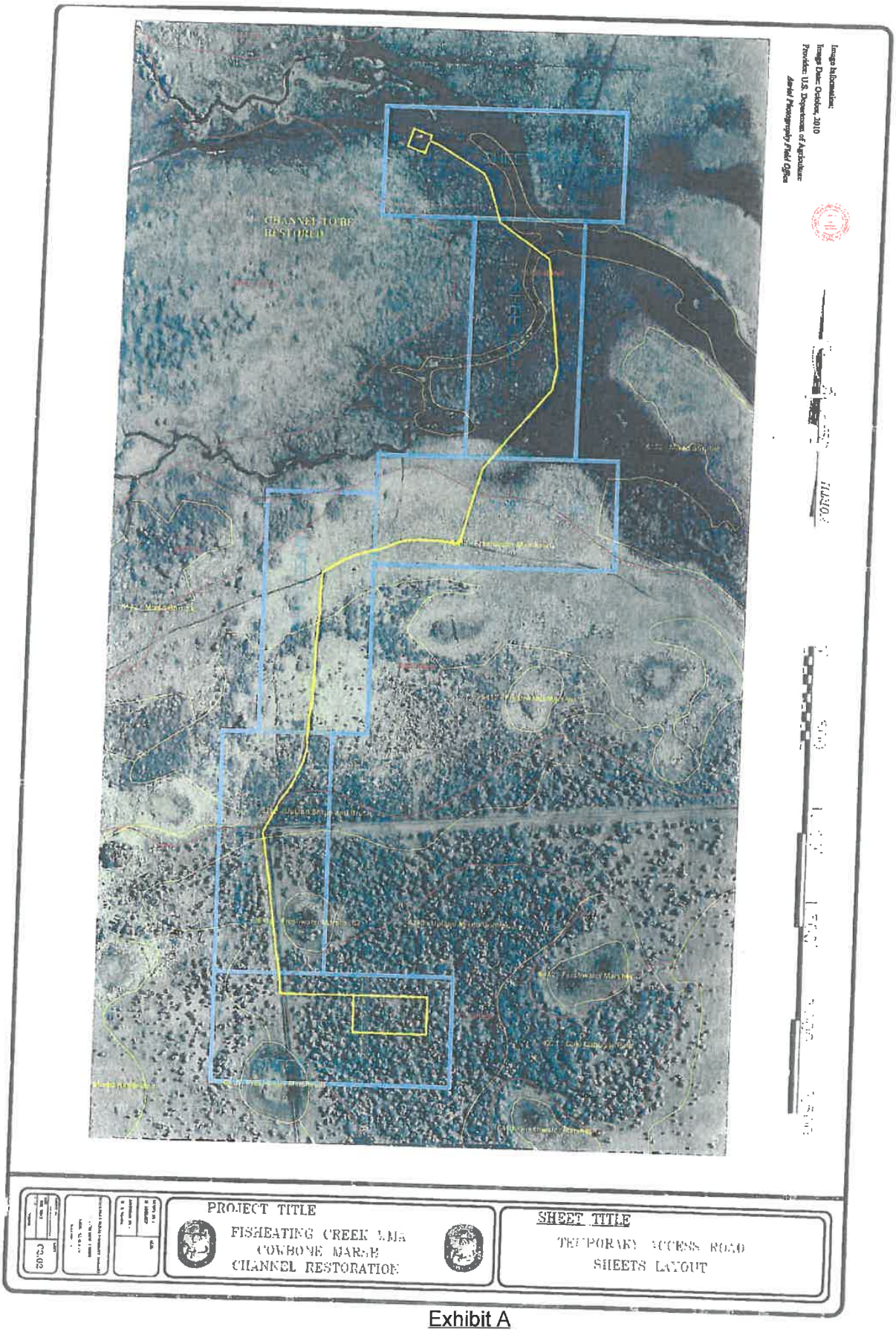

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office
CHANNEL TO BE RESTORED
PROJECT TITLE
FISHEATING CREEK AND COWBONE MARSH CHANNEL RESTORATION
SHEET TITLE
TEMPORARY ACCESS ROAD SHEETS LAYOUT

Exhibit A

PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
SHEET TITLE
TEMPORARY ACCESS ROAD
PLAN AND CROSS SECTIONS
C2.03
0'
100'
200'
300'
400'
500'
MATCHING LINE SHEET C2.04
NORTH
Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

Exhibit A

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
South District Office
P.O. Box 2549
Fort Myers, FL 33902-2549
SouthDistrict@dep.state.fl.us

RICK SCOTT
GOVERNOR

CARLOS LOPEZ-CANTERA
LT. GOVERNOR

JONATHAN P. STEVERSON
SECRETARY

In the matter of an Application for a Permit/Water Quality Certification and Authorization to Use Sovereign Submerged Lands by:

APPLICANT:
Florida Fish and Wildlife Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399

FILE No.: 22-0303652-003
LEASE NO.: 4257
COUNTY: Glades

PROJECT NAME: Fisheating Creek Trail Restoration
Cowbone Marsh Hydrologic Restoration

CONSOLIDATED NOTICE OF INTENT TO ISSUE ENVIRONMENTAL RESOURCE PERMIT AND LETTER OF CONSENT TO USE SOVEREIGN SUBMERGED LANDS

The Department of Environmental Protection (Department) gives notice of its intent to issue an Environmental Resource Permit (ERP) in accordance with Part IV of Chapter 373, Florida Statutes (F.S.), and Chapter 62-330, Florida Administrative Code (F.A.C.) (draft copy of permit attached). Issuance of the ERP constitutes certification of compliance with state water quality standards pursuant to section 401 of the Clean Water Act U.S.C. § 1341. Additionally, issuance of the ERP permit also constitutes a finding of consistency with Florida's Coastal Zone Management Program, as required by Section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456.

The Department of Environmental Protection (Department) also gives notice of its intent to grant a letter of consent to use sovereign submerged lands for the proposed activity, under Article X, Section 11 of the Florida Constitution, Chapter(s) 253, Title 18, F.A.C., and the policies of the Board of Trustees, as described, below subject to any fees, special lease, easement, or consent of use conditions in the attached Recommended Proprietary Action document.

I. DESCRIPTION OF THE PROPOSED ACTIVITY

The applicant, Florida Fish and Wildlife Conservation Commission (FWC), applied on December 16, 2014, to the Department for a major permit modification, water quality certification and authorization to use sovereign submerged lands owned by the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees) to complete the Fisheating Creek/Cowbone Marsh Restoration Project.

The activity is located within Fisheating Creek Wildlife Management Area, and Parcel A27-40-31-A00-0010-0000, uplands, and wetlands, Class III Waters, in Sections 27, 28, 32, and 33, Township 40 South, Range 31 East, Glades County.

The activity includes consideration of an application for a sovereignty, submerged land letter of consent.

II. AUTHORITY FOR REVIEW

The Department is authorized to grant this permit pursuant to Part IV of Chapter 373, F.S., and Chapter 62-330, F.A.C. The activity is not exempt from the requirement to obtain an Environmental Resource Permit. Pursuant to Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department is responsible for reviewing and taking final agency action on this activity.

The activity also requires a proprietary authorization, as it is located on sovereign submerged lands owned by the Board of Trustees. The activity is not exempt from the need to obtain a proprietary authorization. Pursuant to Article X, Section 11 of the Florida Constitution, Sections 253.002 and 253.77, F.S., Sections 18-21.0040, 18-21.0051, 62-330.075, F.A.C., the policies of the Board of Trustees, and the Operating Agreements executed between the Department and the water management districts, as referenced in Chapter 62-113, F.A.C., the Department is responsible for reviewing and taking final agency action on this request for proprietary authorization.

III. BACKGROUND/BASIS FOR ISSUANCE

A. General

Beginning in April 2010, the FWC utilized an Agitator to shred vegetation in Cowbone Marsh along a navigation route depicted on 1929 United States Army Corps of Engineers (USACE) survey. The Department and subsequently the USACE issued emergency orders to halt the work. The USACE referred enforcement to the United States Environmental Protection Agency (EPA).

In accordance with orders issued by these agencies, FWC immediately constructed a temporary weir and has since constructed six check dams, as authorized by DEP Permit 22-0303652-001.

The proposed project is to continue the restoration activities necessary to restore Cowbone Marsh to pre-impact conditions as closely as possible and practicable by backfilling the channel that resulted from the Agitator operations consistent with the EPA Administrative Compliance Order, Docket No. CWA-04-2015-5753, and while maintaining navigation pursuant to the Settlement Agreement dated May 25, 1999.

The applicant has provided an analysis on various backfilling options and vehicle access routes to the project area in the "Cowbone Marsh Cut Restoration Plan", incorporated as an attachment to the draft permit. The current proposed alignment offers a shorter distance to the project area,

avoids the necessity of crossing Fisheating Creek, and avoids potential impacts to known cultural resources and wildlife occurrences that were found along alternate routes.

The applicant has provided a detailed analysis on the potential impacts to fish and wildlife in the vicinity of the project and identified the species-specific procedures to avoid and minimize these impacts.

The access road will be perpendicular to the direction of the flow and is not expected to create any harmful erosion or preferential flow paths. The temporary access road will not adversely affect the hydrologic connection of the marsh to off-site water resources and is not expected to adversely affect the frequency of inundation or saturation of the wetland areas. The mats are designed for use in standing water and therefore no additional culverts are necessary to maintain hydrology. The applicant proposes to use appropriate best management practices where necessary to avoid adverse impacts to water quality. All work will be conducted in the dry season, further minimizing any impacts to hydrology and water quality of the wetlands.

Temporary impacts to the vegetative composition through the installation of the at-grade mats are expected, however rapid recovery of the vegetative community is also expected once the temporary mats are removed. This expectation is based on the fact that the mats will protect the soils from significant disturbance or compression, the seed source will remain in-tact, the hydrology will be appropriate to support re-growth and recruitment of appropriate species. The "Cowbone Marsh Cut Restoration Plan" outlines the monitoring and reporting requirements to ensure there are no permanent impacts from the temporary access road and staging area.

Best management practices will be utilized to prevent short term water quality impacts during road improvements. There are no expected long term water quality impacts. Any impacts to soils will be restored to pre-construction grade. Through the use of the best management practices, on-site supervision by an environmental compliance officer, education of the construction personnel, and post-construction planting and monitoring, the potential for secondary impacts are minimal. Each contractor will be required to attend an educational seminar including information on wetlands, soils, the endangered species present and their habitats. They will learn how to identify each species and the appropriate protocols to engage when one is spotted during construction. Additionally, an environmental compliance officer will be on-site at all times. It will be their duty to ensure that all construction personnel follow the permitting requirements.

The applicant provided reasonable assurance of no adverse impacts to public health, safety, or welfare or the property of others; the conservation of fish and wildlife and their habitats; navigation or the flow of water or cause harmful erosion or shoaling; fishing or recreational values or marine productivity in the vicinity of the activity; historical and archeological resources; or the current condition and relative value of functions being performed by areas affected by the proposed activity.

B. Specific Regulatory Basis for Issuance

The Department has determined, based on the information currently on file and the general and specific conditions included within the attached draft permit, the applicant has provided reasonable assurance that the construction, including the direct, secondary and cumulative impacts, will comply with the provisions of Part IV of Chapter 373, F.S., and the rules adopted thereunder, including the Conditions for Issuance of an environmental resource permit, as provided in Chapter 62-330, F.A.C., and Applicant's Handbook, Volumes I and II (as applicable). The construction activity will not result in violations of the water quality standards set forth in Chapters 62-4, 62-302, 62-520, 62-522, and 62-550, F.A.C. The applicant has also demonstrated that the construction activity, including a consideration of the direct, secondary and cumulative impacts, is not contrary to the public interest, pursuant to Section 373.414(1)(a), F.S.

C. Specific Proprietary Basis for Issuance

Through the above and based on the general and/or specific conditions to the letter of consent, the applicant has met all applicable requirements for proprietary authorizations to use sovereign submerged lands, pursuant to Article X, Section 11 of the Florida Constitution, Chapter(s) 253, F.S., associated rule(s) 18-21, F.A.C., and the policies of the Board of Trustees. The applicant has provided reasonable assurance that the activity:

(1) is "not contrary to the public interest"

(2) will maintain essentially natural conditions;

(3) will not cause adverse impacts to fish and wildlife resources or public recreation or navigation; and

(4) will not interfere with the riparian rights of adjacent property owners.

IV. PUBLICATION OF NOTICE

The Department has determined that the proposed activity, because of its size, potential effect on the environment or the public, controversial nature, or location, is likely to have a heightened public concern or likelihood of request for administrative proceedings. Therefore, pursuant to Subsection 373.413(4), F.S. and section 5.5.5.3 of Applicant's Handbook, Volume I, you (the applicant) are required to publish at your own expense this Notice of Intent to Issue. The notice is required to be published one time, in the legal ad section in a newspaper or newspapers of general circulation in the areas affected. For the purpose of this rule, "publication in a newspaper of general circulation in the area affected" means publication in a newspaper meeting the requirements of Sections 50.011 and 50.031, F.S., in the county where the activity is to take place. The applicant shall provide proof of publication to:

Department of Environmental Protection
South District Office
Submerged Lands and Environmental Resource Permitting
P.O. Box 2549
Fort Myers, Florida 33902-2549
FTMerp_Compliance@dep.state.fl.us

The proof of publication shall be provided to the above address within 30 days of issuance of intended agency action, or within 21 days of the date of publication, whichever occurs sooner. Failure to publish the notice and provide proof of publication within the allotted time shall be grounds for denial of the permit and letter of consent to use sovereign submerged lands.

VI. RIGHTS OF AFFECTED PARTIES

The Department will issue the environmental resource permit (draft permit attached) and letter of consent to use sovereign submerged lands, subject to the applicant's compliance with the requirement to publish notice in a newspaper of general circulation and to provide proof of such publication in accordance with section 50.051, F.S. This action is final and effective on the date filed with the Clerk of the Department unless a timely petition for an administrative proceeding (hearing) is filed pursuant to sections 120.569 and 120.57, F.S. If a timely petition for an administrative hearing is timely filed, this intent to issue automatically becomes only proposed agency action on the application(s), subject to the result of the administrative review process. Therefore, on the filing of a timely and sufficient petition, this action will not be final and effective until further order of the Department. When proof of publication is provided, if required by this intent, and if a sufficient petition is not timely filed, the permit and authorization to use sovereign submerged lands will be issued as a ministerial action.

A person whose substantial interests are affected by the Department's proposed decision may petition for an administrative proceeding (hearing) under Sections 120.569 and 120.57, F.S. Petitions filed by the permit applicant and the parties listed below must be filed within 14 days of receipt of this intent. Petitions filed by other persons must be filed within 14 days of publication of the public notice or within 14 days of their receipt of this intent, whichever first occurs. The failure of any person to file a petition within the appropriate time period shall constitute a waiver of that person's right to request an administrative determination (hearing) under sections 120.569 and 120.57 of the Florida Statutes, or to intervene in this proceeding and participate as a party to it. The petition must contain the information set forth below and must be filed (received) in the Office of General Counsel of the Department at 3900 Commonwealth Boulevard, Mail Station 35, Tallahassee, Florida 32399-3000 or at Agency.Clerk@dep.state.fl.us.

Pursuant to Rule 28-106.201, F.A.C., a petition for an administrative hearing must contain the following information:

(a) The name, address, and telephone number of each petitioner, the applicant's name and address, the Department Permit File Number and the county in which the project is proposed;
(b) A statement of how and when each petitioner received notice of the Department's action or proposed action;
(c) A statement of how each petitioner's substantial interests are affected by the Department's action or proposed action;
(d) A statement of the material facts disputed by Petitioner, if any;
(e) A statement of facts which petitioner contends warrant reversal or modification of the Department's action or proposed action;

(f) A statement of which rules or statutes petitioner contends require reversal or modification of the Department's action or proposed action; and
(g) A statement of the relief sought by petitioner, stating precisely the action petitioner wants the Department to take with respect to the Department's action or proposed action.

If a petition is filed, the administrative hearing process will constitute a renewed determination of the Department's decision on the application. Accordingly, the Department's final action may be different from the position taken by it in this intent. Persons whose substantial interests will be affected by any decision of the Department with regard to the application have the right to petition to become a party to the proceeding. The petition must conform to the requirements specified above and be filed (received) within 14 days of receipt of this intent, in the Office of General Counsel at the above address. Failure to petition within the allowed time frame constitutes a waiver of any right such person has to request a hearing under Section 120.57, F.S., and to participate as a party to this proceeding. Any subsequent intervention will only be at the approval of the presiding officer upon motion filed pursuant to Rules 28-5.207 and 60Q-2.010, F.A.C.

Executed in Lee County, Florida

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Director of District Management
South Florida District

JMI/mm

cc:
U.S. Army Corps of Engineers, File # 2008-4055
DEP, Office of General Counsel, Doug Beason
FWC, Imperiled Species Management Section
Kathy Griffin, Bureau of Public Land Administration, Lease Agreement No. 4257

CERTIFICATE OF SERVICE

The undersigned duly designated deputy clerk hereby certifies that this document, including all copies, was mailed before the close of business on February 13, 2015, to the above listed person(s).

FILING AND ACKNOWLEDGMENT

FILED, on this date, pursuant to Section 120.52(7), F.S., with the designated Department clerk, receipt of which is hereby acknowledged.

Clerk

February 13, 2015
Date

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
South District Office
P.O. Box 2549
Fort Myers, FL 33902-2549
SouthDistrict@dep.state.fl.us

RICK SCOTT
GOVERNOR

CARLOS LOPEZ-CANTERA
LT. GOVERNOR

JONATHAN P. STEVERSON
SECRETARY

VIA ELECTRONIC MAIL

Florida Fish and Wildlife Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399

Fisheating Creek Trail Restoration
Cowbone Marsh Hydrologic Restoration

Authorized Agent:
Mahmoud S. Madkour, Ph.D., P.E.
Florida Fish and Wildlife Conservation Commission
620 S. Meridian Street
Tallahassee, Florida 32399
Mahmoud.madkour@myFWC.com

Environmental Resource Permit
State-owned Submerged Lands Authorization – Granted

U.S. Army Corps of Engineers Authorization – Separate Corps Authorization Required

File No.: 22-0303652-003
Major Modification of Permit No.: 22-0303652-001
Lease No.: 4257

Permit Issuance Date: DRAFT
Permit Construction Phase Expiration Date: DRAFT

Consolidated Environmental Resource Permit and State-owned Submerged Lands Authorization

Permittee: Florida Fish and Wildlife Conservation Commission
Permit No: 22-0303652-003

PROJECT LOCATION

The activities authorized by this Permit and state-owned submerged lands authorization are located within Fisheating Creek Wildlife Management Area, and Parcel A27-40-31-A00-0010-0000 Sections 27, 28, 32, and 33, Township 40 South, Range 31 East, Glades County, as shown on attachments.

PROJECT DESCRIPTION

The permittee is authorized to complete the restoration of Cowbone Marsh through the backfilling of the channel with 25,000 cubic yards of sand fill to match adjacent marsh ground surface elevations at the edges of the restoration area while maintaining a center depression of 12 inches below adjacent marsh ground surface elevation (+/- 3 inches) throughout the restoration area, except at the locations where the Check Dams exist. The center depression within the restoration area shall not exceed eight feet in total width and shall have side slopes equivalent to a 4:1 (horizontal:vertical) ratio. The maintenance of the existing check dams shall be in accordance with DEP Permit No.: 22-0303652-001.

To accomplish this restoration, this permit also authorizes the construction of a temporary access road, 14 feet wide and approximately 1.164 miles in length, through uplands and wetlands, the construction of a 100-foot square staging area within the Fisheating Creek Wildlife Management Area, Class III Waters, and the construction of a borrow pit within uplands, approximately 2 acres in size and up to 30 feet deep on Parcel A27-40-31-A00-0010-0000, owned by a private entity. Authorized Activities are depicted on the attached exhibits.

AUTHORIZATIONS

Fisheating Creek Trail Restoration and Cowbone Marsh Hydrologic Restoration

Environmental Resource Permit

The Department has determined that the activity qualifies for an Environmental Resource Permit. Therefore, the Environmental Resource Permit is hereby granted, pursuant to Part IV of Chapter 373, Florida Statutes (F.S.), and Chapter 62-330, Florida Administrative Code (F.A.C.).

Sovereignty Submerged Lands Authorization

The activity is located on sovereignty submerged lands owned by the State of Florida. The activity also requires authorization from the Board of Trustees of the Internal Improvement Trust Fund (Board of Trustees), pursuant to Article X, Section 11 of the Florida Constitution, and Section 253.77, F.S. As staff to the Board of Trustees under Sections 253.002, F.S., the Department has determined that the activity qualifies for and requires a Letter of Consent, as long as the work performed is located within the boundaries as described and is consistent with the terms and conditions herein.

In addition, the project falls within the boundaries of lands subject to Board of Trustees Lease Agreement No. 4257 ("Lease"). Pursuant to paragraph No. 4, "Purpose" of the Lease: "Lessee shall manage the leased premises only for the establishment and operation of the Fisheating Creek Wildlife

INDEX OF PLANS

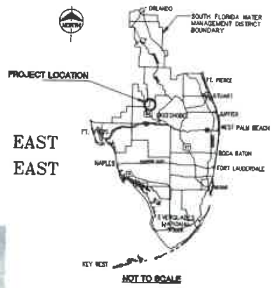
SHEET NO.	SHEET DESCRIPTION
C1.01	KEY SHEET AND VICINITY MAP
C2.01	TEMPORARY ACCESS ROAD LAYOUT
C2.02	TEMPORARY ACCESS ROAD SHEETS LAYOUT
C2.03–C2.08	TEMPORARY ACCESS ROAD PLAN AND CROSS SECTIONS
C2.09	COMPOSITE MAT DETAILS
C2.10	TEMPORARY ACCESS ROAD ALTERNATIVES TAR-1 & TAR-2
C2.11	TEMPORARY ACCESS ROAD ALTERNATIVES TAR-2 & TAR-3
C3.01	CHANNEL SHEETS LAYOUT
C3.02–C3.10	CHANNEL PLAN VIEW AND CROSS SECTIONS
C4.01–C4.02	EROSION CONTROL DETAILS

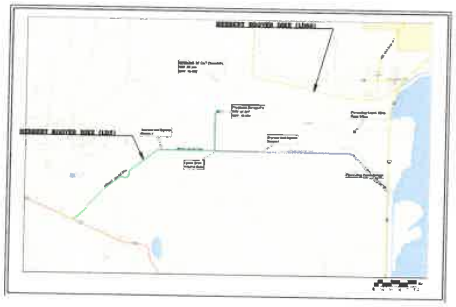
STATE OF FLORIDA
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

CONSTRUCTION PLANS FOR FISHEATING CREEK WMA COWBONE MARSH CHANNEL RESTORATION

PROJECT NUMBER FWC 12/13-17

SECTIONS (26-28, 32-34), TOWNSHIP 40 SOUTH, RANGE 31 EAST
SECTIONS (3-8), TOWNSHIP 41 SOUTH, RANGE 31 EAST





LOCATION STREET MAP



LOCATION AERIAL MAP
SCALE 1" = 10,000'

NATIONAL GEODETIC SURVEY
BENCHMARK W 523
PID AJ6185
SPC FL NAD 83 E, FOOT
NORTH = 952,835.43'
EAST = 616,430.67'
ELEV. = 19.44' NAVD 88

ATTENTION IS DIRECTED TO THE FACT THAT THESE PLANS MAY HAVE BEEN ALTERED IN SIZE BY REPRODUCTION. THIS MUST BE CONSIDERED WHEN OBTAINING SCALED DATA.

GOVERNING SPECIFICATIONS
SPECIFICATIONS AS ISSUED WITH THESE PLANS.

NOTES

POINT COORDINATES ARE IN FEET, AND ARE REFERENCED TO THE FLORIDA STATE PLANE COORDINATE SYSTEM, EAST ZONE, NORTH AMERICAN DATUM OF 1983.

VERTICAL INFORMATION DEPICTED HEREON, UNLESS NOTED OTHERWISE, IS BASED ON THE NORTH AMERICAN VERTICAL DATUM (NAVD 88).

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

REVISIONS:		
DATE	BY	DESCRIPTION

SHEET TITLE
KEY SHEET AND VICINITY MAP

PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION

C1.01

Exhibit B

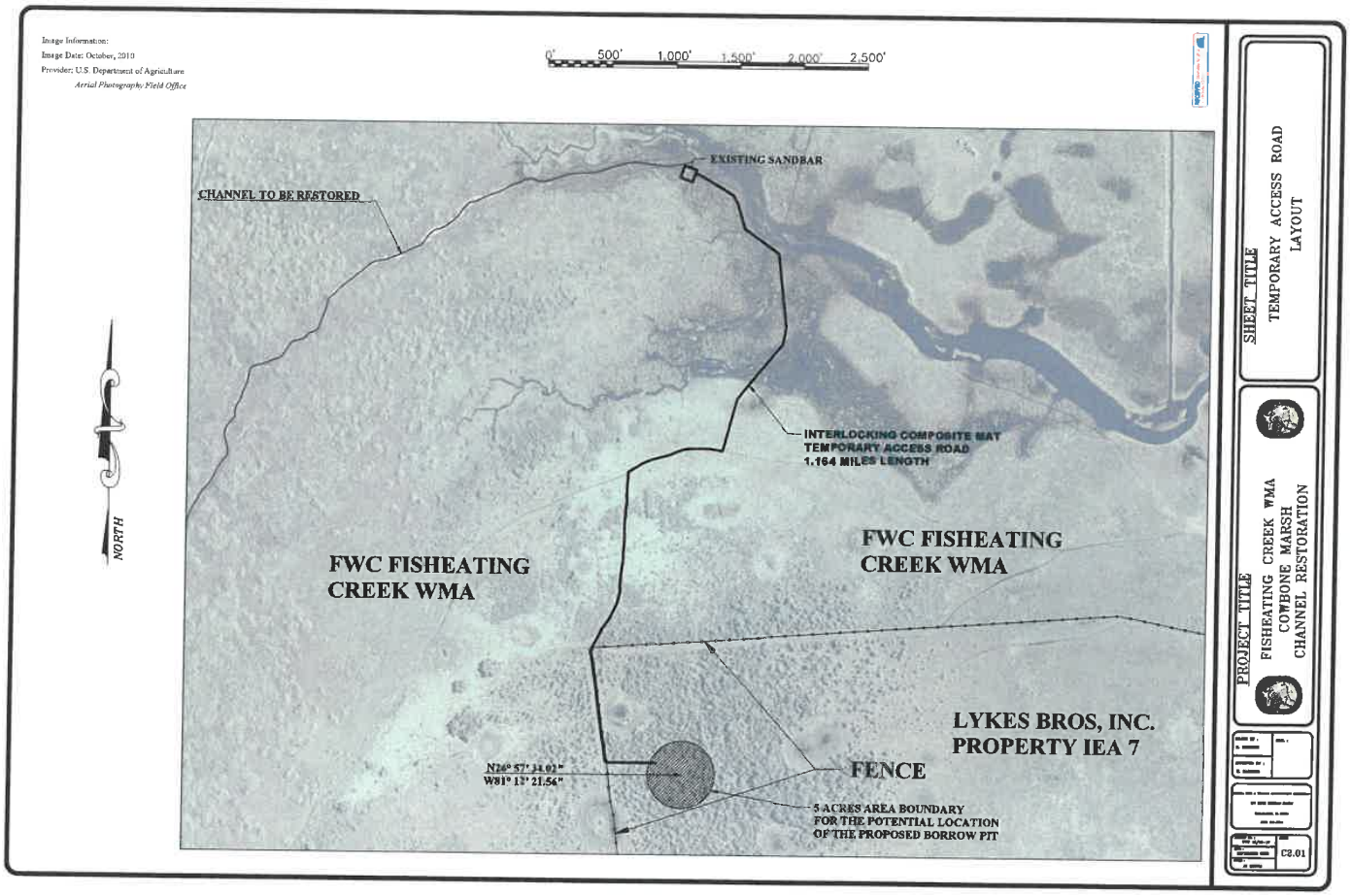

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office
0' 500' 1,000' 1,500' 2,000' 2,500'
EXISTING SANDBAR
CHANNEL TO BE RESTORED
INTERLOCKING COMPOSITE MAT
TEMPORARY ACCESS ROAD
1.164 MILES LENGTH
FWC FISHEATING
CREEK WMA
FWC FISHEATING
CREEK WMA
LYKES BROS, INC.
PROPERTY IEA 7
FENCE
N26° 57' 34.02"
W81° 13' 21.56"
5 ACRES AREA BOUNDARY
FOR THE POTENTIAL LOCATION
OF THE PROPOSED BORROW PIT
NORTH
SHEET TITLE
TEMPORARY ACCESS ROAD
LAYOUT
PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
C2.01

Exhibit B

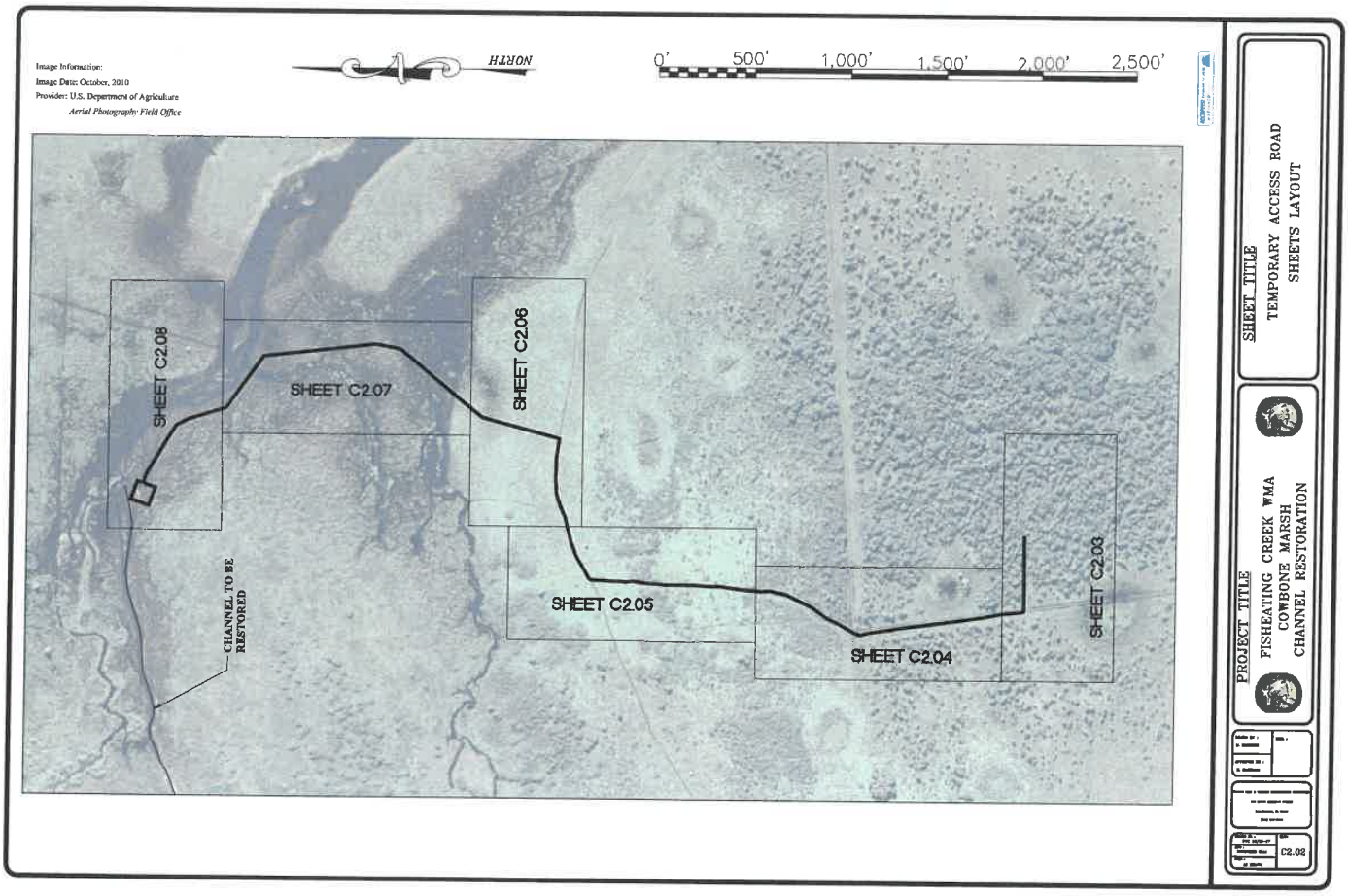

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office
NORTH
0'
500'
1,000'
1,500'
2,000'
2,500'
SHEET C2.08
SHEET C2.07
SHEET C2.06
SHEET C2.05
SHEET C2.04
SHEET C2.03
CHANNEL TO BE RESTORED
SHEET TITLE
TEMPORARY ACCESS ROAD
SHEETS LAYOUT
PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
C2.02

Exhibit B

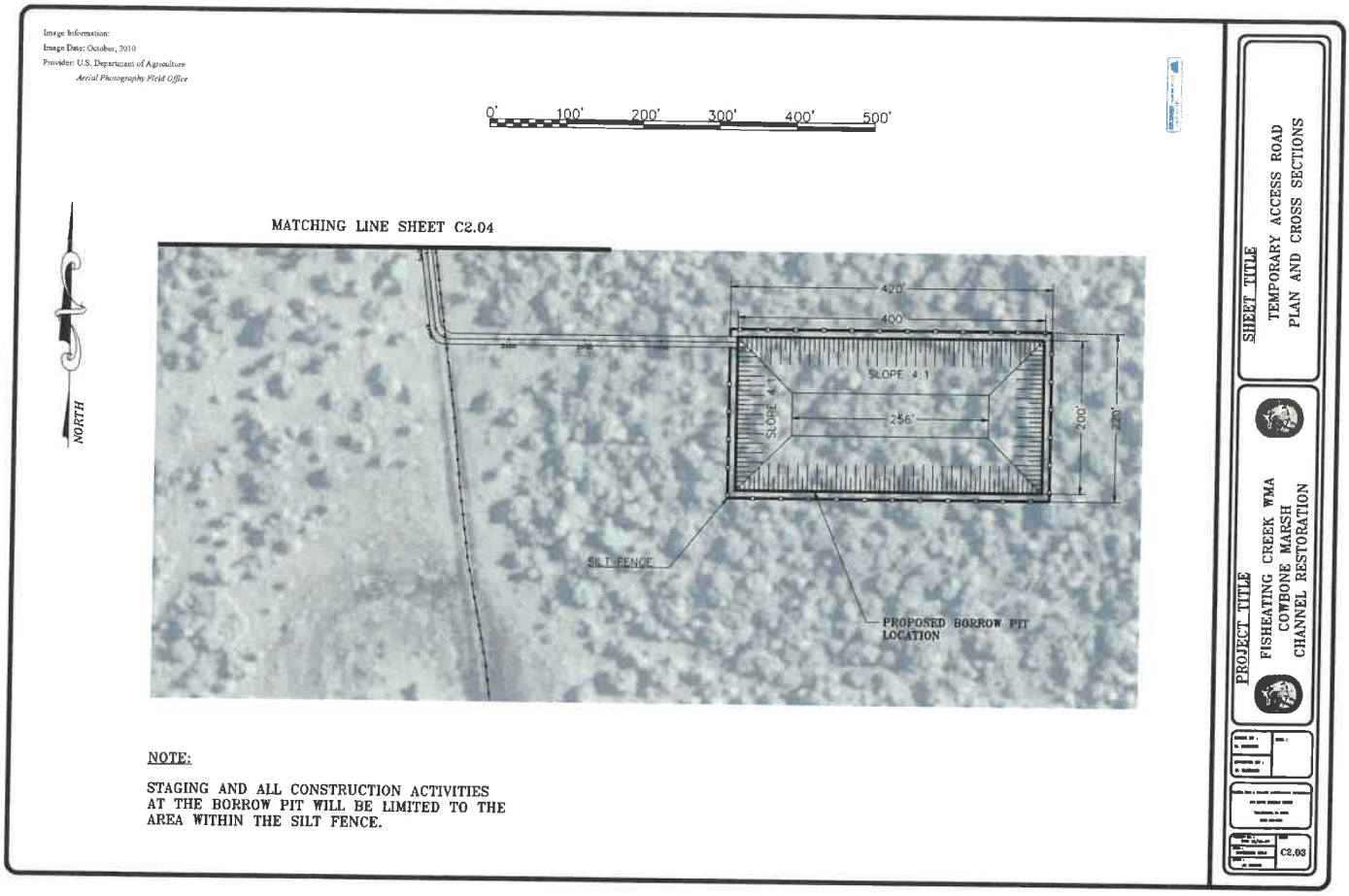
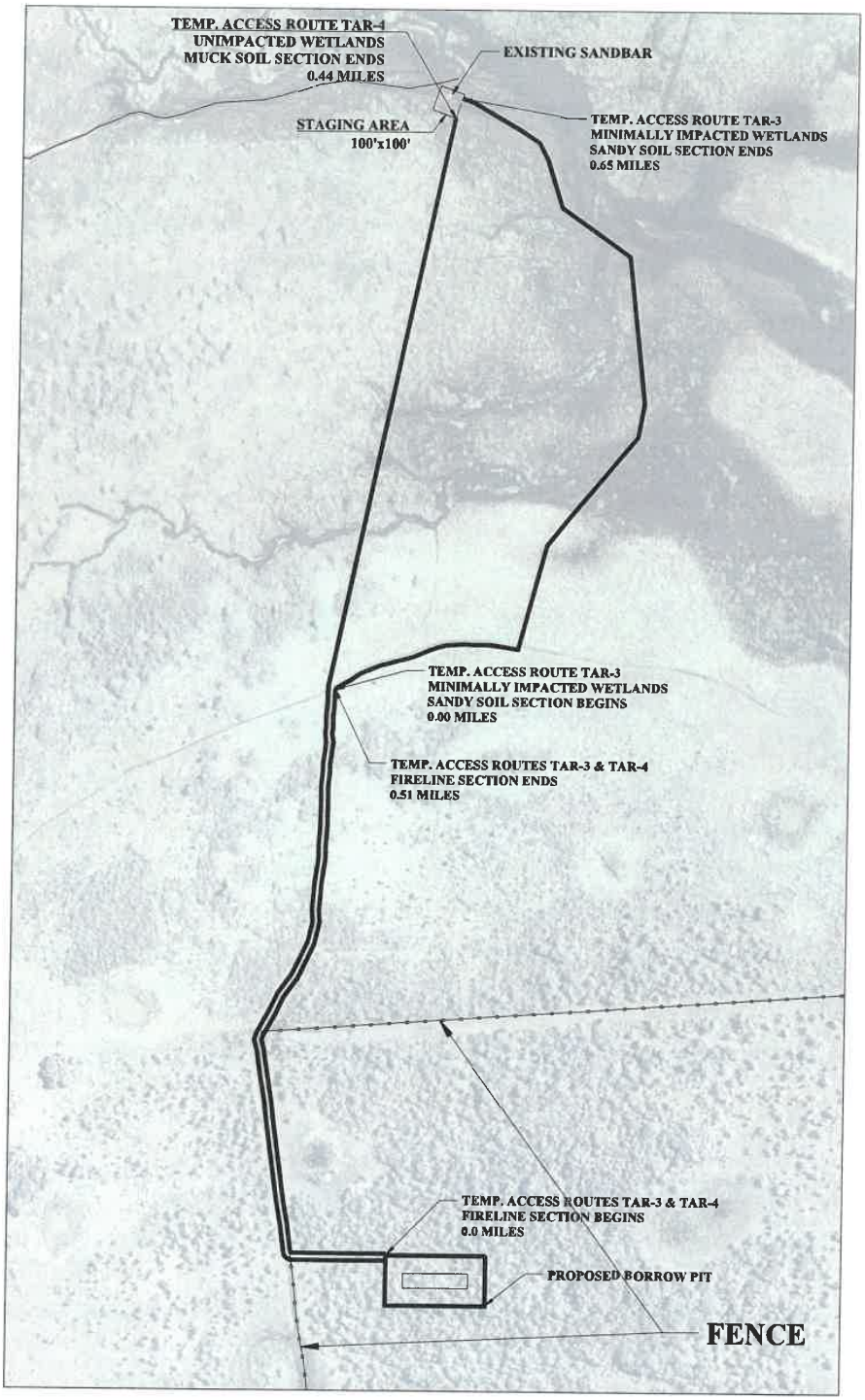

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office
0'
100'
200'
300'
400'
500'
NORTH
MATCHING LINE SHEET C2.04
420'
400'
SLOPE 4:1
SLOPE 4:1
256'
200'
220'
SILT FENCE
PROPOSED BORROW PIT LOCATION
NOTE:
STAGING AND ALL CONSTRUCTION ACTIVITIES AT THE BORROW PIT WILL BE LIMITED TO THE AREA WITHIN THE SILT FENCE.
SHEET TITLE
TEMPORARY ACCESS ROAD
PLAN AND CROSS SECTIONS
PROJECT TITLE
FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION
C2.03

Exhibit B

Image Information:
Image Date: October, 2010
Provider: U.S. Department of Agriculture
Aerial Photography Field Office

0' 1,000' 2,000' 3,000' 4,000' 5,000'



RECEIVED

C2.11

PROJECT TITLE

FISHEATING CREEK WMA
COWBONE MARSH
CHANNEL RESTORATION

SHEET TITLE

TEMPORARY ACCESS ROUTE
ALTERNATIVES TAR-3 & TAR-4

Exhibit B

Cowbone Marsh
Cut Restoration Plan



FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION

DECEMBER 10, 2014

Backfill Implementation

The objective of backfilling is to return the cut to as close to pre-impact conditions as described in the performance measures. The following goals guide the backfilling plan.

1. Minimize the preferential flow path in the impacted area to the greatest degree practicable through implementation of this restoration plan, while allowing for a high-water navigation trail.
2. Ground surface elevations and restored soil surface are as close to pre-impact conditions as outlined in the performance measures. A survey of the channel above the terminus (Appendix-2) was conducted by Whidden Surveying and Mapping, Inc. from 04/17/2-14 to 08/01/2014. The survey showed the presence of a shallow channel ranged from mostly 7-feet to 10-feet width and depth mostly from 0.8-feet to 1.2-feet.
3. Backfill is stabilized so sediment transport from the filled area is minimized.
4. Work does not cause negative impacts to cultural resources and fish and wildlife species.
5. Secondary impacts are eliminated or minimized. Secondary impacts may include sediment transport during backfilling and temporary impacts to wetland vegetation for access and staging and within the marsh.
6. Backfilling will be completed as outlined in the project schedule and contingency plan. Work will be conducted in the dry season, during periods to avoid impacts to wildlife species of concern and preferably within one season to minimize secondary impacts and additional work.

Backfilling will be implemented by transporting fill from either a sand mine located at the western end of the LD-3 levee or from a borrow pit to the downstream end of the cut. Other backfill options evaluated included hydraulic pumping and hauling and backfilling using helicopters. Hauling and backfilling using conventional construction equipment was chosen as the most feasible backfill alternative.

Route Assessment



Access from both the north and south were evaluated. Site visits of both the LD-50 (north) and LD-5 levees (south) were conducted. An access approach from the southern side of the marsh was chosen since this route offered a shorter distance to the cut from the potential sources of fill (Cemex sand mine or borrow pit on adjacent private land), avoids the necessity of crossing Fisheating Creek as well as potential impacts to known cultural resources, wildlife and plants that exist along the route from the north (Figure 6a).

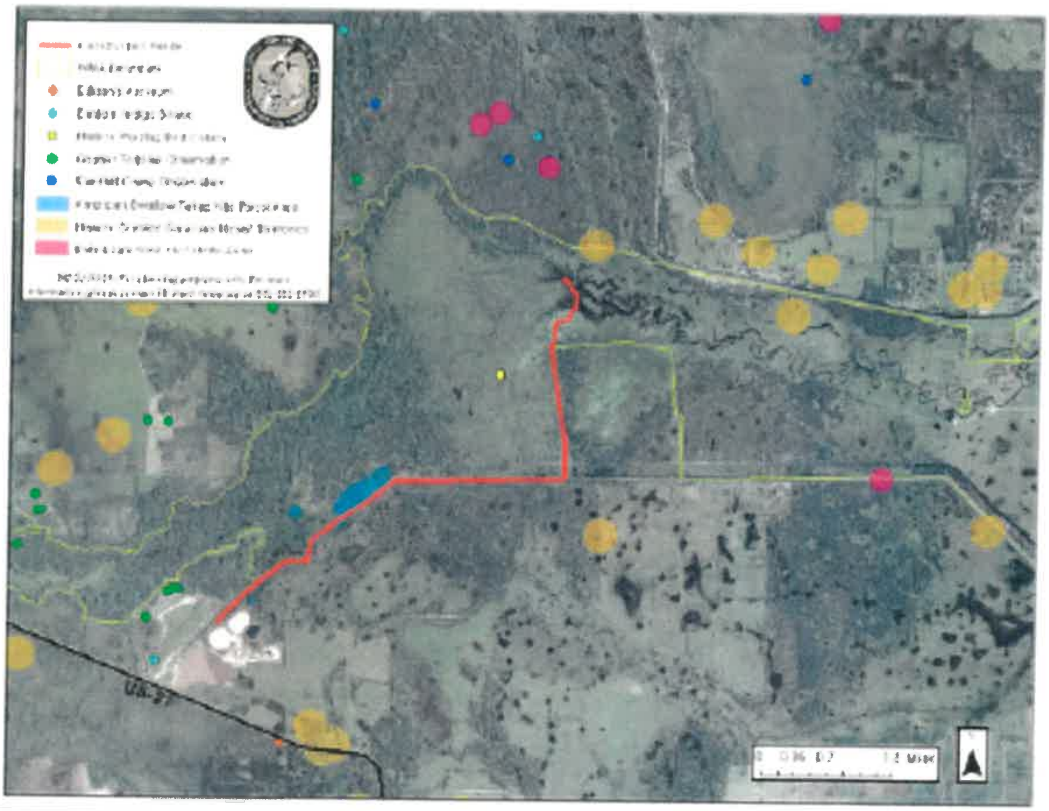


Figure 6a – Wildlife Occurrences and route from LD-5 levee



Figure 6b – Alternative 2 Route from Borrow Pit

Access routes proposed for consideration extend from the CEMEX sand mine east 4.85 miles along the LD-3 levee and then exits the levee and turns north following an existing fire line and trails on impacted wetlands for about 1.66 miles. The last portion of the route traverses minimally impacted floodplain over sandy Basinger and Floridana soils for approximately 0.65 miles. The access route from the borrow pit shown in Figure 6b would intersect and then follow the same route to the north

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and
ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioners,

Case No. 12-3427

v.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

PETITIONERS' NOTICE OF FILING
SUBSTITUTE AMENDED PETITION

Pursuant to the Court's March 4, 2013 order granting their February 25, 2013 motion to file a substitute amended petition, Petitioners Save Our Creeks, Inc., ("SOC") and Environmental Confederation of Southwest Florida, Inc. ("ECOSWF") respectfully submit this Notice of Filing the attached Substitute Amended Petition for a formal administrative hearing challenging the Florida Department of Environmental Protection's ("DEP") September 10, 2012 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization (File No. 22-0303652-002; Modification of Permit No. 22-0303652-001).

Respectfully submitted on this 5th day of March, 2013.

/s/ Joshua D. Smith
Joshua Douglas Smith
Fla. Bar No. 0096844
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Earthjustice
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Exhibit C
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served electronically on this 5th day of March, 2013 to the following counsel of record:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and
ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.,

Petitioners,

Case No. 12-3427

v.

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

SUBSTITUTE AMENDED PETITION FOR ADMINISTRATIVE HEARING

Pursuant to sections 120.569 and 120.57, Florida Statutes, Save Our Creeks, Inc., ("SOC") and Environmental Confederation of Southwest Florida, Inc., ("ECOSWF") (collectively, "Conservationists") respectfully submit this amended petition for a formal administrative hearing challenging the Florida Department of Environmental Protection's September 10, 2012 Environmental Resource Permit and state-owned Submerged Lands Authorization (File No. 22-0303652-002; Modification of Permit No. 22-0303652-001), which authorizes the Florida Fish and Wildlife Conservation Commission ("FWC" or "the Commission") to fill and effectively obliterate the publicly-owned, navigable stream known as Fisheating Creek, where it flows through Cowbone Marsh.

I. COURSE OF EVENTS LEADING TO THIS CONTROVERSY

This case is the latest in a twenty-three year legal dispute over public access by recreational boaters to Fisheating Creek. The Creek is a major tributary of Lake Okeechobee;

Lykes Brothers Corp. ("Lykes") is the riparian land owner that owns most of the land on both sides of the Creek. The Creek courses through prairie, cypress swamps, and marshes, one of which is known locally as Cowbone Marsh. The controversy over public access to the Creek began in 1989, when Lykes felled cypress trees across the navigation channel of the Creek and posted "No Trespassing" signs stating that the Creek is not navigable. After several years of litigation, the Conservationists and the Board of Trustees of the Internal Improvement Trust Fund ("Trustees") prevailed and a jury found that all of the lower 40 miles of Fisheating Creek was navigable. Much of the dispute concerned whether there was a navigable channel through the cypress swamps and marshes, including Cowbone Marsh. The jury found for Conservationists and the Trustees on all issues, effectively prohibiting interference with boaters on the Creek.

At trial, Conservationists and the Trustees relied in large part on a 1929 U.S. Army Corps of Engineers on-the-ground land survey that found Fisheating Creek to be a continuous stream or river in its lower 40 miles, including a survey of the exact location of the channel in Cowbone Marsh. The Chief Surveyor for the State of Florida field verified the location of the channel under the tussock. Attached as Exhibit A is a photograph of Conservationists' field-verifying the location of the navigation channel in Cowbone Marsh by manually removing tussock.

In 1999, while the case was on appeal, Conservationists, Trustees, and Lykes entered into a Settlement Agreement, under which Lykes abandoned its claim that the Creek was non-navigable and agreed to stop blocking public boating and recreational access to Fisheating Creek, including the stream segment through Cowbone Marsh. Lykes also abandoned its property claim to the bed and banks of Fisheating Creek by quitclaim deed, and agreed to sell approximately 40 thousand acres of upland area to the Trustees for the benefit of the public and to preserve of

natural resource values throughout Fisheating Creek. The Trustees, in turn, agreed to dismiss the lawsuit and paid Lykes approximately $37 million for the conservation easement. The Trustees also agreed to lease the entirety of the Creek, its streambed, and adjacent uplands conservation easement to the Florida Fish and Wildlife Conservation Commission ("FWC")[1] to manage for the benefit of the public. The Settlement Agreement and subsequent lease agreement require FWC to maintain traditional uses of the area. In particular, FWC is required to maintain and enhance public navigation throughout the entire lower 40 miles of the Creek course, including the stream segment through Cowbone Marsh, by removal of weeds and invasive vegetation.

For two years, FWC neglected to do any navigation improvement or maintenance on the Creek. In response to Conservationists' threats of litigation, the Commission restored and maintained navigation over most of the stream course by removing invasive vegetation in marshes and deadfalls in cypress swamps. Cowbone Marsh, however, continued to be neglected until the spring of 2010, when FWC ran a "cookie cutter" boat through the stream in Cowbone Marsh to clear most of the navigation channel of tussock and extensive invasive vegetation and bushes. A photograph of the cookie cutter boat in operation is attached as Exhibit B. Although "cookie cutter" boats have been in use for clearing navigation channels by the state and federal governments for decades, Lykes complained to government agencies that a "floating dredge" had dredged a canal through Cowbone Marsh, and advocated that the cleared path be immediately filled with sand.

To avoid any adverse impacts to the Marsh, DEP and FWC agreed to install six "check dams" made of log structures and sandbags in the restored channel to slow water flow, and then to complete the invasive vegetation removal project manually. Although the check dams

[1] Formerly, the Game and Freshwater Fish Commission.

continue to function as designed, the U.S. Environmental Protection Agency ("EPA") and the U.S. Corps of Engineers ("the Corps") intervened and required FWC to develop a plan to fill and replanting of the restored navigation channel through Cowbone Marsh as a means to "restoring" FWC's alleged dredging violation. At the conclusion of the planning process, which involved representatives from all of the regulatory agencies, DEP and FWC were forced to accept EPA's and the Corps' proposal to "restore" Cowbone Marsh by constructing roads across it and conveying over one thousand dump truck loads of sand to completely fill almost two miles in the navigation channel and replant it with invasive vegetation.

Under sections 120.57 and 120.569, Florida Statutes, Conservationists request an Administrative Law Judge to formulate final agency action on the matter of DEP's regulatory action regarding restoration of the Cowbone Marsh navigation channel.

II. IDENTIFICATION OF THE PARTIES

1. Petitioner Save Our Creeks, Inc. is a nonprofit Florida corporation composed of interested citizens and groups devoted to the conservation of natural resources—especially creeks and small waterways—in Southwest Florida and throughout Florida. SOC has a substantial number of members in Glades County that use and enjoy Fisheating Creek.

2. SOC's address is located at 33 Mockingbird Rd. Lake Place, FL 33852. SOC's phone number is (207)712-5481.

3. Petitioner Environmental Confederation of Southwest Florida, Inc. is a nonprofit corporation composed of member organizations, corporations, groups, business entities, governmental agencies, and individuals devoted to the conservation of Florida's natural resources. Specifically, the corporate purposes are to conserve, maintain, and protect the air, water, soil, wildlife, historic and architecturally significant structures, flora and fauna, and other

natural resources of Southwest Florida, the State of Florida, and the United States. A substantial number of ECOSWF's members live, work, and recreate in Glades County and use and enjoy Fisheating Creek.

4. ECOSWF's offices are located at 421 Verna Road, Sarasota, Florida 34240. ECOSWF's phone number is (941)735-0469.

5. Respondent Florida Department of Environmental Protection, through its Division of Water Resource Management is the permitting authority in this proceeding and its offices are located at 2600 Blair Stone Road, MS #5505, Tallahassee, Florida, 32399-2400.

6. The Florida Fish and Wildlife Conservation Commission is an agency of the State of Florida, the recipient of the permit at issue, and is responsible under the 1999 Settlement Agreement and the subsequent lease for the management of the sovereignty lands of Fisheating Creek.

7. FWC's offices are located at 620 South Meridian Street, Tallahassee, FL 32399-6543.

III. NOTICE

8. Petitioners, through their counsel, received notice of the challenged permit via email from FWC staff on September 18, 2012. This petition is filed within fourteen (14) days of that notice and is therefore timely filed pursuant to section 120.569(1), Florida Statutes, and Rule 62-110.106(3), F.A.C.

IV. PETITIONERS' SUBSTANTIAL INTEREST

9. Save Our Creeks, Inc. is a nonprofit Florida corporation made up of interested citizens and groups with a mission to conserve natural resources—especially of creeks and small waterways—in Southwest Florida and throughout the State. SOC was organized in 1989

specifically to preserve public access to Fisheating Creek and was a party to the cases which conclusively established the existence of a historic, navigable channel through the entire Creek in Glades county Florida, including numerous swamps and marshes, and including Cowbone Marsh. SOC was also a party to the 1999 Settlement Agreement, which explicitly provides for the maintenance and enhancement of navigation throughout Cowbone Marsh in perpetuity for public boating, fishing, and other recreational purposes. As a party to the original litigation and subsequent settlement, SOC and its members have a unique legal right and a substantial interest in maintaining and enhancing navigation throughout Fisheating Creek, including the stream segment running through Cowbone Marsh. Because SOC's unique rights under the Settlement Agreement will be destroyed by the implementation of the channel filling project authorized—or more accurately, directed—by EPA, the Corps, and DEP, SOC has a substantial interest in the agency action at issue.

10. A substantial number of the members of SOC use and enjoy boating and camping on Fisheating Creek and it has over 25 members in Glades County. As such, SOC has standing under § 403.412(6), Florida Statutes, to institute this action.

11. Additionally, SOC owns property on Fisheating Creek in Glades County, approximately nine river miles upstream of Cowbone Marsh. SOC's members use this property as a boating access point to Fisheating Creek and Cowbone Marsh. As riparian landowners, SOC and its members have unique rights to use and enjoy the waters of Fisheating Creek, including the stream segment through Cowbone Marsh, for navigation, fishing, and recreation. If the State fills the channel in Cowbone Marsh with sand, it will obliterate the navigable stream through Cowbone Marsh, and SOC's riparian right to use the waters of Fisheating Creek for navigational and recreational purposes will be permanently and substantially impaired.

12. The Environmental Confederation of Southwest Florida, Inc. is a not-for-profit corporation composed of member organizations, corporations, groups, business entities, governmental agencies, and individuals devoted to the conservation of Florida's natural resources. ECOSWF's mission is to conserve, maintain, and protect the air, water, soil, wildlife, historic and architecturally significant structures, flora and fauna, and other natural resources of Southwest Florida, the State of Florida, and the nation. Like SOC, ECOSWF was a party to the 1997 lawsuit and subsequent Settlement Agreement that conclusively established the existence of a historic, navigable channel through Cowbone Marsh. As a result, ECOSWF and its members also have a unique legal right and a substantial interest in maintaining and enhancing navigation throughout Fisheating Creek, including the stream segment running through Cowbone Marsh. Because those interests will be injured by the implementation of the fill project authorized by DEP, the organization has a substantial interest in the agency action at issue.

13. Additionally, a substantial number of the members of SOC and ECOSWF use and enjoy the navigable waters of Fisheating Creek, including the stream segment running through Cowbone Marsh, for a variety of purposes, including wading, walking, canoeing, boating, wildlife observation, photography, personal and commercial research, fishing, and other recreational purposes. If FWC is permitted to fill and obliterate the navigable stream through Cowbone Marsh, a substantial number of Petitioners' members will suffer substantial harm to those recreational, aesthetic, and economic interests.

14. These injuries are sufficiently immediate and of the type and nature that Chapters 373, 403, and 120, Florida Statutes, are designed to protect.

V. DISPUTED ISSUES OF MATERIAL FACT

15. Whether Conservationists joined with the Trustees in a lawsuit against Lykes to establish the navigability and public ownership of the bed and waters of Fisheating Creek, including Cowbone Marsh.

16. Whether a central issue in that case was the dispute over the existence of a historic, navigable channel through the swamps and marshes of the Creek, including Cowbone Marsh, that was in fact used for recreation and small scale commerce several decades before Lykes attempted to close it.

17. Whether the navigable stream through Cowbone Marsh has in recent decades been covered with a layer of floating vegetation called “tussock.”

18. Whether one of the key pieces of evidence in that trial was a 1929 U.S. Army Corps of Engineers survey map that showed Fisheating Creek was a continuous open stream in its lower 40 miles, including the stream segment through Cowbone Marsh.

19. Whether the existence of a navigable stream through Cowbone Marsh has been field verified to follow the same route as the 1929 survey map.

20. Whether the parties to the adjudication described above were the Trustees, Conservationists, and Lykes.

21. Whether DEP, as the agency responsible for performing all functions related to the administration of sovereignty lands, stands in privity or shares identity with the Trustees.

22. Whether the parties to that litigation executed a Settlement Agreement in 1999, in which Lykes agreed to abandon any claim to the bed and waters of Fisheating Creek, including Cowbone Marsh.

23. Whether Lykes agreed to sell to the Trustees a conservation easement on the upland areas of Fisheating Creek and Cowbone Marsh to be held and managed for the benefit of the public and the preservation of natural resources.

24. Whether DEP considered the public's interest in, and the functions and values served by, the conservation easement uplands when it authorized FWC to mine sand from a borrow pit located on the conservation easement.

25. Whether, during the time the FWC was neglecting its responsibility for maintaining navigation in Cowbone Marsh, parts of the Marsh became overgrown with a thicket of non-native willow and button bush.

26. Whether the navigable stream through Cowbone Marsh would have remained unimpeded had FWC timely removed invasive vegetation and maintained navigation in the stream.

27. Whether in 2007, Conservationists demanded that FWC maintain and improve the navigable stream through Cowbone Marsh as required by the 1999 Settlement Agreement.

28. Whether the FWC agreed to restore the navigable stream through Cowbone Marsh channel in 2010.

29. Whether the FWC contractor who began removing the invasive vegetation from the navigable stream through Cowbone Marsh faithfully adhered to the field-verified 1929 Corps' survey map delineating the historic stream bed.

30. Whether that restoration was conducted with equipment that has been used for decades throughout Florida for control of invasive vegetation in lakes and streams.

31. Whether the material removed by that equipment constituted invasive vegetation and tussock that provides no habitat or poor habitat for aquatic species and birds.

32. Whether the purpose of the channel restoration project was to remove noxious aquatic vegetation to restore navigation, facilitate fishing and other recreation, and to improve habitat.

33. Whether the cookie cutter boat removed any organic detrital material.

34. Whether the cookie cutter boat removed any mineral substrate.

35. Whether the state and the federal governments have for over a decade routinely operated cookie cutter boats in a way so that organic detrital material and shredded vegetation was deposited in an upland site, or instead left the shredded vegetation and organic detrital material where it was side-cast by the cutter blades.

36. Whether the state and the federal governments have for over a decade routinely operated cookie cutter boats in that way to improve and maintain navigation channels for recreational boating and fishing and to restore and maintain habitat.

37. Whether there is now any continuing adverse environmental effect from any organic detrital material removed by the cookie cutter that was transported downstream in the stream channel.

38. Whether there is now any continuing adverse environmental effect from any shredded vegetation that was side cast by the cookie cutter downstream in the stream channel.

39. Whether FWC's Cowbone Marsh restoration project adversely affected the hydrology of the Marsh, caused soil erosion, or adversely impacted downstream water quality.

40. If FWC's Cowbone Marsh restoration project adversely affected the hydrology of the Marsh, caused soil erosion, or adversely impacted downstream water quality, whether those adverse effects continue.

41. Whether the open water channel restored by the cookie cutter boat is providing habitat for birds, alligators, fish and other aquatic life that would not otherwise exist and improves diversity of native aquatic plant species.

42. Whether the restored channel improves habitat for endangered, threatened, and species of special concern.

43. Whether DEP ordered FWC to implement corrective measures and develop a site restoration plan to correct the alleged adverse aquatic impacts to the Marsh.

44. Whether those corrective measures were effective.

45. Whether FWC's corrective measures, which consisted of a water-control weir and a series of small, low-impact log check dams made of sand bags and wooden wing walls successfully controlled the flow of water in the Marsh.

46. Whether DEP reached a compromise with the Conservationists and FWC whereby FWC agreed to install the six check dams.

47. Whether DEP developed the permit at issue to comply with EPA's demand that the navigable stream through Cowbone Marsh be filled as a remedy for FWC's alleged dredge activities.

48. Whether DEP's September 11, 2012 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization directs FWC to implement a $3 million plan to build roads and "staging areas" across the Marsh so that several hundred dump trucks can transport sand—supplied by Lykes and mined from conservation easement lands—into the creek bed.

49. Whether filling the channel with sand would effectively obliterate two miles of a publicly-owned, navigable stream held in trust by the State for the benefit of the people.

50. Whether the approved plan to fill two miles of the Cowbone Marsh channel with sand obstructs, impairs, or interferes with the public's use of the stream for navigation, commerce, fishing, boating, and/or other recreational activities.

51. Whether the plan to fill the channel with sand is appropriate given generally accepted engineering and scientific principles.

52. Whether DEP's characterization of the channel filling project as a "Trail Restoration" accurately reflects the nature of the stream through Cowbone Marsh, which has been formally adjudicated to be a navigable water of the State held in trust for the benefit of the public.

53. Whether SOC owns riparian property on Fisheating Creek, upstream of Cowbone Marsh, which the organization uses as a boat launch to access and enjoy the navigable water of Fisheating Creek.

54. Whether the plan to fill the navigation channel in Cowbone Marsh, thereby foreclosing completion of the channel restoration project, will adversely impact SOC's riparian rights to navigate to the lower reaches of the Creek and Lake Okeechobee.

55. Whether dumping approximately sixty-five million pounds of sand and several thousand pounds of chemical fertilizer will cause adverse water quality impacts to the surface waters of Cowbone Marsh.

56. Whether building a road across Cowbone Marsh so that heavy machinery can dump sixty-five million pounds of sand into Cowbone Marsh will adversely affect any threatened, endangered, or sensitive species or their habitat.

57. Whether the proposed sand mine for FWC's fill project is located on wetlands.

58. Whether DEP adequately evaluated the impacts of mining sixty-five million pounds of sand from wetlands subject to a conservation easement.

59. Whether the proposed sand mine will affect cultural, historical, and/or archeological resources on conservation easement lands.

60. Whether using conservation easement wetlands to mine sand to fill the navigable stream through Cowbone Marsh is contrary to public's interest in the preservation of those lands.

61. Whether FWC's plans to convert those mined-out conservation easement wetlands into a permanent cattle pond is contrary to the public's interest in the preservation of those lands.

62. Whether the U.S. Environmental Protection Agency ("EPA") directed FWC to develop a plan to fill the navigable stream through Cowbone Marsh.

63. Whether DEP's approval of FWC's fill plan or ERP modification was conditioned on EPA's approval.

64. Whether DEP considered or allowed FWC to propose feasible alternative mitigation measures that would substantially enhance the ecological values of the Marsh and would avoid completely filling the channel with sand (which effectively turns the navigable stream into a road and destroys FWC's original project purpose of maintaining navigation).

65. Whether the purpose of the check dams and the original May 2011 ERP in this case was ultimately to fill the navigable stream through Cowbone Marsh by the process of natural deposition.

66. Whether DEP's September 2012 ERP modification alters the permit conditions of the original ERP.

67. Whether mining sixty-five million pounds of sand from wetlands subject to a conservation easement and building roads and "staging areas" across Cowbone Marsh and in the navigable stream to transport and dump several hundred dump trucks of sand into the creek results in substantially different or increased impacts on wetlands and other surface waters relative to the initial ERP.

68. Whether establishing a sand mine on adjacent conservation easement wetlands and building roads and "staging areas" across Cowbone Marsh and in the navigable stream to transport and dump several hundred dump trucks of sand to into the creek substantially increases the project area compared to the original ERP.

69. Whether FWC's proposed ERP modification resulted in site inspections.

70. Whether sand could be feasibly obtained and transported directly from a mine on private property, thereby avoiding the use of conservation easement lands for mining.

VI. ULTIMATE FACTS DEMONSTRATING THAT THIS ACTION SHOULD NOT PROCEED AS PROPOSED

71. Fisheating Creek, including Cowbone Marsh, has been adjudicated to be navigable and to contain a historic channel.

72. The FWC restoration project by the cookie cutter boat restored the existing channel under the tussock as surveyed in 1929 by the Corps of Engineers and field verified by the State.

73. As a result of FWC's failure to maintain and enhance the navigable stream through Cowbone Marsh, the tussock overgrew with willows, button bush and other invasive vegetation and became substantially more difficult to remove.

74. DEP stands in privity with the Trustees of the Internal Improvement Fund and with FWC through the 1999 Settlement Agreement and lease.

75. The channel restoration project was conducted with equipment that has been used for at least a decade throughout Florida by state and federal agencies for control of invasive vegetation, including willows, in lakes and streams.

76. The FWC Aquatic Plant Control Division that restored the Cowbone Marsh channel had been housed at DEP only two years before and did not change its practices concerning use of cookie cutter boats when it was transferred to FWC.

77. The restoration project complied with the regulations governing mechanical removal of noxious aquatic plants under Rule 68F-20.0045, F.A.C. and was done for the purpose of complying with a lease condition in its lease with the Trustees. Similar restoration projects have been conducted by the Aquatic Plant Control Division throughout the state using the same cookie cutter boat for the same or similar purposes. *See* Exhibit B.

78. The material removed by the cookie cutter boat was tussock, which is legally defined as vegetation which is "elevated above the natural grade on a mound built up of plant debris, roots, and soils, so that the growing vegetation is not subject to the prolonged effects of soil anoxia."

79. The cookie cutter boat may have removed some amount of organic detrital material but did not remove any mineral substrate. Any organic detrital material removed by the cookie cutter boat was not deposited in an upland site.

80. The state and the federal governments have for over a decade routinely operated cookie cutter boats in a way so that organic detrital material was removed but was not deposited in an upland site.

81. The state and the federal governments have for over a decade routinely operated cookie cutter boats in a way that left the shredded vegetation and any organic detrital material where it was side-cast by the cutter blades.

82. There is no evidence that the turbidity mixing zone for the cookie cutter, in fact, exceeded 150 meters downstream of where the cookie cutter boat was operating.

83. There is now no continuing adverse environmental effect from any organic detrital material or shredded vegetation removed by the cookie cutter boat.

84. The Cowbone Marsh restoration project did not adversely affect the hydrology of the Marsh, cause soil erosion, or adversely impact downstream water quality.

85. Any possible adverse effects of the restoration project on the hydrology of the Marsh, on soil erosion, or on downstream water quality do not continue presently.

86. The open water channel restored by the cookie cutter boat is providing habitat for birds, alligators, fish and other aquatic life that would not exist but for the channel restoration project.

87. DEP's September 11, 2012 Environmental Resource Permit ("ERP") and state-owned Submerged Lands Authorization directs FWC to implement a $3 million plan to build roads and "staging areas" across the marsh so that several hundred dump trucks can transport sand—supplied by sand mined from conservation easement lands—into the Creek bed.

88. Filling the channel with sand would effectively obliterate two miles of a publicly-owned, navigable stream held in trust by the State for the benefit of the people.

89. Filling two miles of the Cowbone Marsh channel with sand would thwart the public's use of the stream for navigation, commerce, fishing, boating, and/or other recreational activities.

90. The plan to fill the channel with sand is inappropriate given generally accepted engineering and scientific principles because it is unnecessary and will result in a net loss to the ecosystem of the Creek.

91. The plan to mine sand from a borrow pit on conservation easement lands held by the Trustees for the benefit of the public will impair the public's interest in those lands.

92. The proposed sand mine is located upon wetlands, as defined by section 373.019(27), Florida Statutes.

93. DEP failed to properly analyze the impacts of developing a sand mine on conservation easement wetlands and then converting those wetlands into a permanent cattle pond.

94. The proposed sand mine and cattle pond will substantially affect cultural, historical, and/or archeological resources on conservation easement lands.

95. The use of conservation easement wetlands to mine sand to fill the navigable stream through Cowbone Marsh is contrary to public's interest in the preservation of those lands.

96. FWC's plan to convert the mined-out conservation easement wetlands into a permanent cattle pond is contrary to the public's interest in the preservation of those lands.

97. DEP's characterization of the channel filling project as a "Trail Restoration" is a misrepresentation of the navigation channel determined to exist by a judicial judgment that is binding on DEP.

98. SOC owns riparian property on Fisheating Creek, upstream of Cowbone Marsh, which the organization uses as a boat launch to access and enjoy the navigable water of Fisheating Creek.

99. The plan to fill the navigation channel in Cowbone Marsh would foreclose completion of the channel restoration project and would thereby thwart SOC's riparian rights to navigate to the lower reaches of the Creek and Lake Okeechobee.

100. The sand filling project would require sixty-five million pounds of sand which would cause adverse water quality impacts to the surface waters of Cowbone Marsh.

101. Building a road across Cowbone Marsh so that heavy machinery can dump sixty-five million pounds of sand into Cowbone Marsh will adversely affect any threatened, endangered, or sensitive species or their habitat.

102. Conservationists relied to their detriment on the Trustee's promises in the 1999 Settlement Agreement and FWC promises in the subsequent lease agreement, as well as FWC's subsequent representations that they would properly improve and maintain navigation throughout Cowbone Marsh.

103. EPA and/or the Corps directed FWC to develop a plan that ultimately results in filling the navigable stream.

104. DEP conditioned its approval of FWC's restoration plan and the issuance of the ERP on FWC's development of an EPA-approved fill plan.

105. DEP did not adequately consider or allow FWC to propose feasible alternative mitigation measures that would substantially enhance the ecological values of the Marsh and avoid completely filling the channel with sand, which effectively destroys the initial project purpose of maintaining navigation.

106. Compared to the DEP's original ERP for the installation of the check dams, DEP's September 2012 ERP modification substantially alters the permit conditions, results in substantially different or increased impacts on wetlands and other surface waters, substantially

increases the project area, and required numerous site inspections, thereby triggering the Department's major modification requirements.

VII. APPLICABLE STATUTES AND RULES OF LAW

107. Rule 62-110.106(12), F.A.C., provides that a person whose substantial interests are affected by a DEP permitting decision may petition for an administrative hearing under Sections 120.569 and 120.57, Florida Statutes. Based on Conservationists' unique interest in the maintenance of navigation under the 1999 Settlement Agreement, SOC's riparian rights on Fisheating Creek and their standing under section 403.412(6), Florida Statutes, Conservationists have a substantial interest in maintaining the navigability of the stream through Cowbone Marsh that will be adversely affected if FWC is permitted to obliterate the stream.

108. Section 253.003(1), Florida Statutes, vests the Board of Trustees of the Internal Improvement Fund with administration of sovereignty submerged lands. DEP is responsible for performing all functions related to the administration of sovereignty lands, including all environmental permitting of activities and water quality protection on sovereignty lands. § 253.002, Fla. Stat.; Rule 18-21.002, F.A.C.

109. Under the principle of estoppel by judgment, parties are estopped from litigating in a second suit issues common to both the first and second causes of action and which were actually or could have been adjudicated in the prior litigation.

110. DEP is responsible for performing all functions related to the administration of sovereignty lands and therefore shares an identity with the Trustees.

111. Because the Order of Judgment and subsequent Settlement Agreement in *Board of Trustees of the Internal Improvement Trust Fund et al v. Lykes Bros., Inc.*, No. CA 93-136) (Fla. 20th Cir. Ct. Feb. 19, 1998), conclusively established the both the navigability of the stream

segment through Cowbone Marsh and the public's interest in maintaining navigability, DEP (which shares an identity with the Trustees) is estopped from arguing that the public interest favors filling and obliterating the publicly-owned, navigable stream.

112. Similarly, DEP is estopped from arguing that the public interest favors mining sand from a borrow pit located on the publicly-owned, conservation easement.

113. DEP is also estopped from arguing that FWC was required to obtain a permit before conducting invasive vegetation removal activities in Cowbone Marsh.

114. Finally, DEP is estopped from contesting the navigability of the stream segment through Cowbone Marsh, or the public's right to use the stream for navigation, fishing, and other recreational purposes.

115. FWC, as the lessee of the sovereignty lands at issue, is in privity with DEP, as the agency responsible for performing all functions related to the administration of sovereignty lands. Because the navigable stream through Cowbone Marsh became occluded as a result of FWC's refusal to fulfill its obligations under the Settlement Agreement, the Trustees and its representatives are barred by the doctrine of unclean hands from asserting that FWC must now fill the navigable stream through Cowbone Marsh.

116. Section 373.4211(20)(12) defines "tussock" as vegetation which is "elevated above the natural grade on a mound built up of plant debris, roots, and soils, so that the growing vegetation is not subject to the prolonged effects of soil anoxia."

117. Section 369.25(1)(a) defines "aquatic plant" to mean any plant, including an immersed species, "growing in, or closely associated with, an aquatic environment," and includes any part of the plant. Section 369.25(1)(d) defines "noxious aquatic plant" as those with

a potential to “interfere with irrigation or navigation.” The plants removed by the cookie cutter were noxious aquatic plants because they hindered navigation.

118. Section 369.20(7) makes FWC the permitting authority for removal of nuisance and invasive aquatic plants, including mechanical control activities.

119. Rule 68F-20.0045, F.A.C. sets out FWC’s permitting criteria:

(1) The commission recognizes the varied human and environmental concerns for Florida's waters. Aquatic plant management permits shall be issued to allow persons reasonable access to, and use of, these waters while maintaining sufficient native vegetation to provide for environmental concerns such as the impact upon fish, wildlife, water quality, and shoreline stabilization. Native aquatic plant species in natural waters will not be considered for control unless the native species alone, or when intermingled with nonindigenous species, have become noxious.
(2) In determining whether a permit shall be issued for aquatic plant management purposes, the commission shall consider the following criteria:
(a) The noxious aquatic plant species present and the potential of the target plants to create adverse effects.
(b) The amount and quality of the aquatic plants within the waterbody and the proposed management site, and their importance to biological communities that are utilizing them.
(c) The positive or adverse impacts of the aquatic plant management activities on public interest considerations such as:
1. Health and safety of the public.
2. Navigation.
3. General public's access to, or use of, the waterbody.
4. Riparian property owners' access to, or use of, the waterbody.
5. Swimming, fishing or other recreational activities.
6. Water flow or the potential for flooding.
(d) The positive or adverse impacts of the aquatic plant management activities on fish and wildlife considerations such as:
1. Endangered or threatened species, species of special concern, or their prey species and habitat.
2. The potential of the management activities to improve habitat for the production of fish and wildlife, including non-game species.
3. The potential of the plant management activities to increase or improve native aquatic plant species diversity.
(e) The positive or adverse impacts of the proposed aquatic plant management activities on water quality considerations such as:
1. Native plant coverage which may protect or improve water quality.
2. Native plant coverage which may prevent or reduce shoreline erosion and runoff.

3. Nutrient levels, dissolved oxygen levels, deposition of organic matter, herbicide residues or other impacts on water quality outside of the control area designated by the commission.

(f) The protection of the receiving waterbodies consistent with the classes of surface waters established pursuant to Chapter 62-302, F.A.C.

(g) The potential of the proposed activity to spread noxious aquatic plants, or to promote the survival and growth of native aquatic plants.

120. As the permitting agency under section 369.20, FWC does not need to issue permits to itself for its own activities and the facts demonstrate that FWC complied with its rule criteria in deciding to conduct the restoration project with the cookie cutter boat when it satisfied the following factors: (a) and (b), the noxious aquatic plants were willows and button bush that are major invasive species that create a nuisance in lakes and streams; and that those noxious plants were and are spreading; (c) the restoration has major positive effects on navigation, the general public's access to, or use of, the waterbody, riparian property owners' access to, or use of, the waterbody, and swimming, fishing or other recreational activities; and (d) the restoration project improves habitat for endangered or threatened species, species of special concern, or their prey species and also improves the habitat for fish, aquatic species, wading birds, wetlands wildlife and improves native aquatic plant species diversity.

121. The remedy in all enforcement cases must be tailored to the harm and to the context of the violation. The legal context is that the Aquatic Plant Control Division of FWC that conducted the restoration project was part of DEP less than two years before the channel restoration project and was implementing its obligations under a lease from the Trustees. And the violation, if there was one, was meeting the criteria used in aquatic plant control permitting under Rule 68F-20.0045, F.A.C. but not also transporting detrital material and shredded vegetation to an upland site as could have been required under section 403.813(1)(r).

122. Section 373.413, Florida Statutes, provides DEP with authority to require permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of Chapter 373 and applicable rules promulgated thereto and will not be harmful to the water resources of the district.

123. Section 373.414, Florida Statutes, provides that the department shall require an applicant for a permit to provide reasonable assurance that state water quality standards will not be violated and reasonable assurance that such activity in, on, or over surface waters or wetlands is not contrary to the public interest. FWC and DEP have failed to provide adequate assurances that the proposed fill project is not contrary to the public interest because the 1999 Settlement Agreement conclusively established that the public's interest in Cowbone Marsh consists of maintaining and enhancing navigation in the stream, not obliterating it. DEP's conclusion that the utter destruction of a navigable stream is consistent with maintaining navigation is facially absurd. Moreover, DEP failed to consider whether mining sixty-five million pounds of sand from wetlands subject to a conservation easement is contrary to the public interest.

124. For the purposes of section 373.414, "wetlands" means:

> those areas that are inundated or saturated by surface water or groundwater at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce, or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas.

§373.019(27), Fla. Stat.

125. Under Rule 62-340.300, F.A.C., the delineation of wetlands "shall be determined by applying reasonable scientific judgment to evaluate the dominance of plant species, soils, and other hydrologic evidence of regular and periodic inundation and saturation . . . ."

126. Applying the regulatory wetland delineation factors, the conservation easement lands that FWC proposes to use as a sand mine and permanent cattle pond constitute wetlands. *See* Rules 62-340.300 and 62-340.500, F.A.C.

127. In determining whether an activity, which is in, on, or over surface waters or wetlands is not contrary to the public interest or is clearly in the public interest, the department shall consider and balance the following criteria:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
>
> 2. Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
>
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
>
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
>
> 5. Whether the activity will be of a temporary or permanent nature;
>
> 6. Whether the activity will adversely affect or will enhance significant historical and archaeological resources under the provisions of s. 267.061; and
>
> 7. The current condition and relative value of functions being performed by areas affected by the proposed activity.

§ 373.414(1)(a), Fla. Stat.

128. All of these factors counsel against the proposed fill project:

a. The factor in section 373.414(1)(a)1. (whether the activity will adversely affect the public health, safety, or welfare or the property of others) weighs against the project because the project will adversely affect the Conservationists' unique rights in the 1999 Settlement

Agreement, SOC's riparian rights, and the public's right to access and navigate on the waters of Fisheating Creek.

b. The factor in section 373.414(1)(a)2.(whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats) weighs against the project because it will adversely affect the numerous, diverse populations of fish and wildlife—including many threatened, endangered, and sensitive species—that inhabit Cowbone Marsh and the surrounding conservation easement lands from which FWC plans to mine sand for the purpose of filling the Marsh.

c. The factor in section 373.414(1)(a)3. (whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling) weighs against the project because it will utterly destroy navigation opportunities in the stream and any harmful erosion or shoaling has been dealt with through FWC's construction of non-navigation blocking weirs. This factor also weighs against FWC's plan because the Commission's plan to remove of sand from wetlands on publicly-owned, conservation easement lands will cause erosion on those lands.

d. The factor in section 373.414(a)4. (whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity) weighs against the project because it will adversely impact fishing and recreational values by destroying a fishable, navigable stream that serves as habitat for numerous marine and fish species.

e. The factor in section 373.414(1)(a)5. (whether the activity will be of a temporary or permanent nature) weighs against the project because filling a navigable stream with sixty-five million pounds of sand is permanent and intended to permanently obstruct navigation and destroy recreational use of the navigation channel through Cowbone Marsh. Additionally, FWC

plans to mine sixty-five million pounds of sand from wetlands on conservation easement lands and then convert that land into a cattle pond will permanently impact those lands.

f. The factor in section 373.414(a)6. (whether the activity will adversely affect or will enhance significant historical and archaeological resources) weighs against the project because there are historical and archaeological resources on the wetland areas from which FWC proposes to extract sixty-five million pounds of sand and then convert into a cattle pond.

g. The factor in section 373.414(a)7. (the current condition and relative value of functions being performed by areas affected by the proposed activity) weighs against the project because the project replaces a currently navigable stream and viable fish and wildlife habitat with sand, chemicals, and invasive willows. Additionally, the project calls for mining sixty-five million pounds of sand from wetlands subject to a conservation easement and then converting the land into a permanent cattle pond, thereby adversely impacting the condition and functions being performed by those wetlands.

129. DEP's regulations also incorporate SFWMD's "Basis of Review for Environmental Resource Permit Applications," which provides that in considering and balancing the public interest factors under section 373.414(a), Florida Statutes, the Department "will consider the current condition and relative value of the functions performed by wetlands and other surfaced waters affected by the proposed regulated activity." Basis of Review § 4.2.3.7; see also § 4.2.3.3 (consider "current navigational uses of the surface waters"). This factor weighs against the proposed fill plan, which would obliterate a stream that is currently used for navigational purposes and used by diverse fish and wildlife for habitat.

130. Under section 373.414(b), if an ERP applicant is unable to meet the public interest criteria set forth in that subsection, the department, "in deciding to grant or deny a

permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks . . . . It shall be the responsibility of the applicant to choose the form of mitigation. The mitigation must offset the adverse effects caused by the regulated activity." FWC's invasive vegetation removal project resulted in an improvement to the function and value of Cowbone Marsh for navigation, fish and wildlife habitat, and fishing and recreational uses. To the extent that FWC's previous activity caused any harm, DEP failed to adequately consider reasonable and feasible mitigation measures, such as allowing FWC to keep the existing check dams in place with additional mitigation, which would substantially enhance the ecological values of the Marsh and advance FWC's original project purpose to maintain navigation.

131. Under Rule 62-330.200(4)(b), F.A.C., DEP adopts by reference SFWMD Rule 40E-4.301, F.A.C., which provides that to obtain an ERP permit, an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal or abandonment of a surface water management system:

> (a) Will not cause adverse water quantity impacts to receiving waters and adjacent lands;
>
> (b) Will not cause adverse flooding to on-site or off-site property;
>
> (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 and 62-550, F.A.C., incorporated by reference in paragraph 40E-4.091(1)(d), 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;

(f) Will not cause adverse secondary impacts to the water resources;

(g) Will not adversely impact the maintenance of surface or ground water levels or surface water flows established pursuant to Chapter 373.042, F.S.;

(h) Will not cause adverse impacts to a work of the District established pursuant to Section 373.086, F.S.;

(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 the 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; and

(k) Will comply with any applicable special basin or geographic area criteria established in Chapter 40E-41, F.A.C.

Rule 40E-4.301, F.A.C.

132. FWC and DEP have failed to adequately analyze the following factors:

a. 40E-4.301(a) (will not cause adverse water quantity impacts to receiving waters and adjacent lands) weighs against the project because dumping sixty-five million pounds of sand into a navigable river will plainly cause adverse water quantity impacts to receiving waters.

b. 40E-4.301(d) (will not adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters) weighs against the project because the project will adversely impact the value of functions provided to fish and wildlife and listed species by wetlands and other surface waters by displacing numerous species currently inhabiting the area, permanently precluding fish from migrating upstream, and returning the vegetation in the area to invasive monoculture.

c. 40E-4.301(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 and 62-550, F.A.C., incorporated by reference in paragraph 40E-4.091(1)(d), 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) weighs against this project because a river cannot be "restored" by dumping sixty-five million pounds of sand into it, and there is no evidence that the plan will do anything but obliterate a navigable waterway.

d. 40E-4.301(f) (will not cause adverse secondary impacts to the water resources) This factor weighs against the project because it would foreclose the completion of the channel restoration project, thereby eliminating a passage for fish and other aquatic life between Lake Okeechobee and the upper reaches of the Creek, diminishing the food sources for wading birds, and preventing the restoration of wading bird habitat.

e. 40E-4.301(i) (will be capable, based on generally accepted engineering and scientific principles, of being performed and of functioning as proposed) weighs against the project because the project is not based on generally accepted engineering and scientific principles in that the roads and staging areas will necessarily damage the Marsh and because driving hundreds of dump trucks in a marsh cannot possibly be done without damaging its ecosystem.

133. In sum, FWC and DEP have failed to provide reasonable assurances that the proposed project complies with these requirements.

134. DEP's regulations also incorporate SFWMD's "Additional Conditions for Issuance of Permits," Rule 40E-4.302, which provide that an applicant must provide reasonable assurance that the construction, alteration, operation, maintenance, removal, and abandonment of a system located in, on, or over wetlands or other surface waters "will not be contrary to the public interest" and "will not cause unacceptable cumulative impacts upon wetlands and other surface waters." Rule 40E-4.302(1)(a) & (b), F.A.C. FWC's fill plan is contrary to the public interest because the 1999 Settlement Agreement in this case conclusively established that the public's interest in Cowbone Marsh is served by the maintenance and enhancement of navigation in the stream. The DEP-approved fill plan will cause unacceptable cumulative impacts to wetlands and surface waters because it calls for building a road across the wetlands in Cowbone Marsh and utterly destroying a navigable waterway. Moreover, the project will impede the propagation of fish and wildlife and contribute sediment to downstream waters.

135. Section 373.4141(4), Florida Statutes, provides that "a state agency . . . may not require as a condition of approval for a permit or as an item to complete a pending permit application that an applicant obtain a permit or approval from any other local, state, or federal agency without explicit authority to require such permit or approval." DEP's approval of FWC's hydrologic restoration plan for Cowbone Marsh was conditioned on EPA's approval.

136. Rule 62-343.100, F.A.C., allows a permittee to request a modification to an existing, currently valid permit. Under the Rule, the Department will determine whether the requested modification is minor or major based on the magnitude and nature of the proposed

modification and the potential for the modification to have environmental impacts that are significantly different from those previously considered by the Department for the activity. "Minor modifications may include requests for a time extension . . . , to correct errors or typographical mistakes, to incorporate changes requested by the Department or required through permits issued by other regulatory agencies, to change due dates for reporting or performance deadlines, to transfer a permit, or to make minor technical changes. For the purpose of this chapter, a modification shall be considered to be minor only where the modification does not:

1. Require a new site inspection by the Department in order to evaluate the request; or

2. Substantially:

a. Alter the permit conditions;

b. Increase the authorized discharge;

c. Have substantially different or increased impacts on wetlands and other surface waters, as delineated by the methodology ratified by Section 373.4211, F.S, and codified in Chapter 62-340, F.A.C.;

d. Decrease the retention/detention specified by the original permit;

e. Decrease any flood control elevations for roads or buildings specified by the original permit; or

f. Increase the project area.

137. A modification which does not meet the requirements set out above is a major modification. Such application shall be reviewed and noticed using the same criteria as new applications, in accordance with the procedures, standards, and fees in Chapters 62-4, 62-341, and 62-330, F.A.C., and this chapter. In this case, FWC's modification of its ERP should have triggered a major modification review because the proposal calls for mining sixty-five million pounds of sand from adjacent conservation lands and building roads and "staging areas" across

Cowbone Marsh and in the navigable stream to transport and dump several hundred dump trucks of sand to into the creek, as well as numerous site inspections. Consequently, the modification substantially alters the permit conditions of the initial ERP, results in substantially different or increased impacts on wetlands and other surface waters, and increases the project area.

VIII. RELIEF SOUGHT

138. Conservationists respectfully request that DEP refer this matter to the Division of Administrative Hearings for a formal administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, and that the Administrative Law Judge enter a Recommended Order setting aside DEP's September 11, 2012 ERP directing FWC to fill the stream in Cowbone Marsh with sand, and instead recommending to DEP that the existing check dams be maintained and monitored.

Respectfully submitted this 25th day of February, 2013.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing petition was served on the following counsel of record on February 25, 2013:

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/s/ Alisa Coe
Attorney

Exhibit A



Exhibit C



Exhibit C

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,

Petitioners,

vs. CASE NO. 12-3427

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME I

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 4, 2013
TIME: 9:00 a.m. - 2:52 p.m.
PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
BEFORE: BRAM D. E. CANTER,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

LISA A. BABCOCK, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:

motion that I thought had been superceded.

THE COURT: Well, if you persuade me on the substitute, I'll withdraw the order.

MR. BEASON: Thank you, Your Honor.

MS. COE: Your Honor, if I might just say, though, that it was our position that the DEP needed to respond, and we did offer sort of a compromise deal of having them respond to both motions at the same time last week so that we'd understand their position if they were objecting, and that was rejected.

MR. BEASON: That's a path we don't want to go down, Your Honor.

THE COURT: Yeah. Let's just move on to the

problems with the -- let me first -- Ms. Coe, why don't you help me understand what was added, how you changed your petition.

MS. COE: Sure. There's -- in the original amendment, there were basically four concepts that were added that we discovered after pursuing discovery. The first was that the permit was -- because it had been issued as a minor modification, no analysis of the filling of the channel had occurred.

The second concept that was added that we also learned through depositions was that mitigation had not been offered to the applicant, and that was the testimony of Jerrie Lindsey. On

the -- the third point was the location of the property on conservation easement lands and that that had not been appropriately considered.

THE COURT: Say that last one again.

MS. COE: That the location of the sand pit that would be used for filling of the channel was placed on conservation easement lands and that that had not been appropriately considered. We discovered that through the e-mail traffic.

And the fourth one was that what we learned was that a major justification for the project was

EPA's approval and that, in fact, what had been required was a plan that was approved by EPA. So those were the issues we covered in the first amendment.

In the substitute amendment, there were two additional issues that, again, we found an indication that the conservation lands may be on -- sited on a wetland in the discovery process. Over the weekend, sent our -- that was on a Friday. Over the weekend, sent our experts out to take a look, and they did believe that this was a wetland, and so that area was -- and so we filed another amendment on that following -- that Monday right after we learned their report.

At the same time, while they were out there, they noticed some unusual fragments, so we added a claim for cultural resources as well. That claim

is -- I don't think we're going to be putting up facts on that claim. I think we ran out of time on that one.

THE COURT: So you're saying right now, you're willing to offer your substitute with a stipulation that you're not pursuing the archeological or historical resource issue?

MS. COE: That's correct, Your Honor.

THE COURT: All right. Mr. Beason?

MR. BEASON: Yes, Your Honor. I just would point out, Your Honor, that the permit that's at issue hasn't changed. There's been no -- since it was noticed in September, it has stood such as it was issued then, and it stands as it is now.

It's the same document. It's the same file. It's the same analysis. It's the same background and supporting material. Nothing has changed. So to the extent that there is a need to amend, it hasn't been or isn't a result of something the Department has done to change its proposed agency action.

Your Honor, this issue about minor modification, Your Honor, I don't know that you had to undertake discovery to figure out that the proposed agency action is a minor modification.

It says, if you look at the permit, the proposed permit, it says it on the front of the permit. The proposed agency action is styled a

minor modification to an existing permit. So you really didn't have to undertake any discovery to figure out that it was a proposed minor modification.

Again, Your Honor, with respect to the issue

of mitigation, a little homework, little review of the file, a little examination of the documents that have been made available over the last several years to the Petitioners would have revealed to them, even on a cursory examination, that there is no mitigation included as part of the proposed agency action.

And we are prepared to defend that fact, Your Honor, but I would just suggest to you that -- I think I've made my point. I don't think there was a big mystery involved there.

Your Honor, the fact -- this issue about the location of the borrow pit on a conservation easement, again, Your Honor, even the most cursory review of the permitting file, of the documents that -- we've made the documents available to the Petitioners on a monthly basis over the last couple years, Your Honor, almost a weekly basis at times.

And if they had taken the time to sit down and look at those documents and reviewed them, they would have figured out pretty quickly where the borrow pit was located, where the conservation

easement is, and they could have put two and two together rather easily and figured out the fact

that the borrow pit was located on a conservation easement.

The -- this issue about the EPA, you know, top-down command performance about this permit, Your Honor, we're going to litigate the merits of the application.

We all understand the provisions of Chapter 373 and applicable rules under 40E. If the application doesn't meet those rules, then no matter what the EPA or the court have said, it's my expectation that you will not recommend that the permit be approved.

It's all well and good what the federal agencies have done, and it is a fact that they have an interest in this, and that they have a very strong position with respect to the restoration of the marsh and they've advocated that. But I think everyone realizes that if the permit is to be approved, it's going to have to be approved on basis of state law, and that's why we're here.

And Your Honor, this issue about the borrow pit being located in a wetland area, again, Your Honor, there's been no mystery about the location of the borrow pit. It is where it is or where

it's proposed to be located. That hasn't changed.

There's nothing new. There's no hiding of secrets, no -- nothing really involved in figuring out where the borrow pit is in relationship to wetlands if you just sit down and look at the permitting file and the applicable documentation.

One thing I would point, Your Honor, though that I do want to raise and specifically object to is the fact -- Ms. Coe conceded that she sent out her experts to the field to -- they went out and did a site investigation a little after the fact, but yet, they did do a site investigation.

The problem is, Your Honor, is that those two experts she sent out had already been deposed, and they had -- under your order of prehearing instructions, their testimony, their opinion was, to the extent practicable, to be final at the time of deposition, Your Honor.

And we took their depositions, and I don't -- I can represent to you neither one of those witnesses said anything about the borrow pit being located in a wetland. And we asked them questions about what they did, you know, what they expected to do, were their opinions final, were they -- you know, what expectations did they have as to

witnesses said a peep about going back out to the site and trying to dig up some additional issues, Your Honor.

So to that extent, I think that issue should be denied, Your Honor, simply for the fact that we kind of got taken advantage of a little bit there. We did our discovery. We did our due diligence. And next thing we know, they're sending these folks back out there to see what else they can come up with.

And that kind of makes a mockery of your order, Your Honor, to the extent that parties were supposed to try to make their witnesses available at a time where their opinions were final. Thank you, Your Honor.

THE COURT: All right.

MS. COE: May I respond, Your Honor?

THE COURT: Yes.

MS. COE: To go directly to Mr. Beason's last point, what had happened was we went through about 15,000 e-mails reading through and finding things. What we found was a report about the different conservation lands, now understanding that this was located on conservation lands, and the parcel

was described as a wetland.

I had no idea whether that was true or not. This was after their depositions. It was not something I was looking at, but I sent them out to

confirm, because in all the mapping I had seen through DEP, the area was defined as uplands.

They went out there, and in fact, their testimony will show that they believe that this is wetland area, and that's when the change was made. So there was no attempt to hide the ball during their deposition. It was an issue that, frankly, we didn't know existed, which is why the amendment came. Otherwise, everything would have come in the same amendment.

The issue as to the minor modification, the permit, on its front, says --

THE COURT: I don't -- I don't want to hear -- I don't need to hear from you about that one, Ms. Coe.

Mr. Osborne, do you have anything to add?

MR. OSBORNE: I do, Your Honor. This entire time, the Petitioners have presented a moving target in this matter, and this is just yet another example of that where, after discovery was had, they went out to discover new facts and came

back, and they, to their credit, they did present them to us to redepose them but far late in the game.

This was the end of last week. During this entire time, we were still conducting other depositions and while we were still working diligently with them in good faith to prepare a

joint pretrial -- or prehearing stipulation. So there was literally no time to redepose these individuals.

And so, Your Honor, we don't feel that we were given ample time to depose these individuals to find out the facts that they found out, and we have a surprise waiting for us if they are able to litigate these matters. So we object strongly to this amendment as well.

THE COURT: All right. Well, it sounds to me like the first issues that Mr. Beason was addressing are ones which -- although he's claiming that they should have known, these issues should have been in their original petition, there's no surprise and the agencies are prepared to defend the permit conditions that are applicable to those things.

With regard to the wetland area, if there's a

representation by the agency, it can come in as a hearsay exception as an admission that this is a wetland. So you all have to deal with that. If the Respondents require additional discovery or -- you know, I'll be allowing any reasonable expansion of discovery by Respondents to deal with that issue.

But since you're already going to have to deal with it, I believe, if Ms. Coe's representation is true, I'm going to allow the

of employees from different agencies, who were meeting somewhat before then, and basically examined three options to conduct backfill of the channel. And they looked at filling in the channel with sand using trucks, constructing a 10-mile pipeline to slurry material from Lake Okeechobee or filling in the channel with sand using helicopters.

FWC continually requested that it be considered to leave the check dams in place and allow them to fill in naturally but that was rejected. Ultimately, the group decided on the option to fill in the check dams using sand by truck, which required the construction of a temporary road that would allow about 3300 dump trucks full of sand to cross there.

It also required the construction of a sand pit, or what they're calling a borrow pit, and that was to be located on conservation easement land that was owned by Lykes and which we believe to be a wetland. And you'll hear the testimony of Greg Sawka and Walt Wheeler that that's what they found.

Also, another great concern with this project is that, even though the success criteria in the original check dam ERP have essentially been abandoned, and even though the project site has been expanded to include the road area and the

sand pit area, and even though there have been numerous required site visits, this has still been evaluated as a minor modification.

And because it went through that process, there really has been no analysis of the effect of

the backfilling inside the channel and what that -- and what will happen with that. It's been assumed that that was just a continuation of the first project.

You'll hear from our experts that there's great concern over the impacts of filling in the channel. Tom Convoy will testify that that effectively can act like a berm. You'll also hear from Jeri Curley and Peter Barile --

THE COURT: Let me interrupt you because you're saying fill in the channel, and I -- maybe you mean a partial fill or something. I mean, if there was a creek, unless you're going to re-create a creek somewhere else, I mean, they don't want to -- you're not saying they want to eliminate the creek; right?

MS. COE: Well, to be honest, it's a little hard for me to understand DEP's position, and I'll let Mr. Beason speak to that. But the plan calls for filling in the channel to grade, so it's filling in the cleared area to grade.

So if they -- I'm not sure exactly what that means in respect to DEP's position on what would

be left of the original channel, but that is --
that is what the permit requires is filling in the

cleared out area to grade.

THE COURT: Okay.

MS. COE: And vegetating it as well to hold it in place. So in addition, I think you'll hear from our experts that wildlife habitat will be lost if the project goes forward -- Peter Barile and Jeri Curley will testify to that -- and that a wetland area will be impacted in the sand pit, and Walt Wheeler will talk about that.

There has been no mitigation offered for this project, and what you'll hear from Tom Conboy is that there are existing agricultural ditches that have been there for a very long time that remain unchecked, and that hydrology in the marsh could be better controlled by putting -- installing some check dams along those old canals.

And that wasn't considered though, because instead, the only thing that was considered here was what -- was the options that EPA would approve, and we believe that DEP illegally conditioned the project on EPA's approval.

These actions run afoul of the permitting requirements in 373 and its implementing rules, and had the project undergone a proper analysis, a different project would be sitting here before us

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,

Petitioners,

vs.

CASE NO. 12-3427

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME III

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 7, 2013

TIME: 9:00 a.m. - 1:00 p.m.

PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida

BEFORE: Bram D.E. Canter,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

NICOLE MAZZARA, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:

THE COURT: All right.

MR. BEASON: I have no reason to -- I don't mean to create alarm or raise alarm. I just haven't seen it. I'll go through it and review it as quick as I can.

THE COURT: Okay. Any other preliminary matters? Hearing none, Petitioners -- no. We're going to have the Agency witness, right? Please call that witness.

MR. OSBORNE: The Commission would like to call Mahmoud Madkour.

THE COURT: Right here, sir.

Whereupon,

MAHMOUD MADKOUR

was called as a witness, having been first duly sworn to

speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE COURT: Thank you. Take a seat. Please state your name for the record and spell your name.

THE WITNESS: Mahmoud Madkour, M-a-h-m-o-u-d, Madkour, M-a-d-k-o-u-r.

THE COURT: Thank you. Your witness.

DIRECT EXAMINATION

BY MR. OSBORNE:

Q Hi, Mahmoud. How are you today?

A Hi.

Q Where are you currently employed?

A I'm currently employed with the Florida Fish

A That's correct.
Q Isn't it true that the acquisition of backfill sand required by the plan requires construction of a borrow pit on approximately two acres in size and up to 30 feet deep on adjacent private land?
A Up to 18 foot deep, not 30.
Q If I might direct your attention, could you take look at Joint Exhibit 1, page -- it's page 1, but it's actually the page following the cover sheet.
A Okay.
Q And do you see the paragraph entitled, "Project Description?"
A Yes.
Q Okay. And can you read to me the second to last paragraph in that first paragraph under -- the second to last sentence in the last paragraph?
A "The borrow pit within uplands approximately two acres in size and up to 30 feet deep." Up to, but that's not what we're going to excavate.
Q Okay.
A We won't excavate to 30 feet.
Q Isn't it true that the borrow pit was not part of the original ERP plan?
A That's correct.

Q Isn't it true that the private land that the borrow pit will be erected on is a conservation easement?
A I was not aware of that.

Exhibit D

THE WITNESS: My name is Gregory J. Sawka, spelled, S-a-w-k-a.

THE COURT: Your witness, Ms. Coe.

DIRECT EXAMINATION

BY MS. COE:

Q Good morning, Mr. Sawka. I'm going to show you Petitioner's Exhibit No. 156, which I'd like to move into evidence. This is your resumé.

THE COURT: Any objection? Petitioner's 156 is admitted.

(Whereupon, Petitioner's Exhibit No. 156 was marked for identification and received in evidence.)

BY MS. COE:

Q Okay. Mr. Sawka, can you tell me your -- can you tell me your educational background?

A I started school in Florida, at Florida Institute of Technology. I received an Associate degree in Environmental Science. I received a Bachelor's degree from Long Island University in Environmental Science. I worked after that for three years mapping soils in New York and Missouri.

I moved my wife down to Gainesville, Florida, where she was working for the USDA and I went back to school. I received a Master's degree in Soil Genesis

A I reviewed -- I did a cursory review of it, yes, I did.

Q Do you have an opinion whether sand is an appropriate substitute for the material that previously was in the channel?

A Well, south of -- I keep saying south.

Downstream of six, structure six towards Lake Okeechobee we had mineral soils. And upstream, all the way to the terminus of the marsh we consistently found four-foot of fibric material loose in the water column. There was very little sand.

There may be some sand getting caught in the tentacles of the -- if you were to think of it like that, but 99 percent fibric material, real loose and organic material. So there wasn't mineral soils up in that section.

Q Okay. Is there -- did you conduct a site visit of the borrow pit site on February 24th, 2013?

A That's correct.

Q And what did you see out there?

A We went into the area of the proposed borrow pit and we walked away from the fence line, it was a grassy area and you started to drop a few inches in elevation, so you were starting to get into a little bit of a pressure landscape.

You have a lot of oak trees. These are laurel oaks, you have wax myrtle, and as we looked at the site there was hydrologic indicators throughout the area.

You had lichen lines up on the trees from 10 to 15 inches. It averaged probably about 12 to 14 inches lichen lines above the ground which indicates that there

was some events of flooding and high waters where the lichen did die.

We also see did see some moss columns near the ground, so there are areas where months of dry where you have some moss columns. We had mud deposits along the trees, we had fluted roots.

Q Okay. I'm going to play for you Exhibit 183 which I'd like the move into evidence. And can you just explain to me when we're seeing here?

THE COURT: Any objection?

MR. BEASON: No, sir.

THE COURT: Petitioner's 183 is admitted.

THE WITNESS: This would be within the area we looked at and I have a tape measure. You can see right there the lichen lines above the one-foot mark. Probably about 14 inches. These are mostly laurel oaks which are fat, wet plants.

There's another picture, I think Bradley was holding the tape. You can see the some of the moss columns on the ground, so to me it's indicating that you do have some dry periods where the moss did grow down.

There are some mud deposits along the trees, along the shrubbery so water had been moving through the area and then getting that deposition

of sediment. There's some water stained leaves. You can see where there is a little flow way. There's fluted roots. You see the base of the trees where the roots go out and that stabilizes the tree under the -- in the wetland areas the roots grow out like that so the tree stabilizes themselves a little bit.

This is a picture of some drainage ways, small, narrow drainage ways through the landscape. There's another shot of deposits of debris along the bottom of the base of the shrubs. I can't tell what that is from here.

MS. COE: Can you move forward to six minutes and 50 seconds? Okay. About there.

THE WITNESS: We also saw a lot of adventitious roots on the plants. Here I'm describing a soil, I have a color book out. We're looking at a soil plug we took. The soils were pretty similar throughout the area. We took one at approximately each corner of the borrow pit and we had one in the center. And what I'm looking for there is differences in soil color.

And what the hydric soil indicators typically found is stripping, and what stripping is under anaerobic conditions when the soils are saturated,

the anaerobic bacteria eat the organic matter which is darker, sort of reddish of sorts. So you get a splotchy pattern, grey colors and darker colors indicative of the seasonal high saturation wet season water table.

In sandy soils when you find stripping or any other indicator within the upper six inches, it's a hydric soil. If you find that it is seven inches, six and a half inches it is not a hydric soil. So it breaks into six-inch gap of six inches depth.

We also saw soils that were a little bit stratified on the top, had like a layer of organic and light sand showing up all over the area. And in most locations a few of them had a thin veneer, a very thin layer of muck on the surface.

But here I'm scraping the soil down in this picture. You put a shovel down and you are pushing everything down with it. You are trying to get a clear cut. You lay out a tape. You also moisten the soil, I have a spray bottle because your soil colors are different when they dry out. It is kind of like on the beach, you got white sand and then when the water comes up, a little wave it gets a little darker. So you're supposed to look at soils when they're in a moist condition, we use a spray

bottle. Not real wet conditions, not dry conditions, but moist.

You moisten it up, you mark a line at the six inches and you evaluate whether I have stripping coming up within six inches of the surface or is it deeper than six inches in the soil surface. And that's how we determine whether the soil is hydric or non-hydric.

(Whereupon, Petitioner's Exhibit No. 183 was marked for identification and received in evidence.)

BY MS. COE:

Q Okay. So do you have an opinion of whether the site that you were on was a wetland?

A Very much so. With a wetland you have numerous hydrologic indicators, including the lichen line. You have some algae matting, you had adventitious roots, you have buttressed trees, you have fluting of trees. It was a very typical picture of a depressional wetland area and the soils were hydric in every location on the site.

Q I am going to show you Petitioner's Exhibit No. 181, pages 130 to 146. Okay. Page 130. Okay. Can you turn to page 144 of that? It's the number labeled on the right in red at the bottom.

THE COURT: We have to deal with it's admissibility first. Are you trying to -- he can identify it first. Is that what you're trying to do or --

MS. COE: Well, this is an e-mail from FWC and

it has attached to it a description of the conservation easement areas. And I was just going if he agrees with one of the conclusions.

THE COURT: All right. Are you going to put it into evidence?

MS. COE: I would like to, Your Honor. We obtained this during a public records request.

THE COURT: All right. Any objection to the admission of Petitioner's 181?

MR. BEASON: Yes.

MR. OSBORNE: Well, as you've noted earlier, we are under an obligation to raise hearsay statutory. So this is that standing objection to hearsay. But, Doug?

MR. BEASON: Your Honor, it's a 1,233-page document. I may not have specific objection to this e-mail, but it's --

THE COURT: This exhibit isn't 1,200 pages.

MS. COE: This is an excerpt from a composite e-mail exhibit we have. We could renumber it as

181-A if that would be okay.

MR. BEASON: That would be fine. I just don't want to go through a 1,200-page document.

THE COURT: Well, we're not going to allow a 1,233 document unless every single page in it is relevant material. So is just part of this relevant or is this the --

MS. COE: The e-mail chain is for basically

authentication. And it's really the description of the conservation land which start on page 132.

THE COURT: All right. As an admission it's exception to the hearsay rule, excluding hearsay. To the extent that it's information provided by -- that's your representation, that it's produced by the Commission?

MS. COE: Yes, it was obtained through an e-mail we got from the Commission.

THE COURT: I don't mean got from the Commission, it has to be by the Commission. Just because it was at the Commission doesn't make it an exception to the hearsay rule. It has to be a statement of the Commission and Commission employees.

MS. COE: These are -- Beth Mumford or Morford is the Wildlife and Habitat Management, she's in

the Wildlife and Habitat Management section at FWC and she's the district biologist down in Fisheating Creek and this is an e-mail that she forwarded on.

THE COURT: So you're being indirect. Directly answer my question. Is this a statement of a Commission employee?

MR. OSBORNE: I don't have that in front of me so I can't make a comment.

MR. SMITH: If I may, Josh Smith, for Petitioners. I think the fact that she forwarded it represents that it's a manifestation of her

belief. Therefore --

MR. OSBORNE: I disagree with that.

MR. SMITH: -- manifestation --

MR. OSBORNE: It might have been forwarded for the purpose that it was contrary to her belief. We don't know.

THE COURT: It could be based on what the e-mail says.

MR. OSBORNE: I don't have that in front of me, so.

THE COURT: Well, get it in from of you.

MR. OSBORNE: Can somebody give it to me, please? I guess they assume that I would comb through the entire 1,200 pages.

MS. COE: Here you go, Ryan.

MR. BEASON: Is this a stand alone e-mail?

MS. COE: Yes.

MR. BEASON: That's what I'm interested in. That's a big document to navigate on the computer.

THE COURT: So since this witness is a soil scientist, is there soil information here is what you're trying to get to?

MS. COE: Actually, Your Honor, what I was going to ask him is there's a description of the property site I believe on page 144. It's IEA7.

THE COURT: 134?

MS. COE: Yes. I'm sorry, I meant 144.

MR. BEASON: Page 144.

THE COURT: I asked you, is this a description of the soil?

MS. COE: It's a description of the site as containing wetlands and I --

MR. OSBORNE: Your Honor, these attachments are out of the conservation easement that we --

THE COURT: He said it was wetlands, why do you want to get somebody else to say it was wetlands?

MS. COE: Okay.

THE COURT: When you say, this person said it

was wetlands, do you agree? That's just getting the hearsay in. If you ask him, is it wetlands, he said, yes.

MS. COE: Okay. We'll move on.

THE COURT: I'm not sure what you're doing. Now, if you find something where the -- I understand if the Commission says it's wetland, you wouldn't have to use this witness for it to get the document in. You would want to show me where they say this area is wetlands.

But I'm asking, you need to show me that this is what this is doing. It looks like it's passing along some information done by somebody else, but maybe this person did the analysis. I don't know.

MR. OSBORNE: No, Your Honor. This is out of the conservation easement, not drafted by FWC.

THE COURT: Anyway, think some more about it

and if you know what you're going to do with it let me know then.

MS. COE: Okay. Thank you.

THE COURT: I need some more focused argument about what it is.

BY MS. COE:

Q Okay. Mr. Sawka, have you been involved in ERP permitting before?

A When I worked for the Water Management District I was involved in ERP permitting to quite an extent. Various projects in Okeechobee basin, and since then as a consultant who worked on the ERP project mapping what is identified as wetlands and such.

Q Did you ever work on any -- or did you ever prepare an ERP for a cattle operation?

A When we do a wetland evaluation we flag wetlands and also we flag surface waters. That's part of the things that delineation of wetlands and other surface waters you call it, which means there's less mitigation requirements for other surface waters.

So when if you go on a project site, the Okeechobee site is trying to sell a piece of property and you go and flag the wetlands for the Water Management District, you would flag marshes, you would flag the wetland prairies, you would flag your cattle ponds and we typically do that on numerous projects.

Q Okay. And in your experience, how big are cattle ponds usually?

A It's usually typically pocketed throughout the pasture area. Its size is normally under, you know, a half acre in size.

Q And how deep?

A Well, a cattle pond, cattle usually go in it

to wade and drink water. Typically, maybe six feet deep. So if your water table drops, you know, during the dry season down to three or four feet, you still have a couple inches of water in the cattle pond and that's not always the case. A lot of times they dry out.

Q Do you recall if you saw any cows while you were out on the property you were inspecting?

A When we were in the airboat on Fisheating Creek we saw cows back in the low flats before the structures and we didn't see any cows in the marsh, itself. It's too deep of water. It is just alligators. And then when we were in the borrow pit area we did not see any animals that I remember.

MS. COE: Nothing further.

MR. OSBORNE: One question.

CROSS EXAMINATION

BY MR. OSBORNE:

Q Can you state definitively that you were at the proposed borrow pit site? Do you know definitively if you were there?

A We -- Bradley brought us out to the borrow pit.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,

Petitioners,

vs.

CASE NO. 12-3427

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME IV

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 7, 2013

TIME: 1:00 p.m. - 3:48 p.m.

PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida

BEFORE: Bram D.E. Canter,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

NICOLE MAZZARA, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:

that point certainly it was.

Q Okay.

A Because I was out of the airboat, standing on it, jittering, being afraid of falling through it, as I said before, and then we moved west as I have previously

testified. But at this point in here, we were in the airboat.

Q Okay. Thank you. You went back out to the Cowbone Marsh vicinity a week or so ago, is that right?

A Yes, on the 24th.

Q Okay. Why did you go back out there?

A I was contacted and asked if we could meet out at a different location than before to take a look and evaluate, if you will, the proposed borrow site area. And that's what we did on the 24th.

Q What were you evaluating the proposed borrow site area for?

A We wanted to determine essentially the character of that location to see if it was uplands or wetlands.

Q How did you know you were in the right place when you went back out there?

A One of the party had aerial photographs from the file that had the specific location of the borrow pit, and we essentially we had to ride bikes along the dyke, Herbert Hoover dyke I think is the term that's been given to it, to get access to this particular spot.

And utilizing the photographs, the landmarks on those aerial photographs and the fact that two of the party, not myself, two of the members of the party had

been to the site prior, we essentially walked in. It's about a mile walk when we left the gate essentially off the Herbert Hoover dyke to the proposed borrow pit location.

Q And that's a mile walk up a dirt road, is that correct?

A It's not really a dirt road. It's along a fence line, if you will.

Q Okay.

A We were weaving an east, west portion of the Herbert Hoover dyke proceeding to the north.

Q Okay.

A And there was an aerial photograph with a line demarcating some form -- I think a proposed road, a rectangular area, two by four, and it feeds the proposed borrow site specific location. There were landmarks that we used. And we were very careful in locating that.

There is specific landmarks, like I said, a fence line or wetland depressions, all of which we utilized. We would stop a number of times on the way to get to the site to make sure we were in the right spot and that's essentially what we did.

Q Did you see any indications of disturbance?

A When we got to the site we knew essentially

where that was located and the approximate distance. As we approached that spot, we were literally walking along stopping, checking the field landmarks, looking at the area. There was flagging tape on the fence, as well as when we essentially moved into what we thought would be the location of the borrow pit we encountered -- essentially we would get to where we thought we were at -- I'll say we were at the northwest corner of that rectangle and starting to walk around and look.

There was flagging tape hanging from vegetation right at that spot. And there was evidence that some other people had been in there. That was little spots of disturbed soil, which is, in my past experiences, if you had people coming out looking at a site, possibly doing soil probes or something like that, that's not uncommon to find that.

Q Okay. You mentioned that you've done many wetland determinations before, is that correct?

A Yes, sir.

Q Can you explain again just very briefly what you're looking for in doing a wetland determination?

A Essentially you want to take a good look at the available aerial photometry for that site. I was provided some aerial photometry of that site that had the same linear delineation of where the supposed borrow

pit is going to be. And you can see that there's grass, herbaceous habitat. You can see forests and very distinctly.

And what you want to do is you want to go out there and look at the topography. I was particularly paying attention once we left Herbert Hoover dyke and we started our walk in, it was approximately a mile, maybe a little over a mile, I'm looking at vegetation all along the way to see what kind of habitat we're traversing through, as well as when you get to the specific site.

Q And what did you see at the site?

A Well, in essence I was looking at the topography as we were walking in. I was looking to try to see if we actually had any significant change in the topography, if we had a ridge or a rise as we go in. And taking a good look at the vegetation as we go in.

Essentially starting to walk not far from Herbert Hoover dyke we were -- I started to encounter hydrophytic kind of vegetation. It was common to see spartina bakeri to the north and to the south as we walked along. Polygonum, smartweed, there was sedges and rushes in the grass. There's paspalum which is a type of common native pasture grass if you will along the way.

Q May I interrupt you, I'm sorry? What is

hydrophytic vegetation?

A Water loving, water tolerance or wetland indicators. You generally see vegetative indicators being described as hydrophytic, the term just means water loving and essentially wetland plants if you will.

Q Okay. What kind of wetland plants did you see?

A That's what I'm describing right now. And it's low water as we walked past the depressions. The surface water had receded fairly significantly. So we're seeing the site under relatively dry conditions. The site was very flat, low plain. There was no real rise. We weren't going uphill, downhill. Essentially it was consistent flat elevation. Very, very minor sloping, if it was there at all.

There is some indication of vehicular traffic, but not really a road. You could see where people had driven. You might refer to it as a road because it was flat and not really rutted, but you could sees trash where vehicles had been around in the area. Some places you could see where they were perpendicular. So there was some types of traffic around there from time to time. I don't know, you know, who that might have been.

But we proceeded essentially in just taking note and observations as we walked in until we got to the specific site where the proposed borrow pit was

going to be. Then we -- at that point we essentially did detail work on the four corners and the central area.

We started in the northwest corner, we moved to the approximate center of the borrow pit location, then to this northeast coroner. And the alignment of the borrow pit is rectangular, about 400 feet in an east to west direction. We moved south -- about 200 feet wide. We moved south to the southeast corner and directly back to the west of the southwest corner before we departed the site.

Q You mentioned some hydrophytic vegetation. Did you see any other wetland indicators?

A Yes, what you are going to look for when making a wetland determination, you are going to look at vegetative constituents. You want to see, do you have a forested system. Here we had a forested system. You want to make an assessment of what that canopy is and make constituents of that canopy, the sub-canopy and of course ground cover.

I did all of that on all five of those locations. I did an assessment of canopy cover, if you

will. It's essentially looking up, overhead on a forested estimating essentially how much above your head looking up, how much of that canopy is closed. In other words, you'll get a percentage. I'll say 40, 50, 60, 70 percent canopy closure. It's a rough estimate, but it generally gives you an idea of how

dense that canopy is in that particular location.

Recorded that on all five of the locations. All of our work was done, recording work was really done in the borrow pit location, itself, that we estimated when we were on the site. And I documented the primary predominant constituents of the forest, forested canopy, sub-canopy and ground cover.

There are also physical indicators if you will that you're looking for. If you can see water marks or water stains on the trunks of the trees. And we saw both lichen line and tannic water stains. If you have elevated water conditions on a tree trunk, sometimes you'll see this on bridge pilings, sometimes you'll see this on coverages or things that you might want to take a note and try to determine what high water conditions may be.

A lot of times those are essentially established by survey elevations if you want to, you know, do that sort of work. On this particular site we

saw both lichen lines and we saw water stains on the trunks of the trees.

We also saw a viscerous of leaf litter. You get in the canopy and you lose a good bit of the ground cover at that point from the shading. So it's a little bit more open. So what you have in those areas is a lot of leaf litter. By far the vast majority of the tree cover here was laurel oak. Laurel oak is a wetland

indicator, it's a water tolerant tree. And by far this was essentially almost all laurel oak, that's what we said.

And let me say right off the bat, these indicators were very redundant. They basically didn't change a lot across that limited area. Again, 200 by 400 feet was the area that we were looking at. So they are very consistent and repetitive. Laurel oak was the dominant canopy cover in the canopy, in the shaded areas. A lot of leaf fall. A lot of laurel oak leaf fall. And you could clearly see across the site this leaf litter had become darkened and stained.

Generally you'll see that when you have surficial inundation, that tannin water, that dark leaf litter will become almost black, very dark shades of red. On top of that very, very distinct new leaf litter fall, tan brown leaves that have recently fallen off the

trees as they go into a viciduous -- a quasi viciduous phase in the winter time. So that was predominantly occurring across the site. You could see this very dark leaf litter on the ground.

Also indicative of some surficial staining of that leaf litter. Coincided very clearly with the lichen lines and the water stains on the trunks of the trees. Twelve to 14 inches above the ground surface we saw that.

Dropping down through the sub-canopy -- is it okay if I just continue and run through this or do you

want me to stop at some point?

Q I'll ask you just a couple quick questions. Thank you. Did you see any obligate species in the area?

A Oh, yes, in a number of places. Quite frequently across the site we saw an iris called Blue Flag Iris Virginca. It's an obligate wetland species and it was common across the site. We ran into it quite a few times.

Also, as I said spartina bakeri was common across the site. There was evidence it was dry, but you would see arrowhead literally, which is often an aquatic emergent species actually. It was also on the site. There were more grass-like aquatic species.

There was marine cospera pretty common across the site. A number of paspalum grasses, I would say the majority of the paspalum grasses are fac wet.

Q What is -- I'm not familiar with --

A -- paspalum.

Q What does that term mean?

A I'm sorry?

Q You said, "fac wet," what does that term mean?

A A general description of wetland status and these aquatic plants, obligatory or obligate plant is when it's generally almost always in water aquatic conditions. Then you get what's called facultative. Facultative is a type of plant that kind of has a

tendency to grow a little bit in dryer areas, a little bit in wetter areas.

So generally in making assessments of facultative species, you kind of consider them to be invisible. So you don't throw a lot of weight to them. Then you have a little bit more aquatic plants, what's called fac wet. It's listed generally as an fac with a w. And the vast majority of all of the plants that we encountered out here, cabbage palm is real common. That's a typical facultative plant, you kind of ignore the cabbage palm. That leaves you with the laurel oak for the most part which is an aquatic indicator.

Q Okay.

A So, at this point in time you -- let me drop down. Facultative means invisible, fac wet means predominantly in wetlands, it is almost always in the wetlands. As I said, we had arrowhead. They were dried up and desiccated. They were sporadic across the site. We drop down in sub-canopy of course there's adolescent cabbage palm and laurel oak.

Lots of wax myrtle, there's a lot of wax myrtle here. Now, wax myrtle is a plant that, again, it grows in relatively hydric conditions. It can also grown in fairly dry conditions. In dry conditions it can be a robust plant, like a small tree. The wax myrtles that we encountered here were essentially growing up out of small hummocks if you will. Very wombly, very small stems. And, like I said, growing up

out of hummocks.

When wax myrtles are inundated they stress out, they begin to die if it is prolonged inundation the wax myrtle will actually die. There was a lot of evidence of this hummock growing wax myrtle across this site with lots of small stems. Where there were large stems they were literally growing up on a hummock, perhaps a root ball of a tree. They would be growing up out of that and you would have a larger wax myrtle

giving you a pretty good sign it's up out of the water most of the time.

Most of your other wax myrtles, like I said were wombly, a lot of dead stems around those wax myrtles laying on the ground.

Q Can you give me an estimate of the percentage of obligate and facultative, is that how you pronounce it?

A Facultative, again, invisible plants.

Q Facultative is --

A I couldn't really give you an exact, the vast majority were fac wet. Cabbage palm is facultative, some of those. I have a list that I just jotted down. But the majority of the plants that I saw here are fac wet and obligate. And again, all the facultative you just ignore those. They're essentially not there. They're invisible.

What you really want to look at are the other

side of the coin are upland, are fac upland. There were a couple of upland, facultative upland plants which may grow on drier sites. They are not thick, not common, but they were present. And in two cases, the urena which is a weed, is a weedy little shrub. It's like a beggar's tick, if you will. It sticks to your shoes and your pants. They were short examples of urena growing

out there and eupatorium which is a dog fennel.

There are some areas of eupatorium, and these are fast-growing weedy shrubs. At dry times they can certainly grow in here. And both the eupatorium and the urena had adventitious rooting at the bottom. That was documented photographically.

Q What does that mean?

A Adventitious rooting, when you have these plants subjected to the high water surface water, the stems of the plants will actually put roots out. You see these fibrous, very little protrusions, literally just roots above the ground. That's why you apply the term adventitious. They are roots growing where they really shouldn't be. We're seeing the site on dry conditions, so you would have these plants with all these roots coming off above the ground, four and five inches above the ground.

Now, the urena was never really more than maybe a foot tall. It was relatively short. Dog fennel is a perennial, so it has a tendency to grow back and survive. There were some small little sprouts of dog

fennel coming back, but it was not a predominant plant, but it was there.

Q Okay. So just to clarify, I think you mentioned four general indicators. Can you just

reiterate those that you saw out there, the four general indicators of --

A You mean the species of the plants, or are we talking about --

Q Let me rephrase.

A I'm sorry.

Q You mentioned staining in the lichen lines, you mentioned facultative, wet and obligate species, the leaf litter and adventitious rooting.

A Right.

Q What do those things taken together mean?

A Well, basically what you're trying to find out, would you consider this area to be subject to regular and periodic inundation. All those indicators give me that opinion that this area floods. This area floods long enough to leave those particular types of biophysical signs. The water staining 12 to 14 inches above the ground. You can't really argue that, it's there.

The lichen line, which essentially lichens can't tolerate inundation, so they stop. They grow from, you know, the dry down to the wetland line and that's in essence where you have the line of flooding

and then it stops. All that evidence was there coupled with the staining of the leaf litter, the vast dominance

of hydrophytic species and the lack of upland species.

And this flat topography, this flat terrain definitely gives me every indication that this area is subject to greater and periodic inundation.

Q I'm going to go through just some photos with you to provide an illustration of some of the points you are talking about.

This is Petitioner's Exhibit 171. Are you familiar with -- have you seen these pictures before?

A Yes, these pictures were taken during this evaluation.

Q Okay. These are Exhibit 171 --

THE COURT: Any objection to Petitioner's Exhibit 171?

MR. BEASON: No objection, Your Honor.

THE COURT: It is admitted.

(Whereupon, Petitioner's Exhibit No. 171 was marked for identification and received in evidence.)

BY MR. SMITH:

Q And I just want to go through a couple of these to show the Court what you're referring to. If you will turn to page 5 of 19.

What do you see in these photographs that stands out at you, if anything?

A In essence, you're -- the photographs on page 5 are showing that leaf litter I was talking about and dark staining and various shades of grey. You can see, although it's a small scale, but lighter tan, newer leaf fall.

On the tree trunks you can see a lichen line. There in the lower right of the photograph with a tape measure. In essence, you can see a lichen line on the trunk of that particular tree. The photograph to the left you can also see the lichen line. There's not a tape measure there, but you can see the lichen stopping basically near the crown of the tree.

Q And moving along to page 12. Do you see anything there that is of a purpose?

A Again, yes. And on page 12 in the upper left you'll see another tape measure applied to the base of the tree, you'll see the lichen stopping. Another -- in the lower right you can see a staining, a tan line, a stain line at the base of the tree.

Similarly on the upper right you see a lichen line and a dark stain pattern beneath that. The lower left you see the wax myrtle I was describing, with a little hummock on the base of it and the long leaf stem of the wax myrtle. Again, representative of an area that's subject to periodic inundation.

Q Okay.
A The next page is another example, page 13.
Q On page 14, if you will flip to that one there. On the upper right-hand photograph there, what does that depict?
A That's the adventitious rooting I mentioned earlier on the stem of the urena. And then the same thing, the lower left is a little bit harder to make out, but right in the center, that little fuzzy portion of the lower extent on those, that is eupatorium.
Again, we're in February, so these aren't green and vigorous growing plants right now, they're relatively dead looking, but present. The eupatorium is a perennial so it will be there. But again, adventitious rooting at the base of that plant.
Q Okay.
A Commonly reactive to being inundated.
Q And can you point out some of these fac wet species that you mentioned?
A Backing up, on page 8, lower left, that spartina bakeri is common across the site. You see it looks like the right, central portion? You see wax myrtles and laurels and cabbage palm in the background. Page 7, upper left the palmering hand, they're over here.

Page 6, lower left, the typical blue flag. In a lot of the photographs you'll see blue flag which is

just a relatively short, iris-looking plant. I wanted to make sure it wasn't red root, not any particular reason. Red root is also a wetland indicator. But I wanted to make sure that, you know, when I was identifying plants if I was looking at a blue flag or a red root. This is a blue flag.

Q Okay. Do you have an opinion about whether this site is a wetland?

A I believe it is.

MR. SMITH: I don't have anything further.

THE COURT: Mr. Osborne.

CROSS EXAMINATION

BY MR. OSBORNE:

Q Yes. I'm going to refer back to Petitioner's Exhibit 72. If you guys can bring that back. All right.

What is your testimony that -- where is this supposed channel, where does it begin?

A Where does it begin?

Q Yes, in a downstream respect.

A This would be upstream, this would be downstream. In essence, what I'm looking at is this channel are. This is a portion of the stream, I'm not

so sure that this isn't probably roads, if you will, rooting out of the willows. Now generally looking at this particular pattern right here, I'm not sure what these marks are over here, but I'm looking at this

STATE OF FLORIDA
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SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,

Petitioners,

vs. CASE NO. 12-3427

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME V

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 8, 2013
TIME: 9:00 a.m. - 1:04 p.m.
PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
BEFORE: BRAM D. E. CANTER,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

LISA A. BABCOCK, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:

pretty good distribution of flow across the width of the area.

Q All right. Mr. Edenfield, have you examined the proposed modification in this case?

A Yes; the application and the permit itself.

Q And what does the permit call for in relation to the channel?

A As I understand the permit, it calls for them to transport 27,000 cubic yards of native material from an off-site borrow, upland borrow area, across a upland and wetland route to come in and place the material in the channel beginning at or near the area we were just

observing and then proceeding westerly to the western terminus of it.

Q Do you have any opinion as to what effect that backfill plan will have on the marsh?

A Yes.

Q What is that opinion?

A I suppose the initial concern, if you will, was the wisdom of taking 27,000 cubic yards of loose material and placing it into a dynamic wetland creek system.

In review of the applications, both for the original permit and for the subsequent modification, there were any number of references to the concerns over sedimentation of Fisheating Creek. So I somewhat question the wisdom of placing 27,000 cubic yards of sediment into a creek, and particularly a dynamic

of alligators, that I could have gotten on the raft and paddled myself up through the area. The flow wasn't so strong that it would have pushed me in the opposite direction.

Q What time of year did you go?

A The water was high because we were able to make it over the weirs. But there were a couple that we were a little concerned that we might not be able to

make it over, so I would say it was after the rainy season.

I'm going to say -- and the rainy season was a little bit unusual in 2012. This year, we had later dumping of water than we normally do. So I would say it was probably late September, early October. But there was still plenty of water.

Q How would you be impacted if this channel was filled in to grade with sand?

A Well, first of all, we wouldn't be able to go on the creek, which was the whole point of the litigation. So the impact would be that it would be a slap in the face to everything that we fought for. So our members would not have access that we have been guaranteed through the settlement that we would have.

MR. MARSHALL: No further questions.

THE COURT: Let me get some clarification then counsel, they may have to ask you some questions.

As I understand it, Lykes Brothers conveyed a

corridor, followed the river and then there was a conservation easement beyond that; right? The conservation easement doesn't allow people to enter.

I mean, it's just -- they're supposed to take

care of it -- or leave it conserved, not -- I think cows are allowed in it is my understanding but not building and things like that, normal conservation easement kind of restrictions. So why -- and then the lease -- what is leased out?

MR. MARSHALL: All right. I --

MR. OSBORNE: Submerged lands.

MR. MARSHALL: There are two sort of like separate --

MR. OSBORNE: And surrounding board-owned lands for management of the area. But mainly, it's the submerged lands.

MR. MARSHALL: The wildlife management area itself is open to the public and is leased to the Commission. Surrounding that, Lykes Brothers own some land and there are conservation easements on some of those lands.

MR. OSBORNE: It's the submerged lands leased to us for allowance of management of vegetation above said lands.

MR. MARSHALL: I could have the witness try to clarify.

THE COURT: No, that's fine. I just wondered

whether the conservation easement is something we need to consider -- I would need to consider.

MR. MARSHALL: Yes, Your Honor, that is something we -- the borrow pit for the project, for the proposed modified ERP, is on one of those conservation easements, not in the wildlife management area but one of the surrounding lands.

MR. OSBORNE: And it is in what's called an impacted conservation easement area, which means it's impacted from --

THE COURT: Well, that's testimony.

MR. OSBORNE: Okay.

THE COURT: You may continue. So it's cross now.

MR. OSBORNE: Do you have any idea of whether or not the area that is now contemplated by the cut --

THE COURT: Wait just a second. I'm sorry to interrupt you, but we didn't finish with the lease, what was going to happen with that. You said you were going to ask questions to identify what was significant.

MR. SMITH: So you don't -- is the concern is that you don't want the entire document in the record?

THE COURT: For something like this, if the importance to the party is that it has a provision

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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Petitioners,

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FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 11, 2013
TIME: 9:02 a.m. - 3:08 p.m.
PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
BEFORE: BRAM D.E. CANTER,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

RAY D. CONVERY, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:

THE COURT: Well, without accompanying testimony, I wouldn't probably give it much weight if it's not the last one because I would have to

assume that things were changed because they were wrong, unless you showed otherwise. But I'm going to admit it since there is no objection. Petitioners' 14 is admitted.

(Whereupon, Petitioners' Exhibit No. 14 was received in evidence.)

MS. COE: Okay. And, lastly, I wanted to admit Petitioners' 179, which is just a copy of the conservation easement.

MR. OSBORNE: No objection.

THE COURT: Petitioners' 179 is admitted.

(Whereupon, Petitioners' Exhibit No. 179 was received in evidence.)

MS. COE: Did I give you a copy of Exhibit 14, Your Honor?

MR. BEASON: I think you did.

THE COURT: Yes.

MS. COE: Okay.

THE COURT: Is that it?

MS. COE: Oh, no. I'm sorry.

MR. SMITH: May I proceed, Your Honor?

THE COURT: Yes.

MR. SMITH: May it please the Court, Josh Smith on behalf of Petitioners. We would like to call Mr. Tom Conboy to the stand as our next

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME VIII

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 14, 2013
TIME: 9:00 a.m. - 2:40 p.m.
PLACE: 1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

BEFORE: Bram. D. E. Canter,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

JEFFREY R. BABCOCK, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

APPEARANCES OF COUNSEL:
Page 1

MS. GRIFFITH: Hi, how are you?

THE COURT: Very well.

Whereupon,

JESSICA GRIFFITH

was called as a witness, having been first duly sworn to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE WITNESS: Yes, sir.

THE COURT: State your name for the record.

THE WITNESS: Jessica Griffith.

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. OSBORNE:

Q High, Ms. Griffith, how are you today?

A Nervous.

Q Don't be. Where are you currently employed?

A FWC.

Q And in what capacity are you employed at the Commission?

A I am currently their monitoring coordinator, database administrator and project manager.

Q Okay. Are you also a biological scientist?

A Yes. Yeah, that's my actual title is Biological Scientist IV.

Q Okay. And how long have you held that position?

A For three years.

Q And what are your current responsibilities in

Exhibit D

this position?
A Back to -- I'm the monitoring coordinator, the database administrator, and I administer aquatic habitat restoration projects.
Q Okay. And what position did you hold prior to your current position?
A I was an environmental consultant for six years.
Q Okay. And what were your primary responsibilities in that position?
A I pretty much was a resource -- environmental resource permitting wetland scientist.
Q Okay. And what did that include?
A Permitting for anything from Army Corps of Engineer wetlands, DEP wetlands. I did DRIs, development, I mean, many things. Corridor studies, anything involving wetlands and assessments, delineations.

Q And what positions did you hold prior to that?
A I worked with the Water Management District as an intern, and I did wetland permitting and compliance.
Q Okay. What's your educational background?
A I have a double-major in Biology and Botany.
Q Okay. Do you -- you mentioned delineations. Do you have experience doing wetland delineations?
A Yes, sir. For six years I -- you know, of

course you start green, but for six years, that was pretty much my main task was to do determinations and delineations for permitting.

Q Okay. How many wetlands delineations would you say you've done?

A I worked on, I don't know, 50 projects. Hundreds of wetlands. How many times do you flag hundreds of wetlands? So --

Q What do the wetlands delineations you've conducted involve?

A You go out and you make observations based on hydric indicators for soil, for water, and for vegetation; and you flag out the boundary, and then you have the Water Management District or DEP or the Corps come out and approve your line based on your

assessment.

Q And what role did botany play, if any, in those delineations?

A It's a third, but it's a major part. It's usually where people start when they use delineation --

Q Okay.

A -- delineations.

Q So what would you say your experience is in the field of botany?

A Very strong. I have four years of college, and I don't know, collectively eight years' experience in botany.

Q Okay.

A Field botany.
Q And in your wetland delineations, do you conduct soil samples?
A Yes, sir, I do.
Q Okay. So how many times would you say you've done that?
A Every time I did a core data sheet, I conducted a soil sample. I don't know, probably 20 to 30, easily.
MR. OSBORNE: Okay. Your Honor, I'd like to tender Jessica Griffith as an expert in botany and wetland delineations.

MR. SMITH: Your Honor --
THE COURT: I'm -- I think that wetland delineations will take into account plant identification associated with that.
MR. OSBORNE: Okay.
THE COURT: So I think it's encompassed. Any objection to wetland delineation as an expertise?
MR. SMITH: Yes, Your Honor.

VOIR DIRE EXAMINATION

BY MR. SMITH:
Q Ms. Griffith, good afternoon.
A Hi.
Q You mentioned that botany was one -- I think you said botany was one-third --
A Yes.
Q -- is that what you said --

Exhibit D

A Yes.
Q -- determination?
A Um-hmm.
Q What are the other two parts?
A Hydrologic indicators and soils.
Q Okay.
A Um-hmm.
Q And just to clarify, you're not a soil scientist, are you?

A No, sir, I'm not.
MR. SMITH: Okay. Your Honor, we'd object to Ms. Griffith offering her opinion about soils with respect to --
THE WITNESS: So the does training count as -- I mean, just --
THE COURT: You don't need to speak.
THE WITNESS: Sorry.
THE COURT: It just -- it goes to the weight with regard to a dispute, specifically about a soil type. But her experience gives her special knowledge in that area, and I'll accept -- I'm accepting her as an expert in wetland delineations.

CONTINUED DIRECT EXAMINATION

BY MR. OSBORNE:
Q Jessica, how did you come to be involved in this matter?
A My section considers me experienced or

Exhibit D

subject-matter expert in wetland delineations, and so Mahmoud sought me out and that's how I ended up on the project.

Q And when you say Mahmoud, that's Mahmoud --

A Mahmoud is the FWC engineer.

Q Okay.

A Um-hmm.

Q Did you conduct a site visit to the proposed borrow pit on June 28th, 2012?

A Yes, sir.

Q Can you please turn to FWC Exhibit C5.

A It's -- okay.

Q It's turned to you, I believe. Did you create a wetland determination form during your site visit?

A Oh, this is the attachment. Yes, sir, I did.

Q Is that contemplated by Attachment G to that exhibit?

A Yes.

Q Okay. And what was that done for?

A That was an actual determination. What you do in that we determined if the borrow pit was or wasn't a wetland using this tool.

MR. OSBORNE: Okay, Your Honor, I'd like to move FWC Exhibit 5 into the record.

THE COURT: Any objection?

MR. SMITH: No. No, Your Honor.

THE COURT: FWC C5 is admitted.

(Whereupon, FWC Exhibit No. C5 was marked for identification and received in evidence.)

/ / / / /

BY MR. OSBORNE:

Q What did you do on this particular site visit?

A We went out and did what you would consider to be a determination. So we walk into the site and we usually -- we just kind of take a good look around and see what we're walking into, and we traverse the site. We walked around the boundary of the site to kind of get a feel for where we were, things that start to look familiar. And we know obvious signs of, you know, changes in vegetation, what kind of vegetation, signs of hydrology, you know, environmental conditions that are physically evident.

Q Okay. Was FWC's engineer Mahmoud Madkour present with you?

A Yes, he was.

Q Okay. And how did you find the proposed borrow pit lotion?

A Mahmoud provided us a GPS shape file, and we entered it into the Trimble, and we followed the GPS coordinates to the site using a Trimble, which is sub-meter accuracy.

Q Okay. Explain what sub-meter accuracy is?

A A lot of GPSs can be off by 30, 40, 50 feet, depending on the unit that you're using. The unit that

I was using is for surveyors, so it's pretty much as accurate as you can get.

Q And are those GPS coordinates that you used located on your wetland determination form?

A Yes, they are.

Q Where did you get those GPS coordinates?

A Mahmoud performed a professional survey --

Q Um-hmm.

A -- and they came from that.

Q Okay. Can you explain what you saw when you visited the proposed borrow bit location?

A Sure. We walked in on an access road, and it was -- as we walked in, we determined that it was wetland based on what we were seeing vegetatively, and it was -- the ground was saturated. And then we proceeded east along the access road, and there was a distinct change in vegetation and the water, you know, obvious signs of hydrology were dropping out.

Then we walked around the boundary and looked for those same indicators. We poked around with a soil probe just checking to see -- you know, in the wetland, what we perceived as the wetland along the access road, we looked at soil samples there, we walked into the pit and looked at soil samples there and started taking general notes about what we were seeing. And then we

began filling the forms out, based on that.

Q Okay. And you talked about a transition, can you explain that a little bit?

A Sure. In a wetland, you have a distinct boundary that separates a wetland from an upland, so that's the transition. I mean, you can see that. The vegetation changes, signs of hydrology change, and soils will change. I mean, those are obvious physical signs. And at -- along a portion of the access road, it changed from a wetlands to an upland, and that would have been our first point that we took.

Q Okay. So you took soil samples?

A Yes. We dug a pit -- we usually do probing where we're just kind of trying to get an idea about what we're seeing and the changes across the landscape, and then we dig a pit when we're filling the form.

Q Okay.

A It's -- I mean, it's a standard operating procedure for our core data sheet that you follow. The NRCS Field Survey Hydric Soil Indicator so, you know, it's a standard procedure that you perform.

Q And what kind of tools did you use?

A We dug a -- usually we dig 18 inches to 24 inches deep, a pit. It's probably, like, that big around (indicating.) We use a Munsell Chart to

determine soil color, which is a standard for soil scientists, it provides a standard for anyone to see

these colors. And we also used the NRCS field survey for doing hydric soils.

Q Okay. So you took -- you mentioned you took a sample there. Was that at the transition that you noticed?

A Yes.

Q And that was coming in on the access road?

A Yes.

Q What's that indicated as in your --

A That would have been --

Q -- spot?

A -- Wet 2.

Q Wet 2?

A Which would be upland -- excuse me, wetland --

Q Uh-huh?

A -- and then on the other side -- so on the other side of that, is where we decided that it changed enough to say that this is where the upland starts. So a portion of the road was wet, and a portion of the road up.

Q Okay.

A And that was from west to east.

Q So in your determination form, that first sample is noted as Wet 2?

A Yes.

Q Okay.

A Yes, sir.

Exhibit D

Q And you mentioned taking a soil sample. Have you used that Munsell Chart before?

A Every time I do a determination for a core, it's -- you -- yes, that's how you do it.

Q Okay. And so you took -- you mentioned you took samples. Did you take samples in both the proposed borrow pit site and the access road; correct?

A Yes. What we did was -- the reason the choice for upland site was that we walked the boundary of the borrow pit, and the vegetation, all the indicators were the same. And so we went to the furthest extent of it, and said that's where we want to do our upland point. Because we were afraid if we did the upland point adjacent to the wetland point, that they would say that we weren't in the proposed borrow pit area, so we did one there.

Q Um-hmm.

A And then we proceeded across the landscape until, you know, we saw a change to capture -- Wetland 1 -- to capture that, an additional change.

Q Okay. And what's that upland sample marked as in your determination form?

A It's the first page, it's Up 1.

Q Up 1, okay. And did you also take another wetland sample?

A Yeah, we did. That was the one to the east of Wetland 1.

Q Okay.

Exhibit D

A And it was just confirming the distance that there was between the borrow pit and the next wetland. So we were just showing that there was additional uplands adjacent to or within close proximity to the borrow pit.

Q How far did you have to walk to get to that next?

A I'm terrible at distance, I don't know, 500 feet or more.

Q Okay. How long did you have to walk along the proposed access route to get to Wet 2?

A At least 300 feet, at least.

Q And what about from Wet 2 to Up 1?

A I'm sorry, that was another 300 feet.

Q Okay. What did you find when comparing the soils from the proposed borrow pit site, which was Up 1 --

A Um-hmm.

Q -- and Wet 2?

A A distinct difference. Saturation was different, the color was different, the wetland soil type had a splotchy consistency, which is usually -- well, I mean, based on what we identified -- it's what they call a stripped matrix --

Q Um-hmm.

A -- and those indicators did not exist in the upland sample pit.

Q What creates that stripped matrix?

A It's where water comes up and down frequently and just pulls -- it pulls the organics to -- you know, and it leaves the spots where it pulls it through the soil.

Q So --

MR. SMITH: Your Honor, may -- I'd like to just reiterate the objection on the testimony with respect to soils. The case law is clear that where a witness acknowledges that he or she is not an expert, she cannot offer testimony on that subject.

THE COURT: Okay, your objection is noted.

MR. SMITH: Thank you.

/ / / / /

BY MR. OSBORNE:

Q So in your experience of conducting soil samples in your many delineations, would you say hydric soils were present at the borrow pit site?

A Not in -- no, there wasn't. Not on Upland 1.

Q Okay. Not at Upland 1?

A Not at Upland 1.

Q And that's reflected in your determination form?

A Yes, sir.

Q Okay. What about in the Wet 2?

A Yes, that was obvious signs of hydrology and hydric soils, and hydrophytic vegetation, all three were present.

Q And where was that -- how did you determine that Wet 2 was a wetland?

A Its physical signs of -- you see stain lines and you see adventitious rooting. You see hydrophytic vegetation. You're standing there, and if you were to take your shoes off, your feet would be wet.

Q Okay.

A I mean, physical signs.

Q Okay. And did you see any of those signs in Up 1?

A No, sir.

Q What kind of vegetation did you see in Up 1?

A There was a huge difference. The transition was apparent. When we were in Wet 1, it was herbaceous ground cover and shrubs. And when we got into Up 1, it became a tree canopy of a cabbage palm and live oak with some scattered laurel oak.

Q Okay.

A And the herbaceous cover pretty much, you know, it transitioned from -- my expertise is in vegetation -- it transferred from obligate species to FAC and a -- you know, a few FAC wet species, but --

Q Can you explain what those are?

A Sure. Sure. And obligate species means it's -- 99 percent of the time -- or greater, a hundred percent of the time -- it's in a wetland. Facultative wet is 98 to 67 percent of the time it's in a wetland. And then facultative is basically equal. It has a

equal chance of being in a wetland as much as it is in an upland. But just because you have one species of something in either place doesn't mean that.

It's -- you know, just because you have a facultative up -- or wetland species in an upland doesn't mean it's a wetland. And just because you have a FAC species in a wetland, doesn't mean it's an upland, if you know what I'm saying. It's a

combination of all three that makes is such. It's not just one distinct plant.

Q So what did you find in Up 1 as far as vegetation?

A It was --

Q Percentages.

A It was dominated by a canopy of FAC. And like I said, there was a laurel oak, which is considered as a FAC wet species. But it was -- it wasn't a dominant -- I want to say that your plot that we looked at was 30 meters by 30 meters, so we didn't look -- just so you understand my concept of -- that we didn't look at the borrow pit as the whole entire plot. But like I said, we traversed the site enough to know that that was a representative of what the site was.

Q Um-hmm.

A So the dominant was cabbage palm and live oak with scattered laurel oak.

Q Okay. Did you find any obligate species in Up 1?

A No, sir.
Q Okay. And what about in Wet 2, what kind of species did you find there?
A It dominated by obligate species with FAC wet species, also.

Q Okay. And you say "dominant." What does that mean?
A It's the species that occurs most frequently, and that's how the test works. It's called a 5020 test, and it's a dominance test. So it tries to not look at those little species that pop here and there, that may cause the test to be skewed.
Q What kind of dominance was present in Up 1?
A It was cabbage palm and live oak.
Q Okay. So can you please explain your summary of findings in Section Up 1?
A My summary of findings was that it's a mesic hammock surrounded by -- well, within proximity around a wetland. It had a -- probably 50-percent-closed canopy of what I considered to be upland trees. Medium vegetation on the ground, both FAC and FAC wet. But the indicators weren't there for hydric soils, and I didn't see hydrology -- hydrologic indicators present, so in my opinion, based on this, it's an upland.
Q Okay. It indicates a 20 percent coverage myrica, what is that?
A That's wax myrtle.
Q Uh-huh.

A And that's one of those species that can be in a wetland just as much as an upland. I mean, I have

laurel oaks growing in my front yard, that doesn't mean that my front yard's a wetland, so -- and wax myrtle is usually -- it's a species that is more related to what you see in a transition. But it will be in a wetland that -- it will be in a wetland, and it will be in a upland, so --

Q So the presence of FAC wet, does that mean anything to you?

A FAC wet, yes.

Q What's it mean to you?

A It just -- it means that there's presence of water. I mean, it's a -- I wouldn't say it's a dry, dry site, but I mean, it might -- it does get wet.

Q Um-hmm.

A But just because there's water doesn't mean it's a wetland, if that makes sense.

Q Did you find any lichen lines at the proposed borrow pit location?

A No, sir.

Q Did you find any an adventitious rooting?

A No, sir.

Q Any stain lines on trees?

A No, sir. No stained leaves, nothing like that.

Q Any predominance of fluted roots?

Exhibit D

A No.
Q On your form, can you explain what it means when it states no wetland hydrology was present?
A That means that, based on the physical evidence that we found, we didn't see signs of hydrology. So it doesn't mean that the site -- like I said, it doesn't mean that it doesn't get water on it, it just means that there isn't enough of it for long-term periods of time to create those indicators that would reflect wetland hydrology.
Q What about what it means when it states that no water table was present?
A That the way that that water table works is that when it's going to be an indicator for hydrology -- hydric, it has to be within 12 inches, and we dug at least 18, and there was no water. You know, the water surface hadn't come up.
Q Okay. What -- can you please explain what it means when it states that no saturation was present?
A Saturation is the ground surface being wet.
Q Um-hmm. So what was your final conclusion regarding the proposed borrow pit site?
A That it was an upland.
Q Okay. You said you found live oaks present at the proposed borrow pit location; is that correct?

Q Were there a lot of them present?
A I mean -- yes, I mean, it was at least a 50 percent closed canopy, so yes, there was quite a few.
Q Did you also find laurel oaks?
A Yes, sir.
Q And how many of them?
A Half as many.
Q Is it difficult to identify a live oak --
A Not as --
Q As a botanist?
A Not as a botanist, no.
Q Could you have used an aerial to locate the proposed borrow pit site?
A I -- I personally could not have used an aerial that -- the surrounding areas are so -- everything looks the same. I mean, just everything looks the same out there. Looking at the aerial, it's just dark-green spots.
Q Um-hmm.
A There aren't any distinct towers or power lines or anything out there that could say that, you know -- you could have walked, you know, 50 feet and been in the wetland, and it would have looked the same

as the wetland that I was standing in, so --
Q Okay. Can I ask you to please pull up Petitioner's 171, is that possible at this time? Can we go to Page 4? Have you had a chance to review those

photos?
A Yes, I looked at them.
Q Okay. And Page 5. Flip through them for me. Was this the proposed borrow pit location?
A Not where I was. That would be an obvious sign that, you know, we would note, a fluted root, so that was not -- that wasn't where I was.
Q Okay. What about the other indicators you see in these?
A I mean, wherever he was, I would say that, you know, he was probably in a wetland. I mean, the soils that he showed looked like they were stripped matrix as well.
Q Do you believe he was in the wrong location?
A I do believe he was in the wrong location.
MR. OSBORNE: Okay. I don't have any further questions, Your Honor.
THE COURT: Let me ask a question just for clarification.
THE WITNESS: Sure, sir.
THE COURT: When you left the site --

THE WITNESS: Um-hmm.
THE COURT: -- did you mark the boundaries of the borrow pit area?
THE WITNESS: No, sir.
THE COURT: Did you leave any marks at all to indicate where you'd been?
THE WITNESS: No, sir. For a determination,

Exhibit D

we don't do that. We only do that when we're delineating a wetland.

THE COURT: All right, thank you.

Mr. Beason?

MR. BEASON: No questions, Your Honor.

THE COURT: Cross?

MR. SMITH: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. SMITH:

Q You mentioned -- just following up on The Judge's question, you mentioned that you did do soil probes; is that right?

A Yes, sir.

Q And you dug up soil --

A Yes.

Q -- in the area; is that correct?

A Yes.

Q Okay. You mentioned with respect to Wetland

2 site, that you had -- you were approximately 300 feet from the fence; is that correct?

A Roughly, yes.

Q Do you happen to know how much further away the beginning of the borrow pit is?

A No. I mean, I don't -- I know a good portion of the access road was wetland, because we were -- Mahmoud and I were discussing putting down tracks so that we didn't -- you know, that the construction didn't go through the wetland. But I told him a part

of the borrow pit would be -- a part of the access road was upland, so he wouldn't have to have the full extent of the access road covered in tracks to protect the wetland.

Q Okay.

A Exact distances, no, but it was a very good walk to get into that upland site. You could not have seen the fence or anything like that.

Q Would it surprise you if you were only a hundred feet from your Wetland 2 determination to the beginning of the borrow pit site?

A Yes, that would surprise me.

Q Okay. Can you please bring up Joint Exhibit Number 1? This is Petitioner's -- or this is Respondent's Joint Exhibit 1, and I think it might --

it's about Page 20. Again, the page numbers are not marked on this, but it is Map C2.03.

A Okay.

Q Do you recognize this spec, this picture at all?

A No. I guess that's Mahmoud's survey.

Q Okay.

A Um-hmm.

Q And --

THE COURT: I'd like to go along with you, so where are we?

MR. SMITH: Okay. (indicating.)

THE COURT: C2.03? That's what this is.

MR. SMITH: In this book -- photograph, the image that you have is not as clearly defined what the path is here.

THE COURT: It's a darker image. You think that's the same one?

MR. SMITH: C2.03 Proposed Location.

THE WITNESS: Imagery varies from year-to-year, so it could look completely different from one year to the next.

MR. SMITH: I think you're further back up in here. Okay. We've got multiple sets of images.

MR. OSBORNE: I think it's in this first

portion.

MR. SMITH: Yeah, here we go. Pardon me, Judge. It's somewhere -- here we go. That's the one.

THE COURT: All right. You may continue.

MR. SMITH: So this looks like the proposed borrow pit to you; is that right? And so over to the left here --

THE COURT: I didn't hear an answer.

MR. SMITH: Oh, I'm sorry.

THE WITNESS: Can you repeat the question?

BY MR. SMITH:

Q Does this look like the proposed borrow pit location to you?

A I mean, I'm assuming that it is. I can't tell from the aerial, it's so zoomed in; but I believe,

if that's his survey.

Q Can you determine -- can you tell on this map what the scale is? So you were right about here; is that right?

A Yeah, I mean, I said roughly 300 -- so okay, so maybe 275 to Wet 1.

Q Okay.

A But I mean, the distance was at least -- at least 300 distance from the road to that, so --

Q Okay.

A -- I mean, I'm not -- you know, I don't measure, but --

Q All right.

A -- so give or take 50 feet.

Q So is it fair to say, then, that you're -- based on this scale, you were about a hundred feet from the borrow pit at the Wetland 2 determination; is that right?

A Yes, I could say that.

Q Okay. Ms. Griffith, you testified about using GPS coordinates and rather high-tech -- technological device to determine where you were; is that right?

A Yes.

Q Are you sure you know where you were?

A I can only tell what the machine tells me.

Q Okay. I want you to look at Page 8 of your wetland determination form, which is the first sheet in

the Wetland 2 form.

MR. SMITH: Again, Your Honor, the pages are not numbered, but it is, I believe Page 8 of that that attachment.

THE COURT: On C5?

MR. SMITH: This would be --

MR. OSBORNE: Yes, Your Honor.

MR. SMITH: -- the wetland determination attachment to C5; correct.

THE COURT: And what page is it?

MR. SMITH: It would Page 8 of that determination form. It says at the top, sampling point wetland, Wet 2.

THE COURT: All right, I have it.

MR. SMITH: You have it?

BY MR. SMITH:

Q Ms. Griffith, if you look at the latitude and longitude there that you have entered in as the location of the Wetland 2 site, you'll see that the longitude -- it should be the longitude -- is 81.207 roughly; is that correct? It looks like the latitude and longitude are flipped, but is that 81.207, do you see that number?

A 81.207193?

Q Correct. That number corresponds to the longitude in actuality; is that correct?

A You mean you're saying I just flipped them?

Q I think so.

A Okay. I mean, it still -- I mean, it would still put you in reference.

Q Okay.

A My bad.

THE COURT: Where is that? I don't see that reference.

MR. SMITH: At the top of the form there, there's a lat/long. I'm sorry, we're looking at this page, Your Honor.

THE COURT: Oh, okay. All right.

BY MR. SMITH:

Q So the number for the longitude is 81.207193; correct?

A Now I have longitude listed as 26.

Q Okay.

A Is that what you're saying? I'm trying to understand.

THE COURT: It says what it says.

MR. SMITH: Okay.

BY MR. SMITH:

Q I want you to flip now to Page 2 of the same determination form, the Upland 1 site. And there's a similar entry for latitude and longitude in that as well. And again, accounting for the flipping of the numbers, the longitude there reads 81.405209; is that correct?

A Yes. Transcription error? I mean --

Q Does that mean that the recorded longitude

that you have on the upland site is actually .2 degrees west of the wetland site that you have listed on the other page?

A I don't understand what you're asking.

Q Well --

A Because I transcribed them in the wrong position doesn't mean that that -- I mean, I don't understand what you're saying.

Q I'm asking you is there a .2-degree difference in the two numbers?

THE COURT: There is approximately point-two difference in those two numbers. Build on that.

MR. SMITH: Okay, I will.

BY MR. SMITH:

Q And given the way that longitude exists -- the way that longitude is determined, that means that that number is .2 degrees west of the wetland determination site; does it not?

A I have no idea. I mean, I --

Q Well, we can figure it out. So The Court can take judicial notice of the fact that there are 360 degrees in circumstance for the earth, and the 0.0-degree mark is at the prime meridian, which runs through England, approximately. And so moving west, the numbers get larger. Does that make sense? Okay.

A I'm going to have to agree with you, I don't -- I have no idea.
Q Okay. And do you know whether .2 degrees is about 12 to 13 miles?
A I -- like I said, I -- I don't know --
Q Okay.
A -- what that -- no.
Q Well --
A I don't know what those numbers mean.
Q Okay.
A I mean, I use the technology that I have in the field, and if -- I mean, that's all I can do.
Q Okay.

MR. SMITH: Can I ask The Court to take judicial notice that .2-degrees is approximately 13 miles to the west of 81.2?

THE COURT: I can't -- I mean, I don't know that it is, but that sounds -- it sounds rational to me that it's a distance of that kind. I mean, whatever it is, I can take official recognition of the laws of physics and those kinds of things so -- and mathematical -- accepted mathematical equations, so yeah. If it's 2 degrees, it can be -- we can find out what 2 degrees means, and there should be no dispute about it.

MR. SMITH: Okay. Well, The Court can take judicial notice of the circumference of the Earth

Exhibit D

is approximately 25,000 miles.

THE COURT: We don't need to get into any of that.

MR. SMITH: Okay.

THE COURT: I mean, I think you've made your point.

MR. SMITH: Okay. My point is this, Ms. Griffith doesn't --

THE COURT: Well, you know she wasn't 12 miles away.

MR. SMITH: Correct, but doesn't this mean, Ms. Griffith, that you don't actually have an accurate record of where you were when you took the upland --

MR. OSBORNE: Object to the form.

MR. QUALLS: No, I do not. I could have transcribed improperly, and I have --

THE COURT: What's wrong with the form, I'm sorry.

THE WITNESS: I could have transcribed improperly and -- but I mean, I have --

THE COURT: No, I'm talking to this lawyer. I don't see anything wrong with the form.

Overruled. Ask it again, please.

BY MR. SMITH:

Q Doesn't this mean that you don't actually have an accurate record of where your upland site determination is?

A No, it doesn't. I have a file, and -- a shape file that was taken in the field, and I could have possibly transcribed it wrong, I mean, it's human error.

Q And that would mean that the record that you have here is incorrect; is that fair?

A It's possible.

Q Okay.

MR. SMITH: That's all I have, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. OSBORNE:

Q When you say that it's possible that there's an error, do you simply mean that you flipped the two numbers around?

A Absolutely. And I could have transcribed them properly, but there is a file that was taken in the field of that spot, and I can produce that, if you'd like --

Q So --

A -- to ensure that these numbers are correct.

Q Can you say with certainty that you were in the correct area?

A Yes, I can.

Q Okay. And regarding the distance of a hundred feet from Wetland 2 to Up 1, does that have any bearing on whether or not Upland 1 was in an upland or not?

A No.

MR. OSBORNE: Okay, thank you. No further questions, Your Honor.

THE COURT: Thank you, you may step down. Do you have another witness?

MR. OSBORNE: That's it for today.

THE COURT: You don't have a witness for today?

MR. BEASON: No, sir.

THE COURT: Any other matters to place on the record before we adjourn until Monday morning at 9:00? All right, we're adjourned.

(The proceedings were adjourned at 2:40 p.m.)

(Proceedings continued in Volume IX.)

CERTIFICATE OF REPORTER

I, JEFFREY R. BABCOCK, do hereby certify that I was authorized to and did report the foregoing proceedings, and that the transcript, pages 1 through 1068, is a true and correct record of my stenographic notes.

Dated this 15th day of April, 2013 at

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,

Petitioners,

vs.

CASE NO. 12-3427

FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION and DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.
_____/

VOLUME IX

TRANSCRIPT OF PROCEEDINGS

DATE TAKEN: March 19, 2013
TIME: 9:00 a.m. - 2:00 p.m.
PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida

BEFORE: Bram D.E. Canter,
Administrative Law Judge

This cause came on to be heard at the time and place aforesaid, when and where the following proceedings were reported by:

NICOLE MAZZARA, Court Reporter
For the Record Reporting, Inc.
1500 Mahan Drive - Suite 140
Tallahassee, Florida, 32308

You may call your witness.

MR. OSBORNE: The Commission would like to call Steve Shea.

MR. SHEA: Is it all right if I take my water up with me?

THE COURT: Yes.

MR. SHEA: Thank you.

THE COURT: We've got water up here at the next place.

Raise your right hand, please.

Whereupon,

STEPHEN MICHAEL SHEA

was called as a witness, having been first duly sworn to speak the truth, the whole truth and nothing but the truth, was examined and testified as follows:

THE COURT: State your name for the record and spell your last name.

THE WITNESS: My name is Stephen Michael Shea. My last name is spelled S-h-e-a.

THE COURT: Your witness.

DIRECT EXAMINATION

BY MR. OSBORNE

Q Hi, Mr. Shea. How are you this morning?

A I'm fine. How are you doing?

Q Doing well, feeling well.

Where are you currently employed?

A I work for the Florida Fish and Wildlife Conservation Commission.

A Backfilling basically describes the process, and what you do is you start and you work off the footprint as you start to build the cut. So as you build the cut, you work off of that footprint so it minimizes the impacts to the adjacent marsh. So backfilling just more describes the process of filling the cut.

Q Have you ever visited the site?

A Yes, I have.

Q Have you had opportunity to inspect the check dams?

A Yes, I have.

Q What have you noticed?

A The check dams appear to be functioning from a hydrological standpoint, but there was two check dams. I think the check dam statement by said there appeared to be some damage to the sandbags on the check dams and there was some erosion occurring around the northern edge.

Q Is that an issue?

A It could be an issue, yes.

Q Why is that an issue?

A Well, that demonstrates that the check dams could be compromised. Water flows at the path of least resistance. The check dams were robust, but the sediment on the outside and the wash was not, and so that was starting

to be compromised.

Q Okay. Did you visit the proposed access route from the proposed borrow pit?

A Yes, I did.

Q Were you involved in the process of Corps permitting of the borrow pit project?

A Yes, I was.

Q What did you do in that role?

A I basically provided technical assistance in regards to avoidance and minimization measures associated with the wetlands and wildlife impacts potentially.

Q Okay. And what impacts did you find regarding the borrow pit?

A Well, the borrow pit was an option that was actually approved by EPA and the Corps, and that provided the most minimal impacts from wildlife, threatened/endangered species standpoint and wetlands.

Q Okay. And what did you observe when you visited the borrow pit location?

A The borrow pit location was basically an upland hammock, live oak hammock with sandy soils --

MR. SMITH: Objection, Your Honor, lack of foundation, and I don't think Mr. Shea has been qualified as a hydrologist or a botanist to speak about hydraulic, hydric soils or any of this.

MR. OSBORNE: I'm not asking to have him testify on any expert position.

BY MR. OSBORNE:

Q I'm just asking you what did you notice when you went to the borrow pit location?

A Appeared to be an upland hammock.

remain under your oath to tell the truth.

Your witness, go ahead.

Whereupon,

MAHMOUD MADKOUR

was called as a witness, having been previously duly sworn

to speak the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. OSBORNE:

Q So were you involved in developing any of the various restoration plans?

A Yes, I was, not from the beginning though. I got involved after the EPA issued the enforcement action to backfill the channel.

Q Did you have any direct dealings with the Corps or EPA?

A Yes, I have. I participated in the meetings and the conferences that we have with the staff of both agencies.

Q Trying to skip through my notes so we don't get duplicative with Mr. Shea.

Were you involved in the process of the Corps permitting the borrow pit?

A Yes, I have.

Q And what do you do in that role?

A I was the one who filled out the application and the engineering plans that accompanied the permit

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material, it will form a layer over.
Q Moving on to a different topic. Did you accompany FWC biologist Jessica Griffith on her wetland involvement?
A Yes, and I was the one to request her assistance.
Q What was that date?
A It was in June, June 26.
Q Could it have been June 28th?
A Twenty-eighth, I'm sorry.
Q Okay. When you visited on that date, what was your opinion on the borrow pit technology?
A I observed the borrow pit to be no water standing in the area or flowing. It was dry.
Q Did you witness the soil samples taken?
A Yes, I did.
Q And what were those samples?
A There was sand and dry sand in the area.
Q Did FWC have to obtain a Corps permit for the proposed borrow pit project?
A Yes, we did some soil analysis.
Q And is that permit application shown, FWC Exhibit C-2?
A Give me just a moment. C-2.
Q Yes. Is this the Army Corps permit application?
A Yes, that is the Army Corps permit application.
Q Did the Corps request additional information from

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the Commission during that permit process?
A Yes, they did request additional information.
Q That is shown in FWC Exhibits 2-C-3 through 7?
A Yes.
Q Did one of those responses to a request for additional information deal with a question whether the borrow pit was in the wetland?
A Yes, it did.
Q Which one was that? Is that Exhibit 5, 2-C-5?
A Yes, that would be in comment number three.
Q Okay.
A The response.
Q In comment number what?
A Three.
MS. COE: Can you clarify which document you're on? We got lost here.
MR. OSBORNE: It is FWC Exhibit 2-C-5. C-2. C-2-5.
THE COURT: No, just C-5. What's the 2?
MR. OSBORNE: The 2 is how it's designated in the Joint Pretrial Stipulation. There's section one, section two, section three, and each one has an A, B, C and D to it.
THE COURT: Well, that's not how -- that's not for the record we've got it.

MR. OSBORNE: C-5.
THE COURT: C-5.

MR. OSBORNE: Did Petitioners find that document?

MS. COE: Yes, we did. Thank you.

BY MR. OSBORNE:

Q Okay. Is this a request for additional information while you were out on the site in June --

A Yes, that's why we performed the delineation, and that was the report and the findings included in attachment G that respond to the Commission.

Q And did you review Ms. Griffith's determination?

A Yes, I did.

Q Did you concur with its conclusions?

A Based on my observations, yes.

Q And what was the conclusion?

A That it was not.

Q Pardon me?

A At the borrow pit.

Q Okay. Was a soil boring done at the site by anybody else?

A Yes, we did the soil boring by a firm that took core samples.

Q And the Commission hired that?

A Yes, we hired that firm.

Q Is that geotechnical report shown in Exhibit C-1?

A Yes. We told them basically where to dig for a boring based on the proposed borrow pit area selected.

Q Okay. And how did that they find the location?

A We give them the GPS on the proposed location.

MR. OSBORNE: Okay. At this time, Your Honor, the Commission would like to submit FWC Exhibit C-1 into the record.

MS. COE: We have a hearsay objection, Your Honor.

THE COURT: It's definitely hearsay.

MR. OSBORNE: This is a study commissioned by the Commission to determine whether or not it was -- this is something that's typically done by the Commission to determine appropriate site selection.

THE COURT: It's hearsay. To some extent it would supplement your witness testimony about the site. So it can come in as hearsay and probably supplement. It can't -- nothing that she didn't cover could be established through that exhibit though. So with that limitation, I'm admitting C-1.

(Whereupon, Respondent FWC's Exhibit No. C-1 was marked for identification and received in evidence.)

BY MR. OSBORNE:

Q What did this soil boring indicate?

A The soil boring in selecting the final location of the borrow pit. We have several borings in several

locations, and based on the soil boring results that indicated that the closest borrow pit area -- potential borrow pit area from the site and concluded high percentage of sand with very little material. And that's how I made my selection to choose that site.

Q Did you concur with her conclusion?

A Yes, I concurred with her conclusion. It's

consistent to the soil maps from the area.
Q And after responding to their -- to the Corps' request for additional information, what occurred?
A The Corps agreed with our determination as far as the wetland and issued the permit.
Q In the course of this proceeding, have you had opportunity to review the conservation easement with the Lykes in relation to the borrow pit?
A I did.
Q What type of area is the borrow pit located in?
A It's impacted easement area.
Q Do you know what that means?
A It means the area was disturbed by human activities. And I believe it's defined in the easement, itself.
Q Is that conservation easement shown in Exhibit 2-C -- or C-16?
THE COURT: I think it came in as a Petitioners'

exhibit.
MR. OSBORNE: Did it already? Okay.
THE COURT: At least part of it did.
MR. OSBORNE: Did you also put that --
MS. COE: I believe we did.
MR. OSBORNE: Okay.
MR. BEASON: That's true.
THE COURT: I think it's part of the Exhibit 4 --
MR. OSBORNE: 179.

MS. COE: Yeah, that sounds right, 171.

MR. OSBORNE: I'm glad you're taking notes of what's admitted, Doug.

MR. BEASON: I've got to do something.

MR. OSBORNE: Second career.

THE COURT: All right.

BY MR. OSBORNE:

Q Okay. So you mentioned impacted easement area. Is that defined in this document?

A The document from reviewing it, yes, I know.

Q There you go, sorry. All right. Page three.

A Yes.

Q Pardon me, yes, Your Honor.

A Yes, that would be on page three.

Q What paragraph?

A In paragraph two.

Q And how does it define impacted easement area?

A Yeah, these areas exhibit substantial human-induced disturbance.

Q In your view of the conservation easement, does it contain less restrictions for this type of area?

A Yes, it does. It allows for cow grazing and also the construction of water ponds, man-made ponds, waterfalls for the cows, pens, cattle, the pens from the cattle and the normal structure associated with cattle grazing operation.

Q So, in your opinion, is the borrow pit in a wetland?

A No, it's not. Based on my observation, it's not.

Q And what about -- what is your opinion regarding post project navigability of the cut?

MS. COE: This has been asked and answered.

THE COURT: You asked prior witness as well.

BY MR. OSBORNE:

Q Okay. In your opinion, has FWC provided all reasonable assurances that the proposed project will meet applicable rules and statutes?

A Yes, we have; otherwise --

MS. COE: Objection. That's a legal conclusion.

THE COURT: I'll just take it as, you know, as project manager, whether he believes they met all their criteria.

THE WITNESS: I believe I met all the criteria, and that's evident by the issuing of the permit.

MR. OSBORNE: No further questions.

THE COURT: Mr. Beason?

MR. BEASON: No questions, Your Honor.

THE COURT: Cross?

MS. COE: Your Honor, may I have just a moment?

THE COURT: Yes.

MR. BEASON: Could we take a quick break?

THE COURT: Yeah, we can have a ten-minute break.

(Recess from 10:22 a.m. to 10:30 a.m.)

THE COURT: Let's go back on the record. Ms. Coe, you may begin.

CROSS EXAMINATION

BY MS. COE

Q Good morning.

A Good morning.

Q I just have a few things I want to follow up on. You testified about visiting the borrow pit?

A Yes, I did.

Q But you weren't the one who actually performed the wetland determination, are you?

A No, that was our biologist Ms. Griffith.

Q And so your name is not on the wetland determination?

A No.

Q And you weren't the one --

A I showed them where to do the analysis.

Q And you weren't the one who conducted the soil analysis?

A Which soil analysis?

Q Either soil analysis.

A Not myself, no, but I indicated where it would be done.

Q Okay. And you also didn't perform a plant survey?

A No.

Q The geo-tech study that you testified about, the purpose of that study is to evaluate soil strength and consistency, isn't it?

A Physical characteristics, yes.

Q And it is not itself a wetland determination?

A No, it's not.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., AND
ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC.,

Petitioners,

vs. Case No. 12-3427

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on March 4, 6-8, 11, 12, 14, 19 and 20, 2013, in Tallahassee, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida, Inc.:

Alisa A. Coe, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Florida Fish and Wildlife Conservation Commission ("Commission") is entitled to the requested minor modification of its existing Environmental Resource Permit and Sovereign Submerged Lands Authorization, which would authorize the backfilling of a portion of Fisheating Creek as part of a restoration project.

PRELIMINARY STATEMENT

In May 2011, the Department of Environmental Protection ("Department") issued to the Commission an Environmental Resource Permit and a Sovereign Submerged Lands Authorization ("permits"). The permits authorized the installation of six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which Fisheating Creek runs. The work was completed later that year.

On September 10, 2012, the Department approved the Commission's application to modify the initial permits. The modification would allow the Commission to backfill approximately two miles of Fisheating Creek.

Petitioners timely filed a petition for administrative hearing. The Department referred the petition to DOAH to conduct an evidentiary hearing and issue a recommended order. Petitioners were granted leave to file an amended petition.

The Department filed a motion in limine to exclude evidence and argument concerning a 1998 circuit court judgment which determined that Fisheating Creek is navigable, and a related 1999 settlement agreement. The motion was denied. Petitioners filed a motion in limine to bar the Department or Commission from presenting evidence inconsistent with evidence presented by the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") in the 1998 circuit court case. No evidence was excluded by the ALJ, but a final ruling on whether any evidence should not be considered was deferred.

At the final hearing, Petitioners presented the testimony of: William Giles, accepted as an expert in aquatic plant removal; Darina Palacio, accepted as an expert in hydrology and stream restoration as it relates to hydrology; Robert Miller, P.E., accepted as an expert in surface water hydrology and stream flow analysis; Peter Barile, Ph.D., accepted as an expert

in aquatic ecology; Greg Sawka, accepted as an expert in wetlands delineation and soil sciences; Walt Wheeler, accepted as an expert in wetland ecology and wetland determinations in Florida; Ron Edenfield, P.E., accepted as an expert in water resource management; Jeff Cooner, accepted as an expert in surveying and aerial interpretation; Thomas Conboy, P.E., accepted as an expert in hydrologic restoration; Jeri Curley, accepted as an expert in biology; Bob Ballard; Nicole Williams; Dale Williams; Karen Putnal; Becky Ayech; Rhonda Roff; Bobbie Lee; Patty Whitehead; Paula House; Leonard Bryant Jr.; Dale Gillis; and Erica Lynne. Petitioners' Exhibits 3, 4, 7, 14, 18, 20-23, 25, 38, 43, 45, 47, 55, 56, 61-63, 65, 80, 87, 90-96, 98-100, 103, 106-108, 111, 113, 114, 116, 120, 125, 127, 130, 132-136, 142, 146, 148, 155, 156, 158, 161a, 162a-162d, 171, 173, 176, 178a, 179-183, 193-196, 198, and 199 were admitted into evidence. Petitioners' Exhibit 72, which is a composite of aerial photographs of Cowbone Marsh, was admitted except as to the dates noted on the photographs. Petitioners' Exhibit 200 was placed in the record as a proffer.

The Commission presented the testimony of: Mahmoud Madkour, accepted as an expert in engineering, hydrology, civil engineering, and lake, stream and aquatic restoration; Jessica Griffith, accepted as an expert in wetlands

delineation; and Stephen M. Shea. Commission Exhibits 1-13 were admitted into evidence.

The Department presented the testimony of: Jon Iglehart, accepted as an expert in environmental assessment and restoration; Paul Gray, Ph.D., accepted as an expert in environmental assessment and restoration; and Lawrence Glenn. Department Exhibits 2-8 were admitted into evidence.

Commission and Department Joint Exhibits 1-10 were admitted into evidence. Joint Exhibits 6 and 7, which are compliance orders issued by the Environmental Protection Agency ("EPA"), and Joint Exhibit 10, which is an emergency final order issued by the Department, were not admitted to prove the truth of the statements contained in the orders.

Official recognition was taken of the Judgment on Title and Right to Immediate Possession, issued in Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Lykes Bros., Inc., Case No. CA93-136 (Fla. 20th Cir. Ct. 1998).

On April 15, 2013, the ten-volume Transcript of the hearing was filed with DOAH. Two requests to extend the time for filing proposed findings of fact and conclusions of law were granted. A third request was denied. On June 12, 2013, all parties filed proposed recommended orders, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state agency responsible for regulating construction activities in waters of the State. The Department has also been delegated authority to process and act on applications for authorization from the Board of Trustees for activities on sovereignty submerged lands.

2. The Commission is the state wildlife management agency. The Commission is the applicant for the minor modification at issue in this proceeding.

3. Petitioner, Save Our Creeks, Inc., is a non-profit Florida corporation with its offices in Lake Place, Florida. Save Our Creeks' members are interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways. Save Our Creeks owns property on Fisheating Creek in Glades County, approximately nine miles upstream of Cowbone Marsh.

4. Petitioner, Environmental Confederation of Southwest Florida, Inc. (ECOSWF), is a non-profit Florida corporation with its offices in Sarasota, Florida.

5. A substantial number of the members of Save Our Creeks and ECOSWF use and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and

wildlife observation. Their interests would be affected by the proposed project.

Fisheating Creek and Cowbone Marsh

6. Fisheating Creek flows from Highlands and Desoto Counties south and east through Glades County. The Creek runs in a northeastern direction through Cowbone Marsh before draining into Lake Okeechobee. The Creek contributes approximately nine percent of the flow into Lake Okeechobee. Fisheating Creek is designated as Class III waters.

7. Cowbone Marsh is located about eight miles west of Lake Okeechobee. It is a mile and a half long and two miles wide, covering about 2,500 acres.

8. Fisheating Creek and Cowbone Marsh are within the Fisheating Creek Wildlife Management Area.

9. In 1929, the United States Army Corps of Engineers ("USACOE") prepared a survey map which shows Fisheating Creek as an open water route from Lake Okeechobee through Cowbone Marsh and continuing beyond. The accuracy of the course of the Creek as it is depicted in the 1929 map is not disputed by the parties.

10. The 1929 map does not describe the depth or width of the Creek. Some evidence about historical widths and depths was presented, but it was incomplete. There was credible evidence showing that some segments of Fisheating Creek were four to five

feet deep and 20 to 30 feet wide. There was also credible evidence that other segments of the Creek were shallower and narrower.

11. The record shows only that canoes, kayaks, and other vessels drawing twelve inches of water or less have been used on the Creek.

12. For a number of years, much of Fisheating Creek has been choked by vegetation and "tussocks." Tussocks are floating mats of vegetation. Carolina willow now dominates Cowbone Marsh, having replaced areas that were previously open water or covered with herbaceous marsh communities.

13. The vegetation in the Creek made navigation difficult or impossible through Cowbone Marsh.

The 1998 Judgment and 1999 Settlement Agreement

14. In 1989, Lykes Bros., Inc., asserted ownership of Fisheating Creek and tried to prevent public access to the Creek. The Board of Trustees responded with a civil action against Lykes Bros., seeking a determination that Fisheating Creek throughout Glades County is navigable and, consequently, the title to its bottom is held by the Board of Trustees as sovereignty submerged lands. Petitioners in this administrative proceeding intervened in the circuit court case on the side of the Board of Trustees.

15. The jury found Fisheating Creek navigable throughout Glades County and the court entered a judgment in 1998 determining that the Creek is sovereignty land held in trust by the Board of Trustees. The judgment did not include any findings about the widths and depths of Fisheating Creek. The court retained jurisdiction to determine the boundaries of the Creek, but the boundaries were never determined.

16. The circuit court case was appealed, but in May 1999, the parties entered into a settlement agreement pursuant to which Lykes Bros. agreed to sell to the Board of Trustees a conservation easement on upland areas adjacent to Fisheating Creek, to be held and managed for the benefit of the public. The conservation area is known as the Fisheating Creek Expanded Corridor.

17. The settlement agreement also called for the Board of Trustees to lease the Fisheating Creek Expanded Corridor to the Commission, who the Board of Trustees designated as the managing agency.

18. The settlement agreement acknowledges the public's "right to boat and canoe on Fisheating Creek throughout the entire Expanded Corridor." With respect to navigation, the settlement agreement provides:

> Protection of Navigation. The navigability of Fisheating Creek throughout the entire Expanded Corridor shall be maintained and

> enhanced through a navigation maintenance program which includes aquatic weed control and removal of fallen logs and similar obstructions. This section does not authorize dredging.

The Cookie-Cutter Project

19. In January 2009, the Commission aerially applied an herbicide to kill the vegetation along the course of the Creek.

20. In April 2010, the Commission contracted with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks." The Commission directed A & L to perform the project by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh."

21. The Commission instructed A & L to re-open a channel "approximately 2.2 miles long and 18-20 feet wide," and to clear some areas of the Creek "as wide as 35-feet wide occasionally as necessary to turn shredding equipment during the shredding process."

22. The Commission did not direct A & L to dredge a deeper channel.

23. The vessel used by A & L to perform the work is known as a "cookie-cutter." The cookie-cutter has two cutting wheels at the front of the vessel to shred and side-cast vegetation. The cutting wheels also act as propellers to propel the cookie-cutter forward.

24. The cookie-cutter can clear woody vegetation up to four inches in diameter.

25. The two cutting wheels can be lowered or raised in order to cut vegetation at various depths in the water. Evidence was presented to show how the cutting wheels could be lowered two to three feet, but it was not made clear whether the cutting wheels could be lowered even more.

26. No evidence was presented to establish how deep the cookie-cutter blades were lowered into Fisheating Creek during the work performed by A & L.

27. No evidence was presented to establish what depth of soil the cookie-cutter was capable of dredging through if the cutting wheels cut into the Creek bottom.

28. The cookie-cutter began on the eastern side of Cowbone Marsh and moved upstream. The parties disputed the point of beginning. Petitioners contend it was farther upstream, but the more persuasive evidence for the point of beginning was presented by the Commission.

29. The cookie-cutter generally followed the course of Fisheating Creek as depicted on the 1929 USACOE map. However, there are three areas where the cookie-cutter deviated from the 1929 map. One deviation is about 100 feet off-line. The other two deviations are 25 to 30 feet off-line. No explanation was given for the deviations, but the cookie-cutter operator

generally followed the path of dead vegetation killed by the aerial spraying of herbicide and the line may have deviated from the true course of the Creek in these three areas.

30. During the cookie-cutter project, water levels within the Creek and Marsh fluctuated. At some point, the project was postponed due to low water conditions. A sandbag dam was placed in the channel to artificially raise the water level so the cookie-cutter could continue.

31. In July 2010, the Department and USACOE ordered the Commission to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. Before the cookie-cutter stopped, it had cleared about two miles of Fisheating Creek.

32. Where the cookie-cutter stopped there is a discernible channel continuing west, but it is shallower and narrower than the channel created by the cookie-cutter. At this terminus, the cookie-cutter was dredging a deeper and wider channel than existed naturally.

33. Additional evidence of dredging along the Creek channel is the soil cast up on the banks, and the removal of peat soils in the bottom of the Creek and exposure of underlying mineralized soil.

34. The cookie-cutter altered the natural conditions of the Fisheating Creek in some areas by dredging the sides and bottom of the Creek.

35. The dredging by the cookie-cutter altered the hydrology of the Creek and Marsh. The Marsh drained rapidly to Lake Okeechobee. In addition, large quantities of soil, muck, silt, and debris disturbed by the cookie-cutter were carried downstream toward Lake Okeechobee. Some of the soil and debris settled out at the mouth of the Creek, causing shoaling.

36. The sides of the channel in many areas is continuing to erode.

The Department's Emergency Final Order

37. In July 2010, the Department issued an Emergency Final Order, which directed the Commission to: (a) remove the cookie-cutter and immediately stop all activities associated with the cookie-cutter; (b) place temporary emergency flow restrictors in the channel to reduce flow velocities and minimize downstream sediment transport, as well as raise the water level to minimize surface and groundwater flow from the adjacent marsh into the channel; and (c) develop a long-term remedial plan to return water levels within the Marsh to pre-impact conditions and apply to the Department for an Environmental Resource Permit to implement the plan.

38. In August 2010, pursuant to the Emergency Final Order, the Commission constructed an aluminum weir in the Creek to decrease flow velocities, reduce erosion, and maintain the hydration of the Marsh. The weir was placed approximately half a mile downstream from where the cookie-cutter stopped.

39. During the wet season of 2010, the aluminum weir was completely submerged. Erosion and shoaling occurred immediately downstream. The Commission determined that the weir was ineffective and removed it.

The EPA Compliance Orders

40. In March 2011, the EPA issued an Administrative Compliance Order in which it alleged the Commission had engaged in "unauthorized activities associated with the excavation and construction of a channel within Cowbone Marsh." The Commission was ordered to construct an initial check dam in the upper reaches of the Marsh to minimize the loss of groundwater and prevent further adverse impacts.

41. In April 2011, EPA issued a second Administrative Compliance Order, directing the Commission to construct five additional check dams. The order describes the check dams as "initial corrective measures" and states that the "final restoration plan will include measures for backfilling the unauthorized cut through Cowbone Marsh."

The Initial Permits

42. In May 2011, the Department issued to the Commission an Environmental Resource Permit and Sovereign Submerged Lands Authorization, which authorized the construction of six earthen check-dams within the portion of Fisheating Creek where the cookie-cutter had operated. The purpose of the check dams was to improve the hydrology of Cowbone Marsh and promote the accumulation of sediments within the channel to restore the natural depth and width of Fisheating Creek.

43. The check dams were constructed using sand bags, marine plywood, coconut matting, and pressure-treated posts.

44. The check dams have ten-foot wing walls which extend into the surrounding marsh. The wing walls are to prevent erosion around the dams and to direct water into the marsh.

45. The installation of the check dams was completed in July 2011. Since that time, some repair efforts have been required to replace lost sandbags and to address erosion that has occurred around the check dams.

46. The check dams have been somewhat successful in maintaining higher water levels in the Marsh. However, they have not restored natural hydrologic conditions, or prevented erosion along the channel.

The Proposed Modification

47. In June 2012, the Commission applied for a "minor modification" to the existing permits, which the Department granted. The modified permits authorize the Commission to backfill the channel cleared by the cookie-cutter with approximately 27,000 cubic yards of sand. The check dams would not be removed.

48. The sand for the backfilling would be excavated from a "borrow" area located about a mile away. Petitioners contend that the borrow area is in wetlands, but the more persuasive evidence is that it is uplands.

49. A 1.164-mile temporary access road would be constructed from the borrow area through uplands and wetlands to a 100-square-foot staging area adjacent to Fisheating Creek where the backfilling would begin. Wetland impacts would be minimized by constructing the temporary access road and staging area with interlocking mats.

50. Petitioners did not show that the route or manner in which the temporary road would be constructed and used would have unacceptable adverse impacts to the environment or otherwise fail to comply with applicable criteria.

51. The sand would be dumped into the Creek and then compacted. As the Creek was filled, the compacted sand would be used as a roadway for the trucks to transport sand to the end of

the filled area to dump more sand, until the backfilling was completed.

52. The proposed backfilling would not restore a typical stream profile, deepest in the middle and becoming more and more shallow moving toward the banks. That kind of profile can be seen in the photographs of Fisheating Creek taken before the cookie-cutter project. The proposed modification calls for filling the cut channel from "bank to bank":

> Final Grade: Fill must be compacted and ground surface elevations must be the same as the adjacent marsh ground surface elevations (within a tolerance of +6/-6 inches)

53. The filled channel would be seeded and fertilized to grow native vegetation. The proposed seed mixture is mostly water grasses, but has some willow included.

Compliance with Criteria

54. Florida Administrative Code Rule 62-343.100 provides that a modification is treated as either minor or major depending on the magnitude of the changes and the potential for environmental impacts that differ from those addressed in the original permit:

> [A] modification shall be considered to be minor only where the modification does not:
> 1. Require a new site inspection by the Department in order to evaluate the request; or
> 2. Substantially:
> a. Alter permit conditions;

b. Increase the authorized discharge;
c. Have substantially different or increased impacts on wetlands and other surface waters. . . ;
d. Decrease the retention/detention specified by the original permit;
e. Decrease any flood control elevations for roads or buildings specified by the original permit; or
f. Increase the project area.

55. At the final hearing, it was not shown how the modification meets the criteria for a minor modification. The proposed modification does not meet the criteria because it required new site visits, substantially alters the original permit conditions, and has a substantially different impact on wetlands.

56. The criteria applicable to an application for a major modification were not identified, nor was it shown how the evidence presented at the final hearing satisfies the requirements for such an application.

57. The proposed backfilling plan would not restore the natural conditions that existed in Fisheating Creek. The Commission did not show that it made a reasonable effort to determine the pre-disturbance conditions throughout the disturbed area.

58. The proposed modification would not restore the natural depths in the Creek. The backfilling plan calls for a finished grade of plus or minus six inches above the level of

the adjacent marsh. A final grade of zero to plus six inches would essentially eliminate Fisheating Creek. The maximum allowed depth of minus six inches below the level of the adjacent marsh would be shallower than the natural depths in portions of the Creek. Even the Department described the Creek was "one to two feet deep" before the cookie-cutter project. Adequate measures are not included in the permits to ensure that after backfilling and planting, the Creek would have the ordinary attributes of a creek.

59. The proposed modification would not restore the pre-existing hydrologic conditions of the Creek.

60. The modified Environmental Resource Permit requires strict compliance with the terms of the 1999 settlement agreement. The modification would not be consistent with the 1999 settlement agreement because the backfilling and planting would destroy the navigability of the Creek.

61. Petitioners want to preserve the current depths of Fisheating Creek, but some of those depths are unnatural, being the result of dredging by the cookie-cutter. However, the proposed backfilling would not restore the natural depths in some parts of the Creek and would not maintain the navigability of the Creek, even for shallow draft vessels such as canoes and kayaks.

CONCLUSIONS OF LAW

62. This is a de novo proceeding designed to formulate final agency action, not to review action taken preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

Standing

63. Standing to participate in a proceeding under section 120.57(1), Florida Statutes, is afforded to persons whose substantial interests will be affected by the proposed agency action. See § 120.52(13)(b), Fla. Stat.

64. In order to have standing to participate as a party, a person must have substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

65. For organizational standing, Petitioners must prove that a substantial number of their members, but not necessarily a majority, have a substantial interest that would be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec., 412 So. 2d 351 (Fla. 1982); Fla. League of Cities,

Inc. v. Dep't of Envtl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992).

66. The standing of Petitioners is not disputed. The evidence establishes their standing to participate as parties.

Burden and Standard of Proof

67. The Environmental Resource Permit was issued under chapter 373, Florida Statutes. A petitioner who challenges a permit issued under chapter 373 has the burden of ultimate persuasion. See § 120.569(2)(p), Fla. Stat.

68. The Sovereign Submerged Lands Authorization was issued under chapter 253. The applicant for such an authorization has the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See Fla. Dep't of Transp. V. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

69. The standard of proof is preponderance of the evidence. See § 120.57(1), Fla. Stat.

Navigability

70. Navigability in Florida can be established even if only boats with shallow drafts of "three to six inches" can navigate on the waterbody. See Broward v. Mabry, 58 Fla. 398, 405-406 (Fla. 1909).

71. Although the determination that a waterbody is navigable means the public has a right to navigate on the waterbody, Petitioners have not shown that Florida law

recognizes a right to navigation that is greater than the natural, physical limits of the waterbody will allow. If a stream is only deep enough to float canoes or similar shallow draft vessels, the public's right of navigation is limited to such vessels. If a stream can only be navigated during the high water season of the year, the public's right of navigation can only be exercised during the high water season.

Judicial Estoppel

72. Petitioners contend that the doctrine of judicial estoppel is applicable in this proceeding and prevents the Department or the Commission from presenting evidence contradicting the Board of Trustees' testimony and evidence presented in the 1998 circuit court case.

73. Judicial estoppel bans litigants from asserting inconsistent positions in separate judicial proceedings. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001). A party is estopped from making an inconsistent claim or taking a conflicting position in a subsequent action, which was successfully relied upon by the party itself or a party with which it is in privity and the inconsistent position will prejudice the adverse party. Ramsey v. Jonassen, 737 So. 2d 1114, 1115-16 (Fla. 2d DCA 1999).

74. Under the terms of the 1999 settlement agreement, and as the Board of Trustees' designated manager of the Fisheating

Creek Expanded Corridor, the Commission is acting as the agent of the Board of Trustees in seeking to conduct the activities authorized by the permits. The Department is acting for the Board of Trustees in issuing the Sovereignty Submerged Lands Authorization. Therefore, judicial estoppel bars the Commission and Department from presenting evidence in this proceeding that contradicts the position taken by the Board of Trustees in the 1998 circuit court case and prejudices Petitioners.

75. However, the evidence presented by the Board of Trustees in the circuit court case was not credibly established in this administrative proceeding. This record does not contain the transcript or exhibits from the circuit court case, other than the 1929 USACOE map and some photographs. No findings of fact in this Recommended Order are inconsistent with the 1929 map and photographs.

76. Judicial estoppel must be based on clearly inconsistent positions. Id. It is not enough for Petitioners' counsel to make general statements in this proceeding about the contrary testimony that was offered in the circuit court case. Among other reasons, that is too self-serving to support a motion to exclude credible evidence about the natural conditions of Fisheating Creek. Neither the Commission nor the Department is claiming that Fisheating Creek is not navigable.

77. As stated previously, the circuit court retained jurisdiction to determine the boundaries of Fisheating Creek, but the boundaries were never determined.

78. It should also be noted that, without written findings of fact it is impossible to know whether any particular evidence was accepted as true by a court, except for facts that are necessary to a court's judgment. This is so even for evidence presented by the prevailing party. Because the determination that Fisheating Creek is navigable was possible even if it was believed the Creek was only several inches deep, there was no need to resolve the question "How much more than several inches?" The court (jury) only needed to conclude that the Creek is "deep enough." The court did not necessarily give much weight to the testimony of any particular Board of Trustees' witness about depths in the Creek when the court concluded the Creek was deep enough to be navigable.

Environmental Resource Permit

79. Section 373.414(1) requires an applicant for an Environmental Resource Permit to provide reasonable assurance that the proposed activity is not contrary to the public interest. Section 373.414(1)(a) sets forth the following criteria to be considered in determining whether a proposed project is contrary to the public interest:

1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
2. Whether the activity will adversely affect conservation of fish and wildlife, including endangered or threatened species, or their habitats;
3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activity will be of a temporary or permanent nature;
6. Whether the activity will adversely affect or will enhance significant cultural and archaeological resources under the provisions of s. 267.061, and
7. The current condition and relative value of the functions being performed by the areas affected by the proposed activity.

80. The proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. All the Department could offer on the subject of post-modification navigability in the Creek is that "[o]ver time a slight depression may form in the [backfilled] cut" due to "some minimal amount of settling in the level of the fill."

81. The proposed modification would adversely affect the conservation of fish and wildlife by eliminating the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced.

82. The proposed modification would adversely affect navigation and the flow of water in Fisheating Creek.

83. The proposed modification fails to restore the functions performed by the pre-disturbed Creek.

84. The proposed modification is contrary to the public interest.

85. The proposed modification fails to meet the criteria in rule 40E-4.301(1), to provide reasonable assurance that the proposed project will not adversely affect storage and conveyance capabilities, will not cause adverse secondary impacts, and will function as proposed.

Sovereignty Submerged Lands Authorization

86. The proposed modification fails to meet the requirements of rule 18-21.004(1) that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands."

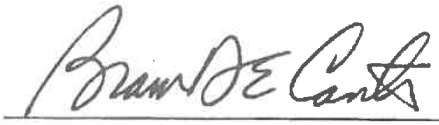
87. The proposed modification fails to meet the requirement of rule 18-21.004(2) that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming."

RECOMMENDATION

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

RECOMMENDED that the Department deny the requested modification to the Commission's Environmental Resource Permit and Sovereignty Submerged Lands Authorization.

DONE AND ENTERED this 3rd day of July, 2013, in Tallahassee, Leon County, Florida.



BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of July, 2013.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

DEPT OF ENVIRONMENTAL PROTECTION
OFFICE OF GENERAL COUNSEL
RECEIVED
JUL - 5 2013

STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

SAVE OUR CREEKS, INC., and ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,	)	
Petitioners,	)	
vs.	)	**OGC CASE NO. 12-1547**
	)	**DOAH CASE NO. 12-3427**
FLORIDA FISH AND WILDLIFE CONSERVATION COMMISSION AND DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Respondents.	)	

CONSOLIDATED FINAL ORDER

An Administrative Law Judge ("ALJ") with the Division of Administrative Hearings ("DOAH"), on July 3, 2013, submitted a Recommended Order ("RO") to the Department of Environmental Protection ("DEP" or "Department") in the above captioned administrative proceeding. A copy of the RO is attached hereto as Exhibit A. The RO shows that copies were sent to counsel for the Petitioner, Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida, Inc. ("Petitioners"), and to counsel for the co-Respondents Florida Fish and Wildlife Conservation Commission ("FWC") and the Department. On July 18, 2013, all the parties separately filed Exceptions to the Recommended Order. The DEP responded to the Petitioners' Exceptions on July 29, 2013. The Petitioners responded to the FWC's and DEP's Exceptions on July 29, 2013. The parties filed three Joint Motions for Continuance of Final Order on September 30, 2013, October 28, 2013, and November 25, 2013. The Joint Motions were granted,

which extended the Final Order deadline until January 15, 2014.[1] This matter is now on administrative review before the Secretary of the Department for final agency action.

BACKGROUND

In March and April 2011, the United States Environmental Protection Agency ("USEPA") issued Administrative Compliance Orders to the FWC that directed construction of six earthen check dams on Fisheating Creek as "initial corrective measures." (RO ¶¶ 40-41). The work became necessary after the FWC contracted, in April 2010, with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks" by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh." Approximately two miles of Fisheating Creek that runs through Cowbone Marsh was dredged by a "cookie-cutter" machine. The DEP and the United States Army Corps of Engineers ("USACOE"), in July 2010, ordered FWC to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. (RO ¶¶ 20-32, 35).

The DEP issued to FWC, in May 2011, a Consolidated Environmental Resource Permit and Sovereign Submerged Lands Authorization in DEP File No. 22-0303652-001 ("permits").[2] The permits authorized installation of the six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which

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[1] "Unless the time period is waived or extended with the consent of all parties, the final order . . . must be rendered within 90 days . . . [a]fter a recommended order is submitted to the agency." § 120.569(2)(l), Fla. Stat. (2013).

[2] The Secretary of the Department is delegated the authority to review and take final agency action on applications to use sovereignty submerged lands when the application involves an activity for which the Department has permitting responsibility. *See* Fla. Admin. Code R. 18-21.0051(2).

Fisheating Creek runs. The work was completed later that year. The USEPA's April 2011 Administrative Compliance Order also directed FWC that a final restoration plan "will include measures for backfilling the unauthorized cut through Cowbone Marsh." (RO ¶ 41). The DEP approved FWC's application in DEP File No. 22-0303652-002, on September 10, 2012, to modify the permits. The modification would allow FWC to backfill approximately two miles of Fisheating Creek. The Petitioners timely filed a petition for administrative hearing that was referred to DOAH to conduct an evidentiary hearing and issue a recommended order. The ALJ conducted a nine-day hearing in Tallahassee, Florida, in March 2013. After the hearing transcript was filed and all parties filed proposed recommended orders, the ALJ issued the RO on July 3, 2013.

SUMMARY OF THE RECOMMENDED ORDER

The ALJ recommended that the Department enter a final order denying the requested modification to FWC's Environmental Resource Permit and Sovereignty Submerged Lands Authorization. (RO at page 27).

Standing

The ALJ found that the Petitioner, Save Our Creeks, Inc., is a non-profit Florida corporation with its offices in Lake Place, Florida. Save Our Creeks' members are interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways. Save Our Creeks owns property on Fisheating Creek in Glades County, approximately nine miles upstream of Cowbone Marsh. (RO ¶ 3). The ALJ found that the Petitioner, Environmental Confederation of Southwest Florida, Inc. ("ECOSWF"), is a non-profit Florida corporation with its offices in Sarasota, Florida. A substantial number of the members of Save Our Creeks and ECOSWF use

and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and wildlife observation. The ALJ concluded that their substantial interests would be affected by the proposed project. (RO ¶¶ 4, 5, 64-66).

Judicial Estoppel

The ALJ found that under the terms of a 1999 settlement agreement,[3] the FWC was acting as the agent of the Board of Trustees in seeking to conduct the activities in Fisheating Creek that are authorized by the permits. The DEP was acting for the Board of Trustees in issuing the Sovereignty Submerged Lands Authorization for the activities in Fisheating Creek. The ALJ concluded that the doctrine of judicial estoppel barred the FWC and the DEP from presenting evidence in this administrative proceeding that would contradict the position taken by the Board of Trustees in the 1998 circuit court case. (RO ¶ 74). The ALJ found that, in this proceeding, neither the FWC nor the DEP was claiming that Fisheating Creek is not navigable. (RO ¶ 76). The ALJ further found that the Petitioners did not credibly establish that FWC and DEP's evidence in this administrative proceeding contradicted the position taken by the Board of Trustees in the 1998 circuit court case. (RO ¶¶ 75 and 76).

Environmental Resource Permit Criteria Are Not Met

The ALJ found that the proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. The proposed modification would adversely affect the conservation of fish and wildlife by eliminating

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[3] *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, et al. v. Lykes Bros., Inc.*, CA 93-136 (Fla. 20th Cir. Ct.1998)(a 1998 circuit court judgment determined that Fisheating Creek is navigable; a related 1999 settlement agreement settled the appeal of the circuit court judgment by providing for protection of navigation but did not authorize dredging of Fisheating Creek through Cowbone Marsh). (RO ¶¶ 15-18).

the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced. (RO ¶¶ 52, 57-61, 80, 81).

The ALJ found that the proposed modification would adversely affect navigation and the flow of water in Fisheating Creek, and that it failed to restore the functions performed by the pre-disturbed Creek. (RO ¶¶ 52, 57-61, 82, 83). The ALJ concluded that the proposed modification is contrary to the public interest. (RO ¶ 84). The ALJ further concluded that the proposed modification failed to meet the criteria in rule 40E-4.301(1), Florida Administrative Code ("F.A.C."), to provide reasonable assurance that the proposed project would not adversely affect storage and conveyance capabilities, would not cause adverse secondary impacts, and would function as proposed. (RO ¶ 85).

Sovereignty Submerged Lands Authorization

The ALJ concluded that the proposed modification failed to meet the requirements of rule 18-21.004(1), F.A.C., that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands." (RO ¶ 86). The ALJ further concluded that the proposed modification failed to meet the requirement of rule 18-21.004(2), F.A.C., that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming." (RO ¶ 87).

STANDARDS OF REVIEW OF DOAH RECOMMENDED ORDERS

Section 120.57(1)(l), Florida Statutes, 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. (2012); *Charlotte Cty. 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).

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 Cty. Sch. Bd.*, 652 So.2d 894 (Fla. 2d DCA 1995). If there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

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 Regional Water Supply Authority 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). In addition, an

agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Section 120.57(1)(l), Florida Statutes, 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); *L.B. Bryan & Co. v. Sch. Bd. of Broward Cty.*, 746 So.2d 1194 (Fla. 1st DCA 1999); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140 (Fla. 2d DCA 2001). 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., 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).

Agencies do not have jurisdiction, however, 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 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.

RULINGS ON EXCEPTIONS

A party that files no exceptions to certain findings of fact "has thereby expressed its agreement with, or at least waived any objection to, those findings of fact." *Envtl. Coalition of Fla., Inc. v. Broward Cty.*, 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). An agency head reviewing a recommended order is free to modify or reject any erroneous conclusions of law over which the agency has substantive jurisdiction, however, even when exceptions are not filed. *See* § 120.57(1)(l), Fla. Stat. (2012); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001); *Fla. Public Employee Council, 79 v. Daniels*, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

PETITIONERS' EXCEPTIONS

Exception No. 1

The Petitioners take exception to paragraph 33 in the RO, where the ALJ found that "[a]dditional evidence of dredging along the Creek channel is the soil cast up on the banks, . . ." The Petitioners argue that the "only competent, non-hearsay evidence" supporting this finding was the testimony of DEP expert, Jon Iglehart, "[b]ased solely on an aerial video. . ." *See* Petitioners' Exceptions at pages 1-2; Vol. VIII, Tr. pp. 947-948. The Petitioners then assert that the ALJ erred by excluding proffered evidence, which the Petitioners argue would conclusively rebut Mr. Iglehart's opinion.

The Petitioners do not argue that the record is devoid of competent substantial evidence to support the ALJ's finding. Instead, the Petitioners appear to argue that the Department should reject the ALJ's evidentiary ruling by accepting and weighing proffered but not admitted evidence. Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See, e.g., Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993). Therefore, based on the foregoing reasons, the Petitioners' Exception No. 1 is denied.

Exception No. 2

The Petitioners take exception to the fourth sentence in paragraph 10 of the RO, where the ALJ found that "[t]here was credible evidence that other segments of the Creek were shallower and narrower." The Petitioners argue that the RO "correctly finds that there was 'credible evidence showing that some segments of Fisheating Creek were four to five feet deep and 20 to 30 feet wide,' but [that] there is absolutely no evidence that 'other segments of the Creek were shallower and narrower' than what was described by Jeff Cooner." *See* Petitioners' Exceptions at page 3. Contrary to the Petitioners argument, there is competent substantial record evidence that the ALJ found credible, which supports the challenged findings. (Vol. VIII, Tr. pp. 955-956; DEP Ex. 4, Slides 14 and 15; DEP. Ex. 2; Vol. IX, Tr. pp. 1183-1184; Joint Ex. 8, p. 5). *See* § 120.57(1)(l), Fla. Stat. (2012).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 2 is denied.

Exception No. 3

The Petitioners take exception to paragraphs 75 and 76 of the RO, where the ALJ concluded that the evidence presented by the Board of Trustees in *Board of Trustees of the Internal Improvement Trust Fund of the State of Florida et al. v. Lykes Bros., Inc.*, No. CA 93-136 (Fla. 20th Cir. Ct.) was "not credibly established in this administrative proceeding." The hearing transcript contains the ALJ's explanation and evidentiary ruling to exclude the proffered testimony of Ms. Reimer, as well as the basis for his decision to exclude Proffered Exhibit 53. (Vol. X, Tr. pp. 1224-1244). The Petitioners appear to assert that the Department should reject the ALJ's evidentiary ruling and reweigh the hearing evidence. *See* Petitioners' Exceptions at pages 5-6. Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. These evidentiary rulings are matters within the ALJ's sound "prerogative . . . as the finder of fact" and may not be reversed on agency review. *See, e.g., Martuccio v. Dep't of Prof'l Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 3 is denied.

Exception No. 4

The Petitioners take exception to the RO at pages 22-24, on the basis that the Department should reject the ALJ's conclusion that the doctrine of judicial estoppel does not apply to exclude "credible evidence about the natural conditions of Fisheating Creek." (RO ¶¶ 72-78). The ALJ essentially concluded in paragraphs 72 through 78 that the FWC and DEP did not take a position in this administrative proceeding that was inconsistent with the position taken by the Board of Trustees in the circuit court case

that Fisheating Creek is navigable. (RO ¶¶ 72-78). The ALJ specifically found in paragraph 76 that neither FWC nor DEP "is claiming that Fisheating Creek is not navigable." (RO ¶ 76).

As discussed in the above rulings, agencies do not have jurisdiction to modify or reject rulings on the admissibility of evidence. *See Id.* In addition, agencies do not have the authority to modify or reject conclusions of law that apply general legal concepts (such as judicial estoppel) typically resolved by judicial or quasi-judicial officers. *See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So.2d 1140, 1142 (Fla. 2d DCA 2001); *Barfield v. Dep't of Health,* 805 So.2d 1008 (Fla. 1st DCA 2001).

Therefore, based on the foregoing reasons, the Petitioners' Exception No. 4 is denied.

FWC'S EXCEPTIONS

FWC's Exception No. 1

FWC takes exception to paragraphs 52, 57, 58, and 61 of the RO. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. III, Tr. p. 344; Vol. IV, Tr. p. 448; Vol. VI, Tr. p. 721, 738-740; Joint Ex. 6). FWC asserts, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that the project will "restore the natural conditions of Fisheating Creek and the natural shallow stream profile as it passes through the Marsh." *See* FWC's Exceptions at pages 1-2. 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).

If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, FWC's Exception No. 1 is denied.

FWC's Exception No. 2

FWC takes exception to paragraphs 54 through 56[4] of the RO. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. VIII, Tr. p. 1041; Vol. IX, Tr. p. 1120; Vol. III, Tr. p. 334; Vol. VIII, Tr. pp. 1014-1016; Joint Exs. 1 and 5; Joint Ex. 8). FWC contends, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that the proposed modification meets the criteria for a minor modification. *See* FWC's Exceptions at page 4. 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). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, FWC's Exception No. 2 is denied.

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[4] FWC's Exception No. 2 did not address the substance of paragraph 56, but see the ruling on DEP's Exception below.

FWC's Exception No. 3

FWC takes exception to paragraphs 60 and 61 of the RO, where the ALJ found that the proposed backfilling and planting would not maintain the navigability of the Creek, even for shallow draft vessels such as canoes and kayaks, and thus the proposed permit modification would not be consistent with the 1999 settlement agreement. The ALJ's findings are supported by competent substantial evidence and reasonable inferences therefrom. (Vol. III, Tr. p. 419-420; Vol. V, Tr. p. 684; Vol. VI, Tr. p. 820; Vol. X, Tr. pp. 1246-1249; Vol. IV, Tr. pp. 490-491; Pet. Ex. 161A at p. 92; Joint Ex. 8). FWC asserts, however, that the findings are incorrect and should be "corrected" with FWC's "more persuasive evidence." FWC argues that the more persuasive evidence shows that after completion of the proposed backfilling, a shallow stream profile will result after natural subsidence of the fill, and a preferential flowway will remain in the stream. *See* FWC's Exceptions at pages 4-5. 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). If there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer,* 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts,* 498 So.2d 622 (Fla. 1st DCA 1986).

Therefore, based on the foregoing reasons, FWC's Exception No. 3 is denied.

DEP'S EXCEPTIONS

Exception to Finding Fact 55

The DEP takes exception to Finding of Fact paragraph 55 of the RO, where the ALJ found that the proposed permit modification does not meet the criteria for a minor modification because it required new site visits, substantially alters the original permit conditions, and has substantially different impact on the wetlands. The ruling on FWC's Exception No. 2 above is adopted in this ruling, and DEP's exception to Finding of Fact paragraph 55 is denied.

Exception to Finding of Fact 56

The DEP also takes exception to Finding of Fact paragraph 56, where the ALJ concluded that:

> 56. The criteria applicable to an application for a major modification were not identified, nor was it shown how the evidence presented at the final hearing satisfies the requirements for such an application.

The DEP asserts that the ALJ's focus on whether the proposed agency action at issue satisfied the criteria for a minor modification under Florida Administrative Code Rule 62-343.100, is misplaced. At the final hearing, the DEP did not contend the proposed agency action at issue was in the nature of a minor permit modification. The Joint Prehearing Stipulation and the DEP's hearing presentation identified the applicable regulatory criteria and attempted to show how they were met by FWC's application. (Vol. VIII, Tr. pp. 999-1003). The rule provides that "[r]equests for minor modifications, whether by letter or formal application, shall be reviewed using the same criteria as new applications in accordance with the standards in Chapters 62-4, 62-341, and 62-330, F.A.C., and this chapter." (emphasis added). Fla. Admin. Code R. 62-

343.100(1)(a). The rule further provides that a major modification "shall be reviewed and noticed using the same criteria as new applications, in accordance with the procedures, standards, and fees in Chapters 62-4, 62-341, and 62-330, F.A.C., and this chapter." Fla. Admin. Code R. 62-343.100(1)(b). The same regulatory criteria are applied to review a minor or a major permit modification. Thus, the ALJ's finding that the "criteria applicable to an application for a major modification were not identified," is not based on competent substantial record evidence. *See* § 120.57(1)(l), Fla. Stat. (2012). Therefore, the DEP's exception to the first part of Finding of Fact paragraph 56 is granted.

The DEP further argues that FWC and DEP "offered competent substantial evidence to demonstrate the manner in which the permit application satisfied the applicable regulatory criteria." *See* DEP's Exceptions at page 5. The ALJ's factual findings to the contrary, however, are supported by competent substantial record evidence. (RO ¶¶ 52, 56 - 61, 79 – 85; Vol. III, Tr. p. 344; Vol. IV, Tr. p. 448; Vol. VI, Tr. p. 721, 738-740; Joint Ex. 6; *see also* above rulings on FWC Exception Nos. 1-3). Therefore, the DEP's exception to the second part of Finding of Fact paragraph 56 is denied.

CONCLUSION

Having considered the applicable law in light of the rulings on the parties' Exceptions, and being otherwise duly advised, it is

ORDERED that:

A. The Recommended Order (Exhibit A), as modified by the rulings above, is adopted and incorporated herein by reference.

B. FWC's modification application in DEP File No. 22-0303652-002, is DENIED.

JUDICIAL REVIEW

Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rules 9.110 and 9.190, Florida Rules of Appellate Procedure, with the clerk of the Department in the Office of General Counsel, 3900 Commonwealth Boulevard, M.S. 35, Tallahassee, Florida 32399-3000; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the clerk of the Department.

DONE AND ORDERED this 15th day of January, 2014, in Tallahassee, Florida.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

HERSCHEL T. VINYARD JR.
Secretary

Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
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FILED ON THIS DATE PURSUANT TO § 120.52, FLORIDA STATUTES, WITH THE DESIGNATED DEPARTMENT CLERK, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED.

Kay Buchanan 1/15/14
CLERK DATE

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Final Order was sent by electronic mail only to:

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Division of Administrative Hearings
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this 15th day of January, 2014.

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL PROTECTION

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SAVE OUR CREEKS, INC., AND
ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC.,

Petitioners,

vs. Case No. 12-3427

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.
_____/

RECOMMENDED ORDER

The final hearing in this case was held on March 4, 6-8, 11, 12, 14, 19 and 20, 2013, in Tallahassee, Florida, before Bram D.E. Canter, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Save Our Creeks, Inc., and Environmental Confederation of Southwest Florida, Inc.:

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STATEMENT OF THE ISSUE

The issue to be determined in this case is whether the Florida Fish and Wildlife Conservation Commission ("Commission") is entitled to the requested minor modification of its existing Environmental Resource Permit and Sovereign Submerged Lands Authorization, which would authorize the backfilling of a portion of Fisheating Creek as part of a restoration project.

PRELIMINARY STATEMENT

In May 2011, the Department of Environmental Protection ("Department") issued to the Commission an Environmental Resource Permit and a Sovereign Submerged Lands Authorization ("permits"). The permits authorized the installation of six earthen check dams on Fisheating Creek to prevent the over-draining of Cowbone Marsh, through which Fisheating Creek runs. The work was completed later that year.

On September 10, 2012, the Department approved the Commission's application to modify the initial permits. The modification would allow the Commission to backfill approximately two miles of Fisheating Creek.

Petitioners timely filed a petition for administrative hearing. The Department referred the petition to DOAH to conduct an evidentiary hearing and issue a recommended order. Petitioners were granted leave to file an amended petition.

The Department filed a motion in limine to exclude evidence and argument concerning a 1998 circuit court judgment which determined that Fisheating Creek is navigable, and a related 1999 settlement agreement. The motion was denied. Petitioners filed a motion in limine to bar the Department or Commission from presenting evidence inconsistent with evidence presented by the Board of Trustees of the Internal Improvement Trust Fund ("Board of Trustees") in the 1998 circuit court case. No evidence was excluded by the ALJ, but a final ruling on whether any evidence should not be considered was deferred.

At the final hearing, Petitioners presented the testimony of: William Giles, accepted as an expert in aquatic plant removal; Darina Palacio, accepted as an expert in hydrology and stream restoration as it relates to hydrology; Robert Miller, P.E., accepted as an expert in surface water hydrology and stream flow analysis; Peter Barile, Ph.D., accepted as an expert

in aquatic ecology; Greg Sawka, accepted as an expert in wetlands delineation and soil sciences; Walt Wheeler, accepted as an expert in wetland ecology and wetland determinations in Florida; Ron Edenfield, P.E., accepted as an expert in water resource management; Jeff Cooner, accepted as an expert in surveying and aerial interpretation; Thomas Conboy, P.E., accepted as an expert in hydrologic restoration; Jeri Curley, accepted as an expert in biology; Bob Ballard; Nicole Williams; Dale Williams; Karen Putnal; Becky Ayech; Rhonda Roff; Bobbie Lee; Patty Whitehead; Paula House; Leonard Bryant Jr.; Dale Gillis; and Erica Lynne. Petitioners' Exhibits 3, 4, 7, 14, 18, 20-23, 25, 38, 43, 45, 47, 55, 56, 61-63, 65, 80, 87, 90-96, 98-100, 103, 106-108, 111, 113, 114, 116, 120, 125, 127, 130, 132-136, 142, 146, 148, 155, 156, 158, 161a, 162a-162d, 171, 173, 176, 178a, 179-183, 193-196, 198, and 199 were admitted into evidence. Petitioners' Exhibit 72, which is a composite of aerial photographs of Cowbone Marsh, was admitted except as to the dates noted on the photographs. Petitioners' Exhibit 200 was placed in the record as a proffer.

The Commission presented the testimony of: Mahmoud Madkour, accepted as an expert in engineering, hydrology, civil engineering, and lake, stream and aquatic restoration; Jessica Griffith, accepted as an expert in wetlands

delineation; and Stephen M. Shea. Commission Exhibits 1-13 were admitted into evidence.

The Department presented the testimony of: Jon Iglehart, accepted as an expert in environmental assessment and restoration; Paul Gray, Ph.D., accepted as an expert in environmental assessment and restoration; and Lawrence Glenn. Department Exhibits 2-8 were admitted into evidence.

Commission and Department Joint Exhibits 1-10 were admitted into evidence. Joint Exhibits 6 and 7, which are compliance orders issued by the Environmental Protection Agency ("EPA"), and Joint Exhibit 10, which is an emergency final order issued by the Department, were not admitted to prove the truth of the statements contained in the orders.

Official recognition was taken of the Judgment on Title and Right to Immediate Possession, issued in Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Lykes Bros., Inc., Case No. CA93-136 (Fla. 20th Cir. Ct. 1998).

On April 15, 2013, the ten-volume Transcript of the hearing was filed with DOAH. Two requests to extend the time for filing proposed findings of fact and conclusions of law were granted. A third request was denied. On June 12, 2013, all parties filed proposed recommended orders, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The Department is the state agency responsible for regulating construction activities in waters of the State. The Department has also been delegated authority to process and act on applications for authorization from the Board of Trustees for activities on sovereignty submerged lands.

2. The Commission is the state wildlife management agency. The Commission is the applicant for the minor modification at issue in this proceeding.

3. Petitioner, Save Our Creeks, Inc., is a non-profit Florida corporation with its offices in Lake Place, Florida. Save Our Creeks' members are interested citizens and groups devoted to the conservation of natural resources, especially creeks and small waterways. Save Our Creeks owns property on Fisheating Creek in Glades County, approximately nine miles upstream of Cowbone Marsh.

4. Petitioner, Environmental Confederation of Southwest Florida, Inc. (ECOSWF), is a non-profit Florida corporation with its offices in Sarasota, Florida.

5. A substantial number of the members of Save Our Creeks and ECOSWF use and enjoy the waters of Fisheating Creek for a variety of purposes, including canoeing, boating, fishing, and

wildlife observation. Their interests would be affected by the proposed project.

Fisheating Creek and Cowbone Marsh

6. Fisheating Creek flows from Highlands and Desoto Counties south and east through Glades County. The Creek runs in a northeastern direction through Cowbone Marsh before draining into Lake Okeechobee. The Creek contributes approximately nine percent of the flow into Lake Okeechobee. Fisheating Creek is designated as Class III waters.

7. Cowbone Marsh is located about eight miles west of Lake Okeechobee. It is a mile and a half long and two miles wide, covering about 2,500 acres.

8. Fisheating Creek and Cowbone Marsh are within the Fisheating Creek Wildlife Management Area.

9. In 1929, the United States Army Corps of Engineers ("USACOE") prepared a survey map which shows Fisheating Creek as an open water route from Lake Okeechobee through Cowbone Marsh and continuing beyond. The accuracy of the course of the Creek as it is depicted in the 1929 map is not disputed by the parties.

10. The 1929 map does not describe the depth or width of the Creek. Some evidence about historical widths and depths was presented, but it was incomplete. There was credible evidence showing that some segments of Fisheating Creek were four to five

feet deep and 20 to 30 feet wide. There was also credible evidence that other segments of the Creek were shallower and narrower.

11. The record shows only that canoes, kayaks, and other vessels drawing twelve inches of water or less have been used on the Creek.

12. For a number of years, much of Fisheating Creek has been choked by vegetation and "tussocks." Tussocks are floating mats of vegetation. Carolina willow now dominates Cowbone Marsh, having replaced areas that were previously open water or covered with herbaceous marsh communities.

13. The vegetation in the Creek made navigation difficult or impossible through Cowbone Marsh.

The 1998 Judgment and 1999 Settlement Agreement

14. In 1989, Lykes Bros., Inc., asserted ownership of Fisheating Creek and tried to prevent public access to the Creek. The Board of Trustees responded with a civil action against Lykes Bros., seeking a determination that Fisheating Creek throughout Glades County is navigable and, consequently, the title to its bottom is held by the Board of Trustees as sovereignty submerged lands. Petitioners in this administrative proceeding intervened in the circuit court case on the side of the Board of Trustees.

15. The jury found Fisheating Creek navigable throughout Glades County and the court entered a judgment in 1998 determining that the Creek is sovereignty land held in trust by the Board of Trustees. The judgment did not include any findings about the widths and depths of Fisheating Creek. The court retained jurisdiction to determine the boundaries of the Creek, but the boundaries were never determined.

16. The circuit court case was appealed, but in May 1999, the parties entered into a settlement agreement pursuant to which Lykes Bros. agreed to sell to the Board of Trustees a conservation easement on upland areas adjacent to Fisheating Creek, to be held and managed for the benefit of the public. The conservation area is known as the Fisheating Creek Expanded Corridor.

17. The settlement agreement also called for the Board of Trustees to lease the Fisheating Creek Expanded Corridor to the Commission, who the Board of Trustees designated as the managing agency.

18. The settlement agreement acknowledges the public's "right to boat and canoe on Fisheating Creek throughout the entire Expanded Corridor." With respect to navigation, the settlement agreement provides:

> Protection of Navigation. The navigability of Fisheating Creek throughout the entire Expanded Corridor shall be maintained and

> enhanced through a navigation maintenance program which includes aquatic weed control and removal of fallen logs and similar obstructions. This section does not authorize dredging.

The Cookie-Cutter Project

19. In January 2009, the Commission aerially applied an herbicide to kill the vegetation along the course of the Creek.

20. In April 2010, the Commission contracted with A & L Aquatic Weed Control ("A & L") to "[m]echanically dismantle floating tussocks." The Commission directed A & L to perform the project by "shredding vegetation and accumulated organic material to re-open the navigation across Cowbone Marsh."

21. The Commission instructed A & L to re-open a channel "approximately 2.2 miles long and 18-20 feet wide," and to clear some areas of the Creek "as wide as 35-feet wide occasionally as necessary to turn shredding equipment during the shredding process."

22. The Commission did not direct A & L to dredge a deeper channel.

23. The vessel used by A & L to perform the work is known as a "cookie-cutter." The cookie-cutter has two cutting wheels at the front of the vessel to shred and side-cast vegetation. The cutting wheels also act as propellers to propel the cookie-cutter forward.

24. The cookie-cutter can clear woody vegetation up to four inches in diameter.

25. The two cutting wheels can be lowered or raised in order to cut vegetation at various depths in the water. Evidence was presented to show how the cutting wheels could be lowered two to three feet, but it was not made clear whether the cutting wheels could be lowered even more.

26. No evidence was presented to establish how deep the cookie-cutter blades were lowered into Fisheating Creek during the work performed by A & L.

27. No evidence was presented to establish what depth of soil the cookie-cutter was capable of dredging through if the cutting wheels cut into the Creek bottom.

28. The cookie-cutter began on the eastern side of Cowbone Marsh and moved upstream. The parties disputed the point of beginning. Petitioners contend it was farther upstream, but the more persuasive evidence for the point of beginning was presented by the Commission.

29. The cookie-cutter generally followed the course of Fisheating Creek as depicted on the 1929 USACOE map. However, there are three areas where the cookie-cutter deviated from the 1929 map. One deviation is about 100 feet off-line. The other two deviations are 25 to 30 feet off-line. No explanation was given for the deviations, but the cookie-cutter operator

generally followed the path of dead vegetation killed by the aerial spraying of herbicide and the line may have deviated from the true course of the Creek in these three areas.

30. During the cookie-cutter project, water levels within the Creek and Marsh fluctuated. At some point, the project was postponed due to low water conditions. A sandbag dam was placed in the channel to artificially raise the water level so the cookie-cutter could continue.

31. In July 2010, the Department and USACOE ordered the Commission to stop the project due to its adverse environmental impacts, including the draining of Cowbone Marsh. Before the cookie-cutter stopped, it had cleared about two miles of Fisheating Creek.

32. Where the cookie-cutter stopped there is a discernible channel continuing west, but it is shallower and narrower than the channel created by the cookie-cutter. At this terminus, the cookie-cutter was dredging a deeper and wider channel than existed naturally.

33. Additional evidence of dredging along the Creek channel is the soil cast up on the banks, and the removal of peat soils in the bottom of the Creek and exposure of underlying mineralized soil.

34. The cookie-cutter altered the natural conditions of the Fisheating Creek in some areas by dredging the sides and bottom of the Creek.

35. The dredging by the cookie-cutter altered the hydrology of the Creek and Marsh. The Marsh drained rapidly to Lake Okeechobee. In addition, large quantities of soil, muck, silt, and debris disturbed by the cookie-cutter were carried downstream toward Lake Okeechobee. Some of the soil and debris settled out at the mouth of the Creek, causing shoaling.

36. The sides of the channel in many areas is continuing to erode.

The Department's Emergency Final Order

37. In July 2010, the Department issued an Emergency Final Order, which directed the Commission to: (a) remove the cookie-cutter and immediately stop all activities associated with the cookie-cutter; (b) place temporary emergency flow restrictors in the channel to reduce flow velocities and minimize downstream sediment transport, as well as raise the water level to minimize surface and groundwater flow from the adjacent marsh into the channel; and (c) develop a long-term remedial plan to return water levels within the Marsh to pre-impact conditions and apply to the Department for an Environmental Resource Permit to implement the plan.

38. In August 2010, pursuant to the Emergency Final Order, the Commission constructed an aluminum weir in the Creek to decrease flow velocities, reduce erosion, and maintain the hydration of the Marsh. The weir was placed approximately half a mile downstream from where the cookie-cutter stopped.

39. During the wet season of 2010, the aluminum weir was completely submerged. Erosion and shoaling occurred immediately downstream. The Commission determined that the weir was ineffective and removed it.

The EPA Compliance Orders

40. In March 2011, the EPA issued an Administrative Compliance Order in which it alleged the Commission had engaged in "unauthorized activities associated with the excavation and construction of a channel within Cowbone Marsh." The Commission was ordered to construct an initial check dam in the upper reaches of the Marsh to minimize the loss of groundwater and prevent further adverse impacts.

41. In April 2011, EPA issued a second Administrative Compliance Order, directing the Commission to construct five additional check dams. The order describes the check dams as "initial corrective measures" and states that the "final restoration plan will include measures for backfilling the unauthorized cut through Cowbone Marsh."

The Initial Permits

42. In May 2011, the Department issued to the Commission an Environmental Resource Permit and Sovereign Submerged Lands Authorization, which authorized the construction of six earthen check-dams within the portion of Fisheating Creek where the cookie-cutter had operated. The purpose of the check dams was to improve the hydrology of Cowbone Marsh and promote the accumulation of sediments within the channel to restore the natural depth and width of Fisheating Creek.

43. The check dams were constructed using sand bags, marine plywood, coconut matting, and pressure-treated posts.

44. The check dams have ten-foot wing walls which extend into the surrounding marsh. The wing walls are to prevent erosion around the dams and to direct water into the marsh.

45. The installation of the check dams was completed in July 2011. Since that time, some repair efforts have been required to replace lost sandbags and to address erosion that has occurred around the check dams.

46. The check dams have been somewhat successful in maintaining higher water levels in the Marsh. However, they have not restored natural hydrologic conditions, or prevented erosion along the channel.

The Proposed Modification

47. In June 2012, the Commission applied for a "minor modification" to the existing permits, which the Department granted. The modified permits authorize the Commission to backfill the channel cleared by the cookie-cutter with approximately 27,000 cubic yards of sand. The check dams would not be removed.

48. The sand for the backfilling would be excavated from a "borrow" area located about a mile away. Petitioners contend that the borrow area is in wetlands, but the more persuasive evidence is that it is uplands.

49. A 1.164-mile temporary access road would be constructed from the borrow area through uplands and wetlands to a 100-square-foot staging area adjacent to Fisheating Creek where the backfilling would begin. Wetland impacts would be minimized by constructing the temporary access road and staging area with interlocking mats.

50. Petitioners did not show that the route or manner in which the temporary road would be constructed and used would have unacceptable adverse impacts to the environment or otherwise fail to comply with applicable criteria.

51. The sand would be dumped into the Creek and then compacted. As the Creek was filled, the compacted sand would be used as a roadway for the trucks to transport sand to the end of

the filled area to dump more sand, until the backfilling was completed.

52. The proposed backfilling would not restore a typical stream profile, deepest in the middle and becoming more and more shallow moving toward the banks. That kind of profile can be seen in the photographs of Fisheating Creek taken before the cookie-cutter project. The proposed modification calls for filling the cut channel from "bank to bank":

> Final Grade: Fill must be compacted and ground surface elevations must be the same as the adjacent marsh ground surface elevations (within a tolerance of +6/-6 inches)

53. The filled channel would be seeded and fertilized to grow native vegetation. The proposed seed mixture is mostly water grasses, but has some willow included.

Compliance with Criteria

54. Florida Administrative Code Rule 62-343.100 provides that a modification is treated as either minor or major depending on the magnitude of the changes and the potential for environmental impacts that differ from those addressed in the original permit:

> [A] modification shall be considered to be minor only where the modification does not:
> 1. Require a new site inspection by the Department in order to evaluate the request; or
> 2. Substantially:
> a. Alter permit conditions;

b. Increase the authorized discharge;
c. Have substantially different or increased impacts on wetlands and other surface waters. . . ;
d. Decrease the retention/detention specified by the original permit;
e. Decrease any flood control elevations for roads or buildings specified by the original permit; or
f. Increase the project area.

55. At the final hearing, it was not shown how the modification meets the criteria for a minor modification. The proposed modification does not meet the criteria because it required new site visits, substantially alters the original permit conditions, and has a substantially different impact on wetlands.

56. The criteria applicable to an application for a major modification were not identified, nor was it shown how the evidence presented at the final hearing satisfies the requirements for such an application.

57. The proposed backfilling plan would not restore the natural conditions that existed in Fisheating Creek. The Commission did not show that it made a reasonable effort to determine the pre-disturbance conditions throughout the disturbed area.

58. The proposed modification would not restore the natural depths in the Creek. The backfilling plan calls for a finished grade of plus or minus six inches above the level of

the adjacent marsh. A final grade of zero to plus six inches would essentially eliminate Fisheating Creek. The maximum allowed depth of minus six inches below the level of the adjacent marsh would be shallower than the natural depths in portions of the Creek. Even the Department described the Creek was "one to two feet deep" before the cookie-cutter project. Adequate measures are not included in the permits to ensure that after backfilling and planting, the Creek would have the ordinary attributes of a creek.

59. The proposed modification would not restore the pre-existing hydrologic conditions of the Creek.

60. The modified Environmental Resource Permit requires strict compliance with the terms of the 1999 settlement agreement. The modification would not be consistent with the 1999 settlement agreement because the backfilling and planting would destroy the navigability of the Creek.

61. Petitioners want to preserve the current depths of Fisheating Creek, but some of those depths are unnatural, being the result of dredging by the cookie-cutter. However, the proposed backfilling would not restore the natural depths in some parts of the Creek and would not maintain the navigability of the Creek, even for shallow draft vessels such as canoes and kayaks.

CONCLUSIONS OF LAW

62. This is a de novo proceeding designed to formulate final agency action, not to review action taken preliminarily. See Capeletti Bros. v. Dep't of Gen. Servs., 432 So. 2d 1359, 1363-64 (Fla. 1st DCA 1983).

Standing

63. Standing to participate in a proceeding under section 120.57(1), Florida Statutes, is afforded to persons whose substantial interests will be affected by the proposed agency action. See § 120.52(13)(b), Fla. Stat.

64. In order to have standing to participate as a party, a person must have substantial rights or interests that reasonably could be affected by the agency's action. See St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011).

65. For organizational standing, Petitioners must prove that a substantial number of their members, but not necessarily a majority, have a substantial interest that would be affected, that the subject matter of the proposed activity is within the general scope of the interests and activities for which the organization was created, and that the relief requested is of the type appropriate for the organization to receive on behalf of its members. See Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec., 412 So. 2d 351 (Fla. 1982); Fla. League of Cities,

Inc. v. Dep't of Envtl. Reg., 603 So. 2d 1363 (Fla. 1st DCA 1992).

66. The standing of Petitioners is not disputed. The evidence establishes their standing to participate as parties.

Burden and Standard of Proof

67. The Environmental Resource Permit was issued under chapter 373, Florida Statutes. A petitioner who challenges a permit issued under chapter 373 has the burden of ultimate persuasion. See § 120.569(2)(p), Fla. Stat.

68. The Sovereign Submerged Lands Authorization was issued under chapter 253. The applicant for such an authorization has the burden of ultimate persuasion to demonstrate its entitlement to the authorization. See Fla. Dep't of Transp. V. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

69. The standard of proof is preponderance of the evidence. See § 120.57(1), Fla. Stat.

Navigability

70. Navigability in Florida can be established even if only boats with shallow drafts of "three to six inches" can navigate on the waterbody. See Broward v. Mabry, 58 Fla. 398, 405-406 (Fla. 1909).

71. Although the determination that a waterbody is navigable means the public has a right to navigate on the waterbody, Petitioners have not shown that Florida law

recognizes a right to navigation that is greater than the natural, physical limits of the waterbody will allow. If a stream is only deep enough to float canoes or similar shallow draft vessels, the public's right of navigation is limited to such vessels. If a stream can only be navigated during the high water season of the year, the public's right of navigation can only be exercised during the high water season.

Judicial Estoppel

72. Petitioners contend that the doctrine of judicial estoppel is applicable in this proceeding and prevents the Department or the Commission from presenting evidence contradicting the Board of Trustees' testimony and evidence presented in the 1998 circuit court case.

73. Judicial estoppel bans litigants from asserting inconsistent positions in separate judicial proceedings. See Blumberg v. USAA Cas. Ins. Co., 790 So. 2d 1061, 1066 (Fla. 2001). A party is estopped from making an inconsistent claim or taking a conflicting position in a subsequent action, which was successfully relied upon by the party itself or a party with which it is in privity and the inconsistent position will prejudice the adverse party. Ramsey v. Jonassen, 737 So. 2d 1114, 1115-16 (Fla. 2d DCA 1999).

74. Under the terms of the 1999 settlement agreement, and as the Board of Trustees' designated manager of the Fisheating

Creek Expanded Corridor, the Commission is acting as the agent of the Board of Trustees in seeking to conduct the activities authorized by the permits. The Department is acting for the Board of Trustees in issuing the Sovereignty Submerged Lands Authorization. Therefore, judicial estoppel bars the Commission and Department from presenting evidence in this proceeding that contradicts the position taken by the Board of Trustees in the 1998 circuit court case and prejudices Petitioners.

75. However, the evidence presented by the Board of Trustees in the circuit court case was not credibly established in this administrative proceeding. This record does not contain the transcript or exhibits from the circuit court case, other than the 1929 USACOE map and some photographs. No findings of fact in this Recommended Order are inconsistent with the 1929 map and photographs.

76. Judicial estoppel must be based on clearly inconsistent positions. Id. It is not enough for Petitioners' counsel to make general statements in this proceeding about the contrary testimony that was offered in the circuit court case. Among other reasons, that is too self-serving to support a motion to exclude credible evidence about the natural conditions of Fisheating Creek. Neither the Commission nor the Department is claiming that Fisheating Creek is not navigable.

77. As stated previously, the circuit court retained jurisdiction to determine the boundaries of Fisheating Creek, but the boundaries were never determined.

78. It should also be noted that, without written findings of fact it is impossible to know whether any particular evidence was accepted as true by a court, except for facts that are necessary to a court's judgment. This is so even for evidence presented by the prevailing party. Because the determination that Fisheating Creek is navigable was possible even if it was believed the Creek was only several inches deep, there was no need to resolve the question "How much more than several inches?" The court (jury) only needed to conclude that the Creek is "deep enough." The court did not necessarily give much weight to the testimony of any particular Board of Trustees' witness about depths in the Creek when the court concluded the Creek was deep enough to be navigable.

Environmental Resource Permit

79. Section 373.414(1) requires an applicant for an Environmental Resource Permit to provide reasonable assurance that the proposed activity is not contrary to the public interest. Section 373.414(1)(a) sets forth the following criteria to be considered in determining whether a proposed project is contrary to the public interest:

> 1. Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
> 2. Whether the activity will adversely affect conservation of fish and wildlife, including endangered or threatened species, or their habitats;
> 3. Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
> 4. Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
> 5. Whether the activity will be of a temporary or permanent nature;
> 6. Whether the activity will adversely affect or will enhance significant cultural and archaeological resources under the provisions of s. 267.061, and
> 7. The current condition and relative value of the functions being performed by the areas affected by the proposed activity.

80. The proposed modification would adversely affect public welfare by impairing navigation and recreation on Fisheating Creek. All the Department could offer on the subject of post-modification navigability in the Creek is that "[o]ver time a slight depression may form in the [backfilled] cut" due to "some minimal amount of settling in the level of the fill."

81. The proposed modification would adversely affect the conservation of fish and wildlife by eliminating the Creek or permanently reducing its natural dimensions so that the uses of the Creek by fish and wildlife are also eliminated or substantially reduced.

82. The proposed modification would adversely affect navigation and the flow of water in Fisheating Creek.

83. The proposed modification fails to restore the functions performed by the pre-disturbed Creek.

84. The proposed modification is contrary to the public interest.

85. The proposed modification fails to meet the criteria in rule 40E-4.301(1), to provide reasonable assurance that the proposed project will not adversely affect storage and conveyance capabilities, will not cause adverse secondary impacts, and will function as proposed.

Sovereignty Submerged Lands Authorization

86. The proposed modification fails to meet the requirements of rule 18-21.004(1) that activities on sovereignty land not be contrary to the public interest, and that the authorization "contain such terms, conditions, or restrictions as deemed necessary to protect and manage sovereignty lands."

87. The proposed modification fails to meet the requirement of rule 18-21.004(2) that sovereignty lands be "managed primarily for the maintenance of essentially natural conditions, propagation of fish and wildlife, and traditional recreational uses such as fishing, boating, and swimming."

RECOMMENDATION

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

RECOMMENDED that the Department deny the requested modification to the Commission's Environmental Resource Permit and Sovereignty Submerged Lands Authorization.

DONE AND ENTERED this 3rd day of July, 2013, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.